Catholic Courier

Posted: August 2, 2012

Hundreds learn about freedom

***By Jennifer Burke**/Catholic Courier*

CANANDAIGUA -- Religious liberty was the hot topic of discussion for the more than 500 people who visited Notre Dame Retreat House between June 21 and July 4 to take part in the Festival for Freedom.

The festival was planned in response to the U.S. Conference of Catholic Bishops' request that Catholics spend the two weeks leading up to July 4 engaging in prayer, education and action related to the topic of religious freedom. The bishops' request, in turn, was inspired in part by a U.S. Department of Health and Human Services (HHS) mandate that nearly all employers offer health-care plans that include coverage for sterilization and contraceptives, some of which could cause abortions. Although this mandate contains a religious exemption, the exemption is so limited that it likely would exclude many Catholic institutions, according to the USCCB.

Courier photo by **Mike Crupi**

Canon lawyer Philip Gray pauses for prayer before giving a presentation on moral conscience June 22 during the Festival for Freedom at Notre Dame Retreat House in Canandaigua.

The Canandaigua event was planned by the 30 or so Catholics and non-Catholics on the "Renewing Our Legacy Task Force" and included lectures from more than two dozen well-known speakers, panel discussions, movie showings, and daily Mass and eucharistic adoration.

"We saw over 500 different people in the course of those two weeks, many who came almost daily," said Deacon Claude Lester, the festival's chief organizer. "The planning group was pleased with the quality of the speakers, the engagement of the audience and the opportunity to bring people together to share concerns of their faith and to learn more about our American Catholic heritage."

When the planning group evaluated the festival after its conclusion, many members thought there should be some sort of follow-up event that would integrate American history with Catholic culture and help people move forward.

"We knew we needed to be grounded in moral development as we acknowledged the crisis of religious freedom which faces our country. It became obvious in our conversation that we need to explore how to draw on the gifts of the Holy Spirit to send us forth in action," said Deacon Lester, director of faith formation for St. Benedict Parish in Canandaigua and East Bloomfield.

Duncan Attach 0449

The resulting follow-up event, "Conscience -- Spirit -- Freedom" will be held Aug. 4 at Notre Dame Retreat House and will feature two presentations and one panel discussion. Daniel Kane, who is a medical nuclear physicist and director of the UNESCO Chair in Bioethics and Human Rights in Rome, Italy, will give a presentation about Christian conscience formation, and members of the St. Thomas More Lawyers Guild will give a talk about "The Crisis of Religious Freedom." A panel of local Christians will discuss their struggles to discern the feelings of their hearts and the message their hands, feet and voices are encouraged to act upon. The event will conclude with night prayer and an informal discussion with the day's speakers.

People who can't come to the intensive forum on Aug. 4 and weren't able to participate in any of the Festival for Freedom activities still can take steps to educate themselves about the issue of religious freedom. Many of the presentations and discussions that took place during the festival were recorded and are available in either video or audio format under the "Media" tab on the Festival for Freedom's website, www.FestivalforFreedom.com. There are many other excellent sources of relevant information online, noted Kyle Duncan, general counsel of the Becket Fund for Religious Liberty. Duncan took part in a July 2 panel discussion with Kathy Gallagher, director of pro-life activities for the New York State Catholic Conference, and Jonathan Tobin, senior online editor of Commentary Magazine.

The U.S. bishops have compiled a wealth of information and resources about religious freedom and the HHS mandate at www.Fortnight4Freedom.org, and the Becket Fund has tried to position its own website, www.BecketFund.org, as "information central on the HHS mandate," Duncan said during the discussion. The Heritage Foundation (www.heritage.org), the Ethics and Public Policy Center (www.eppc.org) and the Alliance Defense Fund (www.alliancedefendingfreedom.org) also are great sources of information, he said. The state Catholic conference's website, www.NYSCatholic.org, also includes a lot of information, as well as an action center to help citizens contact their legislators, Gallagher said.

It's important to read the information put out by people on both sides of any issue, including religious freedom, in order to more fully understand that issue, Tobin said. And no matter what you're reading or where it comes from, it's important to read it with an open, questioning mind, he added, urging his audience members to evaluate the sources quoted in any article as well as the article's basic premise.

"The most important skill I think any of us can develop in our quest to become informed citizens is learning to read critically," Tobin said.

Kathy Smith said she enjoyed the July 2 panel and the several other Festival for Freedom events she attended. Smith, who belongs to Peace of Christ Parish in Rochester, had only planned to attend one or two of the festival's events, but it kept drawing her back like a magnet, she said.

"It's phenomenal. I don't know if this opportunity will ever come again, but it's here now and I'm taking advantage of it," she said.

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Duncan Attach 0451

DeSales panel: Birth control mandate a grave danger

Morning Call (Allentown, Pennsylvania)

March 1, 2012 Thursday, FIFTH Edition

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Byline: Daniel Patrick Sheehan Of The Morning Call

Body

At DeSales University on Wednesday night, Kyle Duncan brought a dose of wry humor to proceedings that were decidedly serious.

The lawyer for the Becket Fund for Religious Liberty mentioned that he started his job six weeks ago, or about the same time the federal government announced that health insurance coverage of contraception would become mandatory for virtually all employers.

That decision sparked an ongoing dispute pitting the Obama administration and women's right groups against the Catholic Church and others with conscientious objections to birth control. The mandate's religious exemption applied only to churches, meaning that many Catholic hospitals, charities and church-affiliated schools such as DeSales faced the prospect of providing the coverage.

"Longest six weeks of my life," Duncan said, prompting chuckles in the standing-room-only crowd at the Center Valley university's student center -- an audience that included Bishop John O. Barres, head of the Allentown Catholic Diocese.

The nonprofit Becket Fund has sued the government on behalf of four institutions challenging the mandate, including a college run by Benedictine monks and EWTN, a Catholic television network founded by a nun. All maintain that the rule violates First Amendment guarantees against government meddling in religious practice.

Defenders of the mandate say contraception is an essential part of women's health care, with applications beyond preventing pregnancy. Birth control pills can be used to correct hormonal imbalances, for example. Making contraception as an essential component of health care was the recommendation of the Institute of Medicine, an independent, nonprofit advisory group.

The administration's effort to placate objectors -- requiring insurers, not employers, to provide free coverage of contraception -- fell short, critics said, because many large religious institutions are self-insured.

That includes the Diocese of Allentown. Like many other dioceses in the country, its leaders have said they will drop health insurance coverage and face potentially crippling fines rather than comply with the mandate. Those fines could amount to $2.6 million a year.

"This is your government assessing penalties because an institution is exercising its religious freedom," said panelist James Kilcur, a labor lawyer and chairman of DeSales' board of trustees. "It's unheard of."

The mandate's defenders reject the constitutional argument, saying it doesn't restrict religious practice or the ability of churches to preach against contraception. They also point to studies showing an enormous percentage of Catholics ignore the church's teaching against birth control.

Duncan and others on the panel characterized those arguments as red herrings that distract from the core issue of the government compelling religious bodies to violate doctrine. The government can't compel Catholic agencies to furnish contraception coverage any more than it can compel pacifist Quakers to go to war, they argued.

"You can't put someone in the position of choosing their faith or a fine," Duncan said, adding that the government has no compelling reason "to make monks and nuns hand out the pill to employees."

The Rev. Alfred Schlert, chief manager of administrative offices in the Allentown Diocese, said about 1,200 diocesan employees and their dependents risk losing health insurance coverage if the mandate isn't overturned by legislation -- two bills are pending in Congress -- or by the courts.

As a self-insured entity, "we are the payer," Schlert said. "There is no distance between us and what we consider an immoral practice."

Panelist Stephen Jenkins, a Wilmington, Del., attorney who has argued religious liberty cases on behalf of the Catholic diocese there, urged the crowd to contract Congress and take other steps to make their opposition to the mandate clear. He predicted the end of Catholic hospitals and charities if the mandate stands.

"All of these [Catholic] institutions that have done good for 150 years are going to be closing because of some bureaucrats in Washington," he said.

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United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 12(e)

STUART KYLE DUNCAN
Nominee to be United States Circuit Judge
for the Fifth Circuit

User Name: Jennifer Bandy
Date and Time: Wednesday, May 10, 2017 11:05:00 AM EDT
Job Number: 47516833

Document (1)

1. *Supreme Court won t say if trans teen can pick bathroom*

Client/Matter: -None-
Search Terms: "Kyle Duncan"
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
News	-None-

Supreme Court won't say if trans teen can pick bathroom

St. Louis Post-Dispatch (Missouri)

March 7, 2017 Tuesday, FINAL EDITION

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Byline: By MARK SHERMAN Associated Press

Body

WASHINGTON - The Supreme Court is leaving the issue of transgender rights in schools to lower courts for now after backing out of a high-profile case Monday of a Virginia high school student who sued to be able to use the boys' bathroom.

The court's order in the case of teenager Gavin Grimm means that attention now will turn to lower courts around the country that are grappling with rights of transgender students to use school bathrooms that correspond to their chosen gender, not the one assigned at birth.

The appeals court in Richmond, Va., and other appellate panels handling similar cases around the country will have the first chance to decide whether federal anti-discrimination law or the Constitution protects transgender students' rights.

Monday's action by a court that has been short-handed for more than a year comes after President Donald Trump's administration pulled back federal guidance advising schools to let students use the bathroom of their chosen gender.

The justices rejected a call from both sides to decide the issue in a case that was dramatically altered by the election of Trump.

Grimm's case had been scheduled for argument in late March. Instead, a lower court in Virginia will be tasked with evaluating the federal law known as Title IX and the extent to which it applies to transgender students. Lawsuits involving transgender students are going through the courts in at least five other states: Illinois, North Carolina, Ohio, Pennsylvania and Wisconsin.

For Grimm, the order means that he probably will graduate with the issue unresolved.

Now, his request to use the boys' bathroom is blocked by a policy of the Gloucester County school board. Although he won a court order allowing him to use the boys' bathroom at Gloucester High School, the Supreme Court put it on hold last August, before the school year began.

"This is disappointing for trans kids across the country and for Gavin, who are now going to be held in limbo for another year or two," said Joshua Block, the American Civil Liberties Union attorney who represents Grimm. "But Title IX means the same thing today as it meant yesterday. Lower courts already have held that it protects trans kids."

In a statement relayed by school board lawyer Kyle Duncan, the board said it "looks forward to explaining why its commonsense restroom and locker room policy is legal under the Constitution and federal law."

The high court action follows the administration's recent decision to withdraw a directive issued during Barack Obama's presidency that said bathroom use should be based on students' gender identity.

The administration action triggered legal wrangling that ended with Monday's order. In essence, the federal appeals court in Richmond, Va., had relied on the Obama administration's interpretation of Title IX to side with Grimm.

The appeals court accepted the administration's reading of the law without deciding what the law and related regulation on same-sex bathrooms mean.

No appeals court has yet undertaken that more independent analysis, and the Supreme Court typically is reluctant to do so without at least one appellate opinion to review, and usually more than one.

Another explanation for Monday's order is that the court might want more of a societal consensus to develop before it issues a ruling on transgender rights, said John Neiman, a lawyer who served as a law clerk to Justice Anthony Kennedy.

"What happened today feels a lot like 2013, when the court used a procedural ruling to temporarily duck the same-sex marriage issue," Neiman said.

By 2015, same-sex marriage was back before the court and Kennedy's opinion gave same-sex couples the right to marry nationwide.

The court's reluctance to take on transgender rights now may have been underscored by the high court vacancy caused by the death of Justice Antonin Scalia nearly 13 months ago .

The justices did not comment on the case beyond their one-sentence order returning it to the 4th U.S. Circuit Court of Appeals.

Graphic

FILE - In this Aug. 22, 2016 file photo, transgender high school student Gavin Grimm poses in Gloucester, Va. The Supreme Court is returning a transgender teen's case to a lower court without reaching a decision. The justices said Monday, March 6, 2017, they have opted not to decide whether federal anti-discrimination law gives high school senior Gavin Grimm the right to use the boys' bathroom in his Virginia school. (AP Photo/Steve Helber, File)

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THE HILL

Transgender fight now in Supr Court's hands

BY LYDIA WHEELER - 02/25/17 09:46 AM EST

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Advocates on both sides of the debate over transgender bathroom rights are pushing the Supreme Court to settle the issue once and for all.

The Trump administration's decision Wednesday to rescind Obama-era guidance that allowed transgender students to use the bathroom that corresponds with their gender identity came just a few weeks before the court will hear arguments on whether a Virginia school can block a 17-year-old transgender student from using the boy's bathroom.

Because the school had been appealing a lower court order that deferred to the Obama administration guidance, Trump's order has left the court asking: What now?

On Thursday, the Supreme Court requested the parties in the case submit their views on how the case should proceed in light of the guidance document issued by the departments of Education and Justice. Those responses are due by 2 p.m. on March 1.

Both sides want the case to move forward as planned.

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"The Supreme Court should absolutely still hear arguments and answer the questions it granted cert on, which was whether the previous administration's interpretation of Title IX was correct," said Joshua Block, a senior staff attorney at ACLU, which brought the case forward on behalf of Gavin Grimm.

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Grimm, a transgender male who was born female, was barred from using the boy's bathroom in 2014 after the Gloucester County School Board enacted a policy requiring all students to use the bathroom that corresponds with their gender assigned at birth.
The Fourth Circuit Court of Appeals sided with Grimm, who argued that the school board "impermissibly discriminated against him" in violation of Title IX anti-discrimination laws and his constitutional right to equal protection under the law.

The Fourth Circuit said the Obama administration guidance should be given deference because federal anti-discrimination laws are ambiguous when it comes to "sex."

"It is not clear to us how the regulation would apply in a number of situations — even under the board's own 'biological gender' formulation," Judge Henry Floyd wrote in the court's majority opinion.

"For example, which restroom would a transgender individual who had undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X-X-Y sex chromosomes? What about an individual who lost external genitalia in an accident?"

The Supreme Court is now being asked to answer two questions: Whether courts should give deference to agency guidance that's in the form of an unpublished letter, and whether Title IX can be extended to require schools to treat transgender students consistent with their gender identity when it comes to bathroom facilities.

"We certainly want to have arguments in court," said Kyle Duncan, the attorney representing the Gloucester County School Board.

Duncan said the Trump administration's letter to the court Wednesday validates the school board's central argument: that decisions about bathroom use should be left to states and local school boards.

"A court should not show deference to such a guidance document and part of the reason for that is, from administration to administration, you could have differing views," he said. "So this proved our point."

But Block said the letter from the Trump administration has only created confusion.

In it, the departments said they were rescinding the Obama guidance "in order to further and completely consider the legal issued involved" because it failed to "explain how the position is consistent with the express language of Title IX."

"It's a very unusual document, and I don't think it's by any means clear what effect that document will have," Block said.

Given the new guidance, the Supreme Court could decide to cancel the oral arguments scheduled for March 28 and send the case back to the Fourth Circuit.

But Matt Sharp, senior counsel at the conservative Christian nonprofit Alliance Defending Freedom, said the high court needs to weigh in now. He said confusion over the definition of "sex" has already come up in other areas of the law.

The Equal Employment Opportunity Commission ruled in 2015 that existing federal protections against workplace discrimination based on sex also apply to sexual orientation.

In schools, Sharp said girls are living with the consequences of being forced to share locker rooms and showers with biological males.

Freedom for All Americans rejects arguments that Obama's guidance has put students at risk.

"School districts across the country encompassing millions of students have had protections in place for transgender students for years without incident, including Los Angeles Unified School District, the largest public school system in California and the second largest public school district in the United States, serving 655,000 students," the group said in a release this week.

"The administration's decision to rescind the guidance has no impact on schools that are already doing the right thing — they can and will continue to protect transgender students."

The guidance from the Obama administration had been on hold since a Texas district court judge ruled in August that the guidance constituted a rulemaking, which means it would require a time-consuming public notice and comment period.

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Court weighs bathroom case in light of Trump decision

Washingtonpost.com

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Byline: Sandhya Somashekhar;Robert Barnes

Body

Attorneys for a transgender teen who sued his school board for barring him from the boys' bathroom said Thursday they plan to continue to press his case before the Supreme Court, despite the Trump administration's decision to withdraw federal guidelines that had buoyed his lawsuit.

The guidelines had instructed schools to let students use the restroom that matched their gender identity, regardless of their anatomy. Now that they have been rescinded, it is even more important that the high court weigh in to eliminate confusion and ensure that children are protected, lawyers for 17-year-old Gavin Grimm said.

The Supreme Court late Thursday afternoon asked attorneys for both sides to submit letters by next Wednesday addressing where the case should go from here. The decision of the U.S. Court of Appeals for the 4th Circuit that favored Grimm was based primarily on the Obama administration's guidance that was rescinded.

"If anything, the confusion caused by this recent action by the Department of Justice and the Department of Education only underscore the need for the Supreme Court to bring some clarity here," American Civil Liberties Union attorney Joshua Block said in a teleconference with reporters Thursday morning. Grimm's case against the school board in Gloucester County, Va., is scheduled for oral arguments in Washington on March 28.

The Trump administration's change in policy this week drew praise and condemnation from predictable corners Thursday but also put new pressure on states and individual school districts to figure out new policies and tamp down anxiety among transgender students and their parents.

Scrutiny also fell on President Trump and his Cabinet after reports that top officials had disagreed over whether to rescind the prior rules. Trump, who has said he supports LGBT rights, also has said he thinks it should be up to states to decide the bathroom policy for transgender students in public schools.

Education Secretary Betsy DeVos, who had initially objected to pulling the guidance but ultimately signed off on the decision, defended her actions at a conservative gathering in Washington. She said President Barack Obama had overreached in establishing a transgender policy for all of the nation's schools.

The sudden lack of guidance left states and school districts scrambling to figure out how to fill the apparent void, and to reassure transgender children and their parents that they are safe and valued. In New York, Attorney

General Eric T. Schneiderman issued what he termed a "reminder" to schools that state law protects transgender student rights regardless of federal guidance. Massachusetts Attorney General Maura Healey spoke at a news conference alongside LGBT advocates to criticize the administration's actions.

The decision had particular resonance in North Carolina, which last year passed a law requiring people in public buildings to use the restroom that matches the gender on their birth certificates. The law drew scorn from celebrities, sports leagues and major corporations, and it figured prominently in the gubernatorial election in which the governor who signed it was defeated.

Lawmakers there have been locked in a battle over how and whether to repeal the law, which resulted in millions of dollars of lost tourism revenue. Both sides cited the Trump administration's actions as a reason to support their position on the law.

"Because of the new federal policy, North Carolina's privacy law - HB2 - remains more vital than ever as efforts to strip away privacy protections will shift even more to the state level," Tami Fitzgerald, executive director of the NC Values Coalition, said in a statement.

The biggest question in the wake of the Trump administration's withdrawal of the guidance is whether the Supreme Court will step in to settle the issue.

The justices could keep Grimm's case on the schedule, send it back to the lower courts for more work or perhaps delay consideration until the Trump administration has clarified its views on the legal issues involved.

Under the last two scenarios, Supreme Court nominee Neil Gorsuch might be confirmed and the court would be back to full strength. A seat has been open since Justice Antonin Scalia's death more than a year ago.

Both Gloucester County and the ACLU are urging the Supreme Court to decide the merits of the case, about whether the protections of Title IX should be extended to cover gender identity.

But the Supreme Court generally likes to have the benefits of lower court deliberations on such important questions. The panel of the U.S. Court of Appeals for the 4th Circuit in Richmond is the only appeals court to have ruled, and its ruling for Grimm was couched almost exclusively on deference to the Obama administration Education Department's interpretation of Title IX.

"We think this changes the complexion of the case considerably," said Kyle Duncan, who is representing the Gloucester County School Board at the Supreme Court. "One thing [the court] absolutely should do is vacate the 4th Circuit's opinion."

Rather than send the case back, Duncan agrees with the ACLU that the court should move forward.

The Trump administration gave the justices little to go on in the letter it sent Wednesday night. It said only that it is rescinding the Obama administration's guidance, and that it would "consider further and more completely the legal issues involved."

It would seem unusual for the court to decide such an important area of federal law without briefing from the government.

The Supreme Court is likely to be closely divided on the issue. In August, it voted 5 to 3 to stay the 4th Circuit's opinion, which meant Gloucester did not have to comply with the order that Grimm could use the boys' restroom at his high school. Justice Stephen G. Breyer said he was joining the conservative justices in granting the stay as a "courtesy" that would preserve the status quo while considering the school board's request to review the case.

Justice Anthony M. Kennedy is the conservative who most often joins the court's liberals on social issues. He has written all of the court's decisions advancing gay rights.

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Teenage Voice Leads the Fight on Restrooms

The New York Times

February 24, 2017 Friday, Late Edition - Final

Section: Section A; Column 0; National Desk; Pg. 1

Length: 1432 words

Byline: By SHERYL GAY STOLBERG

Body

WASHINGTON -- The bespectacled teenager in the gray A.C.L.U. hoodie and cargo pants stood, back pressed against a chain-link fence on Pennsylvania Avenue, under a sign saying "No Trespassing, Authorized Personnel Only." The White House, illuminated at night, cast a glow over well-wishers who, having just wrapped up a protest against President Trump, waited in line to pay homage to 17-year-old Gavin Grimm.

Mr. Grimm looked a little flustered. "Absolutely humbled," he pronounced himself, as his admirers thanked him for being brave.

With Mr. Trump's decision this week to rescind protections for transgender students that allowed them to use bathrooms corresponding with their gender identity, the next stop is the Supreme Court, where Mr. Grimm -- an engaging yet slightly awkward young man -- is the lead plaintiff in a case that could settle the contentious "bathroom debate."

Amid a thicket of conflicting state laws and local school policies on bathroom use, the suit, which pits Mr. Grimm against his school board in Gloucester County, Va., could greatly expand transgender rights -- or roll them back.

Mr. Trump has portrayed the issue as one of states' rights, and already the country's transgender students face differing realities depending on their school. Some are restricted to the bathroom of the gender on their birth certificate. Others are not. Then there are the students like Mr. Grimm, who have had separate facilities set aside for them.

At issue in Mr. Grimm's case is whether Title IX, a provision in a 1972 law that bans discrimination "on the basis of sex" in schools that receive federal money, also bans discrimination based on gender identity. President Barack Obama concluded that it did. Despite Mr. Trump's action, lawyers for both Mr. Grimm and the school board said Thursday that they expected the case to go forward, with oral arguments set for March 28 and school officials across the country awaiting the result.

"No one was in a rush to bring this case to the Supreme Court," said Joshua Block, a lawyer with the American Civil Liberties Union, which represents Mr. Grimm. "Gavin didn't choose this fight; this fight happened to Gavin. But now that we are here, lives are at stake, and they are at stake in a way that is even more acute because you don't have a federal government anymore to protect us."

For Mr. Grimm, who said he knew he was a boy "as soon as I was aware of the difference between boys and girls," the case amounts to a crash course in government and media relations. It bears his initials, G.G., because he is a minor, and the name of his mother, Deirdre.

At home in rural Gloucester, he is a kid with a pet pig named Esmeralda, a geek's love of Pokémon cards and 600-plus Facebook friends. He wears $12 sneakers from Walmart and likes eating at Fuddruckers because the name sounds funny. He is applying for college, but doesn't want to talk about it.

But here in the nation's capital and in big cities around the country, Mr. Grimm is now a hot property, the new face of the transgender rights movement. Laverne Cox, the actress and activist, gave him a public shout-out at the Grammys. (''Everyone, please Google 'Gavin Grimm,'" she said.) After his appearance here Wednesday night, he dashed off to New York to appear Thursday morning on ABC's "The View."

At the protest here Wednesday night, he was the star speaker, besieged with teary hugs and cellphone selfies. The mother of a transgender child burst into tears when she saw him. A government lawyer shook his hand. Activists posed for pictures.

Suddenly, he is hearing his name mentioned in the same breath as Norma McCorvey, the eponymous plaintiff in Roe v. Wade, the Supreme Court case that established a national right to abortion (and who died last week), and Jim Obergefell, whose case led to the legalization of same-sex marriage.

Mr. Grimm looked awe-struck at the thought. ''I just hope I do it justice,'' he said quietly.

When Mr. Grimm was about 12 or 13, he said, he was able to put a name to what he was feeling and recognized himself as transgender. He came out first to his friends, which was easier than telling his parents.

For the family, it was a jolt, his mother said. It made her question preachers -- she eventually left her church -- but strengthened her faith.

''God gave me this child to open my heart and my mind,'' Mrs. Grimm, a nurse, said.

In 2014, when Mr. Grimm was 15 and starting his sophomore year, the family told his school he was transgender. Administrators were supportive at first and allowed him to use the boys' bathroom.

But amid an uproar from some parents and students, and after two tense school board meetings, the board barred Mr. Grimm from using the boys' bathrooms and instead adopted a policy requiring transgender youth to use separate ''single user'' restrooms. The school now has three such restrooms, but two are in refurbished utility closets, said Mr. Block, the A.C.L.U. lawyer.

Kyle Duncan, a lawyer for the school board, said the board ''agonized'' as it sought a thoughtful way to accommodate Mr. Grimm while protecting students who felt uncomfortable. ''This is a sensitive and difficult issue in which everyone's privacy rights need to be respected,'' he said.

But Mr. Block said that Mr. Grimm had been singled out for ''classic sex discrimination.''

Mrs. Grimm was more pointed: ''This school board has targeted my child.''

Her son did not always have such aplomb. Before he began ''living authentically,'' his mother said, he was introverted, often retreating to his room. She winces at the times she tried to curl his hair and make him wear dresses.

Mr. Grimm is, by all accounts, the perfect plaintiff, poised beyond his years. He knows how to deflect unwanted lines of questioning (he will not talk about his twin brother, friends or teachers) and is unfailingly polite in replying to intimate queries about his bathroom habits (''If I have to go, I go to the nurse's restroom,'' he told a local television reporter on Wednesday night) and his emotions (''It's incredibly frustrating, it's embarrassing, it's very uncomfortable. I have this neon sign above my head that says I'm different from my peers'').

But at heart, he is still a kid. Once, while touring the National Archives here, Mr. Grimm excitedly played Pokémon Go in front of the Declaration of Independence, as Bill Farrar, a spokesman for the A.C.L.U.'s Virginia affiliate,

patiently tried to remind him that he was probably "the only person here who has a legal proceeding before the Supreme Court."

The two have bonded over hours of travel, including a dash from Gloucester to Washington on Wednesday. Mr. Grimm stuffed his belongings in a white trash bag, sticking in a dress shirt at the last minute, which proved handy for "The View."

Because Mr. Grimm is to graduate this year, it is unlikely that he will benefit if the court finds in his favor. And legal experts say that is a big if. The Supreme Court could rule narrowly, send the case back to the appeals court for further review, or decide to wait until similar suits percolate through the federal court system.

And with just eight justices on the court -- confirmation hearings for Judge Neil M. Gorsuch, Mr. Trump's nominee for the ninth seat, are scheduled to begin March 22 -- the justices might be inclined to wait.

"There are many reasons not to resolve this issue now," said Carl Tobias, a professor at the University of Richmond School of Law, who has followed the case.

But Vanita Gupta, who ran the Civil Rights Division in Mr. Obama's Justice Department and helped write the directive that Mr. Trump rescinded, said the Grimm case had already advanced the cause of transgender rights, just by raising awareness.

"There has been such social and cultural change in the hearts and minds of people in this country," she said, "and I think that's only going to grow, even if there is a legal setback."

Whatever happens, Mr. Grimm appears destined for a life of advocacy. He says he feels a heavy burden standing up for other transgender people, knowing that everyone is different. He worries that other young people will not have the support that he has had.

While he is not much on school (he is taking only the two courses he needs to graduate), he would like to be a geneticist. He wants to know how the brain works.

But asking him about his career plans brings a Gavin-like answer -- wry and pointed.

"I want to be," he said, "someone who doesn't have to talk about where he is going to use the bathroom."

http://www.nytimes.com/2017/02/23/us/gavin-grimm-transgender-rights-bathroom.html

Graphic

PHOTO: Gavin Grimm, right, a transgender student with a case before the Supreme Court, at a rally Wednesday outside the White House. (PHOTOGRAPH BY AL DRAGO/THE NEW YORK TIMES) (A15)

Load-Date: February 24, 2017

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Supreme Court could pull plug on transgender case; Reversal of restroom rule complicates matter for justices

The Courier-Journal (Louisville, Kentucky)

February 24, 2017 Friday, 2 Edition

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Length: 648 words

Byline: By, Richard Wolf, @richardjwolf

Body

washington - The Trump administration's reversal of a rule on transgender students' rights could remove the controversial issue from the Supreme Court's docket this spring - or lead the justices to render an even more significant ruling.

A Virginia high school senior's legal battle to use the bathroom of his choice was slated to be heard before the high court next month. Wednesday, administration officials withdrew guidance issued under President Obama that instructed the nation's school districts to let transgender students use bathrooms corresponding to their chosen gender.

A federal appeals court in Richmond relied on that guidance last year in ruling that Gavin Grimm should be permitted to use the boys' bathroom at his Gloucester County school, and the school district promptly appealed to the Supreme Court. Now that the policy has been eliminated, the justices face a choice of whether to vacate that decision and send the case back or decide on their own which bathrooms are suitable under a 1972 federal law prohibiting sex discrimination?

The first thing they did Thursday was predictable: The court gave lawyers on both sides six days to submit their views on how best to proceed.

Their choice is complicated by the timing of the Trump administration's directive, coming five weeks before the case was to be heard and on the same day that Grimm's lawyers submitted their 62-page legal brief. The high court could send the case back to Richmond as early as next week, or it could hear oral arguments March 28 before deciding, in essence, whether to decide.

In the background as they weigh those options, the eight justices know they remain shorthanded and in danger of deadlocking 4-4 until Trump's nominee for the vacant ninth seat, federal appeals court Judge Neil Gorsuch, goes before the Senate for confirmation in April. In the case of such a tie, the court probably would rehear the case when it's back at full strength.

"I don't know what the procedure's going to be. I don't think anybody does," said Kyle Duncan, who is representing the school board in the case. "It's a complicated issue, a moving target."

When the high court agreed in October to hear the school board's appeal, Election Day was less than two weeks away and Hillary Clinton led in the polls. The possibility that the next administration would reverse the Obama administration's guidance to school districts seemed remote.

The justices agreed to consider two questions: Should the Supreme Court's customary deference to agency decisionmaking apply, and does the Obama policy fit the prohibition on sex discrimination under Title IX of the Education Amendments of 1972?

The appeals court based its ruling for Grimm on deference to the Obama policy - a decision that would have been different if the policy didn't exist. Because of that, several lawyers and academics predicted Thursday that the Supreme Court will punt.

"The most likely thing for them to do is to send it back," said Geoffrey Stone, a constitutional scholar at the University of Chicago Law School and author of the new book Sex and the Constitution. "I would think that the court would say, 'OK, the situation has changed.'"

Advocates for transgender rights said the threshold issue of how Title IX applies remains very much alive and should be decided.

"This is an incredibly urgent issue," said Joshua Block, who is representing Grimm on behalf of the American Civil Liberties Union. Confusion over the impact of the Trump administration's action, he said, "only underscores the need for the Supreme Court to bring some clarity here."

Shannon Minter, legal director of the National Center for Lesbian Rights and a transgender man, said school boards and administrators might think the new policy allows other forms of discrimination against transgender students. That makes it even more crucial for the justices to decide the issue, he said.

Graphic

Jason Szenes, European Pressphoto Agency

A restroom at the San Diego International Airport is marked "all gender."

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Voter ID lawsuits live on despite likely Trump policy shift

NBC - 13 WVTM (Birmingham, Alabama)

January 26, 2017 Thursday

Section: POLITICS

Length: 707 words

Byline: DAVID SALEH RAUF

Body

AUSTIN, Texas —

Federal lawsuits challenging voter ID requirements in Texas and North Carolina won't just disappear even if Justice Department lawyers who once argued against the laws under the Obama administration effectively switch sides to begin advocating for them under Trump's administration, civil rights lawyers say.

What President Donald Trump's Justice Department will do isn't yet know, but his comments on the campaign trail and since taking office suggest the agency will re-examine its strategy and may support the two states' toughest-in-the-nation requirements that voters show picture identification at the polls. The Barack Obama-led Justice Department launched high-profile legal challenges against those laws, arguing that the requirements were unnecessary and unconstitutional.

"The time and resources the federal government has spent on this case have truly been substantial," said Kristen Clarke, president and executive director of the Lawyers' Committee for Civil Rights Under Law, which is representing plaintiffs in the Texas voter ID case. "But if the federal government reverses course, we are fully prepared to move forward."

A court forced Texas to water down its law for the November election, but the case is continuing in U.S. District Court in Corpus Christi, Texas. North Carolina's 2013 voter ID law as struck down in July, but the state has asked the U.S. Supreme Court to review the appeals court's decision.

"There is a great concern over what DOJ is going to do and if they are going to retreat in these cases," said Gerry Hebert, a former Justice Department lawyer who represents plaintiffs in the Texas voter ID case. "I suspect a great deal of shenanigans from a Trump Justice Department, but we will bear the burden on our own if we have to."

Supporters say the laws help prevent voter fraud by making sure people who aren't eligible to vote, including people living in the country illegally, don't cast a ballot. Opponents say there is no evidence of massive voter fraud and that such laws disproportionally affect minorities and the poor who may faces challenges obtaining a government-issued photo ID.

Trump tweeted Wednesday that he plans to open an investigation into voter fraud that would focus on dead people who remained on the voter rolls, people registered in two or more states and "those who are illegal."

Depending on its results, Trump tweeted, "We will strengthen up voting procedures!" That could mean efforts to expand strict voter ID requirements. On the campaign trail, Trump had praised laws requiring ballot box photo identification.

Another signal that the new administration could abandon the voter ID cases came late last week. Just hours after Trump was sworn in as president, the Justice Department asked for a hearing in Texas set for this week to be delayed until next month. Department attorneys said in court filings that they needed more time to brief new leadership, but lawyers in the case say it could be a precursor to a new position from the federal government.

If the Justice Department were to align with Texas and North Carolina and defend their voter ID laws, it would be a setback for the legal challenges but "certainly not fatal," said Rick Hasen, an election law expert and professor at the University of California, Irvine School of Law.

"Certainly, it is advantageous for these lawyers to have not only the resources of the federal government, but the opinion of the federal government on their side," he said.

Kyle Duncan, a lawyer representing North Carolina in defending its voter ID law, said the state is hopeful that the Justice Department will change its position. The Obama administration's Justice Department filed its last brief in the case opposing North Carolina's motion one day before Trump took office.

"I think the Justice Department would be on solid ground if they changed their position," said Duncan. "My hope is they will do exactly that."

Irving Joyner, an attorney for the North Carolina NAACP, said lawyers already are anticipating a cold shoulder from the Trump administration.

"We don't have any faith that the new Justice Department is going to be a friend," said Joyner. "We are fully prepared to go forward on our own anyway."

Graphic

CNN SOURCE: CNN

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NATIONAL CATHOLIC REGISTER

Karen Elam, a member of the Mississippi's Board of Education, listens to Special Assistant Attorney General Joe Runnels explain various facets of Title IX, prior to the board going into executive session on May 24 in Clinton, Miss. The board voted 9-0 to follow political leaders' opposition to federal guidance on use of bathrooms and locker rooms by students that self-identify with the opposite sex of their biological sex.

'Gender Identity': A Complex Battleground for Religious Freedom

NEWS ANALYSIS: As the Obama administration calls for the adoption of new accommodations for people who refer to themselves as transgender, religious-freedom experts and Catholic leaders weigh a swiftly changing legal and political landscape.

By JOAN FRAWLEY DESMOND – Posted 6/1/16 at 1:26 PM

WASHINGTON — Eleven states have filed a legal challenge to the Obama administration's directive that called on public-school districts to permit students to use bathrooms based on their gender identity, not their biological sex.

According to papers filed on May 25 in a Texas federal district court, the 11 states argue that the administration has "conspired to turn workplaces and educational settings across the country into laboratories for a massive social experiment, flouting the democratic process, and running roughshod over commonsense policies protecting children and basic privacy rights."

The lawsuit marked a new front in the culture wars that will likely pose fresh challenges to the religious freedom of public-school students, faculty and parents, as well as Catholic universities and individual believers in the workplace.

"Gender ideology is the next tsunami that threatens to sweep away centuries of accepted human wisdom about the complementarity and real differences between men and women," said Archbishop Paul Coakley of Oklahoma City, in a column for the archdiocesan website that was provided to the Register before the 11 states filed suit against the federal government.

"These differences are not merely about self-expression and personal choice. Science, philosophy, theology and the accumulated wisdom of every culture have recognized that these

Duncan Attach 0471

differences are rooted in something real and objective.

"They are rooted in biology, and, more fundamentally, they are rooted in the design of the Creator," said Archbishop Coakley.

Legal analysts and religious-freedom advocates are still reviewing the broad implications of the May 13 letter issued by the federal Department of Education and the Department of Justice that interpreted Title IX language prohibiting discrimination based on sex to include people who do not identify with the sex noted on their birth certificates.

According to this new federal guidance, a student's gender identity will be considered the student's sex, and U.S. states and school districts that resist this "guidance" could risk the withdrawal of federal funds for education. The government defines "gender identity" as "an individual's internal sense of gender," which "may be different from ...the person's sex assigned at birth."

The directive applies for bathrooms and locker rooms, sports teams, school records and the use of pronouns when addressing an individual who no longer identifies with his or her biological sex.

"As is consistently recognized in civil-rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students," read the "Dear Colleague Letter on Transgender Students" issued by the Departments of Justice and Education.

'Uncharted Territory'

Douglas Laycock, a leading authority on religious-freedom issues at the University of Virginia School of Law, acknowledged that state and federal courts were moving into "uncharted territory."

It was not clear, said Laycock, whether resistance to new accommodations for people who refer to themselves as transgender would be treated as a religious matter, and so allow for exemptions in public-school settings, among other locations. But he speculated that religious objections to specific accommodations might win support from the courts.

"I do think there is a plausible religious-liberty issue about locker rooms. Religious teachings on sexual modesty may prohibit exposure to a person who is biologically a member of the opposite sex," suggested Laycock.

At present, the Alliance Defending Freedom, a religious-liberty advocacy group, has filed a lawsuit on behalf of a group of Chicago-area public school students and parents that called on the local school district to halt the new accommodations. The ADF lawsuit argued that

the federal directive was unconstitutional and posed a threat to student privacy and safety, but the legal challenge did not highlight religious-freedom concerns.

Meanwhile, the requirement that people in the school community or workplace adopt pronouns that reflect an individual's gender identity will likely spark additional debate and litigation.

"What pronouns to use should be a matter of free speech," said Laycock.

"But free speech cannot be used to harass individuals; there is no right to throw objectionable pronouns in the face of a transgender student."

He predicted that "the transgender movement, and the school systems regulating pronouns, will take a very expansive view of what counts as harassment."

Implications for Catholic Schools

When the administration issued its letter providing guidance on gender-identity accommodations, Loretta Lynch, the U.S. attorney general, equated resistance to such practices with the segregationist policies of the Jim Crow South.

Kyle Duncan, a lawyer who represents North Carolina's speaker of the house, Rep. Tim Moore, and Philip Berger, president pro tempore of the state senate, in one of several legal challenges to the federal guidance, told the Register that Lynch's strong language should raise a red flag with Catholics.

"If I were an administrator of a Catholic school, I would not feel confident that I could maintain" an exemption from this accommodation, "not when the U.S. attorney general equates my school's position with the continuation of Jim Crow laws," said Duncan, who has litigated numerous religious-freedom cases.

After the Department of Education adopted a new interpretation of Title IX in 2014 that prohibited discrimination based on gender identity at institutions of higher education, a growing number of Catholic and Christian colleges and universities have obtained waivers that allow them to adhere to their own policies.

However, the American Civil Liberties Union and other advocates have pressured religious institutions to change course, and a slew of "LGBT" (lesbian, gay, bisexual and transgender) organizations have called on the National Collegiate Athletic Association (NCAA) to sever its ties with faith-based schools that have sought exemptions from Title IX.

In this harsh political environment, conscience protections are often framed as a license to discriminate. Thus, when Catholic educators act to defend the religious mission of their institutions, they risk provoking retaliatory actions from activist groups that can damage a school's reputation.

"We have not filed for an exemption" to Title IX, said John Garvey, the president of The Catholic University of America. He noted the existence of a "shaming campaign," organized by groups like the Human Rights Campaign, to target institutions that seek the religious exemption included by Congress in Title IX.

"A natural consequence [of the new Title IX guidance] is that organizations like us may find themselves seeking an exemption now," Garvey told the Register.

Given the swiftly changing political and legal landscape, Laycock was cautious about assessing the future ability of Catholic and Christian universities and colleges to secure religious exemptions.

"The resistance to allowing any such right is fierce," agreed Laycock.

Federal Overreach?

For now, states that challenge the Title IX directive in court have targeted the administration's failure to follow the formal rulemaking process.

"They are trying to insert a definition of sex in federal anti-discrimination law with no mandate from Congress and without going through the normal regulatory process," argued Kyle Duncan, who has filled multiple lawsuits on behalf of Speaker Moore and Sen. Berger.

"They are doing it by letter and then going to court to force that on sovereign states."

The North Carolina Republicans' legal argument has received a boost from some legal specialists.

In a May 18 op-ed in *The New York Times*, Yale law professor Peter Schuck underscored the need for protections for people who identify as a member of the opposite sex, but criticized the administration's decision to circumvent the rulemaking process. Further, he challenged the adoption of an absolutist legal argument that ignored the rights of others.

"A legal right trumps any other non-right claim, and those who disobey may suffer serious sanctions," read Schuck's critique of the federal guidance.

"This absolutist rigor is precisely why we accord the status of 'right' only to those claims that are essential to individuals' well-being. Do identity-based bathrooms meet this demanding test?" asked Schuck.

Maya Dillard Smith, the interim director of the ACLU's chapter in Georgia, raised similar concerns when she resigned from her post in late May, linking her decision to the organization's strong support for the new bathroom accommodations.

In a statement that marked her departure from the ACLU, Smith said her own daughters were "frightened" when they visited a women's bathroom and encountered "three transgender young adults, over six feet [tall] with deep voices." She argued that civil-rights advocates should look for solutions that respect the rights of all groups.

CUA's Garvey Stands Firm

If the federal government prevails in these lawsuits, Catholic universities like CUA will face mounting pressure to adopt the accommodations or obtain an exemption — and bear the brunt of partisan attacks in the public square.

But John Garvey signaled that he would not yield to the latest skirmish in the culture wars. Not only is he committed to defending the religious freedom of a storied Catholic institution of higher education, he is even more concerned about protecting "the legitimate privacy concerns of our students."

"If a biological male who is transitioning to female applies to our freshman class, we must assign that person housing with women, and a single-room option may not be a solution" that fully adheres to the new guidelines, he noted.

"So a young woman who comes to Catholic University and finds she is rooming with a biological male is asked to dress and bathe and brush her teeth with someone who is biologically male," he explained, outlining a possible scenario if CUA adopted the new guidelines.

Garvey contended that university personnel must be free to engage and work with students dealing with gender-identity issues, just as faculty and staff offer a range of services to other members of the student body.

The decision to adopt a different gender identity, he noted, is "loaded with moral implications."

"We know our students better than anyone else. I don't think it is the government's place to legislate our students' passage through moral maturity."

"If we have students struggling with gender-identity issues, we would naturally want to talk with them," while encouraging discussions with "the parents, campus ministry and others," he said, noting that individuals often reverse course after exploring the "transitioning" option.

Strongly opposing any attempt to prevent his institution from forming students in the faith, Garvey takes inspiration from Pope Francis' encyclical Laudato Si. "Pope Francis says that we need to 'accept our bodies as God's gift' and show them the respect we show the rest of creation. This is 'an essential element of any genuine human ecology.'"

Joan Frawley Desmond is the Register's senior editor.

The Muddled Future of Reproductive Rights

Atlantic Online

February 19, 2016 Friday

Length: 824 words

Byline: Julie Rovner

Body

The sudden death of Associate Justice Antonin Scalia has complicated the fate of many major cases before the U.S. Supreme Court this term. But few issues face as much turmoil going forward as women's reproductive rights.
In March the Court is scheduled to hear two separate cases: one on abortion and one on contraceptive insurance coverage. And the absence of Scalia means predictions of what may be the state of the law come the end of the Court's term this June are being turned, if not on their heads, at least sideways.

The abortion case, which originated in Texas, is considered the more significant of the two. *Whole Women's Health v. Hellerstedt* asks whether the state's law imposing a series of restrictions on abortion clinics amounts to an "*undue burden*" on a woman's right to have the procedure. With only part of the law in effect, *about half of the state's 40 abortion clinics* have closed. If the rest of the law is allowed to take full effect, abortion providers estimate that only *around 10 would remain open*.

The contraceptive case, *Zubik v. Burwell*, is actually seven separate cases that have been bundled together. All the plaintiffs are religious-affiliated institutions that claim the *Obama administration's "accommodation*" to allow them not to offer contraceptive coverage as part of their health plans still interferes with their religious freedom.

The administration's rules specify that religious hospitals or schools do not have to "*contract, arrange, pay, or refer a person for contraceptive coverage*." But it does require those entities to tell the federal government who its insurer is, so the government may make arrangements for the coverage to be provided. That, argue the plaintiffs, makes them "*complicit in sin*" through the act of providing coverage.

Prior to Scalia's death, it was considered likely that the Court would uphold the Texas law, thus giving the nod not just to Texas, but to a *broad array of state laws* to scale back abortion access by, among other things, requiring doctors who perform abortions to have admitting privileges at a nearby hospital and requiring abortion clinics to meet the same health and safety standards as "ambulatory surgical centers" that do much more complicated procedures.

Predictions were not as clear in the contraceptive case. In all the cases before the high court, lower courts found that the administration's requirements did not violate the religious rights of the entities in question. But in *other cases* appeals court judges have found for the religious entities.
Now, however, it's considered possible, if not likely, that both cases could end in a 4-4 tie. And that would be a mess, say those on both sides.

"There's no doubt it would be a muddle," said Kyle Duncan, an attorney in private practice who has represented states seeking to impose abortion restrictions and religious organizations objecting to the contraceptive coverage rules.

The result of a tie vote at the U.S. Supreme Court is that the lower court ruling stands but that lower court ruling does not create a national precedent. That precedent would apply only in the *geographic "circuit"* where the case was brought.

But while that would allow the Texas law to take effect, it is unclear what it would mean for the rest of the Fifth Circuit, which includes Mississippi and Louisiana. That's because a different panel from the same appeals court *struck down a Mississippi law* on hospital admitting privileges in 2014.

The two laws are not identical, but "you have some tension there" between some members of the same appeals court, said Duncan, "that the Fifth Circuit might have to reconcile," by rehearing one of the cases with all of the appeals court judges participating, rather than a three-judge panel.

In the contraceptive case, the federal rules are identical. But a tie could mean those rules would apply differently depending on how each circuit's appeals court ruled.

That's not ideal, says David Cohen, a professor at Drexel University's law school. "The Supreme Court normally tries to resolve circuit splits because they don't want federal laws interpreted differently in different parts of the country," he said.

In both the contraceptive and abortion cases, if the U.S. Supreme Court deadlocks, it could hold the case over until the next term and re-hear it then. There's even precedent for that on reproductive health: *Roe v. Wade itself was heard twice*; once in December 1971 (when there *were two vacancies on the Court*), then again in October 1972.

But it is far from clear whether there will even be a replacement for Scalia when the Court's next term begins this October. "The idea of getting a ninth justice anytime soon seems unlikely," said Duncan.

On that he and Cohen agree. "I fear we're not going to have a justice for 15 or 16 months. If we're lucky," he said.

This article appears courtesy of *Kaiser Health News*.

Read *The Muddled Future of Reproductive Rights* on theatlantic.com

Load-Date: February 20, 2016

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Louisiana inmate wins case against mandatory life sentences for juveniles

1st February 2016 · 0 Comments

By Juvenile Justice Information Exchange, Center for Sustainable Journalism

The U.S. Supreme Court ruled Monday 6-3 in Montgomery v. Louisiana that prisoners serving mandatory life sentences without parole for murders they committed as juveniles should have a chance at release via a resentencing hearing.

Attorneys who specialize in juvenile justice called the decision "potentially sweeping" but warned that resentencing hearings were far from a sure path to freedom.

Read about Henry Montgomery's crime, his trial and the debate over mandatory life sentences for juveniles in our story, published in partnership with the Juvenile Justice Information Exchange.

Though parole boards will now have to review the sentences, they won't have to give parole, said retired law professor Victor Streib, an internationally renowned expert on the juvenile death penalty and juvenile justice. "And it would be very typical for them not to."

The ruling means that the 2012 Miller v. Alabama decision — which said that mandatory life without parole sentences for juveniles are unconstitutional on Eighth Amendment grounds — should apply retroactively. Hundreds of prisoners across the country would qualify for a resentencing hearing.

Until last week's ruling, the landmark Miller decision was the latest in a series from the court rooted in the idea that children should be treated differently than adults because they are less culpable for their actions and have the potential to change.

"It's a step in the same direction we've been going," Streib said. "It follows the same argument that kids are less culpable and aren't as deserving of punishment as adults — so in a way, this decision would be expected. The only thing that's unusual is that the court would say that a ruling is not just effective from now on, but that it should apply to all the older sentences."

Another attorney who has represented inmates sentenced to death before the U.S. Supreme Court called Monday's decision "potentially sweeping."

However, John Mills of Phillips Black, a nonprofit public interest law firm, cautioned that judges can still hand down life without parole at their own discretion.

"That is happening to people in jurisdictions where they've received retroactive relief under state law," Mills said from his San Francisco office. "Their prize for having won that victory is a new, discretionary sentence of life without parole. And that kind of sentence will be available unless and until the U.S. Supreme Court holds that life without parole itself is unconstitutional."

Mills was one of the authors of a 2015 report that documented the racial and geographical disparities in juveniles sentenced to life, finding that a quarter of life-without-parole terms were handed down in just seven urban counties in the country — including Orleans, Jefferson and East Baton Rouge parishes.

Daniel Macallair, executive director of Center of Juvenile and Criminal Justice, called the decision a humane one. It brings the United States more in line with the rest of the world, he said. The U.S. is the only country in the world that allows juveniles to be sentenced to life without parole.

"It's the right thing to do," he said. "The rest of the world has recognized the idea that it's not a good idea to sentence children to die in prison without any hope of release."

"It's great news," said Henry Montgomery's cousin Dianne Coleman. She predicted she and her cousin would have a joyful conversation on Sunday, when she makes her regular visit to the Louisiana State Penitentiary at Angola.

Montgomery has spent decades in prison since he was convicted in the shooting death of sheriff's deputy Charles Hurt in East Baton Rouge, Louisiana, in 1963. He was 17 at the time of the murder.

People with ties to Angola said that they were sure that Montgomery had already heard the news. Norris Henderson, head of the group Citizens for Second Chances, which works on behalf of affected inmates in Louisiana, said that word had spread "like wildfire" to Louisiana's 300-plus inmates serving life-without-parole sentences for crimes committed when they were under 18.

"By now, everyone in corrections in Louisiana knows," said Henderson at midday Monday, several hours after the decision was released.

Henderson and other people on the ground in Louisiana spent Monday determining next steps, to see whether the state could establish a blanket parole eligibility for all affected inmates, for instance, to avoid individual re-sentencing hearings in each case. Despite the court victory, many questioned were left unanswered, said Mark Plaisance, one of Montgomery's lawyers. His hunch was that the case would head back to the district trial court to deal with Montgomery's previously rejected re-sentencing petition. Last year, the Louisiana

Legislature allowed those in Montgomery's situation to be re-sentenced for life with possibility of parole after serving 35 years, so that was a likely outcome, Plaisance said.

Because of the sheer number of juvenile-life cases in Louisiana, Plaisance predicted that the state's district courts were about to be "bombarded with petitions." Each court will have to decide the very basics: how the cases should be prioritized, whether the petitions will be fought and how hard, Plaisance said, noting that the Louisiana Public Defender Board's budget was already tight.

"Given the board's financial straits, they are certainly not in a place to fund re-sentencing hearings on 300-plus defendants," he said. "But it's got to get done. We have to determine how to do it fairly and adhere to the Constitution, now that we have a ruling."

As news of the ruling spread, Cindy Sanford, a Pennsylvania prison activist, was anticipating her regular afternoon call with Kenneth Carl Crawford III. He is serving a mandatory life-without-parole sentence for his involvement in a double murder at age 15 in 1999.

She expected she would be the one to tell Crawford, whom she considers a son, about the ruling.

Jody Kent Lavy, director and national coordinator at The Campaign for the Fair Sentencing of Youth, said many of those affected by the ruling have been on an emotional rollercoaster since Miller as they waited to hear how their states would respond.

The ruling brings greater clarity and hope to them, but work remains to be done, she said.

"I think the challenge is to ensure that the people who are serving these sentences are given meaningful opportunities to present their cases for resentencing or parole," she said.

Highly skilled defense teams are needed to present the cases that address the mitigating circumstances the Supreme Court has identified, and parole boards and judges need training on what the court has ruled, Kent Lavy said.

"It's going to have to be a multifaceted approach to ensure these people have the representation they need and the decision makers who are ultimately deciding their fate have all the information they need and aren't simply rubber-stamping their sentence," she said.

Shirley Bradford, whose son Otis Daniels has been serving a life-without-parole term in Georgia since he was 16, called the ruling "a blessing."

"When you're imprisoned as a child, you go in as a child," she said. "You're not able to go to any classes to rehabilitate yourself. You're not allowed to take any job training skills, because to them it's a waste of time and money, because he's never going get out."

Daniels pleaded guilty to killing one woman and wounding another during a 1998 robbery in southwest Georgia. Bradford said she was waiting to hear what the chances of her son getting a shot at parole might be.

"If you've got a 16-year-old at home you would never consider your child to be an adult, no matter what they've done," she said.

Streib doesn't predict that the decision would result in large numbers of juveniles being set free.

"Symbolically, the ruling is interesting," he said. "But in fact, whether or not any of these child offenders are paroled is still up to the parole board."

"It's great news," said Montgomery's cousin Dianne Coleman. She predicted she and her cousin would have a joyful conversation on Sunday, when she makes her regular visit to the Louisiana State Penitentiary at Angola.

Henry Montgomery has spent decades in prison since he was convicted in the shooting death of sheriff's deputy Charles Hurt in East Baton Rouge, Louisiana, in 1963. He was 17 at the time of the murder.

Nine states have abolished juvenile life without parole in the past six years, while others have added review mechanisms that give inmates a chance to seek a reduction in their sentences.

Steve Reba, an attorney who directs the Appeal for Youth Clinic at Emory Law School's Barton Child Law and Policy Center, said he is hopeful that the next frontier in juvenile justice will eliminate all mandatory minimum sentencing for juveniles because it eliminates the chance to show how a convicted person's youth played a role in his decision making.

The Miller decision did leave the door open to life-without-parole terms in cases where a teen is "permanently incorrigible," but emphasized that those cases would be rare — and the Supreme Court restated that in the Montgomery decision. In his dissent, Justice Antonin Scalia said the majority now makes that "a practical impossibility."

"And then, in Godfather fashion, the majority makes state legislatures an offer they can't refuse: Avoid all the utterly impossible nonsense we have prescribed by simply 'permitting juvenile homicide offenders to be considered for parole,'" Scalia wrote.

Streib stays in touch with some defendants he represented years ago, and he said, "I know they'll get their hopes up."

"But in some cases the crimes are so horrible that the parole board is extremely unlikely to grant it."

A lawyer who argued for the state of Louisiana at the Oct. 13 Supreme Court hearing warned afterward that resentencing hearings, if needed, would impose a significant burden on states.

Duncan Attach 0480

"It would make the state do a fact-intensive resentencing for thousands of offenders who are nonetheless facing a constitutionally valid sentence," S. Kyle Duncan said.

Sanford said that in the past she would have opposed this ruling, but that her family's relationship with Crawford has changed her beliefs.

"We just believe Ken is a perfect example of the change that the child can go through," she said.

Sanford said she doesn't want to minimize the pain of the victims' families. And she knows that the process could be long, and not end in Crawford's favor.

But she still couldn't wait to tell him the news.

"Today, we want to think positively," she said.

This article originally published in the February 1, 2016 print edition of The Louisiana Weekly newspaper.

Supreme Court Allows Lesbian Adoptive Mother to See Children in Alabama Case; High court temporarily blocks state court's ruling denying woman rights over children raised with former partner

The Wall Street Journal Online

December 14, 2015

THE WALL STREET JOURNAL.

Section: US

Length: 463 words

Byline: By Jess Bravin

Body

WASHINGTON-The Supreme Court on Monday temporarily blocked an Alabama court from denying a lesbian woman parental rights over children she had raised with her former partner.

The order allows the woman to visit the three children while the high court weighs whether to hear her appeal, according to the National Center for Lesbian Rights, which represents her.

She and her former partner weren't married when the latter gave birth to the children, who were conceived through artificial insemination. The women weren't identified by name in court documents.

"I adopted my children more than eight years ago to be sure that I could always be there to protect them," the woman said in a written statement. "This terrible Alabama decision has hurt my family and will hurt so many other families if it is not corrected."

The parties disagree over whether Monday's order guarantees the adoptive mother visitation rights. Paul Smith, an attorney representing her, said he believes it does.

But Kyle Duncan, who represents the birth mother, said he believes it is unclear, at least until an Alabama court holds a hearing to examine whether such visits would be in the children's best interest.

"These sorts of things are very difficult when you are talking about the breakup of a family with young children," Mr. Duncan said.

The women were in a long-term relationship dating from 1995. The adoptions took place in Georgia, even though they lived in Alabama. The two rented a house in Alpharetta, Ga., to establish Georgia residency.

Legal papers said after the relationship ended the two became embroiled in a custody dispute, leading to court proceedings in Alabama, where the family lives.

Trial and appellate courts approved a joint custody arrangement. In September, however, the Alabama Supreme Court ruled the adoption invalid, concluding the Georgia court had misapplied its own state law.

The woman's appeal argues the Alabama ruling violates the constitutional requirement that each state give "full faith and credit...to the public acts, records and judicial proceedings of every other state."

The case illustrates the unsettled landscape of family law for same-sex couples, even after the Supreme Court's landmark decision in June extending marriage rights nationwide . The couple from Alabama was together for more than 16 years, legal papers say, but their relationship, the children's births and the split all took place before they were legally entitled to marry.

Moreover, "all Georgia orders that allowed an unmarried second parent to adopt without terminating the existing parent's rights are now void in Alabama, and so all such families are simultaneously recognized in Georgia and not recognized in Alabama," the woman's petition said.

Write to Jess Bravin at *jess.bravin@wsj.com*

Notes

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Docket Chat: October Arguments Draw Veteran Advocates

Supreme Court Brief (Online)

September 30, 2015 Wednesday

THE NATIONAL LAW JOURNAL

Length: 711 words

Byline: Tony Mauro

Body

After a headline-making June and a long summer recess, the U.S. Supreme Court returns to the bench on Oct. 5 for a bracing reminder that not all its cases will rock the world.
The justices will face mostly unexceptional arguments for the next two weeks. But even though the cases may not make headlines, they are attracting an array of court veterans to the lectern.

The court's first argument of the term is an almost unpronounceable Foreign Sovereign Immunities Act case: OBB Personenverkehr v. Sachs, which asks whether Austria's state railroad is immune from liability in a lawsuit in U.S. court filed by an American woman who suffered a serious accident while boarding a train in Innsbruck, Austria.
If nothing else, it will validate the theme of Justice Stephen Breyer's new book The Court and the World, that a growing percentage of Supreme Court cases involve foreign events, laws and norms.

Related: Q&A: Justice Breyer's Interview With The NLJ

Toward the end of the upcoming two-week cycle, the court will hear two consolidated Federal Energy Regulatory Commission cases.
Justice Samuel Alito Jr., will sit out the argument, probably because he owns stock in Johnson Controls Inc., parent of one of the energy companies involved. Other justices may be envious of Alito.
The second week of the October argument cycle will bring a parade of solicitors general to the lectern. In three cases being argued after the Columbus Day holiday, no fewer than four former or current U.S. solicitors general will argue before the court.
Former SG Seth Waxman, now with Wilmer Cutler Pickering Hale and Dorr, will argue on Oct. 13 in Hurst v. Florida against that state's practice of allowing the judge, not the jury, to find facts that would lead to the death penalty.
The energy commission cases Federal Energy Regulatory Commission v. Electric Power Supply Association and EnerNOC Inc. v. Electric Power Supply Association will pit SG Donald Verrilli Jr. against former SG Paul Clement, now with Bancroft, who is representing the Electric Power Supply Association. Sidley Austin's top veteran, Carter Phillips, will share Verrilli's argument time on behalf of private petitioners who agree with the government's view on FERC's jurisdiction over so-called "demand response" programs that reward consumers for reducing usage at peak times of demand.

And on Oct. 14, former solicitor general Gregory Garre of Latham & Watkins will represent the petitioner in Campbell-Ewald v. Gomez, one of several cases this term that raises class actions. Arguing for the class action plaintiff will be former Texas solicitor general Jonathan Mitchell, now a visiting fellow at the Hoover Institution and a visiting professor at Stanford Law School.

One case set for argument Oct. 13 has gotten more attention than most of the others: Montgomery v. Louisiana, *which will determine the retroactivity* of the court's 2012 ruling Miller v. Alabama, striking down mandatory life-without-parole sentences for those who committed their crimes as juveniles.
In an unusual move, the court in March asked the parties to brief an additional question of whether it has jurisdiction over the decision of the Louisiana Supreme Court to deny retroactivity. But because both direct parties agreed the high court does have jurisdiction, the court appointed a "friend of the court" advocate to argue against that position.
The court recruited Richard Bernstein, a Washington partner at Willkie Farr & Gallagher, for the task. Bernstein is a former law clerk to Justice Antonin Scalia-who, as circuit justice for the Fifth Circuit, probably played a key role in making the choice in the Louisiana case.
Arguing for retroactivity for defendant Henry Montgomery will be Mark Plaisance, private practitioner from East Thibodeaux, Louisiana, and Deputy U.S. Solicitor General Michael Dreeben.

S. Kyle Duncan, who until last year was general counsel of the Becket Fund for Religious Liberty, will argue for Louisiana, which he once served as its solicitor general. Duncan, who played a key role in the Hobby Lobby Stores v. Burwell litigation, said he went into solo practice in Washington so he could take on "a wider range of constitutional issues."
Read More:

Musical Chairs on the Docket in Kansas Capital Cases

Load-Date: October 1, 2015

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5th Circuit: Enforce marriage ruling now Jindal flip-flops, delays ordering action again ; Judges agree that high court overrules La. Constitution

Times-Picayune (New Orleans)

July 2, 2015 Thursday, ROP OR AM2 EDITION

Section: NATIONAL; Pg. A01

Length: 524 words

Byline: Andy Grimm, Staff writer

Body

Same-sex marriage is legal in all 50 states, including Louisiana, following last week's landmark ruling by the U.S. Supreme Court, a federal appeals court agreed Wednesday.

In an opinion that should pave the way for state officials to begin extending marriage benefits to gay couples, the U.S. 5th Circuit Court of Appeals handed down a ruling shortly before 5 p.m., finding that the Supreme Court ruling in Obergefell v. Hodges overrides Louisiana's 2004 state constitutional amendment limiting marriage to couples of one man and one woman.

"Obergefell ... is the law of the land and, consequently, the law of this circuit, and should not be taken lightly by actors within the jurisdiction of this court," Judge Jerry E. Smith wrote for the three-judge panel, which heard arguments in the case in January.

Gov. Bobby Jindal had said a ruling by the 5th Circuit would require officials across the state to begin extending marriage rights to same-sex couples, but after the ruling Wednesday he issued a one-sentence statement saying that agencies would wait for U.S. District Judge Martin Feldman to enter a final judgment.

The 5th Circuit gave Feldman until July 17 to enter a final judgment reversing his January ruling that upheld Louisiana's gay-marriage ban.

"Our agencies will follow the Louisiana Constitution until the District Court orders us otherwise," the governor's statement read.

The order says Feldman could act sooner, noting that one of the plaintiffs in the case, Robert Welles, is in declining health and has been unable to get a marriage license in his home of New Orleans.

As of Wednesday afternoon, same-sex couples could get marriage licenses in any parish in the state, though Orleans Parish residents could do so only at the 2nd City Court in Algiers. The Office of Vital Records in downtown New Orleans issues marriage licenses, but because it falls under the state Department of Health and Hospitals, it has turned away same-sex couples because of Jindal's order that state offices were to await the 5th Circuit's ruling.

By Tuesday afternoon, Red River Parish Clerk Stuart Shaw was the only clerk in the state not issuing the marriage licenses, but on Wednesday he released a statement saying he had reversed course. A staff member in Shaw's office said Wednesday afternoon that no same-sex couples had requested licenses there since Shaw lifted ban.

Kyle Duncan, the attorney who litigated the marriage case for Attorney General Buddy Caldwell, noted that Judge Smith, in his ruling for the appeals court, included a long passage from the Supreme Court ruling saying that the First Amendment also protects the rights of individuals and religious groups who disapprove of gay marriage.

“The 5th Circuit did not have to put that in there, and none of the parties asked for that,” Duncan said. “I think that’s extremely significant.”

The three-judge panel, which included Smith and judges Patrick Higginbotham and James Graves, stood aside from offering guidance as to how the Supreme Court ruling might apply to the controversies that could arise as those free-speech rights might clash with the marriage rights of same-sex couples.

Graphic

Caitlin Faw / Staff Photographer Sonja Mathers, 34, and Carolyn Williams, 53, received their marriage license Wednesday in Gretna.

Load-Date: July 2, 2015

End of Document

Federal judge to Louisiana: Make gay marriage changes now

Associated Press State & Local

July 2, 2015 Thursday 10:22 PM GMT

Section: STATE AND REGIONAL

Length: 606 words

Byline: By JANET McCONNAUGHEY, Associated Press

Dateline: NEW ORLEANS

Body

NEW ORLEANS (AP) - After waiting about as long as possible, the state of Louisiana began selling marriage licenses to same-sex couples and agreed Thursday that they could file joint income-tax returns and get both parents' names on their children's birth certificates.

Although most parish clerks of court had been selling same-sex marriage licenses since Monday, the state Office of Vital Records, which sells most marriage licenses in New Orleans, didn't do so until Thursday. That office is part of the state Department of Health and Hospitals.

The records office, along with the Department of Revenue, waited until U.S. District Judge Martin Feldman threw out his earlier decision in several consolidated Louisiana cases. Feldman had been among a few federal judges who previously had upheld state laws against gay marriage.

Feldman's order Thursday was largely procedural, since the U.S. Supreme Court had ruled six days earlier that marriage is a fundamental right under the U.S. Constitution. On Wednesday, the 5th U.S. Circuit Court of Appeals overturned his earlier ruling in several consolidated cases.

The state health and revenue departments said in news releases emailed Thursday that they are complying.

In addition to filing new joint returns, "married same-sex taxpayers may amend prior state returns," the Department of Revenue noted. Taxpayers in Louisiana can amend state returns within three years of the filing deadline for the original tax return or two years from the tax payment, whichever is later.

Married same-sex couples also will be able to get both of their names on their children's birth certificates, whether the child is adopted or born to one member of the couple, said Kyle Duncan, attorney for the Department of Health and Hospitals. It will continue not doing so for unmarried couples, whether heterosexual or same-sex, he said.

Gov. Bobby Jindal's administration had recommended waiting 25 days after the Supreme Court ruling to act on the Supreme Court's decision, but most parish clerks of court began doing so Monday, and virtually all had done so by Wednesday.

The state holdout didn't prevent same-sex marriages from being conducted in New Orleans - Louisiana's first gay marriage was Monday in Orleans Parish Civil District Court after the couple got their license in neighboring Jefferson Parish.

"I am so very pleased that Gov. Jindal's continued attempts at scoring points with Iowa voters were ignored by clerks of court, who continued to comply and implement the Supreme Court ruling this week," said Chris Otten, chair of the Forum for Equality Louisiana, a plaintiff in the suit. "The clerks, not Gov. Jindal, show the true spirit of Louisiana."

Jindal, who is seeking the Republican presidential nomination, is currently campaigning in Iowa.

In Red River Parish, about the only parish which had was not writing same-sex marriage licenses Thursday morning, Clerk of Court Stuart Shaw said that afternoon, "We are going to abide by the laws of the state and the United States government."

The head of Louisiana State Police said earlier that members of same-sex couples who want their married name on their driver's licenses can make that change starting Monday.

Col. Mike Edmonson said computers had to be reprogrammed to change men's last names and to check the changes with Social Security records.

People changing their names need to bring in their certified marriage license and proof that they've changed the name in Social Security records, he said. Those will provide information state police need for the computer check.

Replacement four-year licenses cost $13; the new six-year license is $17.

Load-Date: July 3, 2015

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State to appeals court: Same-sex marriage ruling is wrong, but Louisiana's ban must be overturned ; Gay rights attorney pleased at response

Times-Picayune (New Orleans)

July 1, 2015 Wednesday, ROP OR AM2 EDITION

Section: NATIONAL; Pg. A08

Length: 424 words

Byline: Andy Grimm, Staff writer

Body

Lawyers for state Attorney General Buddy Caldwell said the U.S. Supreme Court's landmark gay marriage ruling was wrong, but they concede it does mean Louisiana's ban on same-sex marriage must be overturned.

In a two-page letter to the 5th Circuit U.S. Court of Appeals on Tuesday, attorney Kyle Duncan said the state agreed with the four justices who dissented in the 5-4 ruling issued Friday in the landmark Obergefell v. Hodges case that declared marriage a right available to same-sex couples.

But the high court's ruling does require the 5th Circuit to rule in favor of seven same-sex couples who sued to challenge Louisiana's ban on same-sex marriage, wrote Duncan, the attorney Caldwell's office hired to litigate the gay marriage case.

"Appellees agree with the four dissenting justices in Obergefell that it is wrongly decided," Duncan wrote.

"Obergefell forces the panel to reverse the district court's judgment granting summary judgment to (state officials) and to remand to the district court for final judgment."

In an interview Tuesday, Duncan would not say when he thought the 5th Circuit should issue its order in the case.

"That's for the court to decide," Duncan said. "We've made our decision clear, that we'll do what the 5th Circuit says."

The 5th Circuit Clerk on Monday asked lawyers for both sides to submit a brief by Wednesday to outline how the court should resolve the case following the Supreme Court's ruling. Lawyers for the couples had not filed their brief as of 6 p.m. Tuesday.

Gov. Bobby Jindal has said a ruling from the 5th Circuit would force the state to enforce the Supreme Court ruling, and so far has held off on allowing state agencies under his control to extend marriage rights to same sex couples, including directing the state health department not to issue marriage licenses to same-sex couples in Orleans Parish.

Duncan's letter does not indicate when the 5th Circuit should issue its ruling, but does indicate the case should be remanded to U.S. District Judge Martin Feldman. Feldman in September delivered a rare courtroom victory for state officials defending a marriage ban when he dismissed the couple's lawsuit and upheld the 2004 state constitutional amendment that restricted marriage rights to heterosexual couples.

Jennifer Bandy

The head of the gay rights group that backed the couples' lawsuit said Tuesday he was pleased with the state's response.

"I'm glad it would appear that the state will comply with Obergefell and not seek any unnecessary delays," said Chris Otten, chairman of the Forum for Equality.

Load-Date: July 1, 2015

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*Judge to eye La. abortion clinic case *** Texas and Wisconsin decisions key in ruling*

The Advocate (Baton Rouge, Louisiana)

June 30, 2015 Tuesday, Main Edition

Section: A; Pg. 07

Length: 673 words

Byline: MARSHA SHULER

mshuler@theadvocate.com

Body

A federal trial judge in Baton Rouge is preparing to weigh in on an anti-abortion battle that appears to be headed to the U.S. Supreme Court.

A 51/2-day trial, which ended Monday, looked at the constitutionality of a 2014 Louisiana law that opponents claim serves as a barrier to a women's legal right to the procedure that would end her pregnancy. The law requires abortion clinic physicians to have admitting privileges to a nearby hospital.

Similar laws in Texas and Wisconsin - one upheld, the other not - are on hold because of U.S. Supreme Court actions. The court on Monday stopped Texas from enforcing the law as scheduled Wednesday, pending an appeal of its legality to the high court.

In Louisiana, the decision rests with U.S. District Court Judge John deGravelles, of the Middle District of Louisiana, who said he would rule by Sept. 30 and called the case before him "a very important and very difficult issue."

Before ruling, deGravelles will consider post-trial briefs, in which lawyers from each side will present their proposed findings of fact and law to the judge. Kyle Duncan, the state's lead lawyer, said state government will depend heavily on the 5th U.S. Circuit Court of Appeals decision upholding the Texas law. The court found access would not be impeded with the admitting privileges restriction.

Meanwhile, plaintiffs - physicians and the owners of abortion clinics - are counting on a 7th U.S. Circuit Court of Appeals decision in a Wisconsin case, where the court also blocked enforcement. The court concluded there was no medical necessity for the regulation and was simply an anti-abortion maneuver. The Supreme Court earlier blocked Wisconsin's try to reinstate the state law, thereby letting the appeals court decision stand.

The 2013 Texas law could result in fewer than a dozen abortion clinics remaining throughout the Lone Star state. Prior to the law's passage, 41 existed - a number that's already down by half.

The 5th Circuit found enough access for Texas women would exist as to not violate rights granted under the landmark U.S. Supreme Court's Roe v. Wade decision. Texas, Louisiana and Mississippi are in the 5th Circuit.

"My feelings are that we put in the evidence that we wanted. ... We believe that this law is identical to the admitting privileges law the 5th Circuit already upheld," Duncan said.

Jennifer Bandy

Two of the six doctors who perform abortions in Louisiana today have admitting privileges to nearby hospitals, he said.

There are five abortion clinics in Louisiana. Operators of those located in Metairie, Shreveport and Bossier City and their physicians filed suit challenging the state law. Other clinics are located in New Orleans and Baton Rouge.

Ilene Jaroslaw, senior staff attorney for the Center for Reproductive Rights, said plaintiffs hope the judge adopts the 7th Circuit approach, which takes into account medical evidence. The court said the state had not submitted evidence to show that admitting privileges are necessary to protect the health of women who have abortions. The federal judge found that the law was motivated for the unconstitutional purpose of restricting access to legal abortions.

"That's what we consider the model," Jaroslaw said. "The 7th Circuit said these laws create a burden on a woman's right to an abortion. Admitting privileges laws have substantial impact."

"In this case, there's detrimental effect on women, but we also think the purpose of this law is to shut down clinics. It's a sham," Jaroslaw said.

The American College of Obstetrician and Gynecologists and the American Medical Association have weighed in opposing the restriction.

DeGravelles said he would get transcripts of the proceedings to attorneys by late July, then they would have 30 days from the time the transcripts are received to submit post trial briefs.

After that, the parties have 10 days to respond to each other's briefs.

Follow Marsha Shuler on Twitter, @MarshaShulerCNB. For more coverage of the State Capitol, follow Louisiana Politics at *http://blogs.theadvocate.com/politicsblog*.

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NewsRoom

6/14/15 Baton Rouge Advoc. A1
2015 WLNR 21134449

Baton Rouge Advocate

June 14, 2015

Section: A

If the Supreme Court rules in favor of same-sex marriage, How soon could Louisiana couples marry?

MAYA LAU; mlau@theadvocate.com

Advocates for same-sex marriage in Louisiana are openly betting that by the end of this month the U.S. Supreme Court will rule in their favor.

But even if the decision they expect comes down, it's up in the air whether gay and lesbian couples across the state waiting to cement their partnerships with a wedding will get immediate satisfaction.

Legal experts offer different answers, estimating it could take days or even months after a favorable opinion for same-sex marriages to move forward in the state.

Part of the likely delay is due to the usual questions about interpreting a court decision and the time local and state officials could need to parse the ruling. In addition, though, there is a possible hiccup unique to Louisiana, legal experts say, because this is the only state where a federal district court judge in recent years has upheld a statewide same-sex marriage ban.

"There's a slightly different route for Louisiana because we lost at the trial level," said Kenneth Upton Jr., senior counsel with Lambda Legal, the attorneys representing gay couples in the Louisiana case. The federal appeals court "would send it back to the court in New Orleans with instructions to enter a judgment for the plaintiffs. That could take some time."

Still, the excitement surrounding a landmark Supreme Court ruling of this type could spark a rush on clerk of court offices, the local agencies that typically hand out marriage licenses.

If gay marriage is legalized, any clerks who decide to immediately dispense licenses to same-sex couples would be on firm footing, Upton said. But if any balk, there could be some breathing room.

The political scramble might be just as dramatic. What would be the reactions of state leaders like Gov. Bobby Jindal and Attorney General Buddy Caldwell, who have staked out positions adamantly opposed to same-sex marriage? And what about local clerks - themselves politicians, although ones not normally in the spotlight?

"Until we know what the ruling says, we really can't know what we're going to do. Between what our legal counsel advises us and what the attorney general advises us, that's what we'll do. I'm sure the question is: Does Louisiana law supersede

a federal law or decision that's handed down?" said Debbie Hudnall, executive director of the Louisiana Clerks of Court Association.

"Believe me, we're all very anxious to know which way (it goes)," she said. "Whatever we do, we want to be consistent and make sure we're doing the right thing."

U.S. v. Windsor

Since the U.S. Supreme Court's 2013 ruling in United States v. Windsor, a rolling tide of lower court decisions across the country have declared marriages between same-sex partners a constitutional right. Citing the Windsor precedent, in which the high court required the federal government to recognize gay marriages performed in states where they are legal, judges found that state bans on those marriages were unconstitutional, denying couples a fundamental right. Based in significant part on these court rulings, gay marriage is now legal in 36 states.

That stopped when the issue reached U.S. District Judge Martin Feldman in New Orleans, who upheld Louisiana's ban last September, saying the democratic process, not the courts, should determine whether the definition of marriage changes. Louisiana voters in 2004 overwhelmingly approved a constitutional amendment restricting marriage to be between a man and a woman.

Louisiana gay-rights advocates took the issue to the 5th U.S. Circuit Court of Appeals earlier this year, but then the Supreme Court justices decided to hear the issue themselves.

The high court heard arguments on two issues related to gay marriage. The first issue dealt directly with whether state bans themselves are unconstitutional and, therefore, same-sex marriage should be allowed everywhere. But the justices also considered whether states could continue their bans but those states would be required to acknowledge out-of-state marriages of gay couples, just as they would straight marriages.

Upton said the Feldman ruling and pending 5th Circuit case could complicate implementation if the Supreme Court sides with same-sex couples' ultimate goal: marriage in every state. Both the 5th Circuit and Feldman would need to act - the appeals court issuing a ruling and Feldman overturning his - after a favorable Supreme Court decision, he said. It would be Feldman's final judgment that's needed to bring enforcement against any official who refuses to abide by a new rule of law, he said.

This time gap means clerks who refuse to issue licenses to gay couples could "have cover" during a limbo period while the matter works its way through the courts, he said.

"I think by the time you get past the summer, as you get toward September, I think anybody who's not issuing licenses (to same-sex couples) is on shaky ground," Upton said.

Legislators in North Carolina - where a federal judge last fall overturned the state's ban on same-sex marriages - could provide a preview of possible reactions from those opposed to expanding marriage rights. Lawmakers there this month overrode the governor's veto of a bill that would allow local officials with a "sincerely held religious objection" to recuse themselves instead of assisting the marriages of gay couples.

Legal alternatives

The Jindal administration mentioned exploring legal alternatives should the Supreme Court support same-sex marriage, in a coordinated statement with the Attorney General's Office issued by that agency's lawyer in the lawsuit, Kyle Duncan.

"Depending upon the ruling, Congress may need to explore federal options, such as bringing forward new legislation to protect religious liberty or even a constitutional amendment. But we'll need to wait and see what the court's opinion states. Until we receive a decision, we will continue fighting to preserve the Louisiana Constitution that states marriage is between one man and one woman," Duncan wrote in an email.

University of Louisiana at Lafayette political scientist Pearson Cross predicted Jindal would plan his response to the Supreme Court's decision to boost his presidential prospects. The governor is expected to announce his official candidacy in late June, around the time of the expected ruling.

"If the Supreme Court should uphold the right of same-sex couples to get married, I think it's going to be an opportunity for Jindal to fulminate against an out-of-control judiciary and the imposition of the federal government into the lives of citizens and the duties of the state," Cross said. "He would, probably, in the context of a presidential campaign, say, 'This is the reason you should elect me because I will appoint justices who believe that a marriage is between one man and one woman.' "

While some Republicans have shied away from the issue, Jindal has recently grabbed hold of it. When a state House committee this year defeated a controversial bill that would have provided legal protections to people who oppose same-sex marriage, Jindal issued an executive order with many of the same components, saying it was a matter of religious freedom.

But Shannon Dirmann, Jindal's deputy communications director, dismissed the idea the governor's beliefs on same-sex marriage are politically motivated.

"The people of Louisiana voted to define marriage as that between one man and one woman. That is why the state is fighting to preserve the Louisiana Constitution's definition of marriage in court. It is important to note that the governor supports traditional marriage because of his faith, not polls or politics. That said, discrimination is wrong and will not be tolerated in Louisiana, and the governor believes that tolerance and the religious view of traditional marriage can co-exist in our state," she said in a statement.

Supreme Court arguments

The Supreme Court in late April heard arguments about same-sex marriage prohibitions like Louisiana's, accepting cases that offered legal challenges to bans in Ohio, Michigan, Kentucky and Tennessee. The 6th U.S. Circuit Court upheld the bans in a November decision that made many of the same arguments as Feldman's earlier ruling.

"When the courts do not let the people resolve new social issues like this one, they perpetuate the idea that the heroes in these change events are judges and lawyers," the opinion by Judge Jeffrey Sutton concluded. "Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way."

During the high court's oral arguments, same-sex marriage advocates took comfort in statements from Justice Anthony Kennedy, considered the key swing vote on the issue, who repeatedly made comments underscoring the idea that marriage confers dignity on couples.

"Same-sex couples say, 'Of course, we understand the nobility and the sacredness of the marriage,' " Kennedy said. " 'We know we can't procreate, but we want the other attributes of it in order to show that we, too, have a dignity that can be fulfilled.' "

Leaders in Louisiana's gay and lesbian community are predicting an outright victory, opining that by denying circuit court appeals other than that from the 6th Circuit, the Supreme Court was positioning itself to make a historic ruling.

John Hill, with the Forum for Equality Louisiana in New Orleans, noted that the high court needs only four votes to hear a case but apparently didn't get enough votes to take up earlier appeals of circuit court decisions that sided in favor of same-sex marriage.

But the gay leaders also acknowledged there could be Louisiana leaders who would hesitate at implementing a Supreme Court decision.

"I imagine that various folks will be trying to ... diminish it, pretend it doesn't say what it says, assert that it somehow doesn't affect actions taken by the state," said Matt Patterson, research and policy coordinator for Equality Louisiana, a Baton Rouge-based group supporting LGBT rights. "So in that sense, it might take a while to work through that."

Stephen Griffin, a constitutional law professor at Tulane University, echoed the idea that the Supreme Court's decision may not have an immediate effect.

"I have my doubts whether it would be the next day. It would be once the officials absorb the reality that there's no basis on which to challenge the Supreme Court's ruling, and they would just have to conform," he said.

Follow Maya Lau on Twitter, @mayalau.

---- Index References ----

News Subject: (Family Social Issues (1FA81); Gay & Lesbian Issues (1GA65); Health & Family (1HE30); Judicial Cases & Rulings (1JU36); Legal (1LE33); Social Issues (1SO05))

Region: (Americas (1AM92); Louisiana (1LO72); North America (1NO39); U.S. Southeast Region (1SO88); USA (1US73))

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Other Indexing: (John Hill; Jeffrey Sutton; Debbie Hudnall; Anthony Kennedy; Martin Feldman; Kyle Duncan; Bobby Jindal; Shannon Dirmann; Kenneth Upton Jr.; Stephen Griffin; Buddy Caldwell; Matt Patterson)

Edition: Main

Word Count: 1755

Admitting Privileges Law on Trial

By SUE LINCOLN · JUN 24, 2015

"The right of personal privacy includes the abortion decision." So said the U.S. Supreme Court in 1973's *Roe v. Wade* decision. But 42 years later in federal court in Baton Rouge, lawyers working for major policy groups on either side of the issue are arguing about restrictions on that personal private decision.

"I'm a lawyer in private practice in Washington, D.C., who has been retained to represent the Department (DHH) in this case," explains Kyle Duncan, who primarily works with the Bio-Ethics Defense Fund.

His co-counsel is Mike Johnson, who has done extensive work for the Alliance Defense Fund and Right to Life. He's also a frequent Fox News commentator on legal issues. (And yes, he is also Louisiana state Rep. Mike Johnson of Bossier City, the author of this past session's Marriage and Conscience Act.)

They are representing the state Department of Health and Hospitals and DHH Secretary Kathy Kliebert in a constitutional challenge to 2014's HB 388, the law requiring abortion providers to have hospital admitting privileges.

"It's an important law to protect the health and safety of patients, and also the integrity of the medical profession," Duncan says of HB 388.

"This legislation was engineered by the same groups defending it now," says Ilene Jaroslaw, one of the attorneys for the plaintiffs -- the clinics and their doctors. "It was drafted by these groups and shopped around to lawmakers in receptive states."

Jaroslaw is with the Center for Reproductive Rights.

"These laws place substantial burden on women's right to access abortion. That's what they're intended to do. Make no mistake -- it's their purpose, and it has that effect."

In court Tuesday, a doctor who performs clinical abortions as his primary practice testified about his efforts to get admitting privileges and comply with the law. Binders full of correspondence between the doctor --whose identity was kept hidden due to his fear of anti-abortion reprisals -- and the hospitals were admitted into evidence.

Both sides are dotting every "i" and crossing every "t" because they are focused ahead --to the 5th Circuit Court of Appeals, and ultimately the nation's highest court.

"What we're trying to do is make the most complete factual record that we can. We expect this issue will be before the Supreme Court," Jaroslaw stated. Duncan advised the same.

U.S. District Court Judge John DeGravelles is hearing the case, but both sides say no matter his decision, they'll appeal to the 5th Circuit. One panel for that appeals court has struck down a similar law in Mississippi, while another panel of the 5th Circuit upheld the Texas version of the law, earlier this month. As the 5th Circuit serves Louisiana, Mississippi and Texas, the Louisiana case is being viewed as the tie-breaker.

Louisiana: Texas abortion ruling reopens question in La case

Associated Press State & Local

June 11, 2015 Thursday 10:46 PM GMT

Section: STATE AND REGIONAL

Length: 273 words

Byline: By JANET McCONNAUGHEY, Associated Press

Dateline: NEW ORLEANS

Body

NEW ORLEANS (AP) - Eleven days before trial, Louisiana has asked a federal judge to throw out one of two claims against its law requiring doctors who perform abortions to be able to admit patients to a hospital within 30 miles.

Tuesday's ruling for a different Texas law erases abortion clinics' planned arguments that legislators passed Louisiana's law to keep women from getting abortions, said Kyle Duncan, a Washington, D.C., attorney representing the state.

Part of Tuesday's ruling "says disagreement over medical necessity of a law is no basis for saying the Legislature had a bad purpose in passing it," Duncan said in a phone interview Thursday, the day his motion was filed before U.S. District Judge John deGravelles.

The 5th U.S. Circuit Court of Appeals ruling sets law for Texas, Louisiana and Mississippi unless the Supreme Court overturns it.

The other question before deGravelles is whether doctors performing abortions in Louisiana would be able to get admitting privileges, or whether the law would make it unconstitutionally difficult for women to get abortions.

"We are confident the court will continue to block Louisiana's sham health and safety law in favor of truly protecting women's health - and their constitutional rights," said Ilene Jaroslaw, senior staff attorney at the Center for Reproductive Rights, in an emailed statement. The center represents three of Louisiana's five abortion clinics.

She could not comment directly about the motion's arguments because the center has not yet filed its response, spokeswoman Jennifer Miller said in an email.

DeGravelles has scheduled trial without a jury starting June 22.

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Judge throws out part of suit against Louisiana abortion law

Associated Press State & Local

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Section: STATE AND REGIONAL

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Byline: By JANET McCONNAUGHEY, Associated Press

Dateline: NEW ORLEANS

Body

NEW ORLEANS (AP) - A federal judge ruled Tuesday that Louisiana's law requiring abortion clinic doctors to gain hospital admitting privileges could pose too great an obstacle to abortions even though there's a rational reason for the law.

U.S. District Judge John deGravelles in Baton Rouge threw out part of a challenge to the law but refused to dismiss the entire lawsuit. He scheduled a trial for June 22-29 over the state's requirement for doctors performing abortions to be able to admit patients to a hospital within 30 miles of their clinics.

"We are pleased that the judge's ruling recognizes that an admitting provisions requirement like Louisiana's is medically reasonable and we look forward to the trial," said Kyle Duncan, an attorney representing the state.

Ilene Jaroslaw, an attorney at the Center for Reproductive Rights, was also pleased. The center represents three of the state's five abortion clinics.

"What the judge was saying is: evidence matters, facts matter, and the state can't hide behind a technicality to obscure the fact that the point of this law is just to shut down abortion clinics," she said.

The 5th Circuit Court of Appeals, which covers Texas, Louisiana and Mississippi, upheld a nearly identical Texas law last year, saying it was meant to keep patients and doctors together. DeGravelles (duh-GRAV-el) said he's bound by that ruling, but that's "only one part of the test for constitutionality."

He noted that the 5th Circuit overturned Mississippi's admitting privileges law. That decision said the law would have made it too hard for women to get abortions by closing the state's only abortion clinic.

The Texas and Mississippi cases were heard by different three-judge panels, and Mississippi is asking the full 5th Circuit to reconsider last year's decision.

Duncan said deGravelles will consider two questions: the Louisiana Legislature's purpose when it passed the law in 2014 and the effect it would have on access to abortions.

Jaroslaw said, "If the state says that their purpose is to help women and it has a net effect of harming women - which in fact it does - it will shed a lot of light on the true purpose."

Judge throws out part of suit against Louisiana abortion law

Six doctors currently perform abortions in Louisiana, according to deGravelles' ruling.

Jaroslaw said four of them do not have hospital admitting privileges. Of the two with such privileges, one doctor - in north Louisiana - has a thriving obstetrics and gynecology practice and works part-time at an abortion clinic. The other performs abortions in both Baton Rouge and New Orleans and lives closer to Baton Rouge but has admitting privileges only in New Orleans, Jaroslaw said.

Louisiana is among many states which has passed restrictions on abortions in recent years.

While Louisiana's case remains in court, DeGravelles has ordered the state not to penalize doctors who have applied for hospital admitting privileges and are waiting for responses.

Load-Date: May 13, 2015

End of Document

Telling the justices what they meant

Washingtonpost.com

April 6, 2015 Monday 2:48 AM EST

washingtonpost.com

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Byline: Robert Barnes

Body

It would seem indisputable that the people who know better than anyone else what the Supreme Court was saying in its landmark decision on same-sex marriage are the nine justices themselves.

After all, the 5-to-4 ruling in **U.S. v. Windsor** that struck down a key portion of the federal Defense of Marriage Act came less than two years ago. It was the most scrutinized and consequential case in a term of big decisions. The court's most influential member, Justice Anthony M. Kennedy, wrote the majority opinion, and three of the dissenters wrote to explicate their own understandings of the ruling.

But as the court prepares for its most important case on gay marriage - whether state prohibitions on same-sex marriage are unconstitutional - the justices and their clerks are plowing through a mountain of briefs that confidently, and contradictorily, instruct the court on what the **Windsor** decision meant.

It's a bit of a strange and "delicate enterprise" for the attorneys, said Kannon Shanmugam, a Washington lawyer and frequent advocate at the Supreme Court who is not involved in the same-sex marriage case.

"The Supreme Court has cases all the time" whose outcomes would seem to hinge on the interpretation of a single precedent, he said. "But it's rare to have one that is so recent and so high-profile. . . . The justices can hardly have forgotten" what they meant.

Nonetheless, most of the more than 100 briefs that have been filed on both sides argue that the **Windsor** decision demands a decision in their favor when the court decides whether states may limit marriage to a man and a woman and refuse to recognize same-sex marriages performed elsewhere.

"Like the federal law invalidated in **Windsor**, Kentucky's marriage ban is borne of moral disapproval of couples 'whose moral and sexual choices the Constitution protects,' " says a brief from couples challenging that state's ban on gay marriages and the recognition of those conducted where it is legal.

"It makes no difference that **Windsor**involved federal recognition of a state marriage, whereas this case involves Kentucky's recognition," that brief says. "Whether recognition is denied by state or federal government, the impingement on equal dignity for individuals is every bit as severe."

But Michigan, defending its decision to limit marriage to heterosexuals, said **Windsor** is supportive of its position.

Michigan's brief notes the acknowledgment in Kennedy's opinion that "until recent years, many citizens had not even considered the possibility that two persons of the same sex might" marry. So, the state asks, how can the Constitution command it?

"To recognize a right to marriage without gender [distinction], the court would have to abandon the reasoning and holding of the decision it issued just two years ago in**Windsor**," the brief says.

Kyle Duncan, a Washington lawyer who filed an amicus brief on behalf of Louisiana and other states that want to retain their same-sex marriage prohibitions, devotes a long section of his brief to the **Windsor** decision.

"Yes, it is a little bit curious telling the Supreme Court, 'This is what you decided,' " Duncan acknowledged. The court's precedents are often from years gone by instead of fresh and controversial.

"I think the rapidity of this returning to the court has caught everyone off guard a little bit," he said.

A federal judge agreed with Duncan in the lower court and upheld Louisiana's law. But that ruling was an outlier.

More than five dozen court decisions since the **Windsor** decision have gone in favor of gay-marriage advocates. Federal appeals courts in Denver, Chicago, Richmond and San Francisco, covering a broad swath of the nation, have struck down state prohibitions on same-sex marriage, and it is now legal in 37 states and the District of Columbia.

But an appeals court in Cincinnati upheld the prohibitions in Michigan, Ohio, Kentucky and Tennessee, giving rise to a split in the nation's appeals courts that has compelled the Supreme Court to step back in.

The court's decision in **Windsor** struck down a law that withheld federal recognition of same-sex marriages performed where they are legal. All nine justices agreed that the ruling did not settle the question of whether states must allow such unions, as advocates say the Constitution's guarantee of due process demands.

Kennedy's opinion, joined by the court's liberals, gave ammunition to both sides. Half of his opinion rests of the traditional respect the court has shown for states to set their own laws regarding marriage. The other used soaring language to describe a state's decision to allow gay couples to marry, saying it "enhanced the recognition, dignity and protection of the class in their own community."

State sovereignty must account for constitutional guarantees, Kennedy wrote.

Justice Antonin Scalia, in his much-quoted dissent, said that the majority had armed gay rights advocates to go after state prohibitions, and he has been proven right. The Supreme Court has repeatedly decided since then not to put on hold the rulings of lower courts forcing reluctant states to allow same-sex marriage, and this has strengthened the view that a majority of the court has made up its mind.

Irv Gornstein, a longtime Supreme Court practitioner who is now director of the Supreme Court Institute at Georgetown Law Center, said only the Supreme Court knows exactly what **Windsor** meant, and advocates are unlikely to sway the justices on that.

"There are some good lines in there that I would quote" if he were writing a brief for either side, Gornstein said. "I just wouldn't try to pretend it decided the question either way."

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Load-Date: April 6, 2015

NewsRoom

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New Orleans Times Picayune

January 13, 2015

Section: NATIONAL

Supreme Court won't hear La. marriage case
5th Circuit can continue to consider state's ban

Andy Grimm

The U.S. Supreme Court will not consider Louisiana's gay marriage case in this term, the justices decided Monday.

The decision means the 5th U.S. Circuit Court of Appeals in New Orleans can continue to consider an appeal from seven gay couples challenging the state's 2004 ban on gay marriage.A panel of three appeals court judges heard arguments in the case Friday.

The Supreme Court's decision not to take the case while the 5th Circuit ruling is pending is not surprising, said Kyle Duncan, the lawyer defending Louisiana's marriage laws.Lawyers for both sides had petitioned the court for a hearing, Duncan said, because it appeared likely the justices would take up the issue of gay marriage this term.

"If the Supreme Court is going to get involved, we wanted to get in the mix," Duncan said Monday. "It's not surprising that they didn't take Louisiana's case, because the court rarely takes cases that are still before the Court of Appeals."

The Supreme Court has not decided yet, however, whether to take any of four other gay marriage cases from Michigan, Ohio, Kentucky and Tennessee, cases that have already gone through initial appeals.The justices could decide later this week to accept one or more of those.

Court observers expect that the Supreme Court will take up the issue of gay marriage for their spring term.

The justices in October declined to review cases from three appeals court jurisdictions, all of them rulings in which gay marriage bans had been struck down.By not reviewing those cases, the court let stand decisions legalizing gay marriage in several states.

But the four cases the court is still considering this week come from states in the 6th Circuit, which in November upheld gay marriage bans.That created opposite rulings from different appeals courts, a discrepancy that most experts think the Supreme Court must now address.

The justices' decision not to take the Louisiana case didn't surprise Chris Otten, chair-elect of the Forum For Equality, a Louisiana gay rights group that is one of the plaintiffs in the lawsuit.

"I don't think anyone should read anything into it," he said. "I would have liked for (the Supreme Court) to look at Louisiana's case, but ultimately, this is about getting the right decision, whichever case they use."

If the Supreme Court takes up any of the other gay marriage cases, it's unclear whether the 5th Circuit judges would wait for the justices to rule or issue their own opinion in the meantime, Otten said.

If the 5th Circuit rules in favor of Louisiana's ban, Otten said, the plaintiffs would appeal to the Supreme Court.

If Louisiana's ban were struck down, Duncan said, the state would probably appeal, either for a hearing in front of the full roster of 5th Circuit judges or to the Supreme Court.

In either case, the state would seek a stay to prevent same-sex couples from marrying while the appeal was pending.

. . . . . .

Staff writer Manuel Torres contributed to this report.

PullQuote: "It's not surprising that they didn't take Louisiana's case, because the court rarely takes cases that are still before the Court of Appeals."

Kyle Duncan

lawyer defending Louisiana marriage laws

---- Index References ----

News Subject: (Gay & Lesbian Issues (1GA65); Government (1GO80); Government Institutions (1GO90); Judicial Cases & Rulings (1JU36); Legal (1LE33); National Judiciaries (1NA65); Social Issues (1SO05); U.S. Supreme Court (1US13))

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Issue of gay marriage has eyes on a pair of courtrooms today

San Antonio Express-News

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Section: A SECTION; A; Pg. 1

Length: 962 words

Byline: Lauren McGaughy

Body

AUSTIN - Crowds of demonstrators are expected outside a federal appeals court in New Orleans today as lawyers inside argue for and against same-sex marriage bans in Texas, Louisiana and Mississippi, but the real story will be playing out some 1,400 miles away in the nation's capital.

Today is the first day the U.S. Supreme Court could indicate whether it will take up the controversial issue this year.

Advocates and attorneys on both sides of the debate have urged the high court to review the issue as soon as possible after an Ohio-based federal appeals court became the first to uphold the constitutionality of gay marriage bans in four states.

"I won't say it's much ado about nothing, because the issue is very important," Sandy Levinson, a professor at the University of Texas at Austin School of Law, said of today's hearing in New Orleans. "But what the Circuit says just isn't going to matter very much because there's already been a split and the Supreme Court has to take the case."

Marriage equality advocates recognize their ultimate fate lies with the high court. For them, the importance of getting a favorable ruling from the 5th U.S. Circuit Court of Appeals is more about timing. A win at the 5th Circuit means same-sex couples could marry in Texas, Louisiana and Mississippi months, possibly years, ahead of a Supreme Court decision.

"This is a situation where my clients are being deprived of their rights every day," said Daniel McNeel "Neel" Lane, attorney for the Texas plaintiffs, adding gay marriage already is legal in 36 other states and Washington. "We need immediate relief."

In February, San Antonio-based U.S. District Judge Orlando Garcia became the fourth federal judge to strike down a state's gay marriage ban since the Supreme Court overturned a critical portion of the federal Defense of Marriage Act in 2013. Garcia stayed his ruling pending appeals.

The decision had unique implications for Texas plaintiffs Nicole Dimetman and Cleopatra DeLeon.

"With the upcoming birth of our baby girl in March, we are again reminded that every day our rights are denied is another day our family is vulnerable because of cruel inequity," DeLeon said this week. "A ruling for equality will make a huge difference for our family and other Texas families like ours."

Attorneys on both sides expressed confidence in the three-judge panel chosen to decide the issue, which consists of two long-time judges appointed during Ronald Reagan's presidency and one fairly new Obama appointee.

Although he has not ruled on a case of this kind before, court watchers say Judge James Graves Jr., the Obama appointee, likely will side with gay marriage advocates. Experts said Judge Jerry Smith, a staunch conservative and former chairman of the Harris County Republican Party who once labeled feminists a "gaggle of outcasts, misfits and rejects," likely will argue for the constitutionality of gay marriage bans.

That leaves Senior Judge Patrick Higginbotham as the panel's potential tie breaker. Respected by liberals and conservatives alike, Higginbotham was quoted recently as saying that while he once was considered one of the 5th Circuit's more conservative members, "now, I'm probably left of center, even though I don't think I've changed my views at all."

The nature and tenor of the panel's questions today may help shed light on the judges' decision, which could be months in the making. Until then, all eyes will be on the Supreme Court. While experts agree it is less likely the justices will agree this week to hear the issue, they'll conference nearly every Friday after that and could agree at any one of those meetings to take up gay marriage this year.

"The U.S. Supreme Court can't dodge this much longer," said Levinson, who added the court would need to grant certiorari by February to have enough time to come to a final decision by the end of its term this summer. Northwestern University Law School Professor Andrew Koppelman agreed, saying the court was under "considerable pressure to make a decision."

"One of their primary functions is to resolve conflicts from courts of appeals, so that the Constitution doesn't mean one thing in one part of the country, and another thing in another part of the country," he said. "That has manifested, truly, in the case of gay marriage."

Kyle Duncan, special counsel for the state of Louisiana, said he hopes a defeat for gay marriage in the Fifth Circuit would "influence" the Supreme Court.

"This is a huge issue and the more viewpoints you get from circuit judges, the better," said Duncan.

Koppelman disagreed, saying it would be unusual for one additional circuit court decision to change the justices' minds: "This isn't like an election where if it is close enough, one vote could change the outcome."

What an early decision from the 5th Circuit upholding the right to marry would do for the high court, Koppelman said, would be to ease the justices' decision.

"The more places in the country that already have same-sex marriage, the less the Supreme Court has to worry about the impact of a decision saying it's Constitutionally protected, because they won't be changing the status quo," he said.

Even as gay marriage continues through the courts at multiple levels, the issue could again become a focus of Texas lawmakers during the session that begins Tuesday. Several bills already have been filed, including one this week that seeks to prohibit state or local government employees from issuing or enforcing marriage licenses for same-sex couples.

In his explanation for why he filed the bill, Rep. Cecil Bell, R-Magnola, said the Tenth Amendment that safeguards states' rights should preclude Texas from enforcing a court ruling to recognize gay marriage.

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Federal court hearing gives hope to foes of La. ban on gay marriages

The Acadiana Advocate

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Section: ACADIANA

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Byline: Andrew Vanacore

Body

Judge Patrick Higginbotham let the state's lawyer get all of two sentences into his defense of Louisiana's ban on same-sex marriage Friday before he cut in with a question.

"Let's suppose that I'm a 22-year-old male sentenced to life without parole in a prison system that doesn't allow conjugal visits," Higginbotham said. "Do I have a constitutional right to marry?"

His point was clear enough: If Louisiana can justify restricting marriage to traditional couples because of their role in bearing children, then why allow a prisoner to wed, even if he has no prospects of raising a family?

Lawyers involved in marriage equality lawsuits from Louisiana, Mississippi and Texas all were in New Orleans on Friday to trade arguments before a three-judge panel of the 5th U.S. Circuit Court of Appeals.

And Higginbotham is viewed as the closest thing that panel has to a swing vote. So the skeptical questioning he aimed at the state Friday offered a tantalizing - if inconclusive - window into his thinking. It left gay rights activists with a ray of hope that one of the most conservative federal appeals courts in the nation might actually side with them.

"You can never be sure, but at least based on the Louisiana argument, I think we've got a good shot at getting Higginbotham to agree that the ban is unconstitutional," said Kenneth Upton, a lawyer with the gay rights group Lambda Legal. "I'm not as skeptical about the 5th Circuit as I was a few weeks ago."

Still, while two votes would be enough to strike down Louisiana's ban, court watchers could only speculate on Friday. There is no telling when the appeals court might actually issue a ruling, and skeptical questions do not always point reliably toward a final opinion.

For his part, Kyle Duncan, the state's lawyer, sounded as upbeat as ever after Friday's hearing.

"I thought it went great," he said. "The judges were really engaged, asked a lot of hard questions. That's the best you can ask for. I have no idea how it will come out."

Jennifer Bandy

Also, it may not ultimately matter what the 5th Circuit decides. Friday's hearings came just as the U.S. Supreme Court met to begin considering whether it would finally take up the issue. The justices did not make a decision Friday, but they could still take up one or more cases in time to render an opinion this year.

Amid a wave of similar lawsuits, federal appeals courts have already offered conflicting decisions on whether banning same-sex marriage runs afoul of the Constitution's guarantee of equal protection under the law, or the due process clause. So the Supreme Court is widely seen as likely to step in and resolve the split.

In conference on Friday, the justices were scheduled to consider taking up a ruling from the 6th U.S. Circuit Court of Appeals in Cincinnati, which upheld bans in four states.

They were also set to consider a request from both sides of Louisiana's lawsuit, who want the Supreme Court to take up their case with the 6th Circuit decision even before the 5th Circuit in New Orleans has a chance to rule.

Even so, no one on either side of the issue in Louisiana is taking their eyes off the case as it stands now. Spectators packed the courtroom in New Orleans, spilling into overflow rooms where the court piped in audio of the proceedings.

Camilla Taylor, a Lambda Legal attorney, argued on behalf of the Forum for Equality Louisiana and a group of gay and lesbian couples, attacking the idea that questions about same-sex marriage should be left to voters instead of the courts.

That was a central theme of U.S. District Judge Martin Feldman's ruling in September, which the plaintiffs want overturned.

"States cannot use the democratic process to write inequality into the law or to deprive individuals of the liberty and autonomy guaranteed by the due process clause," Taylor said.

She also echoed Supreme Court Justice Anthony Kennedy, whose 2013 majority opinion in United States v. Windsor served as the catalyst for the dozens of lawsuits on gay marriage now making their way through the courts.

Taking up Kennedy's point about the children of same-sex couples, Taylor said, "These children are told that there is something wrong with them and their families."

When Duncan's turn came, he barely made it off the block before facing questions from Higginbotham.

To the judge's point about male prisoners, Duncan replied that a prisoner's right to a traditional marriage would still be more "deeply rooted in the nation's history" than the relatively novel idea of same-sex marriage.

Higginbotham, 76, persisted. "Why would marriage be extended to people who are sterile, etc., or people who are aged, such as I am?" he asked.

Judge James Graves, an appointee of President Barack Obama, at times seemed disdainful of the state's case, particularly the idea that states should be left to legislate on gay marriage because of possible unintended consequences.

"Since we don't know, we should fear the unknown and we should ban it?" Graves asked.

Judge Jerry Smith - like Higginbotham, a Ronald Reagan appointee - gave Duncan the most receptive hearing. Smith seemed more open than the other judges to the idea that Louisiana's ban has at least a "rational" purpose in mind, even if it is not perfectly tailored to ensure that no couple without biological children can possibly wed.

He referred to case law that suggested a law can pass constitutional muster even if it represents an "imperfect fit between means and ends."

Notes

PUBLISHER: Capital City Press

Graphic

Advocate staff photo by MATTHEW HINTON--Mississippi plaintiffs Carla Webb kisses her wife Jocelyn Pritchett next to Rebecca Bickett, center, and her partner, Andrea Sanders, left, as Louisiana attorney Dalton Courson, far left, applauds during a press conference celebration event with the plaintiffs and legal teams before oral arguments are heard in gay marriage cases for Texas, Louisiana, and Mississippi at the U.S. Court of Appeals for the Fifth Circuit in New Orleans Friday. The event was hosted by Freedom to Marry, Lambda Legal, Campaign for Southern Equality, Equality Texas, and the Forum for Equality Louisiana. Photo taken in New Orleans, La. Thursday, Jan. 8, 2015. Advocate staff photo by MATTHEW HINTON--Louisiana plaintiffs Courtney and Nadine Blanchard hold their son Cade, 2, at celebration event with the plaintiffs and legal teams before oral arguments are heard in gay marriage cases for Texas, Louisiana, and Mississippi at the U.S. Court of Appeals for the Fifth Circuit in New Orleans Friday. The event was hosted by Freedom to Marry, Lambda Legal, Campaign for Southern Equality, Equality Texas, and the Forum for Equality Louisiana. Photo taken in New Orleans, La. Thursday, Jan. 8, 2015.

Load-Date: January 10, 2015

N.O. federal court to hear same-sex marriage cases ; Supreme Court may take over decision

Times-Picayune (New Orleans)

January 8, 2015 Thursday

Section: NATIONAL; Pg. A02

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Byline: Andy Grimm, Staff writer

Body

A federal appeals court in New Orleans will hear arguments Friday in three cases involving state bans on same-sex marriage, including Louisiana's, in what could be one of the final courtroom showdowns over the marital rights of same sex couples.

A panel of three appeals court judges -- two Reagan appointees and an Obama appointee -- will listen to arguments in a case appealing a district judge's September ruling that upheld Louisiana's 2004 constitutional amendment banning gay marriage.

It's the first case on the docket for Friday's session in the 5th Circuit U.S. Court of Appeals, which will also hear arguments in cases from Texas and Mississippi, where lower courts struck down marriage bans as unconstitutional.

Court officials are preparing for a large crowd interested in hearing the arguments, and for possible demonstrations outside the building on Camp Street downtown.

As of Monday, same-sex marriages were legal in 36 states, an area where 70 percent of the U.S. population live. A 5th Circuit ruling striking down marriage bans would add three more states to that list.

But the appeals court may not get a chance to rule at all. Louisiana's case is among several gay marriage cases across the country that the U.S. Supreme Court plans to review on Friday, in a closed-door session at which justices will discuss what to take up in the coming term. If the Supreme Court adds Louisiana's case for its docket -- or another case that upheld gay marriage bans in Ohio, Tennessee, Kentucky and Michigan -- the 5th Circuit case likely would be put on hold.

A ruling in either court would not come for months, but one by the Supreme Court could likely set marriage laws for the entire nation.

"The Supreme Court could take our case, it could put off making a decision," said Kyle Duncan, the Washington D.C.-based attorney hired by the state of Louisiana to defend the marriage amendment.

"This is an unusual situation ... so many courts around the country are weighing in on the same issue at the same time. I think the 5th Circuit is going to provide a very important viewpoint."

U.S. District Judge Martin Feldman's ruling in the Louisiana case in September was the first by a federal judge anywhere in the country that upheld a ban on gay marriage. That came after more than 20 courtroom victories for

gay rights advocates in lawsuits filed since the U.S. Supreme Court's July 2013 decision in U.S. v Windsor -- the case that eliminated parts of the federal Defense of Marriage Act.

Seven Louisiana couples had sued to overturn the state ban, claiming that not issuing marriage licenses to gay couples or recognizing same-sex marriages performed in states where they were legal discriminated against them. They also said the state deprived them of benefits of marriage ranging from tax breaks to parental rights.

The Windsor ruling struck down sections of DOMA that barred the federal government from recognizing the rights of same-sex couples who wed in states where gay marriage was legal. Feldman read the Supreme Court's decision as an endorsement of the right of individual states to define marriage, not as a guarantee of marriage rights for all gay couples.

Gay marriage advocates can hope that Feldman's opinion might not sway two of the three judges on the 5th Circuit panel, said Carl Tobias, a University of Richmond Law School professor who has followed marriage cases nationwide.

The 5th Circuit is considered one of the most conservative appeals courts in the nation, with a record of opinions in favor of the death penalty and restricting abortion. But Tobias said the panel that will hear the marriage cases seems fairly balanced.

The three judges include Judge Jerry E. Smith, a Texan appointed to the court in 1987 by President Ronald Reagan and considered a staunch social conservative. But fellow Reagan appointee Judge Patrick Higginbotham is considered one of the 5th Circuit's more moderate judges, Tobias noted. Judge James Graves was appointed to the court in 2011 by Barack Obama.

"Smith's vote is pretty clear; he's one of the most conservatives judges in the circuit," Tobias said. "Graves' record is pretty short as a federal judge, but one would assume, as an Obama appointee, he would be more liberal.

"Higginbotham is harder to pin down ... he's not uniformly one way or the other, he's not as conservative on social issues. It should be very interesting."

Both Higginbotham and Smith are known to be active inquisitors during oral arguments, which could mean Friday's session will be lively, said Tulane University Law School professor Stephen Griffin, a Constitutional law expert who said he will be in the gallery for the hearing.

"This could serve as an important tune-up for the Supreme Court," should Louisiana's case wind up before the high court. "We'll find out how influential Feldman's opinion is for the 5th Circuit and for the nation. He's a very expert judge, and we'll find out if his opinion has national reach."

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Gay couples wed in Miami

The Washington Post

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Distribution: Every Zone

Section: A-SECTION; Pg. A01

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Byline: Robert Barnes

Body

Gay couples began marrying in Miami on Monday, kicking off a pivotal week when the Supreme Court will have a chance to consider whether same-sex couples have a constitutional right to marry or whether states may limit marriage to a man and a woman.

A Miami-Dade County judge gave couples there a head start before marriages begin elsewhere Tuesday in the nation's third most populous state. With the addition of Florida, more than 70 percent of Americans now live in the 36 states and the District of Columbia where same-sex marriages are allowed, according to estimates by the Williams Institute at the UCLA School of Law.

On Friday, Supreme Court justices will meet in private to consider whether to act on cases that could provide a nationwide answer on whether same-sex marriages must be allowed. On the same day, a federal appeals court will consider bans in Texas, Mississippi and Louisiana.

"It's an incredible confluence of events," said Shannon Minter, legal director for the National Center for Lesbian Rights. "It's the culmination of many years of work."

The marriages in Florida and the potential for a constitutional decision by the Supreme Court this year reflect the rapid advance of the same-sex-marriage movement and a remarkable change in public opinion. When the court heard oral arguments about California's Proposition 8 and the federal Defense of Marriage Act (DOMA) in 2013, only nine states and the District allowed such unions.

The justices this week will be considering petitions from five states where lower-court judges, bucking a nationwide trend, upheld laws banning same-sex marriage and barring the recognition of such unions performed in states where they are legal.

In all but one case, even the winning side has asked the Supreme Court to accept the cases and settle the issue during its current term, which will conclude at the end of June.

Without explanation, the justices in October passed up that chance. But that was before a panel of the U.S. Court of Appeals for the 6th Circuit in Cincinnati ruled that there was no constitutional right to marriage that must be extended to gay couples and that states were free to define marriage as they wished.

Because four other regional appeals courts have ruled the other way, "the court is more likely to decide the issue now than when it denied review last October," Kyle Duncan, a Washington lawyer defending Louisiana's bans, said in an e-mail.

The Supreme Court does not have to announce its decision on the petitions Friday. But generally the justices must accept a case by the end of January in order to hold oral arguments and rule by June.

If they do not, same-sex marriages will probably remain legal in the majority of states through 2015 and banned in the rest.

The growth in the availability of same-sex marriage is a result of a nearly unanimous string of federal court decisions following the twin gay rights victories the Supreme Court delivered in 2013.

Since then, the court has repeatedly rebuffed states asking that they not be forced to follow the lower-court rulings and offer marriage licenses until the constitutional question is settled.

In Florida's case, for instance, the justices refused - over the objections of Justices Antonin Scalia and Clarence Thomas - to extend a stay, even though the issue was on appeal. A federal judge's order ruling the state's ban unconstitutional has not yet been reviewed by the next court up the ladder, the U.S. Court of Appeals for the 11th Circuit.

To some court-watchers, that refusal was evidence that the five-justice majority that struck down part of DOMA - a section that withheld federal recognition of same-sex marriages performed where they are legal - is prepared to take the next step.

The justices are no doubt aware that thousands of marriages have resulted from their actions. There is some dispute about what would become of those unions should the Supreme Court rule against supporters of same-sex marriage.

But Evan Wolfson, president of the group Freedom to Marry, says none of the marriages would be in jeopardy.

"Couples who get legally married will remain legally married - as married as any couples on the planet - even in the unlikely event that the Supreme Court were to later rule there is no constitutional right going forward," Wolfson said in a statement.

Duncan said it is impossible to predict how the court will rule on same-sex marriage based on its record in considering stays. Early on, for instance, the court granted Utah's request for a stay and stopped the marriages that were being performed there.

But ultimately, the court decided not to review lower courts' decisions, and same-sex marriages resumed in Utah.

"All we can say concretely is that the Supreme Court has not yet rendered a single substantive decision on state marriage laws," Duncan said.

The growth in the number of states offering same-sex marriage since 2013 has been almost entirely a result of legal challenges. Most - but not all - states vigorously defended their laws and voters' decisions to limit marriage to its traditional definition.

Former Florida governor and likely presidential candidate Jeb Bush noted that in a recent interview with the Miami Herald.

"It ought to be a local decision. I mean, a state decision," Bush said. "The state decided. The people of the state decided. But it's been overturned by the courts, I guess."

On Monday, as the marriages began, Bush offered a more conciliatory take. He asked for "respect for the good people on all sides of the gay and lesbian marriage issue - including couples making lifetime commitments to each other who are seeking greater legal protections and those of us who believe marriage is a sacrament and want to safeguard religious liberty."

In Florida, various plaintiffs filed several lawsuits in state and federal courts, and they were victorious in each. Most significant was a decision by U.S. District Judge Robert Hinkle of Tallahassee, who ruled the ban unconstitutional.

But there was confusion about whether Hinkle's decision affected all 67 Florida counties or just the one where the case was brought. Hinkle issued an unusual clarification on New Year's Day saying all county clerks should prepare to issue marriage licenses.

"History records no shortage of instances when state officials defied federal court orders on issues of federal constitutional law," Hinkle wrote. "Happily, there are many more instances when responsible officials followed the law, like it or not."

Hinkle had stayed his order at the time of his original decision but said it would expire at midnight Monday. It is that stay that the 11th Circuit and then the Supreme Court refused to extend.

Proponents of same-sex marriage went to state court Monday and persuaded Circuit Judge Sarah Zabel to lift the stay immediately.

"In the big picture, does it really matter whether or not I lift the stay or leave it until tomorrow?" Zabel said from the bench, according to the Miami Herald. "I'm lifting the stay."

Zabel then performed marriage ceremonies for two of the couples who had been plaintiffs in the case.

robert.barnes@washpost.com

Load-Date: January 6, 2015

Will this be the Supreme Court term for same-sex marriage?

Sun-Sentinel (Fort Lauderdale, Florida)

December 19, 2014 Friday, Palm Beach Edition

Section: OPINION; Pg. 19A {ZONE} PN

Length: 872 words

Byline: Robert Barnes, The Washington Post

Dateline: WASHINGTON --

Body

WASHINGTON -- Neither journalists nor lawyers are particularly known for their math skills, but the ciphering is underway as we await word on whether the Supreme Court will determine this term that there is a constitutional right for same-sex couples to marry.

As a near-inviolable rule, the justices must take a case before the end of January in order to set oral arguments and render a decision by the end of their term in June. Usually, only an emergency breaks the pattern.

There is no shortage of cases teed up for the court to render the ultimate decision on whether it is up to states to decide the definition of marriage and recognition of unions performed elsewhere, or if marriage is a fundamental right that must be extended to gay as well as straight couples.

Kyle Duncan, a Washington lawyer representing Louisiana in its so-far-successful defense of laws licensing and recognizing only opposite-sex marriages, said there is a remarkable effort on both sides of the issue to get the matter to the justices now.

If briefing is concluded quickly -- and it appears it will be -- there should be no doubt that the justices could consider the cases at their private conferences scheduled for Jan. 9 and 16.

"The court has a significant amount of latitude," Duncan said. "I assume that if the justices wanted to hear the cases this [term], they could."

There is remarkable agreement among opponents and supporters of same-sex marriage that the court should act now.

Ohio, for instance, told the Supreme Court in its filing last week that it believes it has the right to withhold recognition of same-sex marriages performed in other states, as an appeals court has ruled.

But if it is wrong, the state's lawyers wrote, "the present status quo is unfair to gays and lesbians living in the states [that] retain marriage's traditional definition." They added: "The country deserves a nationwide answer to the question -- one way or the other."

From the other side, Evan Wolfson, president of the group Freedom to Marry, said there should be nothing precluding the justices "from hearing this on time, which from our perspective is as soon as possible."

Does all this sound familiar?

The same arguments were made this fall, when the court also had the chance to review lower court rulings and decide the constitutional question left unanswered by its 2013 decision striking down part of the federal Defense of Marriage Act.

The court, without comment, passed. The practical effect was a vast expansion of same-sex marriage beyond the jurisdictions where voters and legislators had approved such unions. Taken together with the states covered by regional appeals courts that have decided state bans are unconstitutional, same-sex couples in 35 states and the District of Columbia may wed.

The game-changer was the 2-to-1 decision in November by a panel of the U.S. Court of Appeals for the 6th Circuit. It upheld marriage bans in Michigan and Kentucky, and recognition bans in Ohio and Tennessee.

How long will the court tolerate different on-the-ground realities dictated by the regional appeals courts? If the justices don't accept the issue in January, the ultimate constitutional question would likely not be settled until 2016.

From a political viewpoint, advocacy for same-sex marriage is a foregone conclusion for Democrats running that year. Republicans face much more of a generational divide within their ranks, and they might be just as happy to have the court settle the issue before their primaries begin.

It is possible that the Supreme Court will have to confront one more decision about same-sex marriage before mid-January.

A federal judge struck down Florida's ban, and a panel of the U.S. Court of Appeals for the 11th Circuit has denied the state's request for a stay. Even though the appeals court has not made a decision of the merits of striking the ban, marriages in Florida are set to commence Jan. 6.

Florida Attorney General Pam Bondi, a Republican, is considering whether to ask the Supreme Court to step in.

Speculation about change at the Supreme Court is constant, especially with four of the justices -- Ruth Bader Ginsburg, Antonin Scalia, Anthony Kennedy and Stephen Breyer -- age 76 and over.

Ginsburg's latest medical emergency -- the 81-year-old had a heart stent procedure just before Thanksgiving -- renewed comment about the justices' health and age.

But it was interesting in a Politico story on the subject to notice the longevity of those politicians in the story who work across the street from the court.

Interviewed were Sen. John McCain, R-Ariz., 78, who says he is most likely running for another six-year term in 2016, as well as Sen. Barbara Boxer, D-Calif., 74, who hasn't yet made a decision.

Sen. Dianne Feinstein, D-Calif., who like Ginsburg was born in 1933, is in the national spotlight because of the release of the Senate Intelligence Committee's report on CIA interrogation techniques. Her term ends in 2018.

Ginsburg, for her part, has been making the rounds of holiday parties and telling folks that she has been cleared to resume normal activities -- which in her case includes the push-ups she has said are part of her fitness regime.

Robert Barnes covers the Supreme Court for The Washington Post.

Graphic

Photo(s)

Will this be the Supreme Court term for same-sex marriage?

Photo: The Supreme Court should take one of the same-sex marriage cases this term and put an end to all the divergent rulings coming from regional appellate courts. SAUL LOEB/AFP/GETTY IMAGES

Load-Date: December 20, 2014

End of Document

La asks US Supreme Court to hear gay marriage case

Associated Press State & Local

December 4, 2014 Thursday 6:24 PM GMT

Section: STATE AND REGIONAL

Length: 511 words

Byline: By JANET McCONNAUGHEY, Associated Press

Dateline: NEW ORLEANS

Body

NEW ORLEANS (AP) - The state of Louisiana agrees with gay rights activists about one thing: asking the U.S. Supreme Court to take the rare step of hearing an appeal of Louisiana's ban on same-sex marriages before a federal appeals court rules.

The request filed this week by Washington attorney Kyle Duncan asks the justices to hear appeals of Louisiana's case and the only other federal court decision to uphold gay marriage bans. The 6th U.S. Circuit Court of Appeals in Cincinnati upheld bans in Kentucky, Michigan, Ohio and Tennessee.

The 5th U.S. Circuit Court of Appeals is to hear Louisiana's appeal and one from Texas on Jan. 9.

"We likely won't know whether the Supreme Court will take up any of the pending petitions until mid-January at the earliest. By then, we will have already argued the Fifth Circuit case," Duncan wrote in an email to The Associated Press.

In his request, he said he agrees with gay-rights that Louisiana's case and the Cincinnati appellate court ruling should be considered together.

When that application was filed in November, Duncan said that unless the high court intervened, he would continue in appellate court.

He said he hasn't changed his mind. "We still plan to go ahead in the Fifth Circuit. But if the Supreme Court decides to wade into the issue now, we would like Louisiana's case to be one of the cases reviewed, which could be accomplished by granting the petition now rather than waiting for a Fifth Circuit ruling," he wrote in an email.

Twenty federal district judges and four federal appeal courts have ruled that gay marriage bans are unconstitutional under a 2013 Supreme Court decision striking down part of the Defense of Marriage Act, a federal law against gay marriage.

"The Louisiana decision provides a crucial counterpoint to the many erroneous decisions usurping state authority to define marriage," Duncan wrote in the request for review.

Louisiana also is in a unique position because a state district judge found its amendment against same-sex marriage unconstitutional, he wrote. That case is before the state Supreme Court, he wrote, putting state officials "between the Scylla and Charybdis of conflicting state and federal rulings."

Hearing both cases in which judges upheld the bans would allow the justices to consider "the widest possible range of state marriage laws," he wrote.

The justices rarely agree to hear a case before a federal appeals court has weighed in. One such example was the 1974 dispute over President Richard Nixon's refusal to hand over Watergate tapes to special prosecutor Leon Jaworksi. After Jaworksi won in a federal trial court, both sides appealed directly to the Supreme Court, bypassing the court of appeals in Washington. The Supreme Court's rulebook says the justices will deviate from the routine "only upon a showing that the case is of such imperative public importance."

A federal solicitor general asked the Supreme Court to consider the DOMA case before it went to the 2nd Circuit. The 2nd Circuit heard and ruled on the case before the justices agreed to consider it.

Load-Date: December 5, 2014

End of Document

Supreme Court asked to look at La. marriage ban

Associated Press State & Local

November 20, 2014 Thursday 11:45 PM GMT

Section: STATE AND REGIONAL

Length: 445 words

Byline: KEVIN McGILL, Associated Press

Dateline: NEW ORLEANS

Body

NEW ORLEANS (AP) - Gay-rights advocates challenging Louisiana's same-sex marriage ban announced Thursday that they have asked the U.S. Supreme Court to review their case before it is heard by a federal appeals court.

In September, U.S. District Judge Martin Feldman in New Orleans upheld Louisiana's ban, embodied in a constitutional amendment that forbids the state to legalize gay marriages in the state or to recognize those performed legally in other jurisdictions.

An appeal of that ruling is tentatively set to be argued in January at the 5th U.S. Circuit Court of Appeals in New Orleans, which has jurisdiction over Louisiana, Mississippi and Texas.

However, lawyers for gay rights groups Lambda Legal and Forum for Equality Louisiana on Thursday said they have asked the Supreme Court to take the rare step of reviewing Louisiana's case ahead of those arguments.

Same-sex marriage advocates have won cases at four circuit appeal courts. However, the Cincinnati-based 6th Circuit recently upheld bans in Kentucky, Michigan, Ohio and Tennessee. Same-sex couples challenging marriage bans in those states have asked the high court to consider an appeal of that case.

A lawyer in the Louisiana case says reviewing the state's case as well would provide the justices with a broader array of legal arguments.

"We are asking for the Supreme Court's review now while it is considering the Sixth Circuit decision because together these cases present the full gamut of aberrant arguments supporting these discriminatory bans," attorney Kenneth Upton Jr., of Lambda Legal, said in an emailed news release.

Attorney General Buddy Caldwell's office issued a statement from Kyle Duncan, hired to defend the state's ban. "If the Supreme Court takes up this issue, Louisiana will continue to defend what it's citizens have already decided about this important issue through the Louisiana Constitution," Duncan said. "Until the Supreme Court decides whether to intervene, however, Louisiana will go forward in the U.S. Fifth Circuit, which has scheduled arguments for January 9."

The justices rarely agree to hear a case before a federal appeals court has weighed in. One such example was the 1974 dispute over President Richard Nixon's refusal to hand over Watergate tapes to special prosecutor Leon

Jaworksi. After Jaworksi won in a federal trial court, both sides appealed directly to the Supreme Court, bypassing the court of appeals in Washington. The Supreme Court's rulebook says the justices will deviate from the routine "only upon a showing that the case is of such imperative public importance."

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Associated Press reporter Mark Sherman in Washington contributed to this story.

Load-Date: November 21, 2014

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NewsRoom

10/28/14 Hous. Chron. (Pg. Unavail. Online)
2014 WLNR 30008106

Houston Chronicle

October 28, 2014

Texas gay marriage advocates disappointed with 2015 hearing date

Lauren McGaughy; Houston Chronicle

Oct. 28--AUSTIN -- The 5th U.S. Circuit Court of Appeals tentatively has scheduled oral arguments in the Texas and Louisiana gay marriage cases for early January, disappointing local advocates and possibly delaying until 2016 a hearing by the U.S. Supreme Court.

Texas gay marriage advocates were disappointed with the Monday announcement. The New Orleans-based appeals court had earlier agreed to expedite the hearing, and the appellees hoped oral arguments would be scheduled before the New Year.

"This doesn't look like a very expedited schedule to me. But justice can't come soon enough," said Daniel McNeel "Neel" Lane, an attorney for the two same-sex couples challenging Texas' ban on gay marriage. U.S. District Judge Orlando Garcia of San Antonio struck down the 2005 ban in February, saying it violated couples' 14th Amendment rights to due process and equal protection.

Nicole Dimetman and her wife Cleopatra DeLeon, one couple on the appeal, are expecting the birth of their second child in March. They had requested an expedited hearing in the hopes the legal process would be completed, or at least further along, at that time.

"I may have to miss the argument in January because I will be in my third trimester and may not be able to travel," Dimetman said. "That is sad for Cleo and me and for everyone else who is waiting for the Fifth Circuit to recognize our right to marry."

'Love will ... prevail'

Mark Phariss, who is also challenging Texas' ban with partner Victor Holmes, expressed his frustation Monday: "It unnecessarily delays the time when Vic and I and the hundreds of thousands of other gay and lesbian couples in Texas can marry. But love will ultimately prevail and we look forward to that day."

Earlier this month, the U.S. Supreme Court upped the number of states with legal gay marriage to 32 after the justices declined to take up the issue this term. The only scenario likely to force the high court to revisit it would be if a federal appeals court broke with precedent and upheld a state's gay marriage ban.

Conservative courts

Many agree a circuit court split of this kind is most likely to occur in the Fifth or Sixth Circuits, seen as the two most conservative appeals courts in the country. Oral arguments in the Sixth Circuit have already taken place, and a federal judge in Louisiana became the first to uphold a state's same-sex marriage ban in September.

"I think the safest thing to say is the Supreme Court is waiting for a clear circuit split ... and these cases raise that very significant possibility, said Kyle Duncan, special counsel the state of Louisiana has hired to handle the challenge to its gay marriage ban. "They were already extremely important cases and now even more so," Duncan said, adding he also thought the hearing would have been scheduled a little sooner.

But unless the Ohio-based Sixth Circuit upholds a state ban soon, the Fifth Circuit may not rule on the Texas and Louisiana cases until after the current Supreme Court term ends in June, said University of Richmond School of Law Professor Carl Tobias. This would push back any hearing by the high court justices until the 2015 term, which starts in October, thus delaying an ultimate decision until 2016.

"It's really hard to understand why this is happening. Every other court really has made an effort to move these cases along because a lot of peoples' lives are really hanging fire," Tobias said. "It seems the Fifth just is not in any hurry at all. And that's fine; they can do whatever they want. It just leaves everything up in the air."

The Fifth Circuit set the oral arguments in the Texas and Louisiana cases for the week of Jan. 5, 2015. The same three-judge panel, to be announced the week before the hearing, will hear both states' cases.

---- Index References ----

News Subject: (Family Social Issues (1FA81); Gay & Lesbian Issues (1GA65); Government (1GO80); Government Institutions (1GO90); Judicial Cases & Rulings (1JU36); Legal (1LE33); National Judiciaries (1NA65); Social Issues (1SO05); U.S. Supreme Court (1US13))

Region: (Americas (1AM92); Louisiana (1LO72); North America (1NO39); Texas (1TE14); U.S. Southeast Region (1SO88); U.S. Southwest Region (1SO89); USA (1US73))

Language: EN

Other Indexing: (Kyle Duncan; Daniel McNeel; Nicole Dimetman; Carl Tobias; Orlando Garcia; Cleopatra DeLeon; Mark Phariss; Victor Holmes)

Word Count: 653

End of Document

NewsRoom

10/12/14 AP St. News 21:00:00

AP State News

October 12, 2014

Analysis: Focus on the 5th in gay marriage case

AP

NEW ORLEANS (AP) - When the Supreme Court last week declined to hear appeals from five states seeking to prohibit gay marriage, it set off nationwide conversations - debate and speculation on what the justices on the high court were thinking, why they sidestepped the issue for now and whether their actions so far signal that, eventually, same-sex marriage will be legal nationwide.

In Louisiana, those conversations also center on the role that the state - and the New Orleans-based 5th U.S. Circuit Court of Appeals - might have in the eventual outcome.

The 5th Circuit, which has jurisdiction over federal courts in Mississippi, Louisiana and Texas, is one of a handful of circuits that have yet ruled on the issue since the Supreme Court ruled last year that the federal government had to recognize marriages performed in states where gay marriage is legal.

With the high court unexpectedly punting the larger issue of state marriage bans, scrutiny on the circuit courts grew.

"Every time a court agrees with the prior decisions, that leaves fewer and fewer courts to disagree and, so, the focus becomes more intense," said Kenneth Upton, senior counsel for Lambda Legal. The nonprofit gay rights group announced last week that it would join Louisiana plaintiffs seeking to overturn the state's gay marriage ban. He was interviewed at midweek. At that point, he singled out the 5th, 6th, 8th and 11th circuits as those yet to weigh in.

Pending before the 5th Circuit are cases from Louisiana and Texas that will be heard in the coming months by the same three-judge panel, most likely on the same day.

In the Texas case, a U.S. district judge declared the state's gay marriage ban unconstitutional in February and issued a preliminary injunction. The ban stands, however, pending the appeal.

The Louisiana case consolidates lawsuits filed by the Forum for Equality Louisiana and same-sex couples who either want to get married in the state or want the state to legally recognize their marriages performed in other jurisdictions where same-sex marriage is legal.

Bucking a national trend, U.S. District Judge Martin Feldman ruled in early September in the Louisiana case that the state can continue to outlaw same-sex marriages within the state and refuse to recognize such unions that are legally performed elsewhere. Feldman, agreeing with attorneys for Louisiana, said individual states retain the right to define

marriage. His ruling broke a string of 20 court victories around the country for gay marriage advocates, a string that resumed soon afterward.

Feldman clearly knew his wouldn't be the last word. "Clearly, many other courts will have an opportunity to take up the issue of same-sex marriage; courts of appeals and, at some point, the U.S. Supreme Court," he wrote.

As events last week unfolded, there was growing speculation that the Supreme Court might never take its opportunity to hear arguments - if all the other appeals courts agree with those that have, in effect, made gay marriage legal in roughly 30 states.

"I think the culture of the Supreme Court is, they don't step in when they don't have to," Upton said.

Any break from the trend would mean a split among the circuits and the likelihood that the high court would have to settle the issue.

Upton and Kyle Duncan, a lead attorney for Louisiana's efforts to preserve its gay marriage ban, agree that the upcoming 5th Circuit arguments will be important, even if, by the time they are held another circuit has broken the unanimity by upholding a gay marriage ban.

The geographical scope and the experience of the judges on the New Orleans-based court mean their ruling will have weight, Duncan said.

"The 5th Circuit is a very important circuit," Duncan said. "It's a big circuit. It's got some important judges on it who have been around a long time."

Kevin McGill is an Associated Press reporter in New Orleans.

---- Index References ----

News Subject: (Gay & Lesbian Issues (1GA65); Government (1GO80); Government Institutions (1GO90); Health & Family (1HE30); Judicial Cases & Rulings (1JU36); Legal (1LE33); National Judiciaries (1NA65); Social Issues (1SO05); U.S. Supreme Court (1US13))

Region: (Americas (1AM92); Louisiana (1LO72); North America (1NO39); Texas (1TE14); U.S. Southeast Region (1SO88); U.S. Southwest Region (1SO89); USA (1US73))

Language: EN

Other Indexing: (Kenneth Upton; Kyle Duncan; Kevin McGill; Martin Feldman)

Word Count: 660

NewsRoom

Justices' punt on gay marriage could put La. cases in spotlight

The Acadiana Advocate

October 7, 2014 Tuesday, Web Edition

Section: ACADIANA

Length: 1118 words

Byline: Richard Burgess

Body

Oct 7, 2014 21:45

The U.S. Supreme Court's decision on Monday not to delve further into whether gay couples should be allowed to marry sets the stage for similar cases out of Louisiana to possibly head to nation's highest court.

The justices opted not to review decisions in cases out of five states where federal appeals courts have struck down same-sex marriage bans - Indiana, Oklahoma, Utah, Virginia and Wisconsin.

The court's inaction means same-sex marriages are now legal in those states and eventually are expected to become legal in other states included in the appeals courts' jurisdictions. But it also should bring more attention to the 5th U.S. Circuit Court of Appeals' pending review of a ruling last month by U.S. District Judge Martin Feldman, who upheld Louisiana's ban on same-sex marriage in a group of cases out of New Orleans.

Feldman is the only federal district judge to uphold a state ban on same-sex marriage since the U.S. Supreme Court's decision last year in U.S. v. Windsor struck down part of the federal Defense of Marriage Act.

Just three weeks after Feldman's opinion, 15th Judicial District Judge Edward Rubin reached the opposite conclusion, ruling the state's ban unconstitutional in a case out of Lafayette Parish that the state is appealing to the Louisiana Supreme Court. Rubin compared the state prohibition on gay couples marrying to segregation-era laws against interracial marriage.

Any decision from either the state Supreme Court or the 5th Circuit upholding Louisiana's ban on same-sex marriage could attract the attention of the U.S. Supreme Court.

"I certainly think there is going to be much more of a focus on the Louisiana cases," said Camilla Taylor, an attorney with gay rights group Lambda Legal, which was involved in some of the cases that had been pending before the U.S. Supreme Court.

That assessment is shared by Kyle Duncan, the attorney hired by the Louisiana Attorney General's Office to argue in support of the state's same-sex marriage ban in the federal case in New Orleans and the state court case in Lafayette.

"If courts out there start going the other direction ... then you are going to have a real split in authority and more reason for the Supreme Court to step in," Duncan said.

The U.S. Supreme Court's move on Monday does not legalize same-sex marriages nationwide and applies only to the states within the jurisdiction of federal appeals courts with cases being considered for review - the 4th Circuit, the 7th Circuit and the 10th Circuit.

The expected result is that the number of states allowing same-sex marriage will rise from 19 to 30, but because the high court did not actually issue a decision one way or the other, existing same-sex marriage bans in Louisiana and other states beyond the jurisdiction of those appeals courts are still considered good law.

"As of today, it doesn't bring any changes to couples in Texas, Louisiana and Mississippi," said Forum for Equality Louisiana Chairman-elect Chris Otten, referring to the states under the jurisdiction of the 5th Circuit.

The Forum for Equality has led the recent challenge to Louisiana's same-sex marriage ban in federal court in New Orleans.

Divining what Monday's announcement says about the leanings of the U.S. Supreme Court justices is like reading tarot cards, Otten said.

Otten views it as the U.S. Supreme Court deciding not to wade into the contentious legal issue until a federal appeals court upholds a state ban on same-sex marriage, creating a split among the appeals court circuits.

"I think today (Monday) they signaled that they would not touch this unless they had to," Otten said. "... When a split develops, they almost have an obligation to take it."

Others have taken the ruling to mean that the high court, by allowing same-sex bans to fall away in several states, might be signaling a stance on the issue - essentially declaring support for gay marriage.

Duncan said he sees Monday's announcement as a message that the high court is simply not ready to take it up.

"They want to wait and see the issue develop more," he said.

That view seems to match comments made by Justice Ruth Bader Ginsburg during a talk last month at the University of Minnesota law school, where she said there is "no need for us to rush" if no rulings emerged to compete with the existing appeals court decisions striking down same-sex marriage bans.

Ginsburg specifically mentioned the 6th Circuit, which already heard arguments and is expected to rule soon.

The 6th Circuit is made up of Kentucky, Michigan, Ohio and Tennessee.

If the 6th Circuit upholds the state bans and gives the U.S. Supreme Court a conflicting case to consider, Otten said, "it may not even be an issue for the 5th Circuit."

But if it turns out the 5th Circuit is the only appeals court to uphold a ban on same-sex marriage, it seems likely the Louisiana case could be on its way to the Supreme Court, Loyola University New Orleans College of Law professor Monica Hof Wallace said in an email.

"If the Fifth Circuit affirms the Louisiana decision, I would be surprised if the Supreme Court does not take the case," she said. "If the Fifth Circuit reverses the Louisiana decision, then the country is one step closer to legalizing same-sex marriage without the Supreme Court having to get involved."

Otten cautioned against any assumption about how the conservative 5th Circuit might rule, because the critical factor is which three appeals court judges are assigned to rule on the case.

"There is a reputation, but it really depends on the panel you get," he said.

Of the two pending same-sex cases in Louisiana, the federal case likely will be decided first, as the Supreme Court has not decided whether to even hear the Lafayette case.

The 5th Circuit, on the other hand, has fast-tracked the appeal of Feldman's ruling and will assign it to the same panel of judges that will hear a federal case out of Texas.

The appeals court has set a Nov. 7 deadline for attorneys in the Louisiana case to file briefs on the issue.

No date has been set for arguments.

At play in the federal case is Feldman's interpretation of the U.S. Supreme Court's Windsor decision, which the Louisiana plaintiffs relied upon in their arguments.

Justice Anthony Kennedy, who wrote the opinion, said the federal government must recognize the marriage of same-sex couples because it otherwise demeans those marriages compared with traditional ones.

But Feldman argued that Kennedy still made clear the states, not the federal government, should be allowed to define marriage.

"Windsor repeatedly and emphatically reaffirmed the long-standing principle that the authority to regulate the subject of domestic relations belongs to the states," Feldman wrote.

Notes

PUBLISHER: Capital City Press

Graphic

The Supreme Court can be seen from the view from near the top of the Capitol Dome on Capitol Hill, Thursday, Dec. 19, 2013, in Washington. (AP Photo/Susan Walsh) This photo taken Friday, Oct. 3, 2014, shows the U.S. Supreme Court in Washington. (AP Photo/Susan Walsh)

Load-Date: October 8, 2014

Outcome thrills pair of couples

San Antonio Express-News

October 7, 2014 Tuesday, STATE EDITION

Section: A SECTION; A; Pg. 1

Length: 835 words

Byline: Guillermo Contreras

Body

The U.S. Supreme Court's decision Monday to not take up the issue of same-sex marriage had no immediate effect on Texas law, which has been ruled unconstitutional by a federal judge in San Antonio but remains in place pending review by the 5th U.S. Circuit Court of Appeals. Still, the two couples challenging the Texas ban and their attorneys hailed the top court's inaction Monday as a victory that, they hope, will prompt the 5th Circuit to act quickly.

Neel Lane, an attorney representing the couples, said the development "absolutely raises the stakes" of their lawsuit. Client Mark Phariss described it as "fantastic."

"It's what I hoped they would do but didn't expect them to do it so soon," said Phariss, who wants to marry his longtime partner, Victor Holmes, in their home state of Texas. "What it has done is bring marriage equality to a total of 30 states. It did that without us having to wait for a decision until next June."

The 5th Circuit also has jurisdiction over Mississippi and Louisiana. In Louisiana, a judge upheld that state's ban, and the 5th Circuit announced last week that it will take up the opposing Texas and Louisiana decisions on the same day. The date, however, has not yet been set.

Meanwhile, the "Texas law is still in effect, and the attorney general's office will continue to defend the law in this case just as we do in all cases where state laws are challenged in court," spokeswoman Lauren Bean said.

Attorney General Greg Abbott, who is running for governor, has been clear that he hopes the conservative 5th Circuit will be the first federal appeals court to uphold a state ban.

"I think it raises (the Texas and Louisiana cases') importance considerably," said Kyle Duncan, special counsel defending Louisiana's ban. "They were already extremely important, and now the Supreme Court has signaled they're not yet ready to get involved in the issue.... The 6th Circuit hasn't ruled, and the 5th Circuit has expedited the Louisiana and Texas cases and will set the oral argument fairly soon."

Phariss and Holmes, who lived in San Antonio but now live in Dallas, had been planning a wedding for October 2015.

"The truth of the matter is we can actually start thinking about having a wedding next spring," Phariss said Monday. "It just changes favorably the time frame when we'll have marriage equality in Texas."

The other couple in the Texas case - Nicole Dimetman and Cleopatra De Leon, former San Antonio residents whose out-of-state marriage is not recognized by the state - said they are "so excited" that the Supreme Court brought "justice to (other same-sex families) sooner than they anticipated."

"As far as the 5th Circuit, we feel and we hope this puts a little bit of pressure, that it puts the issue front and center for the court so it can resolve the issue sooner rather than later," said Dimetman, who now lives in Austin with her wife and their child. "Who knows how the 5th Circuit will interpret the Supreme Court's action, but one way could be is that they'll realize this is going to have a real and immediate impact on a whole lot of families."

The court's action Monday effectively makes same-sex marriage legal in 30 states, plus the District of Columbia. But one legal scholar said the court may have passed on reviewing rulings from Virginia, Oklahoma, Utah, Wisconsin and Indiana for a reason.

"It still could be that the court passed on the cases today to take up a later one," said Carl Tobias, who teaches law at the University of Richmond School of Law in Virginia. "There are still the cases in the 5th and 6th circuits, and both could end up finding the bans constitutional."

Other legal analysts had predicted that the justices would settle the divisive issue of nationwide same-sex marriage once and for all this term.

Besides the 6th and 5th circuits, the 9th Circuit is weighing the matter and has jurisdiction over nine states. If it rules in favor of same-sex marriage, as expected, it is unlikely to enter a stay, observers note.

The Texas couples who sued last year persuaded U.S. District Judge Orlando Garcia in February to declare the state's ban unconstitutional, and Abbott appealed to the 5th Circuit. Though it announced that it will take up the Texas and Louisiana cases together, the court will not release the names of who will be on the judicial panel until a week before oral arguments.

Duncan, the special counsel defending Louisiana's ban, vowed to continue the fight.

"We won in our case and we feel great about the merits of our case," he said.

Others saw the issue as an inevitable wave.

"This decision by the nation's highest court illustrates that, though it may be slow, the trajectory of history is toward progress," said U.S. Rep. Joaquin Castro, D-San Antonio. "I am hopeful that the rest of the states, like Texas, where the courts have also ruled in favor of equality, will soon catch up and reaffirm our nation's core values of justice and equality for all."

Lauren McGaughy of the Austin bureau contributed to this report.

Load-Date: October 8, 2014

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Sept. 29, 2014 05:36 PM

Righteous and Holy

BY LAMAR WHITE JR.

Wednesday, Oct. 1, 2014

For a few brief seconds on Thursday, Sept. 25, 2014, for the first time ever, same-sex marriage was legal in Louisiana, specifically Acadia, Lafayette, and Vermilion parishes. But before any vows could be exchanged and any certificates could be issued, a suspensive appeal was granted.

Three days before, Judge Edward Rubin of the 15th Judicial District Court became the first sitting judge in Louisiana history to rule, definitively, that the state's ban on same-sex marriage was unconstitutional. Only 19 days earlier, another Louisiana judge, U.S. District Judge Martin Feldman of New Orleans, also made history. In upholding Louisiana's ban, Judge Feldman broke a streak of more than 20 consecutive decisions from all over the country striking down bans against same-sex marriage.

Although Feldman's opinion was the subject of intense national media attention (largely because it was such an outlier), Rubin's decision, at least within the context of Louisiana jurisprudence, will likely be remembered as much more historically significant.

But before I explain why, please allow me to digress.

Despite what the punchlines of far too many jokes may suggest, you cannot marry your first cousin in Louisiana, Arkansas or even Mississippi. But if you really want to marry your first cousin and have your marriage legally recognized in Louisiana, there's no reason to panic: All you need to do is get hitched in Alabama or, to be fair, New York, California, Florida, Hawaii, or one of the 18 other states across the country that recognize incestuous marriages between first cousins.

If you're feeling particularly adventurous, you could even tie the knot in Iran, because Louisiana also recognizes incestuous marriages between first cousins entered into in the Islamic Republic of Iran. I'm not kidding.

In 2008, Louisiana's First Circuit Court of Appeal recognized the validity of an Iranian marriage, performed in 1976, between first cousins, even though the husband had moved to the United States only a year later and even though he had subsequently married and divorced an

American woman (apparently to help him expedite his citizenship status) and then, decades later, remarried another woman from Baton Rouge. The court explains (emphasis added):

> Based upon the law of Louisiana, first cousins may legally cohabitate, have intimate relations, and even produce children; however, they are merely prohibited from regularizing their union by marriage. This disparity would tend to negate any contention that Louisiana has a strong public policy against marriages between first cousins, since it is in conflict with this state's policy to legally solidify such unions for the good of society at large and for the benefit of any potential posterity. (Ghassemi v. Ghassemi, 998 So. 2d 731, 748)

It is also worth noting that in Louisiana and throughout the entire country, two serial killers behind bars on death row still maintain a "fundamental right" to marry one another, as long as they are not of the same sex.

Why do we recognize that it's important to "legally solidify" unions between first cousins from Iran who haven't even been together for nearly 40 years and unions between murderers and rapists and violent domestic abusers? How are those unions "for the good of society at large and the benefit of any potential prosperity"? What does this really say about the "sanctity of marriage"?

During the last three years, Louisiana Gov. Bobby Jindal and Attorney General Buddy Caldwell have spent hundreds of thousands in taxpayer dollars and countless hours in order to prevent gay and lesbian American citizens from accessing the fruits and benefits of a right so fundamental to our nation that it can still be enjoyed by prisoners stripped of virtually every other right. Their arguments are specious and easily discounted by the law and by reality.

Marriage, they suggest in one breath, is about incentivizing the traditional nuclear family and ensuring children remained tethered to their biological parents. This, of course, belies the fact that Louisiana already recognizes marriages between cousins, common law marriages, and marriages between people who are elderly, infertile or simply uninterested in ever having children.

In the next breath, they argue that marriage is a state's rights issue via the 10th Amendment, and that any federal intrusion on a state's sovereign ability to regulate marriage is thereby unconstitutional. After speaking with Special Assistant Attorney General Kyle Duncan, the D.C.-based attorney hired by Caldwell at $385 an hour to defend Louisiana's prohibition on same-sex marriage and who had also been hired by Caldwell in 2004 to promote Louisiana's constitutional amendment banning same-sex marriage, I think it's

safe to say that they think this is their strongest argument. But it's a house of cards.

Remember, there's still a Constitution and 25 other amendments (26 if you count the 18th Amendment, which enforced the prohibition of alcohol, though Louisiana never counted that one anyway). States can't constrict or constrain any of the protections and fundamental rights guaranteed by the Constitution; they can only expand and enhance those protections and fundamental rights.

In our conversation and in the briefs he filed with Judge Feldman's and Judge Rubin's courts, Duncan repeatedly quoted from Supreme Court Justice Anthony Kennedy's majority opinion in United States v. Windsor, the 2013 case that struck down portions of the federal Defense of Marriage Act as unconstitutional.

Angela Costanza and Chasity Brewer, the couple whose custody case led to Judge Ed Rubin's historic decision clearing the state's ban on same-sex marriage unconstitutional

That may seem paradoxical to some: How could you possibly use a Supreme Court opinion striking down federal discrimination on the basis of sexual orientation in order to justify state discrimination on the basis of sexual orientation? The short answer is: You probably can't, but you can try.

Duncan, writing on behalf of the state of Louisiana, argues that Windsor actually reaffirmed the supremacy of state regulation of marriage. In Windsor, an elderly widow who legally married her wife in Canada and had their marriage recognized by the state of New York was

denied more than $300,000 in federal survivor's benefits, because the Defense of Marriage Act prohibited same-sex couples from accessing or receiving benefits.

At the risk of boring you with the minutia, I think this is important, because it's the argument our taxpayer dollars are funding: The Supreme Court, Duncan suggests, was less concerned about striking down a federal law that discriminated against gay and lesbian couples than it was with deferring to a state law protecting those couples. Therefore, according to his logic, even though Windsor represented the biggest victory for gay and lesbian rights in American history, and even though it obliterated a federal law that had been passed by the Congress and signed by the president, it actually was a green light for states to pass laws banning same-sex marriages and same-sex adoptions.

So far, only one judge in the entire country has agreed with Duncan's logic: Feldman in New Orleans.

It is easy for some to become more focused on theory than practice. And in practice, these bans are most assuredly discriminatory; they most certainly are based on animus toward gay and lesbian Americans; they tangibly hurt families and children; they perpetuate a culture of bigotry and bullying and blind hatred.

As a heterosexual white male from an upper middle class family, I don't need to have a dog in this fight, but I feel obligated because of people like Chasity and Angela.

Ten years ago, Chasity Brewer realized a dream for her and her partner Angela Costanza. Thanks to the marvels of modern medicine, Chasity gave birth to the couple's first child, a healthy little baby boy. Like most spouses, Angela was right by Chasity's side the entire time. And even though Chasity was the "biological mother," Angela was actually the first to hold their baby boy in her arms.

Four years later and only three months after California's Proposition 22 (the precursor to Proposition 8) was found to be unconstitutional, Chasity and Angela were finally able to make it official: They got properly, legally married.

With their little boy in tow, Chasity and Angela decided to settle for good in Lafayette. And although they likely knew their marriage would not be recognized in Louisiana, as it would have been if they were opposite sex first cousins, they hoped, at the very least, that their family would be dignified and recognized. Angela and Chasity filed for an intrafamily adoption, so that Angela would be legally recognized as a parent of their son, in the same way that countless stepfathers and stepmothers

have been granted adoption rights for decades.

They hired a smart, young attorney, Josh Guillory, an Iraqi War veteran who graduated at the top of his class in law school. Louisiana is a small state, and as it turns out, unbeknownst to me when I began writing this article, he happens to be the same Josh Guillory I knew as a classmate in high school. I call him up and congratulate him on his victory, and just as he was at Alexandria Senior High, Josh is gracious and humble. I ask him what attracted him to take up this case.

"I'm a conservative," he says, more than once. "And I'm a member of the NRA, even though I don't own any guns right now," he laughs. For Josh, this case has nothing to do with partisan politics; it is about ensuring equal protection under the law.

Josh submitted a trove of documents to the trial court, including "an Authentic Act of Consent to Adoption by the biological mother, Chasity Brewer, a criminal records check from the Lafayette Parish Sheriff's Office, the recommendations and records check for any validated complaints of child abuse or neglect from the Department of Child and Family Services and the Child Welfare State Central Registry Check." Everything turned up clean. His i's and j's were dotted, and the t's were crossed. Judge Rubin granted adoption rights to Angela, and for the first time ever, their

rights as an intact and loving family unit, including their now 10-year-old son who had known them since birth as his parents, had been recognized in Louisiana.

However, the office of Attorney General Caldwell and, particularly, Special Assistant Attorney General Duncan, who had only just been hired back, were not pleased with the decision, and they tried their best to convince the court that these two loving, committed, legally married women shouldn't be allowed an intrafamily adoption of the boy they raised together since his birth.

Perhaps unwittingly, Caldwell and Duncan, in attempting to invalidate the adoption of a 10-year-old boy by a parent who had known him, cared for him and loved him since the very moment of his birth, turned this case into a much broader set of issues about the constitutionality of laws that prohibit same-sex marriages in Louisiana.

I am well aware that Louisiana is, at least for now, a reliably conservative state, and I fully appreciate the influence of the religious right in our politics. But what are we doing here?

We're paying a lawyer in Washington, D.C., $385 an hour to write creative essays styled as legal briefs about why two loving parents shouldn't be allowed to adopt their own child. We're denying decent, hardworking, patriotic and

compassionate Americans - our neighbors - the basic dignity and the fundamental right of marriage. Louisiana taxpayers don't spend money attempting to prevent serial killers from marrying one another, and we don't spend money to stop 18-year-old girls from marrying predatory 65-year-old creeps.

I spent a great deal of my childhood in the classrooms and the sanctuary of First United Methodist Church in Alexandria. I taught Sunday School when I was a teenager, sang in the youth choir and, when I was 17, I delivered a sermon from the pulpit; the topic was grace. I earned a degree in religious studies when I was an undergraduate at Rice University. I don't know if any of this really qualifies me to opine on religion, but I know this: There is nothing righteous or holy about Bobby Jindal and Buddy Caldwell's relentless persecution of our LGBT brothers and sisters.

That was an awfully long digression. My apologies.

So, why will Judge Rubin's decision be remembered as historically significant? Because it was righteous and holy.

Lamar White Jr. is a native of Alexandria and author of CenLamar.com, an award-winning blog about Louisiana politics. He is in his final year of law school, concentrating on constitutional law and public policy, at the SMU Dedman School

of Law in Dallas, where he lives with his golden retriever, Lucy Ana.

*Judge rules La.'s gay marriage ban unconstitutional *** Ruling to have no immediate impact*

The Advocate (Baton Rouge, Louisiana)

September 23, 2014 Tuesday, Acadiana Edition

Section: A; Pg. 01

Length: 733 words

Byline: RICHARD BURGESS

rburgess@theadvocate.com

Dateline: LAFAYETTE

Body

LAFAYETTE - A state judge in Lafayette on Monday declared Louisiana's ban on same-sex marriage unconstitutional, a ruling that conflicts with a federal judge's decision earlier this month upholding the state ban.

Fifteenth Judicial District Judge Edward Rubin's decision, made in an adoption case involving two women in Lafayette, will have no immediate impact on the status of same-sex marriages in Louisiana.

Rubin's strike at the ban is another salvo in a legal battle that soon could be settled by the U.S. Supreme Court.

"This is a major win for Louisiana families, but it's the first step in a long road," said Chris Otten, chairman-elect of the Forum for Equality Louisiana.

The group led the recent challenge to Louisiana's same-sex marriage ban in federal court in New Orleans.

In that case, U.S. District Judge Martin Feldman upheld the state law in a ruling earlier this month that went against the trend of federal judges in other states striking down similar bans.

The state will appeal Rubin's Monday ruling to the Louisiana Supreme Court and has asked the judge to put his decision on hold pending the appeal, said attorney Kyle Duncan, who has been hired by the state Attorney General's Office to handle challenges to Louisiana's same-sex marriage ban and who also argued the case before Feldman.

"In Louisiana, the constitution defines marriages as that which occurs between a man and a woman. The state will continue to register marriages and adoptions according to that definition," the Attorney General's Office said in a written statement issued through Duncan.

Rubin's ruling came in an adoption case involving Angela Costanza and Chasity Brewer, who were legally married in California and now live in Lafayette.

The adoption court case, as well as Rubin's ruling, are sealed from public view, but an attorney representing the women, Joshua Guillory, said Costanza sought to be legally recognized as a parent to Brewer's son.

As part of that process, the women first asked that their out-of-state marriage be recognized as legal in Louisiana, Guillory said.

Guillory said he received an OK from the judge to discuss only the broad outlines of Monday's ruling.

He said Rubin found Louisiana's ban on same-sex marriage violated the due process and equal protection clauses of the 14th Amendment and the U.S. Constitution's "full faith and credit clause," which calls for each state to recognize the laws and court decisions of other states.

"They were legally married out of state," Guillory said.

Duncan said he was perplexed that Rubin did not even mention Feldman's ruling on the same issue just weeks before in federal court.

Keith Werhan, a constitutional law professor at Tulane University Law School, said he doesn't believe a state judge in Lafayette has an obligation to follow Feldman's decision, because Feldman serves in the New Orleans-based Eastern District of the federal court system in Louisiana and Lafayette Parish is in the Western District.

"Technically, it doesn't have any power to bind them," Werhan said.

Werhan also said he would expect the Louisiana Supreme Court to hold off ruling on any challenges to the same-sex ban that are based on the federal constitution, predicting the issue probably will be settled in short order by the U.S. Supreme Court.

A U.S. Supreme Court decision would trump a decision by the Louisiana Supreme Court on the issue.

"Often, a (state) court in that circumstance would say, 'We are going to stay back. ... It's all going to be resolved by the U.S Supreme Court,' " Werhan said.

Duncan said he plans to push forward with his appeal of Rubin's ruling.

"We are going to ask to move this as quickly as possible," he said. "We can't know how quick the U.S. Supreme Court will react."

Supporters of same-sex marriage counted the ruling as a major win, despite the still unsettled nature of the law.

"Today is a victory for Angela, Chasity and their son, Nicholas, to be sure, but it is also a victory for thousands of citizens who work hard and contribute to this state every day, hoping that one day soon they too will be allowed the freedom to marry the person they love," Equality Louisiana President Tim S. West said in a written statement.

"Unlike Judge Feldman's uninformed and mean-spirited ruling earlier this month that dismissed real Louisiana families, Judge Rubin's ruling today demonstrates that Feldman doesn't represent Louisiana values."

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More Than a Case -a Mission; These are the lawyers fighting marriage equality.

The National Law Journal

September 22, 2014 Monday

THE NATIONAL LAW JOURNAL

Section: NATIONAL NEWS; Pg. 1; Vol. 37; No. 4

Length: 886 words

Byline: MARCIA COYLE

Body

In 2004, one year after a trailblazing Massachusetts court declared a constitutional right to same-sex marriage, an Idaho lawyer established the Marriage Law Foundation to prevent that from happening in any other state.
A decade later, Monte Stewart of Boise's Stewart Taylor & Morris is making little headway against the same-sex marriage movement. But Stewart, a native Utahn and Mormon, is among a group of lawyers who see their defense of marriage bans as more mission than job.

Not all of the lawyers defending marriage bans share that view-some state attorneys general simply see it as their job to defend laws duly enacted by their state's voters or legislatures. One Kentucky law firm was attracted by the challenging legal issues involved.
By far the most heavily invested in defending state bans is the Arizonabased Alliance Defending Freedom founded by 30 evangelical Christian leaders in 1994. Headed by Alan Sears, a former Reagan Justice Department attorney, the alliance describes itself as an "unique legal ministry" defending religious liberty, the sanctity of life, and marriage and family. It has 44 lawyers on staff and nearly 2,200 "allied" attorneys nationwide. Alliance attorneys are lead counsel in federal cases from Hawaii, Oklahoma and Virginia, and amicus counsel in dozens of others.
"It's quite clear the number of lawyers advocating same-sex marriage vastly outnumbers those of us defending marriage," senior legal counsel Austin Nimocks said. "It's clear the challenges and pressures have mounted over the years in terms of providing defenses to those lawsuits."
The alliance also works internationally, Nimocks said, and holds nongovernment organization status at the United Nations. And it has an increasing presence in the U.S. Supreme Court. The organization filed the original lawsuit challenging Massachusetts' abortion-clinic buffer zone in last term's McCullen v. Coakley and represented the Hahn family in the contraceptive insurance case, Conestoga Wood v. Burwell, and the Town of Greece, N.Y., in the governmentprayer case. The justices this term will hear its First Amendment challenge by a local church to a city's sign ordinance.
Boise's Stewart, who declined to be interviewed, was a force in the 2004 campaign in favor of Utah's amendment banning same-sex marriage, and the state's governor called upon him to defend the ban when initially challenged. Gene Schaerr, a Utah Mormon, took over the appellate defense after leaving his partnership at Winston & Strawn.

Schaerr turned over those duties to John Bursch, former Michigan solicitor general, now that Utah's case is pending in the Supreme Court. Bursch, a partner at Warner Norcross & Judd in Grand Rapids, Mich., will argue for Utah if the justices grant review.
Stewart, representing the Coalition for the Protection of Marriage, leads the defense of Nevada's ban and Idaho's ban on behalf of Idaho Gov. "Butch" Otter.

S. Kyle Duncan, a solo practitioner in Washington, D.C., stands apart from those other defenders in one key respect: He recently won Louisiana's defense of its marriage-ban amendment in federal district court-breaking the string of federal court victories in favor of samesex marriage since the Supreme Court's United States v. Windsor decision in 2013. Duncan was Louisiana's solicitor general from 2008 to 2012, when he became general counsel at the Becket Fund for Religious Liberty.
He was lead counsel for Hobby Lobby Stores Inc. up to the Supreme Court when Louisiana asked him to handle its same-sex marriage litigation.
Duncan believes his Louisiana court victory prompted Norfolk, Va., circuit court clerk George Schaefer to ask him to defend Virginia's ban in Schaefer v. Bostic-one of three Virginia petitions pending in the Supreme Court. "I have not been involved as long as some of the other attorneys," Duncan said. "The first case I reviewed carefully was Windsor. That's obviously the key decision now. As I read it, yes, it's about the rights of same-sex couples married in New York, but it views those rights through the lens of a pretty clear affirmation of state authority to define marriage."
Duncan resists being pegged as a particular type of lawyer because of his work on marriage and for the Becket Fund. "I've been in government practice for most of my career," he said. "I'd take just about any kind of case now. What drives me is the issue."
The same thing drives Leigh Gross Latherow, a partner in Ashland, Ky.'s VanAntwerp, Monge, Jones, Edwards & McCann. When the state attorney general declined to defend the state's marriage law, Gov. Steve Beshear requested outside proposals for the defense. Latherow's firm got the case and she took the lead. "I was interested in the [marriage] case from the outset," said Latherow, a civil litigator. She and her firm represent Kentucky's governor in three marriage cases-two in federal court and one in state court. "All litigation is demanding, but high-profile cases add another element," she said.
Despite the tide of federal court rulings against them, none of the bans' defenders admitted to any discouragement. "Whether we win or lose in lower courts doesn't matter that much, assuming the Supreme Court is going to take this on and settle the issue once and for all," Nimocks said.

Contact Marcia Coyle at *mcoyle@alm.com*

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NewsRoom

9/1/14 Baton Rouge Advoc. A1
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Baton Rouge Advocate

September 1, 2014

Section: A

Federal judge issues restraining order *** Doctors can perform abortions while seeking hospital privileges

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A Baton Rouge federal judge issued a temporary restraining order late Sunday evening that stops the enforcement of a new abortion law set to take effect Monday that requires abortion clinic doctors to have admitting privileges at a nearby hospital.

The order, granted by U.S. District Judge John deGravelles, allows the clinics to remain open while doctors await approval of admitting privileges at a hospital within 30 miles.

The restraining order will be in effect until a hearing, which deGravelles said would be set within 30 days.

In his ruling issued about 8 p.m. Sunday, deGravelles noted that three of the four doctors participating in the suit, two of whom are not plaintiffs, have filed for admitting privileges with hospitals within 30 miles of their clinics, but have yet to hear back on those applications.

DeGravelles determined that Act 620 will be allowed to take effect Monday but doctors will not be subject to the penalties and sanctions allowed in the statute for practicing without the "relevant admitting privileges during the application process."

"Plaintiffs will be allowed to operate lawfully while continuing their efforts to obtain privileges," he wrote.

S. Kyle Duncan, an attorney representing the state Department of Health and Hospitals, called the ruling a win for the state.

He said he was pleased that it falls in line with what DHH had already promised to do - not enforce the sanctions against the physicians awaiting hospital approval for admitting privileges.

The head of a national woman's rights group said late Sunday that the law was designed to shutter abortion clinics across the state.

"Today's ruling ensures Louisiana women are safe from an underhanded law that seeks to strip them of their health and rights," said Nancy Northup, president and CEO of the Center for Reproductive Rights, of the decision.

The doctors in the suit argued the law violated their rights to due process because they would have been penalized for not complying with the law while they were working to comply with the law.

Attorneys for three abortion clinics in Shreveport, Bossier City and Metairie and two unidentified doctors - one working in Shreveport and the other splitting time between Bossier City and Metairie - filed the lawsuit Aug. 22 arguing that doctors didn't have adequate time to apply and receive responses from hospitals and that the law, Act 620, could close the state's five abortion clinics.

The suit argued that the 81 days the law gave doctors to get admitting privileges and clinics to comply was woefully inadequate. It called forcing doctors to gain admitting privileges at any hospital within 30 miles in that amount of time "an impossible task" since most hospitals take between 90 days and seven months to decide on whether to grant a doctor admitting privileges.

Any doctor not complying with the new law faces a fine of up to $4,000 and the clinic the doctor works out could lose its license.

In court filings Thursday, state Department of Health and Hospitals Secretary Kathy Kleibert said she has "no intention" of enforcing the new law against physicians who applied for admitting privileges during the act's grace period, but who have not received answers on those applications. The grace period ran from June 12 to Sept. 1.

The law received overwhelming support in the 2014 legislative session and was pushed by anti-abortion advocates who said the law was needed to ensure proper care for women if they have complications from the procedures.

Opponents of the law have said the requirement is medically unnecessary and limits abortion access.

The new law would likely close three of the state's five abortion clinics, leaving one in Shreveport and one in Bossier City, both more than 300 miles from New Orleans. The three other clinics are in Baton Rouge, New Orleans and Metairie.

Recently, there were two conflicting rulings from different panels of the 5th U.S. Circuit Court of Appeals on laws with similar restrictions in Texas and Mississippi. The New Orleans-based appellate court hears challenges of district court judges' decisions in Louisiana, Texas and Mississippi.

In July, a 5th Circuit panel upheld challenges to the admitting privileges law in Mississippi that would have shut down the state's only abortion clinic. In a 2-1 vote, the panel said Mississippi lawmakers took the new rules too far and that the law "effectively extinguishes" a woman's right to choose "within Mississippi's borders."

In March, a different 5th Circuit panel upheld nearly identical restrictions in Texas, saying the requirement passed constitutional muster. But the panel said the government defendants couldn't enforce the admitting-privileges law against a doctor who applied for those privileges during the Texas law's grace period but had not yet received a response before the law's effective date.

Duncan, the DHH attorney, pointed to this ruling as the reason the state is confident in its case going forward.

The Texas law was the model for Louisiana's law, Kliebert has said in court filings.

The admitting-privileges requirement has been challenged in other states.

---- Index References ----

News Subject: (Abortion (1AB77); Social Issues (1SO05))

Industry: (Bioethics (1BI56); Healthcare (1HE06); Healthcare Service Providers (1HE78); Healthcare Services (1HE13); Hospital Administration (1HO60); Hospitals (1HO39))

Region: (Americas (1AM92); Louisiana (1LO72); Mississippi (1MI74); North America (1NO39); Texas (1TE14); U.S. Southeast Region (1SO88); U.S. Southwest Region (1SO89); USA (1US73))

Language: EN

Other Indexing: (John deGravelles; S. Kyle Duncan; Kathy Kleibert; Nancy Northup)

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US judge blocks enforcement of new La abortion law

Associated Press State & Local

September 1, 2014 Monday 4:25 AM GMT

Section: STATE AND REGIONAL

Length: 740 words

Byline: JANET McCONNAUGHEY, Associated Press

Dateline: BATON ROUGE, La.

Body

BATON ROUGE, La. (AP) - A federal judge has temporarily blocked Louisiana from enforcing its restrictive new abortion law. But lawyers and advocates appeared to disagree about whether the judge's order affects doctors at all five abortion clinics in the state or only those at three clinics whose lawsuit challenges the measure.

U.S. District Judge John deGravelles wrote that authorities cannot enforce the law until he holds a hearing on whether an order to block it is needed while the case remains in court.

The law requires doctors who perform abortions to have admitting privileges to a hospital within 30 miles of their clinics. The lawsuit claims doctors haven't had enough time to obtain the privileges and the law likely would close all five clinics.

"Today's ruling ensures Louisiana women are safe from an underhanded law that seeks to strip them of their health and rights," Nancy Northup, president and CEO of the Center for Reproductive Rights, one of the groups representing two northwest Louisiana clinics, one in suburban New Orleans, and doctors at those clinics, said in a news release.

But Kyle Duncan, representing state Health and Hospitals Secretary Kathy Kliebert, said it covers only the plaintiffs - not clinics in New Orleans and Baton Rouge or the doctors who work at those clinics.

"That doesn't mean the state is on Monday just going to go out and try to enforce the act," he said in a phone interview from Washington. "I have no indication that's the state's intention."

Center for Reproductive Rights spokeswoman Jennifer R. Miller, asked specifically whether the order covered only the plaintiffs, wrote, "We are still analyzing the decision."

DeGravelles' order states that "any enforcement" of the law is forbidden until a hearing. However, his next sentences state that the law will go into effect but plaintiffs cannot be penalized for practicing without admitting privileges during this period while their applications are still pending.

The judge said he will call a status conference within 30 days to check on the progress of the plaintiffs' applications and to schedule a hearing to consider a request for an order blocking the law while the case is in court.

For now, the doctors' risk of $4,000 fines and losing their licenses outweighs any possible injury to the state from keeping the status quo, he wrote. That's especially true, he wrote, because Louisiana's health secretary has said she doesn't plan to enforce the law any doctors who don't yet have a final decision on their hospital applications.

However, deGravelles wrote, neither Kliebert nor the head of the Board of Medical Examiners promised that they would never prosecute those doctors later for violations that occurred starting Monday.

Duncan said that if he'd been asked during the hearing about retroactive enforcement, "I'm fairly certain we would have said, 'Of course we're not going to retroactively enforce the law.' ... I did not think Secretary Kliebert's declaration was ambiguous on that point."

She filed two statements saying that the law won't be enforced against any doctors who can show they submitted applications for admitting privileges during the 81 days between June 12, when it was signed, and Monday, he said.

But the judge wrote that, on that point, the case is very similar to one in Mississippi, where a federal appeals court overturned a similar law.

However, deGravelles wrote, clinics' lawyers have not proven that enforcing the law would shut down most, if not all, of Louisiana's clinics, eliminating access to legal abortions in Louisiana. Because the doctors' applications haven't all been acted on and the attorneys don't represent two clinics, that's speculative, he said.

"How many patients do these other two facilities treat? How many doctors practice there? How many of these doctors have applied for admitting privileges and what is the status of their applications?" he wrote. He said he needs answers to those and other questions, including how far patients would have to travel for care if the other two clinics stayed open.

Admitting privileges laws have passed across the South.

A panel of the 5th U.S. Circuit Court of Appeals, which has jurisdiction over Louisiana, upheld a similar Texas law. But in July, a different panel of the 5th Circuit voted to overturn Mississippi's law, which would have shuttered the state's only abortion clinic, saying every state must guarantee the right to an abortion.

Load-Date: September 2, 2014

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Abortion law negotiations fizzle ; Court weighing restraining order

Times-Picayune (New Orleans)

August 31, 2014 Sunday

Section: NATIONAL (EARLY EDITION); Pg. A05

Length: 350 words

Byline: Cole Avery, Staff writer

Body

Negotiations have broken down between attorneys representing opposing sides in a suit attempting to stop an anti-abortion law from taking effect Monday.

"There's not going to be an agreement. It appears the court will decide, but probably not today," said Kyle Duncan, an attorney representing the state Department of Health and Hospitals.

Attorneys representing five abortion clinics in Louisiana had asked the court for a temporary restraining order to prevent Act 620 from taking effect Monday. The law requires doctors at abortion clinics to have admitting privileges to a hospital within 30 miles of their clinics.

Critics of the law worry it will result in the closure of abortion clinics.

Three doctors are awaiting decisions on their applications. Only one doctor in Shreveport has admitting privileges, but he has said he will not perform abortions if he is the only one able to do so.

Federal Judge John deGravelles asked for DHH Secretary Kathy Kliebert on Thursday to declare she would be the sole enforcer of the law and that she would not pursue penalties against doctors who are applying for admitting privileges.

Kliebert agreed to both conditions, but the attorneys were still unable to reach a deal that would cause the plaintiffs to drop their request for a restraining order.

Duncan would not comment on negotiations, but he said the judge is expected to rule over the weekend on the order.

If deGravelles grants the restraining order, the implementation of the law would be put on hold and abortion clinics could remain open. But after Kliebert's declaration promising not to go after doctors still waiting on a decision on their applications, the clinics will likely remain open anyway.

Questions remain as to the time frame doctors have to get a decision on their applications. The plaintiffs say each hospital has different procedures, and the process can take between 90 days and seven months There's also a question about whether the nonenforcement of the law would extend to doctors who apply for admitting privileges in the future, or if it applies to the three plaintiffs in the suit.

Load-Date: September 4, 2014

End of Document

La. abortion law ruling expected before Monday

Associated Press State & Local

August 30, 2014 Saturday 1:31 AM GMT

Section: STATE AND REGIONAL

Length: 476 words

Dateline: BATON ROUGE, La.

Body

BATON ROUGE, La. (AP) - A federal judge will rule before Monday on a request to block enforcement of Louisiana's new, restrictive abortion law while a lawsuit seeking to overturn it remains in court, attorneys for both sides said Friday.

The law, which requires doctors who perform abortions to have admitting privileges at a nearby hospital, is scheduled to go into effect Monday.

William Rittenberg, an attorney for several abortion clinics and doctors who sued the state last week, said U.S. District Judge John deGravelles will rule before then. The judge heard the case Thursday and said he would issue a ruling Friday but Rittenberg and an attorney for the state said a decision would not be handed down Friday.

"I can confirm that the parties have been unable to work out an agreed stipulation and that the judge will therefore rule on the plaintiffs' request," Kyle Duncan, an attorney for the state Department of Health and Hospitals, wrote in an email Friday. "The court has informed the parties that it will rule before Sept. 1, although likely not today."

The law, backed by Gov. Bobby Jindal and passed overwhelmingly by lawmakers, was pushed by anti-abortion supporters who said it was aimed at protecting a woman's health by ensuring access to proper care if they have complications from the procedure. It requires every doctor providing an abortion to have active admitting privileges at a hospital not more than 30 miles from where the abortion is performed. The hospital must provide obstetrical or gynecological health care services.

The law's opponents contend the restrictions are medically unnecessary and designed to limit access to abortion.

The Advocate reports (http://bit.ly/1sR26i5) that Louisiana Department of Health and Hospitals Secretary Kathy Kliebert has assured deGravelles she has no intention of enforcing the new law against physicians who applied for admitting privileges during the act's grace period but who have not received answers on those applications.

The grace period ends Sept. 1.

The lawsuit argued the 81 days between Gov. Bobby Jindal's signature and the Sept. 1 effective date was too little time for doctors to get responses from the hospitals, so the law probably would shut down Louisiana's five abortion clinics. Each hospital has its own rules, and some are more complicated than others.

Admitting-privileges laws have passed across the South.

Jennifer Bandy

A panel of the 5th U.S. Circuit Court of Appeals, which has jurisdiction over Louisiana, upheld a similar Texas law. But in July, a different panel of the 5th Circuit voted to overturn Mississippi's law, which would have shuttered the state's only abortion clinic, saying every state must guarantee the right to an abortion.

There are five clinics in Louisiana that perform the procedure: one each in Baton Rouge, New Orleans, Metairie, Shreveport and Bossier City.

Load-Date: August 30, 2014

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Judge: rule Friday if no abortion law agreement

Associated Press State & Local

August 28, 2014 Thursday 11:01 PM GMT

Section: STATE AND REGIONAL

Length: 524 words

Byline: JANET McCONNAUGHEY, Associated Press

Dateline: BATON ROUGE, La.

Body

BATON ROUGE, La. (AP) - A federal judge on Thursday asked lawyers battling over Louisiana's new, restrictive abortion law for an agreement that apparently could let clinics stay open - at least for a while - after the law takes effect Sept. 1.

U.S. District Judge John deGravelles said that if the two sides cannot agree, he will rule Friday on a request from clinics and doctors for a temporary order blocking enforcement of the law while a lawsuit seeking to overturn it remains in court.

The law will require doctors who perform abortions to have admitting privileges to a hospital within 30 miles of their clinics. The Center for Reproductive Rights filed the court challenge last week, saying doctors haven't had enough time to obtain the privileges and the law likely would force Louisiana's five abortion clinics to close.

Attorneys for the state said in court Thursday that the 5th U.S. Circuit Court of Appeals barred enforcement against doctors who have requested admitting privileges but don't yet have responses from the hospitals they applied to.

DeGravelles asked whether a state pledge to refrain from enforcing the law against all such doctors would persuade attorneys for two doctors and three clinics to drop their request for a temporary restraining order to stop the law from taking effect. The clinics are in northwest Louisiana and in a New Orleans suburb.

The state's refusal to include doctors at clinics in New Orleans and Baton Rouge had been a sticking point in attempts to reach an agreement, attorneys for both sides said.

DeGravelles sought statements from both Kathy Kliebert and the state Board of Medical Examiners. He also wants Kliebert to state that only her department has the power to enforce the law. Attorneys for state Attorney General Buddy Caldwell said he did not plan to get involved unless asked by the health department.

Kyle Duncan, who represents Health and Hospitals Secretary Kathy Kliebert, on Thursday resubmitted a statement filed earlier in the week to add a paragraph explaining the department's authority to enforce the law.

Asked about coverage for doctors in New Orleans and Baton Rouge, Duncan said, "Our position was that ... the original declaration covered that." He cited a paragraph that says any doctors who had gotten in touch with the

department would have been told that it cannot enforce the law against doctors who don't have a final decision on their requests to hospitals.

The lawsuit filed last Friday said the 81 days between Gov. Bobby Jindal's signature and the Sept. 1 effective date was too little time for doctors to get responses from the hospitals, so the law probably would shut down Louisiana's five abortion clinics. Each hospital has its own rules, and some are more complicated than others.

Admitting privileges laws have passed across the South.

A panel of the 5th U.S. Circuit Court of Appeals, which has jurisdiction over Louisiana, upheld a similar Texas law. But in July, a different panel of the 5th Circuit voted to overturn Mississippi's law, which would have shuttered the state's only abortion clinic, saying every state must guarantee the right to an abortion.

Load-Date: August 29, 2014

End of Document

*Louisiana same-sex marriage ruling nears *** U.S. Supreme Court likely to review issue*

The Advocate (Baton Rouge, Louisiana)

August 8, 2014 Friday, New Orleans Edition

Section: A; Pg. 01

Length: 754 words

Byline: ANDREW VANACORE

avanacore@theadvocate.com

Body

For weeks now, those involved in the debate over gay marriage in Louisiana have been waiting for U.S. District Judge Martin Feldman to decide.

Arguments before the judge in a lawsuit challenging Louisiana's ban on same-sex marriage took place more than a month ago. Feldman denied a request for further courtroom debate back in July, and both sides are expecting a ruling from him any day.

And yet, even as anticipation builds, courtroom decisions elsewhere around the country appear to be quickly overtaking the Louisiana case, building toward a

U.S. Supreme Court showdown that could make any further skirmishing in district courts irrelevant.

Events on Thursday in one of the Utah same-sex marriage lawsuits drove home the growing likelihood of a Supreme Court review. In that case, Utah officials hoping to preserve that state's same-sex marriage ban already have lost in district court and at the 6th U.S. Circuit Court of Appeals in Denver. Now they are appealing to the Supreme Court, but, in an unusual move, the winning side also is asking for the high court to review the case.

It's a sign both that gay rights advocates are feeling hopeful they can win at the highest level and that they expect the Supreme Court to step in relatively soon anyway, perhaps during the court's next term.

"We do feel confident, and a lot of people feel the wind is at our sails," said Chris Otten, chairman-elect of the Forum for Equality Louisiana, though he added, "There is, of course, always the risk that one side may be overplaying its hand. Who knows?"

Otten also stressed that the Forum for Equality, which is a party to the Louisiana lawsuit, will be pressing ahead with its own case regardless of what happens elsewhere. There are still certain scenarios under which the Supreme Court may avoid taking up the issue, however unlikely they've become.

For one thing, all of the federal appeals courts could end up ruling in favor of same-sex marriage, leaving the Supreme Court with no need to resolve conflicting decisions. So far, there's been no ruling from the 5th Circuit, which hears cases from Louisiana, Texas and Mississippi, so one of the local cases will have to proceed or Louisiana's ban will remain in place.

Also, the Supreme Court could simply decide to give the issue more time - perhaps even a few years - to play out, allowing more circuit courts to come down one way or the other.

But observers on both sides of the issue see that as increasingly unlikely because of the complications it could bring. Gay and lesbian couples already are running into thorny legal questions, some of them having wed in states where same-sex marriage is legal then moved to states where it is not.

Then there is the possibility a lower court will strike down a same-sex marriage ban, only to have its decision overturned months or years later, leaving couples who marry in the interim in legal limbo.

"It creates a really untenable situation," said Kenneth Upton, a lawyer for the LGBT rights group Lambda Legal. "I don't see the Supreme Court doing that."

Here, even those defending bans on same-sex marriage agree. In their brief to the Supreme Court, officials from Utah argued, "A vast cloud covers this entire area of the law, and only this court can lift it."

There are signs the high court agrees with that view. In an interview recently with The Associated Press, Justice Ruth Bader Ginsburg predicted the court would not try to dodge the issue and may take it up as soon as its next term, with a ruling likely by next summer.

All of this could affect the Louisiana case, which began as a dispute over whether the state should have to recognize legal same-sex marriages performed in other states and has grown to encompass gay couples' demand for the right to wed in Louisiana as well.

The Supreme Court could end up ruling before the Louisiana case is resolved at the 5th Circuit. The appeals court then would simply recognize that the Supreme Court has decided the issue.

Legal experts say it would be difficult for either side to keep fighting after a Supreme Court ruling, even if the justices technically address a same-sex marriage ban from another state. That's because all of the state bans are worded similarly, and the constitutional issues involved are more or less identical.

In fact, the 5th Circuit could decide to put the Louisiana case on hold and wait for the Supreme Court to rule.

Kyle Duncan, the attorney arguing for Louisiana's ban, said, "I think the open question now is how long the Supreme Court is going to take."

Load-Date: September 8, 2014

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Abbott's tactics against gay marriage questioned;

The Houston Chronicle

July 31, 2014 Thursday, 3 STAR EDITION

Section: A; Pg. 1

Length: 790 words

Byline: By Lauren McGaughy

Body

AUSTIN - Attorney General Greg Abbott is defending the state's same-sex marriage ban using a widely rejected "responsible procreation" argument, bolstering gay rights advocates' hopes and raising questions about his chances of success.

"None of the arguments (against gay marriage) have prevailed, but I think that one especially is not compelling and has not persuaded the judges," said University of Richmond School of Law Professor Carl Tobias.

Tobias added, "The courts so far that have discussed that argument have pretty much rejected it out of hand."

Evan Wolfson, founder and president of Freedom to Marry, a national nonprofit aimed at overturning same-sex marriage bans across the country, went further: "It's the last desperate argument of those who don't have an argument."

Abbott's brief filed in the 5th Circuit Court of Appeals on Monday clocked in at 42 pages. It detailed the various reasons why state officials believe Texas should be allowed to keep intact its ban on same-sex marriage, passed by an overwhelming margin in 2005 as an amendment to the state Constitution.

Abbott spokeswoman Lauren Bean would not further explain the state's argument, saying the "brief fully articulates all the reasons why the Texas law is constitutional."

U.S. District Judge Orlando Garcia, a Bill Clinton appointee based in San Antonio, ruled the ban unconstitutional in February. He was the fourth federal judge to make such a declaration since the Supreme Court overturned the Defense of Marriage Act last year; 10 more followed.

The state appealed, pushing the case to the New Orleans-based appeals court that hears cases from Louisiana, Mississippi and Texas.

Wants procreation

While the state's appeals brief argued the issue of gay marriage should be left to the voters and state lawmakers rather than courts, it relied most heavily on the argument that Texas has a "legitimate state interest" in encouraging opposite-sex couples to procreate.

"By encouraging the formation of opposite-sex marriages, the State seeks not only to encourage procreation but also to minimize the societal cost that can result from procreation outside of stable, lasting marriages," Abbott's brief

read. "Because same-sex relationships do not naturally produce children, recognizing same-sex marriage does not further these goals."

Previously rejected

LGBT (lesbian, gay, bisexual and transgender) and pro-gay marriage activists were surprised Abbott led with the "responsible procreation" argument since it has been rejected in the 10th and 4th Circuit Courts.

"It hasn't succeeded very often because it doesn't make a whole lot of sense and it doesn't really comport with what most of us think about marriage," said Rebecca Robertson, legal and policy director for the American Civil Liberties Union of Texas. "(State law) doesn't have to be perfect. It just has to be reasonable."

Any outcome in the 5th Circuit would be a win for the gay marriage movement, said Steve Rudner of Equality Texas.

If the court upholds Judge Garcia's ruling overturning the ban, it will bolster LGBT activists' case. If it becomes the first appeals court to toss out such a ruling, creating a circuit court split, it could put the Texas case on a fast-track to the U.S. Supreme Court.

"I think Greg Abbott, in a strange way, if he succeeds in the 5th Circuit, will be doing people a favor," said Rudner.

The New Orleans court is widely considered one of the nation's most conservative, making it a likely source of such a split, experts agreed.

"If you're going to get a circuit court split, it would probably be here," said Kyle Duncan, a former Louisiana solicitor general most recently with the Beckett Fund for Religious Liberty in Washington, D.C. In February, Louisiana Attorney General Buddy Caldwell hired Duncan on contract to handle that state's gay marriage case.

An uphill battle

Duncan acknowledged the uphill battle he and others have in defending gay marriage bans but also cautioned against presupposed outcomes, saying the state's rights argument is strong.

"I agree with (gay marriage advocates) that whatever the 5th Circuit does in this case or the Louisiana case, the Supreme Court will have to decide the issue," said Duncan. "But they appear to be assuming they're going to win in the Supreme Court."

He added while Abbott's "responsible procreation" argument is "compatible" with those made in the Louisiana case, that's not the argument he'll make before the circuit court.

"Louisiana's primary emphasis in our case ... is on federalism," said Duncan.

"You absolutely have to come to grips that there have been a lot of decisions that have been made in a short amount of time that disagree with the position that Texas and Louisiana are taking."

lauren.mcgaughy@chron.com

Load-Date: July 31, 2014

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Gay marriage debate hits Louisiana ; Does state law violate federal?

Times-Picayune (New Orleans)

June 25, 2014 Wednesday

Section: NATIONAL; Pg. A01

Length: 1070 words

Byline: Paul Purpura, Staff writer

Body

Should Louisiana's government recognize a same-sex marriage that is sanctioned in another state? It's a question that a federal judge in New Orleans will be asked to consider this morning, when attorneys on both sides of the national debate argue whether a 2013 U.S. Supreme Court decision requires Louisiana to recognize such marriages.

The heart of the issue is the high court's decision in United States v. Windsor, a New York case. The justices ruled 5-4 that the federal government must recognize same-sex marriages from states that allow such unions.

Attorneys for six same-sex couples in Louisiana and the advocacy group Forum for Equality Louisiana Inc. sued the state last year. They argue that Louisiana must recognize their unions under the Windsor decision.

Attorneys for Louisiana disagree, saying that in the Windsor decision the court affirmed states' right to define marriage, and that Louisiana has defined it as being between a woman and a man.

U.S. District Judge Martin Feldman must interpret Windsor here. With no facts in dispute, Feldman, an appointee of President Ronald Reagan, must address only the question of law. In legal terms, both sides have asked for a partial summary judgment.

The plaintiffs aren't asking Feldman to order Louisiana to legalize same-sex marriage. Rather, they want the judge to strike down a 1999 Louisiana law and a constitutional amendment that voters approved in 2004. Those laws define marriage as being between a man and a woman and forbid the state to recognize any other union as a marriage.

At stake are such matters as whether Louisiana should allow same-sex couples to file joint income tax returns, have their names appear on children's birth certificates or adopt children. Three of the six couples suing Louisiana are raising children together but may not be recognized as two-parent households, according to their court pleadings. They have different tax burdens than marriages involving men and women. They are subject to different inheritance laws and are relegated to the "unstable position of being in a second-tier marriage," New Orleans attorney Scott Spivey wrote for the plaintiffs.

"You can't treat two groups differently without justification, and the state has not offered valid justifications to do so," Chris Otten, chairman-elect of Forum for Equality Louisiana Inc., said Tuesday. "Really it's about a question of legal and social fairness, not just for the couples involved but for the children."

Louisiana, on the other hand, argues that unmarried couples are free to arrange their affairs by contract, to co-own property and to will property to each other. The high court reaffirmed the states' "historic and essential authority to define the marital relation," a brief filed on behalf of the state says.

"Windsor thus plainly teaches that states are authorized to determine the shape of marriage, and -- whether their citizens decided to shape it as New York did in 2011 or as Louisiana did in 2004 -- they act rationally in doing so," according to the state's pleadings.

Some states have used that authority to adopt same-sex marriage, but most have not. Louisiana is among the states that have not. Louisiana, in its pleadings, questions whether the decision rests with voters in the respective states or the federal courts.

"It seems clear to Louisiana, from the Windsor opinion, that forcing the states to recognize same-sex marriage would overrule the Windsor decision," said Kyle Duncan, the attorney the state hired to defend its position.

Louisiana isn't alone in the debate. Since the Windsor decision, almost every state that doesn't recognize same-sex marriage has seen lawsuits. As of Tuesday, at least 12 federal courts have struck down state laws, Otten said.

Twenty jurisdictions -- 19 states and Washington, D.C. -- now recognize same-sex marriage. They include Oregon and Pennsylvania, which have decided not to appeal judges' rulings in their lawsuits, Otten said. He called it "a quickly evolving" legal matter.

Duncan, a special assistant attorney general, said Louisiana hopes Feldman does not follow the other federal jurisdictions. "Our view is those courts are quite fundamentally misreading the Windsor decision," Duncan said.

Feldman has received 23 amicus briefs from parties with interest on one side of the argument or the other. Among them is New Orleans, which weighed in on the side of the same-sex couples by saying the city recognizes domestic partnerships and allows its employees to extend their municipal benefits to their partners.

"Indeed, as expressly set forth in the New Orleans Municipal Code, the city has an interest in strengthening and supporting all caring, committed and responsible family forms," City Attorney Sharonda Williams wrote in the brief.

The American Military Partner Association and OutServe-SLDN Inc., which helps gay and lesbian people who are kicked out of the armed forces because of sexual orientation, says in its brief that a "patchwork" of conflict among states' recognition of same-sex marriage undermines national security. "For many married gay and lesbian couples, the prospect of moving to a state where their marriage would be ignored and dignity affronted will be too high a price to pay for joining or staying in the military," the groups wrote.

Attorney General Buddy Caldwell initially was the named defendant in the suit, but Feldman dismissed him in November under the sovereign immunity claim. In his place, the plaintiffs named Secretary Tim Barfield of the Louisiana Department of Revenue, Secretary Kathy Kliebert of the state Department of Health and Hospitals, and Devin George, state registrar and center director at the health and hospitals department.

The same-sex couples who sued the state are:

John Robicheaux and Derek Penton, who live in New Orleans and were married in Iowa on Sept. 23, 2012.

Courtney and Nadine Blanchard, a Raceland couple who were married in Iowa on Aug. 30, 2013.

Nick Van Sickels and Andrew Bond, who live in New Orleans and were married in Washington, D.C., on Dec. 28, 2012.

Jacqueline and Lauren Brettner of New Orleans, who married in New York on Feb. 14, 2012.

Henry Lambert and Carey Bond, who live in New Orleans and were married in New York on Oct. 29, 2011.

Havard Scott and Sergio March Prieto of Shreveport, who were married in Vermont on July 9, 2010.

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Load-Date: June 27, 2014

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*Couples fight for state to honor marriages *** Comes down to how judge interprets high court's decision*

The Advocate (Baton Rouge, Louisiana)

June 22, 2014 Sunday, New Orleans Edition

Section: A; Pg. 01

Length: 1142 words

Byline: ANDREW VANACORE

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Body

Same-sex couples hoping to have their marriages from other states recognized in Louisiana will go before a federal judge this week confident that the U.S. Supreme Court has already vindicated their argument. And the lawyers defending Louisiana's ban on gay marriage will feel exactly the same way.

As with nearly identical cases working their way through other courtrooms across the country, the future of legal rights for same-sex couples in this state will come down to how a judge chooses to interpret the Supreme Court's decision last year in United States v. Windsor, which required the federal government to recognize gay marriages performed in states where those marriages are allowed.

Six Louisiana couples will argue that the Supreme Court's decision means Louisiana must recognize their marriages in other states, just as the federal government now does.

A victory for those couples would not necessarily mean that same-sex couples could get a marriage license in Louisiana, but those married legally elsewhere could adopt children in Louisiana together, file joint tax returns and enjoy other benefits extended to opposite-sex couples.

Lawyers for Attorney General Buddy Caldwell and the other named defendants will make the case that while the federal government may have to recognize all legal marriages, the Windsor ruling explicitly left it up to voters to decide whether gay marriage should be allowed in individual states.

In doing so, they also will be arguing that federal judges have gotten the question dead wrong in states such as Kentucky, Oklahoma, Virginia and Utah, where a rapid succession of court victories has given gay-rights activists hope that all barriers to marriage equality in the U.S. are falling, even if it may ultimately take another Supreme Court decision to finally wipe them out.

Whatever U.S. District Judge Martin Feldman decides after hearing oral arguments Wednesday, both sides see a major reckoning at hand.

"Everything is up in the air," said Kyle Duncan, the attorney hired by Caldwell to defend Louisiana's ban on same-sex marriage. "It's a remarkable moment for constitutional law to see all of these decisions coming out around the same time."

Duncan, of course, believes the reasoning behind nearly all of those decisions has been flawed.

Two separate but closely related questions are at issue: whether gay couples should be allowed to marry in a particular state, and whether same-sex marriages performed in states where it is legal then have to be recognized in states where it is not.

Some lawsuits have targeted marriage rights head-on, while others have gone after only recognition. So far, both arguments have been successful in district courts, where judges have relied heavily on the Supreme Court's Windsor precedent.

The case for recognition is this: If the federal government has to recognize a same-sex marriage performed legally in, say, New York, as the Supreme Court last year said it must, then so should Louisiana. After all, the state must acknowledge the marriage of a traditional couple who wed in New York, so to single out only gay couples would run afoul of the U.S. Constitution's guarantee of equal protection under the law.

By the same logic, some judges have decided that states cannot hand out marriage licenses to one type of couple and not another, striking down state bans on same-sex marriage in Wisconsin, Michigan, Virginia and elsewhere.

"Generally speaking, the government cannot treat different groups of citizens differently," said Chris Otten, chairman of the Louisiana Forum for Equality, which brought one of two cases now consolidated before Feldman.

Meanwhile, states hoping to keep same-sex marriage bans in place are pinning their argument on the same Windsor decision.

Justice Anthony Kennedy may have written that singling out same-sex marriages "demeans" gay couples and "humiliates" the children already being raised by them. But he also wrote that the states have a "historic and essential authority to define the marital relation."

The state's court filing in defense of Louisiana's same-sex marriage ban seizes on that authority. "The people in some states have recently used that authority to adopt same-sex marriage; most have not," it points out. "That is our constitution at work."

Whichever argument Feldman sides with, the case will almost certainly go next to the 5th U.S. Circuit Court of Appeals, which hears cases from Louisiana, Texas and Mississippi.

There seems little chance that Feldman's ruling will have an immediate effect before the appeals process plays out. None of the couples in the case are asking for the right to marry in Louisiana, so the judge's ruling is likely to be confined to recognition of existing marriages.

And even in states where couples have won such recognition cases, district judges often have put a stay on their decisions pending circuit court review, hoping to avoid chaos in the interim.

Once Feldman makes a decision on the Louisiana case, the 5th Circuit will have to sort out how to handle that case and a similar one that's already been appealed from Texas, which includes both a couple hoping to marry in Texas and another hoping to have their marriage elsewhere recognized.

The 6th U.S. Circuit Court of Appeals is in a similar position. It has five different cases before it, from Ohio, Michigan, Kentucky and Tennessee. The court will decide on each case individually, but the same panel of judges will hear arguments in a single session, aiming to deliver a consistent set of rulings.

Just as in Louisiana, the couples from Ohio are suing only for recognition of existing marriages, while those from Michigan want to get married in that state. But attorneys involved say there is an outside chance that if the 6th Circuit allows couples to marry in Michigan, then the ban in other states in the 6th Circuit could, more or less, fall automatically.

"An attorney general is free, if he reads a strong, sweeping decision, to decide to interpret that as binding law in Ohio," said Al Gerhardstein, a lawyer representing plaintiffs in two Ohio cases.

Not that Gerhardstein is counting on it. He has another lawsuit pending in Ohio, still at the district court level, that goes directly after marriage rights and should be decided by late summer, he said.

It also would be significant for Louisiana if the 6th Circuit were to issue a ruling that runs contrary to what the 5th Circuit, or any other circuit court, decides. That's because the Supreme Court tends to step in when circuit courts split on cases with similar issues involved.

In the Windsor decision, the Supreme Court stopped short of ruling on a fundamental question: whether the U.S. Constitution guarantees gay couples the right to marry, states' rights aside. But the swarm of legal challenges that have followed may force the justices to decide just that.

Graphic

Color Mug of Martin Feldman Color photo: Andrew Bond, left, and Nick Van Sickles are one of four legally married couples who will argue before U.S. District Judge Martin Feldman on Wednesday that a Supreme Court decision means Louisiana must recognize their marriages from other states, just as the federal government now does. Van Sickles holds their adoptive daughter Jules, 2. (Advocate photo by JOHN McCUSKER)

Load-Date: July 24, 2014

No Headline In Original

Grand Rapid Press (Michigan)

March 22, 2014 Saturday

Length: 1183 words

Body

By Greg Stohr

Bloomberg News

Hobby Lobby Stores' 600 U.S. craft shops close each Sunday, posting a notice that employees are spending the day with their families and at worship. It is a visible sign that the company is as focused on honoring God as it is on making money.

That dual mission is at the core of an ideological showdown over President Barack Obama's health care law, set for argument before the Supreme Court next week.

Hobby Lobby, a family-owned business that says it looks to the Bible for guidance, seeks a religious exemption from the requirement that employers cover birth control as part of worker-insurance plans.

First amendment case

Hobby Lobby is asking the court to give for-profit corporations the same religious freedoms as individuals, with potentially sweeping rights to opt out of laws they say are immoral. A victory for the company also would put a dent in a health care law that remains under siege on multiple fronts two years after the Supreme Court upheld its central provisions.

"Why as a family, because we've incorporated, do I have to give up religious freedoms, which are core to what our nation was founded on?" said Steve Green, the president of the Oklahoma City-based company and son of its founder.

The case comes to a court that four years ago expanded corporate speech rights under the First Amendment in the Citizens United campaign-finance case. The Hobby Lobby case focuses on the First Amendment's separate guarantee of "free exercise" of religion, along with a 1993 federal religious- rights law.

'They have No soul'

Critics of Hobby Lobby's position say religious rights are personal -- and impossible to square with the nature of corporations. That's especially the case given that corporations are designed to limit the legal liability of their owners, said Caroline Mala Corbin, a professor at the University of Miami School of Law.

Corporations "are not sentient, they have no soul, and they certainly do not have a relationship with God," Corbin said.

The justices will hear the Hobby Lobby case alongside a similar dispute involving Conestoga Wood Specialties, a woodworking business owned by a Mennonite family.

The companies' lawsuits are among at least 47 filed by for-profit businesses opposed to the contraception requirement, according to the Becket Fund for Religious Liberty, which represents Hobby Lobby.

The Tuesday argument will take place simultaneously with a lower court's consideration of a case that also challenges the health law.

In that case, being argued at a federal appeals court a half-mile away in Washington, opponents of the law contend that people who buy insurance on federally run exchanges aren't eligible for tax credits to cut their premiums.

Hobby Lobby was founded in 1970 by David Green, the son of a Christian minister. David Green is now one of five co-equal owners of the company, along with his wife, Barbara, and their three children. All five have signed statements declaring their religious faith and committing to run the business accordingly.

The company's religious character can be both subtle and unmistakable. In stores, Christian songs play in instrumental form, recognizable to adherents who know the music though not to other customers, Steve Green says. More visibly, Hobby Lobby buys hundreds of full-page newspaper ads at Christmas and Easter inviting people to "know Jesus as Lord and Savior."

At the same time, Hobby Lobby is a growing business, one with $3.3 billion in sales last year and ambitions to add 70 stores this year. It has at least 15,000 full-time employees.

The company has long provided health insurance to those employees. Under its plan, Hobby Lobby covers 16 of the 20 federally approved contraceptives. The ones that aren't included are Teva Pharmaceutical Industries' Plan B One-Step, Actavis Plc's Ella and two types of intrauterine devices.

Steve Green said those four can work as "abortifacients" by preventing a fertilized egg from being implanted in the uterus.

That's not a universal view. The manufacturers and the Food and Drug Administration say Plan B and Ella work primarily by preventing the release of an egg from the ovary. The American Medical Association considers pregnancy to begin when a fertilized egg is implanted in the uterus.

The high court case focuses less on the science behind contraception than on the reach of the 1993 Religious Freedom Restoration Act, a law enacted to nullify a 1990 Supreme Court decision that cut back constitutional protections for religious practices. The 1993 measure says that only in rare cases may the government "substantially burden a person's exercise of religion."

The Obama administration says that provision doesn't cover for-profit corporations. The government also contends that the Greens themselves can't claim a violation of their rights because the birth-control requirement doesn't impose any obligations on them as individuals.

Either way, the government says the contraceptive requirement doesn't impinge on religious rights because it is the woman, not the employer, who ultimately decides whether to use contraceptives.

"Those decisions by independent third parties are not attributable to the employer that finances the plan or to the individuals who own the company," U.S. Solicitor General Donald Verrilli argued in court papers.

The company's lawyers say that argument is a backdoor effort to challenge the sincerity of the Greens' beliefs.

The Greens "object to being forced to facilitate abortion by providing abortifacients, and that objection does not turn on the independent decisions of their employees," their lead lawyer, Kyle Duncan, contended.

The birth-control rule is part of a broader Obama administration effort to ensure coverage for preventive care. The rule stems from the health-care law's requirement that insurance plans provided by employers meet minimum standards.

Opponents say the administration has undermined its own case by carving out an exemption for churches and separately letting religiously affiliated nonprofit groups avoid paying for birth control directly.

"The government consistently has said, 'We don't assert an overriding compelling interest to overcome religious objections,'" said Kevin Baine, a Washington lawyer who filed a brief backing the companies on behalf of the libertarian Cato Institute.

Administration supporters counter that accommodations for churches and religious nonprofits shouldn't force similar allowances for profit-making corporations.

Although Hobby Lobby says it could be fined as much as $475 million a year for noncompliance, supporters of the requirement say the law gives employers another choice: not providing health coverage at all.

That would leave employees to buy insurance on the new exchanges set up by the health-care law. Employers taking that approach must pay a penalty of as much as $3,000 per employee.

"There's no employer mandate," said Walter Dellinger, a Washington lawyer and former solicitor general who filed a brief backing the administration. "It's a myth. You do not have to buy health insurance for your employees."

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Load-Date: March 23, 2014

NewsRoom

3/20/14 CQ News (Pg. Unavail. Online)
2014 WLNR 8037309

CQ News

March 20, 2014

CQ News

Business Challenge to Health Care Law's Contraception Mandate Heads to High Court

The long-running legal and political debate over the 2010 health care law's contraception mandate will get a public airing at the Supreme Court on Tuesday, with the justices set to evaluate whether the federal government may require private businesses to offer their female employees free birth control in violation of the company owners' religious beliefs.

In two similar cases that will be consolidated into a single oral argument, the justices will examine the health care law's requirement that large, for-profit businesses offer their workers insurance policies that cover certain contraception methods, such as the "morning-after" pill, without co-pays or other forms of cost-sharing for the employee. The requirement was set out in a rule from the Health and Human Services Department.

The issue has divided Congress and the lower courts, and the cases mark an important new legal test for the health care overhaul nearly two years after the Supreme Court upheld the individual insurance mandate at the heart of the law (PL 111-148, PL 111-152).

In the new cases, two private, Christian-owned companies -- the Oklahoma-based Hobby Lobby chain of craft stores and a Pennsylvania-based cabinet manufacturer named Conestoga Wood Specialties -- contend that the contraception mandate violates the Religious Freedom Restoration Act, a 1993 law that created a multi-part, statutory legal test for the government to overcome before it may require Americans to act in violation of their religious views.

Under that law (PL 103-141), the government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling government interest, and is the least restrictive means of furthering that compelling governmental interest." The bipartisan measure won enactment with little opposition after a 1990 Supreme Court ruling that the government interest had to serve only a "valid" state purpose.

The owners of Hobby Lobby and Conestoga Wood Specialties, who are backed by many congressional Republicans, argue that the Obama administration is violating the statute because it is giving them an untenable choice between providing contraception methods they oppose on religious grounds or paying a $100 penalty per day for each employee if they fail to comply. That amounts to a "substantial burden" that is not outweighed by any "compelling" government interest, the two companies argue, pointing to the fact that the administration has been willing to exempt other employers, such as religiously affiliated nonprofit charities, from the same mandate.

The administration, with the support of many congressional Democrats, counters that the contraception rule does not place a "substantial burden" on Hobby Lobby and Conestoga Wood Specialties because the company owners' claims are "too attenuated."

A group health plan covers many services, not just contraception, and it is up to individual employees whether they will even use that benefit, the government argues. The arrangement is effectively no different from a female employee using her company-paid salary to purchase birth control on her own, the government argues. The administration further contends that the contraceptive rule does advance a "compelling" government interest because it gives women free access to important preventative health care.

Companies as 'People'

The high court is likely to closely examine the dueling claims Tuesday, but a procedural question looms large over the arguments and may render all of the other considerations moot, depending on how the justices choose to answer it.

The Religious Freedom Restoration Act protects only "a person's exercise of religion," and the Obama administration and the companies are also at odds over whether a for-profit business should be treated as "a person" in the first place.

Citing the statute's legislative history, the administration contends that the law was never intended to apply to companies and that a firm such as Hobby Lobby, which operates more than 500 stores in more than 40 states and has more than 13,000 full-time employees, should not be treated the same way as "a person."

The companies counter that there should be no legal distinction between businesses and their religious owners, since the owners are individuals who are entitled to the law's protections, just as other Americans are.

If the court determines that the religious freedom law does not apply to companies, the other legal questions the cases raise -- such as whether providing free birth control to women is a "compelling" government interest -- may not receive the justices' attention at all. Some legal experts see that as the likeliest outcome, given the far-reaching precedents that might otherwise be set and the flood of subsequent lawsuits that a broad ruling in favor of the companies might set off.

"The court is going to have to write an opinion, and that opinion is going to have to govern a lot of cases later," Tom Goldstein, a partner at the Goldstein & Russell law firm and frequent advocate before the Supreme Court, said at a recent forum at the Kaiser Family Foundation.

Looming over the debate on the contraception mandate is the Supreme Court's contentious 2010 decision in Citizens United v. Federal Election Commission, in which it held that corporations, like people, have free-speech rights under the First Amendment. The 10th Circuit Court of Appeals, which ruled in Hobby Lobby's favor last year, cited the Citizens United campaign finance case in applying its logic.

Bigger Implications

The two contraception cases have attracted widespread interest, including from more than 80 organizations and other parties who filed amicus briefs with the high court. The arguments are seen as a key test not only for the 2010 health care law, but for broader health policy and even civil rights debates that have emerged across the country.

At the same Kaiser forum, Laurie Sobel, a senior policy analyst at the foundation, said if Hobby Lobby and Conestoga Wood Specialties are successful in their challenge, business owners could have a strong precedent to raise religious challenges to other federal health care mandates, including ones related to blood transfusions and vaccinations.

Sobel and many other experts also have connected the contraception cases to an emerging spectrum of state legislative proposals that seek to give businesses the right to turn away customers based on their owners' religious views. Arizona Gov. Jan Brewer, a Republican, last month vetoed the most high-profile of such proposals, a bill that would have allowed private businesses to refuse to provide services to gay and lesbian clients because of the owners' religious objections to homosexuality.

"While this started as part of the [health care law] and preventive services for women, the ramifications can go well beyond that," Sobel said.

But in an interview with CQ Roll Call, an attorney representing Hobby Lobby rejected the assertion that the company is seeking a "slippery slope" ruling from the Supreme Court that could change the nation's civil rights landscape.

"There are all kinds of crazy claims we can dream up," said Kyle Duncan of the Becket Fund for Religious Liberty. Such hypotheticals, he said, "take the focus off the real question in the case, which is whether these plaintiffs deserve some kind of relief."

Melissa Attias contributed to this article.

---- Index References ----

Company: RUSSELL BREWERIES INC

News Subject: (Health & Wellness (1HE60); Legal (1LE33); Judicial Cases & Rulings (1JU36))

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Language: EN

Other Indexing: (Melissa Attias; Jan Brewer; Tom Goldstein; Kyle Duncan; Laurie Sobel)

Word Count: 1201

11 February 2014

Defending Religious Freedom

Kyle Duncan is Lead Attorney for Hobby Lobby Supreme Court Case

A Columbia University law alumnus says he simply wants to serve God as he prepares to enter the nation's highest judicial stage in his quest to champion religious liberties.

In November, the U.S. Supreme Court agreed to hear twin cases testing the strength of the Religious Freedom Restoration Act. The 1993 measure commits the federal government to safeguarding an individual's "inalienable right" to exercise religion.

Kyle Duncan, Columbia LL.M. '04, is the lead attorney for Hobby Lobby Stores, Inc., which is challenging a regulation within the federal healthcare law requiring employers to offer access to so-called morning-after pills. In addition to the retailer's claims under the religious-freedom act, the court plans to examine constitutional issues.

That case and a similar lawsuit from Conestoga Wood Specialties Corporation involve religious liberty objections by family businesses to provisions in the Patient Protection and Affordable Care Act. On spiritual grounds, they oppose the act's requirement for employers to expand health coverage to include contraceptives linked to early abortions.

The Hobby Lobby case "will answer the question of whether religious faith extends to people who are simply trying to earn a living," said Duncan. "Churches and charities have religious freedom. The government says there's no religious freedom if you're running a business."

Duncan, who is representing Hobby Lobby on a pro-bono basis via The Becket Fund for Religious Liberty, readily asserts the chain's owners have a "meaningful, valid rejection of the mandate."

For Duncan, his work as general counsel for the Washington, D.C.-based non-profit is tied to his principled embrace of individual liberties and his personal faith. "We've made a basic commitment in this country to respect religious conscience," he said.

In the case of Hobby Lobby, the Green family has openly reflected its Christian beliefs through its operation of craft stores for four decades. Likewise, the Hahn family's Mennonite faith is embedded in its longtime woodworking business.

In June, a majority of the justices on the 10th U.S. Circuit Court of Appeals agreed with Hobby Lobby, ruling corporations have similar religious rights to humans. The prevailing jurists said the contraception requirement posed a violation of the corporation's religious freedom under federal law, according to news reports.

Two other cases handled in the 3rd and 6th appellate circuits held for-profit corporations do not have religious rights. In an unusual twist, Hobby Lobby welcomed the Supreme Court's decision to hear the government's appeal of the arts-and-crafts chain's victory, hoping for a favorable resolution to the so-called circuit split.

"This is a highly important case that the court needs to resolve," Duncan said. "It's the kind of

issue that the Supreme Court needs to decide."

In part, the justices will be asked if they agree with the "corporate-conscience" argument, meaning that for-profit corporations can hold religious beliefs and, thus, opening the door to religious exemptions from federal mandates, according to news reports.

At a personal level, "when the Supreme Court decides to weigh in, it's extremely satisfying," Duncan said. "It's important to my client and the nation."

Hobby Lobby is among 40 or so corporations, ranging from industrial-material shredding to property management, seeking exemptions similar to the ones the healthcare law grants for nonprofit religious organizations and churches.

In tackling the central issues, the Supreme Court is likely to decide whether such businesses amount to "persons" under the religious act and whether the U.S. Congress meant to equate corporations as persons. If the high court decides a business is incapable of practicing faith, it may decree such firms can exercise the religious preferences of their owners.

As for Duncan, the father of five children and practicing Catholic, said he is simply motivated to use his talents to honor his Creator. "All I really want to do is what God wants me to do with the talents He gave me," said Duncan. "The Supreme Court hears very few cases."

President Barack Obama, Columbia '83, Harvard Law '91, signed the healthcare act in March 2010 as his signature piece of legislation and as the most significant regulatory overhaul of the U.S. healthcare system since the introduction of Medicare and Medicaid in 1965. U.S. Solicitor General Donald Verrilli, Yale '79, Columbia, '83, is representing the government in its case against Hobby Lobby.

As for Duncan, the Louisiana native is not a stranger to the high court. In 2010, Duncan argued Connick v. Thompson before the Supreme Court, obtaining the reversal of a $20 million civil-rights judgment against a district attorney's office. He also has worked on another 10 or so cases that have landed before the court.

Duncan, whose diverse background includes a stint at the University of Mississippi as a law professor and as Louisiana's solicitor general, said he relishes his new role championing liberties for the Becket Fund, which seeks to protect expressions of faith.

"These are areas of the law that are incredibly rewarding. We need people who are fighting in these realms," Duncan said. "They are important to our Constitution and in our public interest."

Washington, D.C. – Hobby Lobby, the family-owned arts and crafts business founded by David and Barbara Green, will ask the U.S. Supreme Court today to protect them from being forced to violate their deeply held religious beliefs or be forced to pay severe fines. The brief will be filed today at the Supreme Court, with the government filing its own brief in Hobby Lobby's companion case by 11:59 p.m. EST.

In preparation for oral arguments on March 25, 2014, join us for a press briefing to discuss the legal merits, government's position, and the implications of this case as it arrives at the Supreme Court.

What:
Press briefing for *Sebelius v. Hobby Lobby Stores, Inc*.

Who:
Kyle Duncan, Becket and lead counsel for Hobby Lobby Stores, Inc.

When:
February 10, 2014, 3:30 p.m. EST

Where:
800.704.9804 Participant code: 743216#

Becket *is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 19 years its attorneys have been recognized as experts in the field of church-state law. Becket recently won a 9-0 Supreme Court victory in* Hosanna-T*abor v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half century*."

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Duncan Attach 0579

How Much Money Is Hobby Lobby's Morality Worth?

Atlantic Online

February 11, 2014 Tuesday

Length: 1035 words

Byline: Emma Green

Body

How much money is morality worth? This is one of the questions looming in the recent slew of court cases concerning birth control and the Affordable Care Act. As judges at the district, federal, and Supreme Court level decide whether religious groups and businesses can be exempt from new rules about contraceptive coverage, organizations are having to make a choice: Are moral objections to birth control and pregnancy prevention worth millions of dollars?

Under the health care law, big companies that have made recent changes to their insurance plans are required to cover 20 FDA-approved forms of birth controlor face significant fines if they refuse. Only companies with more than 50 employees have to provide insurance coverage; small businesses are exempt. Large companies can also choose to opt out of providing plans, but at a significant cost: $26 million in fines every year, plus any intangible losses that might come from not being able to offer insurance as an employee benefit.

One of the most prominent cases, *Sebelius v. Hobby Lobby*, will be argued before the Supreme Court in late March. It concerns David and Barbara Green, the owners of the Hobby Lobby craft store chain. The couple have expressed moral objections to four of the 20 forms of contraception included in the mandatespecifically, types of birth control that keep a fertilized egg from implanting in the uterus.

In a brief *filed on Monday,* their lawyers argue that religion plays a big role in how the Greens run their company: They keep the stores closed on Sundays; they play Christian music; they offer free spiritual counseling services to employees. Requiring the Greens and their company to cover these kinds of birth control would be a burden on their ability to practice their religion, their lawyers say; the Greens feel like they would be complicit in helping others do something they find morally wrong.

In a press call on Monday, one of Hobby Lobby's lawyers from *the Becket Fund for Religious Liberty* said the Greens intend to refuse to cover these kinds of contraception no matter what, even if they don't win their Supreme Court case. "The Green family has always stood by their convictions, and they will continue to stand by those convictions no matter what happens in federal court," said Kyle Duncan, the lead counsel on the case. If they were to lose in court, this stance would almost certainly be a financial catastrophe for Hobby Lobby: They would be forced to drop their insurance plan and pay the $26 million penalty, or else provide insurance without birth control and pay up to $100 per day per employee for not complying with the health care law. With 13,000 employees currently covered by Hobby Lobby's plan, their legal team estimates that this could mean up to $1.3 million in fines every day, or $475 million each year.

That's a pretty big hit for a company's bottom line. The Greens have said that they feel a religiously motivated obligation to provide their employees with health insurance, but it seems highly implausible that they would pay the government up to $475 million each year just to keep offering their current plan. Although the Greens are apparently quite wealthy *David Green was said to be worth $5 billion as of September 2013*any fine this substantial would definitely affect their business. That might mean layoffs, pay cuts, benefit reductions, and closed storesall of which would hurt their employees.For their part, the Greens seem to believe that the possibility of being inadvertently responsible for a terminated pregnancy is more morally objectionable than any of these possibilities. But it doesn't seem like any path will leave the Greens with an entirely clear conscience.

In the case of Hobby Lobby, this is all speculative. But in other cases, it's not. In January, *Notre Dame University became the only religious non-profit organization* to face a setback in its legal fight against the birth control coverage rules for religious non-profit groups: Although the university has a lawsuit pending, a judge denied its request for a stay on enforcement, meaning that it became fully responsible for complying with the law or paying penalties starting on January 1. Notre Dame's situation is different from Hobby Lobby's because the university is a non-profit organization, and the government has made a different kind of accommodation for these groups. The moral question is similar, though: The school says it has a religious objection to being involved in any way with providing insurance coverage for birth control. But when faced with the choice of complying or paying a hefty fine, Notre Dame chose to comply, at least until its court case is resolved.

Is birth control a matter of public health or a matter of conscience?

Does this mean that Notre Dame has weaker moral convictions than the Greens? The glib answer would be "yes"facing the possibility of a heavy financial burden, Notre Dame showed that its morals could be "bought," so to speak. But that assessment seems too simple. The university is a large employer, responsible for the education of several thousand bright young people each year. In this case, paying a multimillion dollar fine would seem like shallow ethical choice: It might protect the conscience of Notre Dame's administrators, but it would cripple the university's ability to do good in other ways.

Of course, none of this touches on the moral question that's arguably at the center of this debate: Should organizations be compelled by the government to cover birth control in their insurance plans? This is not a matter of whether women should be able to buy birth controlit's about whether birth control is affordable, and who should have to offset the cost. In the Hobby Lobby case, the government is arguing that birth control access improves the quality of life for women and men, creating better sexual health and facilitating better family planning. But the Greens and other religious groups see it differently: To them, some kinds of birth control negate life altogether. In their view, refusing to cover these four kinds of birth control gives them the moral high ground. The question is how much they're willing to pay to stay there.

Load-Date: March 4, 2014

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Hobby Lobby Case Is About Religious Freedom Not 'Women's Health,' Says Attorney

BY MICHAEL GRYBOSKI , CHRISTIAN POST REPORTER

Feb 11, 2014 | 8:58 AM

An attorney with a religious freedom organization representing a retail chain against the federal government over the controversial "preventive services" mandate has stated that the case is about religious freedom and not women's health.

Kyle Duncan, attorney with the Becket Fund for Religious Liberty and lead counsel for Hobby Lobby Stores Inc., was the featured speaker at a conference call press briefing held Monday afternoon.

The briefing was in regards to Hobby Lobby's suit against the Department of Health and Human Services over the "preventive services" mandate, which compels businesses to cover various forms of contraceptive in employee health insurance.

Duncan told The Christian Post that contr
which will be argued before the United St
health.

"The federal government has exempted m
cover any contraceptives in any women's

"The government itself has put all sorts of exceptions into this law, but even more than that, the Greens and Hobby Lobby have generous health benefits for women and for men."

During the press briefing, Duncan gave an overview of the Hobby Lobby case and provided arguments in favor of the Green family, who own and oversee the Oklahoma-based business.

"The Greens do not object to covering 16 out of 20 FDA-approved contraceptives. In fact, their company's generous health plan covers all mandated services for women, with the exception of only four contraceptive methods that can terminate human life in the womb," said Duncan.

The briefing came on the day that the Becket Fund filed its brief in the Hobby Lobby case, which was also sent out to media, including CP.

"On the merits, this is one of the most straightforward violations of the Religious Freedom Restoration Act this Court is likely to see," reads the brief in part.

"Respondents' religious beliefs prohibit them from providing health coverage for contraceptive drugs and devices that end human life after conception. Yet, the government mandate at issue here compels them to do just that, or face crippling fines, private lawsuits, and government enforcement."

Since the highest court in the U.S. agreed to hear the Hobby Lobby lawsuit, several amicus briefs were filed both for and against the plaintiffs.

One amicus brief filed by the Freedom From Religion Foundation argued that Hobby Lobby was trying to impose a "radical redefinition" of the concept of religious freedom.

"This case is particularly important to FFRF, as its two principal founders, Anne and Annie Laurie Gaylor, formed the organization partly in response to unwarranted governmental and religious intrusion into a woman's reproductive health decision," reads the FFRF brief in part.

"Thus, FFRF was organized in part to figh
oppression – patriarchal religion and its in

Hobby Lobby's case will be heard in conj
Specialties.

NewsRoom

2/11/14 CQ News (Pg. Unavail. Online)
2014 WLNR 4306830

CQ News

February 11, 2014

CQ News

Health Care Law's Birth Control Rule Fought Over in New Legal Briefs

As legal challenges to the health care law's contraception rule draw closer to a March argument before the U.S. Supreme Court, lawyers for the Hobby Lobby craft store chain and the Department of Justice are filing briefs that debate whether the rule violates business owners' religious freedoms.

The Becket Fund for Religious Liberty, which is representing Hobby Lobby, outlined the key points of their client's argument on a call with reporters Monday afternoon and announced that brief had been filed. The Department of Justice also filed a brief Monday in a similar suit brought by the Pennsylvania company Conestoga Wood Specialties; that case has been consolidated with the Hobby Lobby case for the high court arguments on March 25.

Both lawsuits are part of a second wave of challenges to the health care overhaul (PL 111-148, PL 111-152) after the Supreme Court largely upheld the law in June 2012. The cases are being followed closely by members of Congress, who filed amicus briefs supporting both sides of the challenges late last month.

The deadline for the final round of briefs is March 12, when the Obama administration will file a response to the Hobby Lobby brief and Conestoga will respond to the government, according to a DOJ spokeswoman.

The two cases are centered on a rule from the Department of Health and Human Services that requires most employers to cover birth control as a preventive service without cost-sharing under the overhaul. Churches and other religious institutions are exempt from the requirements, while religious nonprofits such as hospitals were given a workaround so they do not directly arrange or pay for the coverage.

But the question raised by the Hobby Lobby and Conestoga suits is whether the requirements violate religious freedom when it comes to for-profit businesses, which were not extended a workaround.

In their brief filed Monday, lawyers for Hobby Lobby said that is the situation. The brief said the company is protected by the Religious Freedom Restoration Act (PL 103-141) because the law applies to both individuals and corporations.

It also argued that the statute doesn't distinguish between for-profit and non-profit corporations, maintaining that "the government is forced to concede that RFRA applies to non-profit corporations and offers no support for the notion that a corporation's ability to exercise constitutional rights turns on its tax status."

Kyle Duncan, general counsel for the Becket Fund and counsel for Hobby Lobby, said that their argument is that the "plain terms" of federal statute protect religious exercise no matter where it occurs. No loophole exists in the First Amendment that excludes business owners, he said.

"The only question here is whether profits and religion can never mix," Duncan said during the Monday conference call. "But that is a strange idea and nothing in the law supports it."

The brief also said that the rule "substantially burdens" Hobby Lobby's religious freedom because it requires the company to cover four contraceptive methods that the owners object to on religious grounds or face significant fines and other consequences. Hobby Lobby's owners do not want to offer four drugs and devices in company health care plans: the emergency contraceptives Plan B and Ella and two types of intrauterine devices.

The brief also said the government "has not come close to carrying its burden of demonstrating that the mandate satisfies strict scrutiny," maintaining that there are less restrictive ways to achieve the goals of the policy. And it said the government cannot argue it is trying to institute a comprehensive system of providing benefits to everyone because other groups are already exempt from the requirements.

"There's simply no reason why the government cannot give the Greens an exemption from the mandate," Duncan said, referring to the family that owns the craft store chain. "After all, it's already exempted millions of other people, some for religious reasons and others purely for convenience."

In its latest brief in the related Conestoga case, the administration did not contest the business owners' religious opposition to some forms of contraception. But their beliefs do not justify an exemption from the business' obligation to comply "with a generally applicable law that regulates only that corporation (not its individual owners) and that provides Conestoga employees with privately enforceable health benefits," the government said.

For one thing, the brief argued that the requirement does not violate the First Amendment's free exercise clause because the provision is "a neutral law of general applicability." Phased-in compliance with new laws and statutory exemptions are common, it said.

The brief also said that Conestoga does not count as a person exercising religion under RFRA and that its claim "also violates fundamental corporate-law principles because it attributes the religious beliefs of the corporate shareholders to the corporation itself."

In addition, the government disputed the idea that owners can challenge the requirement as individuals because it doesn't impose any "personal obligations" on the owners.

"While religious accommodations are available in a variety of contexts, there are powerful legal and practical reasons to exclude requests from for-profit corporations (and individuals in their capacity as owners, managers, or directors) to exempt themselves from laws meant to protect others," the brief said. "Such accommodations would visit tangible harm on an identifiable group of third parties, namely the corporation's employees and their covered dependents."

The administration also said that claims that any distinction between nonprofits and for-profits is arbitrary "is impossible to square with this Nation's traditions" and would discourage lawmakers from making accommodations for religious nonprofits.

It said that the requirement is backed by compelling interests, including public health and gender equality, and that it represents the least restrictive way of accomplishing them.

Although these two suits were both brought by for-profit corporations, opposition to the contraception rule isn't limited to businesses. Religious nonprofits have also filed lawsuits challenging the requirement and the Supreme Court agreed to provide the Catholic organization Little Sisters of the Poor with a temporary reprieve last month.

Source: CQ News
Round-the-clock coverage of news from Capitol Hill.

---- Index References ----

News Subject: (Civil Rights Law (1CI34); Legal (1LE33); Health & Wellness (1HE60); Judicial Cases & Rulings (1JU36); Intellectual Freedoms & Civil Liberties (1IN08))

Industry: (Women's Health (1WO30); Contraception (1CO66); Healthcare (1HE06); Healthcare Practice Specialties (1HE49))

Language: EN

Other Indexing: (Kyle Duncan)

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WASHINGTON – Hobby Lobby, the family-owned arts and crafts business founded by David and Barbara Green, asked the U.S. Supreme Court today to protect them from being forced to violate their deeply held religious beliefs or be forced to pay severe fines. The written brief filed today at the Supreme Court, calls a federal mandate to provide objectionable drugs and devices "one of the most straightforward violations … this Court is likely to see" of a 1993 law preserving the free exercise of faith.

Sebelius v. Hobby Lobby, to be argued at the Supreme Court March 25, 2014, will determine whether the government has the power to force family business owners to act against their faith based solely on their companies' form of organization. Specifically, the government is mandating that Hobby Lobby provide four potentially life-terminating drugs and devices through their health insurance plans or face severe fines, even as it concedes that doing so will violate the Green family's beliefs. The Greens and their family businesses have no moral objection to providing 16 of the 20 FDA-approved contraceptives under the HHS mandate, and they provide a broad range of contraceptives at no additional cost to employees under their self-insured health plan.

Hobby Lobby's brief calls on two centuries of high court rulings to counter the government's reasoning that the Greens' rights as individuals cannot be exercised through their family-owned corporation. The brief insists that this freedom does not "turn on [the Company's] tax status," and further states that the Administration cannot "divide and conquer" the Greens' religious liberties from those of Hobby Lobby to make those rights "simply vanish."

"Hobby Lobby's latest brief brings into even sharper focus the issue at the heart of this landmark case: No one should be forced to give up their constitutionally protected civil rights just to go into business," **said Kyle Duncan, General Counsel for Becket and counsel for Hobby Lobby**. "The filing demonstrates in no uncertain terms that the government's efforts to strip this family business of its religious rights represent a gross violation of the Religious Freedom Restoration Act and the First Amendment. We are hopeful that the Supreme Court will uphold the Tenth Circuit's strong affirmation of the Greens' rights to live out their deeply held beliefs in every aspect of their business."

In July, the 10th Circuit Court of Appeals granted Hobby Lobby a preliminary injunction preventing the government from forcing the family business to provide the objectionable drugs and devices. The government then appealed to the U.S. Supreme Court. "The government has taken the extreme position that Americans forfeit their constitutional rights when they open a family business," said Duncan. "That rule would give the government broad powers to restrict religious freedom. People of all faiths should be concerned." There are currently 93 lawsuits challenging the mandate, with 90% of the cases winning relief.

For more information, or to arrange an interview with one of the attorneys, please contact Melinda Skea, media@becketlaw.org*, 202.349.7224.*

Becket *is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 19 years its attorneys have been recognized as experts in the field of church-state law. Becket recently won a 9-0 Supreme Court victory in* Hosanna-T*abor v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half century*."

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DIOCESES WIN ROUND AGAINST HEALTH RULE; FEDERAL GOVERNMENT LIKELY TO APPEAL DECISION REGARDING BIRTH CONTROL COVERAGE FOR WORKERS

Pittsburgh Post-Gazette

December 21, 2013 Saturday, SOONER EDITION

Section: LOCAL; Pg. A-1

Length: 929 words

Byline: Rich Lord, Pittsburgh Post-Gazette

Body

Western Pennsylvania's Catholic groups won another round in their fight against the Affordable Care Act's contraception mandate Friday, likely setting up an appeal by the federal government as the cases climb the ladder toward the U.S. Supreme Court.

U.S. District Judge Arthur J. Schwab's decision granting permanent injunctions in lawsuits filed by the Roman Catholic dioceses of Pittsburgh and Erie against federal agencies and officials puts those cases among a handful nationally that are ready for appeals courts.

It also breaks a tie as 43 lawsuits against the mandate by religious organizations inch through federal courts. Prior to Friday, the Catholic Archdiocese of New York had won its case, while a group called Priests for Life saw its bid dismissed.

"The government will likely appeal to the next level," which is the 3rd U.S. Circuit Court of Appeals, Bishop David Zubik of the Pittsburgh diocese wrote in a statement. "But the government will then have to convince those judges that there were legal flaws in Judge Schwab's decision, a decision based on a fulsome record of evidence we submitted with little evidence submitted by the government.

"As a result, getting this case reversed could be difficult, like trying to reverse a referee's decision on the football field."

Requests for comment from the Department of Justice, which is defending the cases for the federal agencies, received no response.

"We disagree with the court," said Jennifer Lee, staff attorney at the Center for Liberty of the American Civil Liberties Union, which has backed the government in the contraception mandate cases. "While religious freedom is fundamental, it does not permit the plaintiffs to discriminate against their female employees and prevent third party insurance companies from providing contraceptive coverage."

The act compels most employers to provide health insurance that includes coverage for contraception, reproductive counseling and abortion-inducing drugs. Churches are exempt.

Religious nonprofit organizations, though, get what's called an accommodation. They must tell their insurance administrators that they object to that coverage. The administrators must then provide the coverage to all employees at no charge to the organization, and seek federal reimbursement.

Last month Judge Schwab granted a preliminary injunction to the nonprofit organizations tied to the two dioceses. He found that the accommodation required them to act against conscience, violating freedom of religion.

On Friday attorney Paul "Mickey" Pohl, representing the Catholic organizations, filed a motion asking to make the injunction permanent. Department of Justice attorneys filed a notice confirming that because the judge has already found in the Catholic groups' favor, and there is no new evidence to present, they did not oppose ending the case.

"In doing so, defendants in no way suggest that they agree with plaintiffs' characterization of the issues raised in these cases," the government attorneys wrote. "Defendants respectfully reserve all arguments stated in their oppositions to plaintiffs' motions ... for the purposes of appeal."

The bishops, the judge then wrote, "shall not have to sign or authorize any entity under their control to sign the self-certification form" triggering contraception coverage.

He then closed the case.

Had they not received an injunction, and had they refused to trigger the accommodation process, organizations like Catholic Charities of the Diocese of Pittsburgh and the Prince of Peace Center near Erie could have faced fines estimated at millions of dollars each year.

They remain subject to other provisions of the act.

"This has never been an argument over the Affordable Care Act," Bishop Zubik wrote in his release. "The Church has always supported universal access to health care coverage for everyone."

Judge Schwab's ruling doesn't affect any organizations other than the plaintiffs.

Will it have broader ramifications as it moves through the appeal process? That depends on how the U.S. Supreme Court decides to handle the 43 cases brought against the mandate by church groups, 46 brought by businesses and two class-action lawsuits.

The fact that the Pittsburgh and Erie dioceses have won permanent injunctions puts them at the head of the pack, increasing the chance that they'll get to the nation's top court, said Kyle Duncan, general counsel for The Becket Fund for Religious Liberty. That organization is involved in several lawsuits against the mandate, though not the Western Pennsylvania cases.

The Supreme Court could decide some of the involved issues when it rules on the business cases. The nine justices are expected to hear in March arguments in cases brought by Hobby Lobby Stores Inc. and other firms with religious owners. That would likely lead to a June decision on whether the contraception mandate applies to them.

"You have the government saying, look, all we're asking to do is make a benefit available," said Mr. Duncan. "The employer is saying, no, you are forcing me to underwrite, subsidize, facilitate very specific kinds of benefits."

A Supreme Court decision on the business cases may not address all of the issues in the church group lawsuits.

That's because the religious organizations have the accommodation under the act, which the businesses don't have, said Ms. Lee. In the ACLU's view, the accommodation eliminates any burden that the mandate would otherwise place on the religious groups.

Mr. Duncan disagreed, saying the accommodation doesn't address "a pretty important question of moral complicity."

Notes

Rich Lord: *rlord@post-gazette.com* /

Load-Date: December 25, 2013

End of Document

Affordable Care Act's Coverage of Contraception Under Court Review

New Jersey Law Journal

December 2, 2013 Monday

New Jersey Law Journal

Section: Pg. 8; Vol. 214; No. 9

Length: 435 words

Byline: Tony Mauro THE NATIONAL LAW JOURNAL

Body

T he U.S. Supreme Court on Tuesday set the stage for its second major look at the constitutionality of the Affordable Care Act, agreeing to review the requirement that most employers provide health insurance coverage for contraception, including "morning after" methods.

Employers who object to the requirement on religious grounds have filed dozens of suits against it, two of which were granted and consolidated by the court on Tuesday: Sebelius v. Hobby Lobby Stores and Conestoga Wood Specialties v. Sebelius.

While narrower than the sweeping and unsuccessful attack on the entire statute in last year's NFIB v. Sebelius, the new dispute is more deeply emotional, pitting strongly held views about religious freedom against equally strong views voiced by women about their reproductive rights.

"The choice about whether to use birth control should be between a woman and her doctor, and no boss should be able to interfere," said Cecile Richards of Planned Parenthood Federation of America Tuesday as she announced a nationwide campaign to tell the court how important the issue is.

But David Green, founder of the Hobby Lobby chain of stores and lead plaintiff challenging the requirement, said he was also advocating for a fundamental right. "Business owners should not have to choose between violating their faith and violating the law," said Green, who asserted "the right of our family businesses to live out our sincere and deeply held religious convictions as guaranteed by the law and the Constitution."

The court's action raises the strong possibility of a dramatic rematch between Solicitor General Donald Verrilli Jr. and former Solicitor General Paul Clement, who squared off the last time the court examined the sweeping law in NFIB v. Sebelius.

Clement, who was the lead advocate in the 2012 case, was recently brought in by the Becket Fund for Religious Liberty as part of the legal team for Hobby Lobby, an Oklahomabased chain of arts and crafts supply stores that operates "in a manner consistent with Biblical principles," according to its mission statement.

Asked if he expected to argue the case, likely to be heard in March, Clement declined to comment. Kyle Duncan, general counsel of the Becket Fund and Hobby Lobby's lead counsel, said "it is certainly possible" Clement could argue, but it was too early to say.

A spokesman for President Barack Obama, while not commenting on specifics, welcomed the court's decision to resolve the issue. "We believe this requirement is lawful and essential to women's health and are confident the Supreme Court will agree," a White House release stated.

Load-Date: December 2, 2013

End of Document

SCOTUS to weigh contraceptive rule

Politico.com

November 26, 2013 Tuesday 6:30 AM EST

Length: 1176 words

Byline: Jennifer Haberkorn

Body

The Supreme Court has agreed to revisit Obamacare, this time to review the requirement that most employers provide contraceptive coverage in their employee health insurance plans.

On Tuesday, the court accepted two cases centered on the issue of business owners' religious expression.

It's another test for the embattled health care law, which is already struggling under the weight of a botched website and a political backlash after millions of Americans saw their current insurance plans cancelled for 2014.

(Also on POLITICO: It's not Obamacare, it's business)

The case could also rekindle the same clash that unfolded during the 2012 presidential campaign, when Republicans attempted to make the contraception rule an important issue. A ruling against the contraception coverage rule wouldn't knock down the whole health law, but it would give more fuel to its opponents.

This is not Obamacare's first trip to the high court. In 2012, the court ruled in favor of another controversial piece of the law -- the individual mandate, which requires most Americans to have health insurance. Chief John Roberts sided with the liberal wing of the court to uphold the mandate, a surprise move that kept a key piece of the law intact.

The court also ruled at the time that states could opt-out of the Medicaid expansion designed to cover low-income Americans. About half the states did opt out, meaning that in some states poor people can get covered and in others they remain uninsured.

The Affordable Care Act requires most large employers to provide health insurance that includes coverage of certain treatments and medicines, including several forms of contraceptives. Under pressure on the contraception mandate, the White House gave an exemption to certain non-profit religious organizations but not to private employers generally.

Contraceptive coverage proved to be popular with most Americans, especially unmarried women - key supporters of President Barack Obama.

In Sebelius v. Hobby Lobby Stores Inc., the appeals court temporarily lifted the requirement that the craft-store chain provide contraceptive coverage for their workers. The company cited religious reasons.

(Also on POLITICO: TOP 5 anticipated Supreme Court decisions)

A separate lower court ruled against Conestoga Wood Specialties Corp., requiring the Pennsylvania company to follow the contraception rule.

The Obama administration wants the high court to resolve the split in the lower courts and uphold the contraception rule.

The White House released a statement Tuesday calling the requirement for private companies to provide contraceptive coverage "lawful and essential to women's health." It pointed to what it called a "commonsense" exception for religious institutions.

"These steps protect both women's health and religious beliefs, and seek to ensure that women and families--not their bosses or corporate CEOs--can make personal health decisions based on their needs and their budgets," said White House press secretary Jay Carney in the statement.

On Capitol Hill, Rep. Joe Pitts (R-Pa.), whose district includes Conestoga, immediately voiced support for the justices' decision. "I am very pleased that the Supreme Court will consider whether Obamacare is violating the religious freedom of employers," he said. "Conestoga and people of faith across the nation are waiting to see if the court will protect their constitutional right to live out that faith in the marketplace."

(PHOTOS: Who's who on the Supreme Court)

And Sen. Ted Cruz (R-Texas) also weighed in quickly, welcoming the high court's review. "Illegal mandate tramples religious freedom, should be struck down," he tweeted.

The central question in both cases is whether a for-profit, secular corporation can claim constitutional protection from the provision based on religious grounds. The two cases will be combined and given one hour of oral arguments before the justices next spring.

The justices did not announce whether they will hear cases brought by other companies, including Autocam Corp., and Liberty University.

At issue is whether the Religious Freedom Restoration Act of 1993 prohibits the government from requiring a business and its owners to provide contraceptive coverage in employee health plans if the owners object on religious grounds. In ruling in favor of Hobby Lobby, the U.S. Court of Appeals for the 10th Circuit said that since the Supreme Court extended constitutional protections to corporations for political speech in the Citizens United case, religious expression protections should be extended as well.

Hobby Lobby's owners, David and Barbara Green, say they run their company in accordance with their strongly held Christian beliefs, with all stores closed on Sundays. The Greens say they have no argument against including preventive contraceptive -- such as the birth-control pill or diaphragm -- in their employee insurance plans and, in fact, have long done so. But they say their beliefs forbid them from providing the morning-after pill as part of those plans; the drug, which could prevent a fertilized egg from implanting in the uterus, is akin to abortion, they say.

If the company fails to comply with the contraceptive mandate, it faces steep fines. Dropping all coverage for employees would also make Hobby Lobby subject to millions of dollars in additional fines a year.

Conestoga is a Mennonite-owned company with similar objections, but its request for an injunction was denied by a lower court.

The cases will decide "who gets to exercise religion -- it's really that simple," said Kyle Duncan, general counsel of the Becket Fund, which is representing Hobby Lobby. "The idea that the protection of religious liberty is confined to only certain pursuits ... from our perspective, that's disturbing."

The Justice Department argues that the coverage requirement does not pose a substantial burden on religious liberty but rather advances a "compelling" government interest in promoting preventive health care -- to allow for healthier mothers and babies in planned pregnancies. The department also argues that the owners chose to incorporate their business, so they cannot choose corporate protections, such as limited personal liability, on one day and choose personal protections, such as religious freedom, on another.

Supporters of the provision say that an adverse ruling could not just restrict access to contraceptives in employer health plans, it could also allow employers to impose other religious beliefs on employees.

A ruling against the administration on this issue is "in essence saying that these corporations ... can impose their religious beliefs on their employees," said Louise Melling, deputy legal director of the American Civil Liberties Union. She pointed to potential cases in which an employer tries to pay men more than women, based on the theory that men should be heads of households; restrictions on providing mental health care or blood transfusions based on religious beliefs; or prohibitions on providing insurance coverage to same-sex partners of employees.

Load-Date: November 27, 2013

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WASHINGT**ON, Nov. 26, 2013** – The U.S. Supreme Court today agreed to take up *Sebelius v. Hobby Lobby Stores, Inc.*, a landmark case addressing the Constitutionally guaranteed rights of business owners to operate their family companies without violating their deeply held religious convictions.

The nation's highest court accepted the federal government's appeal of a June decision by the U.S. Tenth Circuit Court of Appeals that a U.S. Department of Health and Human Services (HHS) mandate to provide potentially life-terminating drugs and devices in employee insurance plans places a substantial burden on the religious freedoms of Hobby Lobby, which is solely owned by founder David Green and his family.

"This is a major step for the Greens and their family businesses in an important fight for Americans' religious liberty," said **Kyle Duncan, general counsel of Becket and lead lawyer for Hobby Lobby**. "We are hopeful that the Supreme Court will clarify once and for all that religious freedom in our country should be protected for family business owners like the Greens."

In July, a lower federal court granted Hobby Lobby a preliminary injunction preventing the government from enforcing the HHS mandate requiring the family businesses to provide in the employee health insurance plan two drugs and two devices that are potentially life-terminating.

The Greens and their family businesses – who have no moral objection to providing 16 of the 20 FDA-approved contraceptives required under the HHS mandate and do so at no additional cost to employees under their self-insured health plan – then took the unusual step in October of joining the government in asking the U.S. Supreme Court to review the case, despite the family's victory in the U.S. Tenth Circuit Court of Appeals.

"My family and I are encouraged that the U.S. Supreme Court has agreed to decide our case," said Mr**. Green, Hobby Lobby's founder and CEO**. "This legal challenge has always remained about one thing and one thing only: the right of our family businesses to live out our sincere and deeply held religious convictions as guaranteed by the law and the Constitution. Business owners should not have to choose between violating their faith and violating the law."

Sebelius v. Hobby Lobby Stores, Inc. will be argued and decided before the end of the Supreme Court's term in June 2014.

There are currently 84 lawsuits challenging the unconstitutional HHS mandate. Becket Fund represents: Hobby Lobby, Little Sisters of the Poor, Guidestone, Wheaton College, East Texas Baptist University, Houston Baptist University, Colorado Christian University, the Eternal Word Television Network, Ave Maria University, and Belmont Abbey College.

Becket *is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 19 years its attorneys have been recognized as experts in the field of church-state law. The Becket Fund recently won a 9-0 Supreme Court victory in Hosanna-Tabor v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half century.*"

For more information, or to arrange an interview with one of the attorneys handling Sebelius v. Hobby Lobby Stores, Inc., please contact Melinda Skea, media@becketlaw.org*, 202.349.7224.*

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Duncan Attach 0596

Washington **, D.C.** — Today, Hobby Lobby asked the U.S. Supreme Court to review its case and decide whether the Green family will be required to provide and pay for life-terminating drugs and devices in violation of their religious beliefs. Last month, the government asked the Supreme Court to review the case, and today Hobby Lobby took the unusual step of agreeing with the government that the Supreme Court should hear the appeal.

"Hobby Lobby's case raises important questions about who can enjoy religious freedom," said Kyle **Duncan, general counsel of Becket and lead lawyer for Hobby Lob**by. "Right now, some courts recognize the rights of business owners like the Green family, and others do not. Religious freedom is too important to be left to chance. The Supreme Court should take this case and protect religious freedom for the Green family and Hobby Lobby."

Last June the Christian-owned and operated business won a major victory before the en banc 10th Circuit Court of Appeals, which rejected the government's argument that the Green family and their family-owned businesses, Hobby Lobby and a Christian bookstore chain named Mardel, could not legally exercise religion. The court further said the businesses were likely to win their challenge to the HHS mandate. Since then, courts in other parts of the country have ruled differently, setting up a conflict that only the Supreme Court can resolve.

The Court will consider the government's petition and Hobby Lobby's response next month. If the petition is granted, the case would be argued and decided before the end of the Court's term in June.

Becket *is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 18 years its attorneys have been recognized as experts in the field of church-state law. Becket recently won a 9-0 Supreme Court victory in Hosanna-Tabor v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half century*."

For more information, or to arrange an interview with one of the attorneys, please contact Melinda Skea, media@becketlaw.org*, 202.349.7224.*

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Duncan Attach 0597

High court asked to look at rule on birth control

The Washington Post

September 21, 2013 Saturday, Suburban Edition

Distribution: Every Zone

Section: METRO; Pg. B02

Length: 533 words

Byline: Sarah Pulliam Bailey

Body

U.S. Supreme Court asked to review birth control mandateHobby Lobby's lawsuit is one of the most high-profile cases involving the contraceptive mandate

Federal officials have asked the U.S. Supreme Court to review the government mandate that private companies offer employees birth control coverage despite the moral objections of the owners.

The Obama administration was acting in a lawsuit brought by Hobby Lobby, one of highest-profile of about 60 cases involving the contraceptive mandate. The arts and crafts chain was founded by David Green, whom Forbes has called "the biblical billionaire backing the evangelical movement."

In June, the Obama administration issued final rules for the mandate, which requires most employers to provide contraception coverage at no added cost. Although there are exemptions for religious groups and affiliated institutions, there are none for private businesses whose owners have religious objections.

Mandate opponents say they will be forced to provide coverage they find morally abhorrent. Attorneys for Alliance Defending Freedom filed a federal lawsuit against the administration Friday on behalf of four Christian universities in Oklahoma, where Hobby Lobby is based.

Now that two different federal courts have issued contradictory opinions on the mandate, the issue is almost certain to be decided by the Supreme Court.

Thursday's petition from the Obama administration to the high court raises the issue central in the 1993 Religious Freedom Restoration Act, which says the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest.

High court asked to look at rule on birth control

The administration is asking the Supreme Court to decide that for-profit corporations cannot deny employees contraceptive coverage to which workers are otherwise entitled by federal law, regardless of the religious objections of the corporation's owners.

"The United States government is taking the remarkable position that private individuals lose their religious freedom when they make a living," said Kyle Duncan, general counsel of the Becket Fund for Religious Liberty and lead lawyer for Hobby Lobby.

"We're confident that the Supreme Court will reject the government's extreme position and hold that religious liberty is for everyone - including people who run a business."

In June, a federal court in Oklahoma ruled in Hobby Lobby's favor, saying that corporations have religious-exercise rights and that the contraceptive coverage mandate substantially burdened those rights without a compelling governmental interest.

The government's petition to the Supreme Court came the same day as a petition in a case involving a challenge to the mandate involving a family-owned woodworking business.

The Philadelphia-based U.S. Court of Appeals for the 3rd Circuit rejected the business's challenge in July, ruling that a business organized to make a profit cannot exercise religion.

"The chances are strong that the Court will agree to rule on one or more of the challenges, since federal appeals courts are now split on the question," Supreme Court watcher Lyle Denniston wrote on Scotusblog.

- Religion News Service

Load-Date: September 21, 2013

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W**ashington, D.C.** — Today, the United States government asked the U.S. Supreme Court to take the *Hobby Lobby* case to determine whether the Green family will be required to provide and pay for life-terminating drugs and devices in violation of their religious beliefs. The government's appeal makes it highly likely that the Supreme Court will decide the issue in the upcoming term.

"The United States government is taking the remarkable position that private individuals lose their religious freedom when they make a living," said **Kyle Duncan, general counsel of Becket and lead lawyer for Hobby Lobby**. "We're confident that the Supreme Court will reject the government's extreme position and hold that religious liberty is for everyone—including people who run a business."

Last June the Christian-owned and operated business won a major victory before the en banc 10th Circuit Court of Appeals, which rejected the government's argument that the Green family and their family-owned businesses, Hobby Lobby and a Christian bookstore chain named Mardel, could not legally exercise religion. The court further said the businesses were likely to win their challenge to the HHS mandate.

The government's petition comes the same day as a petition in *Conestoga Wood Specialties v.* Sebelius, another case involving a challenge to the HHS mandate.

The court will consider the government's petition in the next six weeks. If the petition is granted, the case would be argued and decided before the end of the Court's term in June.

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For more information, or to arrange an interview with one of the attorneys, please contact Melinda Skea, media@becketlaw.org*, 202.349.7224.*

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Duncan Attach 0600

Second court backs Obama birth control mandate; Cases could end in Supreme Court

The Washington Times

September 18, 2013 Wednesday

Section: A, POLITICS; Pg. 2

Length: 627 words

Byline: By Tom Howell Jr. THE WASHINGTON TIMES

Body

The 6th U.S. Circuit Court of Appeals on Tuesday sided with the Obama administration in the nationwide legal battle over the mandate to cover contraception services, marking the second time a federal appeals court rebuffed a company that argued the mandatory coverage of birth control violates its religious beliefs.

A third court, seated in Denver, took an opposing view in July when it granted the Hobby Lobby crafts franchise an injunction that shields the Oklahoma City company from the rule tied to the Affordable Care Act until the merits of their case can be heard.

Taken together, the split rulings indicate that the matter is headed for the highest court in the land.

"This just sets it up for Supreme Court review," said Kyle Duncan, general counsel for the Becket Fund for Religious Liberty, which is representing some of the employers who object to the mandate.

Judges on the 6th Circuit, seated in Cincinnati, said Tuesday that a Michigan-based manufacturing company named Autocam must comply with the mandate even though it would violate the owners' Roman Catholic beliefs.

John Kennedy, president of Autocam, and other plaintiffs who sued over the mandate, said the Obama administration's rule required them to choose among violating their beliefs, dropping Autocam employees' health care coverage or facing massive fines for flouting the mandate.

Conservative lawmakers and religious groups have lobbied the Obama administration and Congress to provide a religious exemption from the mandate, citing particular objections to morning-after pills that they equate with abortion.

Supporters of the mandate say contraception use is widespread and at times unaffordable for many women. They argue that corporate owners are not entitled to impose their personal beliefs on the diverse array of people they employ at secular companies by stripping contraception coverage from their health care plans.

"The Kennedys' actions with respect to Autocam are not actions taken in an individual capacity, but as officers and directors of the corporation," the 6th Circuit panel wrote.

The judges said they agreed with government attorneys who argued "that Autocam has not carried its burden of demonstrating a strong likelihood of success on the merits in this action."

The American Civil Liberties Union hailed the ruling.

"Religious liberty is a fundamental right, but for-profit companies cannot invoke religious beliefs to deny their employees benefits," ACLU senior staff attorney Brigitte Amiri said.

Houses of worship are exempt from the contraception mandate, and religious nonprofits have been extended an "accommodation" that would divorce corporate owners from managing or paying for their employees' contraception coverage.

But corporations were not granted any form of relief from the requirement.

In late July, about a week after Hobby Lobby's successful plea to the 10th U.S. Circuit Court of Appeals, judges on the 3rd Circuit said a Pennsylvania-based company, Conestoga Wood Specialties, had to comply with the mandate.

A decision tracker at the Becket Fund said 29 companies have secured an injunction against the mandate at either the district or circuit court level, while five firms, including Conestoga and Autocam, have been denied relief.

Mr. Duncan said the Obama administration has until Sept. 25 to decide whether it will ask the Supreme Court to take up the Hobby Lobby case that went against them.

"I can't imagine that the United States [government] will just acquiesce in that," Mr. Duncan said, given the case's impact in the states covered by the 10th Circuit.

On Tuesday, a federal district court judge in Colorado cited the Hobby Lobby decision at length in an order that shielded former Sen. Bill Armstrong's mortgage company from the mandate.

Load-Date: September 18, 2013

Circuits Divided on Religion-Based Challenges to New Health Care Act

New York Law Journal

August 5, 2013 Monday

New York Law Journal

Section: U.S. SUPREME COURT; Pg. p.6, col.1; Vol. 250; No. 25

Length: 1047 words

Byline: MARCIA COYLE WASHINGTON

Body

RELIGION-BASED challenges to the new health care law likely will bring the controversial reforms back to the nation's high court before the end of the coming term.

Although a recent split among the circuits increased that likelihood substantially, lawyers in one of the two divided circuits chose on Wednesday to seek en banc review in the U.S. Court of Appeals for the Third Circuit instead of a swifter trip from the panel decision to the U.S. Supreme Court.

However, other splits may develop as cases in the Sixth and Seventh circuits are expected to be decided soon, said S. Kyle Duncan, general counsel of The Becket Fund for Religious Liberty.

"Those panels seemed to be leaning heavily in one direction or another," Duncan said. "We may see decisions by the end of August deepening the split."

Duncan won a ruling in late June from the en banc Tenth Circuit in Hobby Lobby v. Sebelius. The owners of Hobby Lobby, a craft store chain, and Mardel, a Christian bookstore chain, challenged regulations implementing the Patient Protection and Affordable Care Act requiring them to provide certain contraceptive coverage in their employer-sponsored health care plans. They contend the coverage includes drugs and devices they believe are abortifacients, the use of which is contrary to their faith.

The en banc court on June 27 held that the two for-profit companies are entitled to bring their claims under the Religious Freedom Restoration Act and the First Amendment free exercise clause. It said the companies had established a likelihood of success that their rights under the statute were substantially burdened by the contraceptive-coverage requirement, and had established an irreparable harm. The circuit sent the case back to the district court to determine whether two of the remaining factors for granting a preliminary injunction had been met.

The district court held a hearing and entered an injunction. At that point, the government asked for a stay of the proceedings, which was granted until Oct. 1 in order for the government to consider a petition to the Supreme Court.

Shortly afterwards, a Third Circuit panel took the opposite position in Conestoga Wood Specialties v. Sebelius.

Conestoga Wood Specialties Corp. is owned by the Hahn family, who hold 100 percent of the voting shares. It is a Pennsylvania for-profit corporation that manufactures wood cabinets and has 950 employees. The Hahns, who are Mennonites, claimed the contraceptive coverage requirement violates the Religious Freedom Restoration Act and the free exercise clause. They objected specifically to the emergency contraception drug known as Plan B and the weekafter pill known as Ella.

The panel, voting 2-1, held that a for-profit, secular corporation cannot exercise religion either directly, as the Hahns argued, under the Supreme Court decision in Citizens United v. FEC; or under a so-called pass-through method, by which the corporation can assert the free exercise claims of its owners.

"Even if we were to disregard the lack of historical recognition of the right, we simply cannot understand how a for-profit, secular corporation- apart from its owners-can exercise religion," said the majority.

Conestoga Wood's en banc petition argues, "The panel majority invented a rule that makes religious families incapable of exercising religion in a business corporation. The decision does not merely prevent the Hahns' claim from succeeding; it blocks a family business company from being able to exercise religion at all. This eviscerates the rights of devout business owners of all kinds, from religious families running companies like Conestoga, to kosher butchers and Bible publishers. The panel judicially amends the Constitution by adding a novel exception to the Free Exercise Clause."

Conestoga Wood is represented by Charles Proctor of Proctor, Lindsay & Dixon, in Chadds Ford, Pa.

"When the Hahns filed incorporation papers, Obamacare was nowhere on the horizon," said Proctor. The government says they are separate from the corporation but any profits and losses pass through right to the Hahns."

Proctor noted that in two Supreme Court cases the justices upheld the right of two religious corporations to practice animal sacrifices and to use hallucinogenic tea.

"Those corporations could exercise their religious rights in odd ways and the Supreme Court upheld it, no problem at all," he said. "Here, we're talking about something not as extreme, but simply because they manufacture a secular product they're denied that relief."

Another case, Liberty University v. Lew, is definitely headed to the Supreme Court after a remand by the justices in June 2012.

A panel of the Fourth Circuit recently rejected the university's broad-based attack on the law's requirement that employers with 50 or more full-time employees offer health insurance. Liberty also claimed the law and implementing regulations violated its rights under the First and Fifth amendments and the Religious Freedom Restoration Act.

The panel rejected the constitutional and statutory attacks on the law and declined to rule on the claims against the regulations.

"This court of appeals has now decided that Congress can force employers to buy an unwanted product," said Mathew Staver, chairman of Liberty Counsel, representing the university. "As Congress cannot force individuals to buy an unwanted product, neither can it force employers to do so. I look forward to having this matter before the Supreme Court."

There are some 64 challenges to the contraceptive coverage requirement pending. Of those, 36 were filed by for-profit companies. The remaining number have been brought by religiously affiliated nonprofit organizations.

The Becket Fund's Duncan is handling eight cases, only one of which is for a for-profit corporation: Hobby Lobby. The challenges by nonprofit organizations generally have been stayed or dismissed without prejudice while the courts awaited the Obama administration's final rule on accommodations for nonprofit entities with religious objections.

That rule came out at the end of June, noted Duncan who added, "We should expect activity in the nonprofit cases fairly soon."

@| Marcia Coyle, chief national correspondent for The National Law Journal, an affiliate, can be contacted at *mcoyle@alm.com*

Load-Date: August 5, 2013

High court may be near HHS mandate review

Legal Monitor Worldwide

July 31, 2013 Wednesday

Length: 798 words

Body

A court setback to a Pennsylvania family business that objects to the Obama administration's abortion/contraception mandate heightens the likelihood the Supreme Court will soon decide whether for-profit companies have religious free exercise rights, says a legal expert.

A divided, three-judge panel of the U.S. Third Circuit Court of Appeals in Philadelphia denied a preliminary injunction requested by the Conestoga Wood Specialties Corp., saying "for-profit, secular organizations cannot engage in religious exercise."

Had it been granted, an injunction would have blocked enforcement of a controversial rule from the Department of Health and Human Services that requires employers to pay for coverage of contraceptives, including ones that can cause abortions.

The Third Circuit opinion, issued July 26, clashed with one issued only a month earlier by the full 10th Circuit Court of Appeals. The 10th Circuit rejected the Obama administration's argument that protections under the 1993 Religious Freedom Restoration Act (RFRA) do not extend to for-profit companies. That court in Denver ruled corporations such as Hobby Lobby and its sister corporation, Mardel, "can be 'persons' exercising religion for purposes" of RFRA.

Kyle Duncan, general counsel of the Becket Fund for Religious Liberty, told Baptist Press, "That split is likely to deepen as other courts of appeals weigh in. It seems to us that the Supreme Court needs to resolve the issue.

"The split's only going to get deeper."

The Sixth and Seventh Circuit Courts have heard arguments in similar cases but have yet to issue rulings, Duncan said.

The Supreme Court may have the opportunity shortly to decide if it is ready to settle the difference. He expects the Department of Justice to ask soon for a high court review, Duncan said.

He is "not surprised that there's a difference in opinion on these legal issues," Duncan said. He said, however, he is "disappointed" the Third Circuit "did not grapple" with the 10th Circuit's reasoning.

The Department of Health and Human Services issued the abortion/contraception mandate as a regulation to implement the 2010 health care law.

The Hahns, a Mennonite family that owns Conestoga, object to the controversial mandate because they believe life begins at conception. The mandate went into effect for Conestoga when its group health plan was renewed in January, and the company is abiding by the requirement.

Jennifer Bandy

The Greens, an evangelical Christian family that owns Hobby Lobby and Mardel, also oppose the rule because of their pro-life beliefs. Protected for now by a preliminary injunction, they have said they will not comply with the mandate even though it could cost them $1.3 million a day in penalties.

The Southern Baptist Ethics & Religious Liberty Commission has signed onto friend-of-the-court briefs defending the businesses' religious liberty in both cases. The Christian Legal Society wrote both briefs.

The Becket Fund, which represents Hobby Lobby and Mardel, thinks it has "very strong arguments" that RFRA applies to for-profit companies, not just individuals and nonprofits, Duncan said. In the federal code, it is "black-letter law" that a person includes corporations, he said.

The Obama administration is saying "only nonprofit corporations can exercise religion," Duncan explained. The Becket Fund hopes the Supreme Court will rule federal law does not exclude for-profits from religious freedom, he said.

Drugs considered contraceptives under the mandate include Plan B and other "morning-after" pills, which can prevent implantation of tiny embryos. That secondary, post-fertilization mechanism of the pill causes an abortion. The mandate also covers "ella," which -- in a fashion similar to the abortion drug RU 486 -- can even act after implantation to end the life of the child.

More than 60 federal lawsuits have been filed against the abortion/contraception mandate. Courts have granted injunctions to 23 for-profit corporations and refused to issue injunctions or restraining orders for seven companies, according to the Becket Fund. No action has been taken in five lawsuits by for-profit companies.

The ERLC and the U.S. Conference of Catholic Bishops lead a coalition of diverse religious organizations that have urged the Obama administration to protect freedom of conscience under the mandate.

The Obama administration's final rule on the mandate, however, does not provide a religious liberty accommodation to for-profit companies such as Conestoga Wood and Hobby Lobby. Religious liberty advocates say it also fails to remedy the conscience problems for nonprofit organizations that object.

The Third Circuit case is Conestoga Wood v. Secretary of HHS. The 10th Circuit case is Hobby Lobby v. Sebelius. Kathleen Sebelius is secretary of HHS.

Load-Date: July 31, 2013

| JUL. 31, 2013

HHS Mandate Challenges Headed to Supreme Court?

Split appeals-court decisions increase the likelihood the high court will rule on religious freedom cases involving for-profit employers.

JOAN FRAWLEY DESMOND

PHILADELPHIA — The Third Circuit Court of Appeals, in a 2-1 decision, ruled that the Conestoga Wood Specialties Corp. must comply with the federal contraception mandate and cover co-pay-free Plan B and Ella in its employee health plan.

The Third Circuit's recent ruling in the closely watched case, one of about 30 legal challenges to the Health and Human Services' mandate filed by for-profit employers, increases the likelihood that the U.S. Supreme Court will ultimately rule on this issue.

The 10th Circuit had already decided that another legal challenge filed by Hobby Lobby, a craft-store chain, would likely win on the merits and ordered a lower court to approve a restraining order that protected the company from massive penalties it would incur for refusing to comply with the federal law.

The split decision, said legal experts, means that the high court will be under pressure to clarify whether free exercise rights protected under the federal Religious Freedom Restoration Act apply to religious nonprofits as well as businesses like Conestoga, which is wholly owned by the Hahns, a Mennonite family. Lancaster Online, a local news site, reported that the cabinet-making company was covering the drugs, for now, in order to avoid financial penalties of $95,000 a day.

Kyle Duncan, general counsel for the Becket Fund for Religious Liberty, the public-interest group that represents Hobby Lobby, noted the dueling judicial rulings and predicted that other HHS for-profit cases before the Sixth and Seventh Circuits that await review would "deepen the split decision. "We expect the Justice Department would seek review of Hobby Lobby, by September at the latest," Duncan told the Register.

The Becket Fund also represents EWTN in its legal challenge to the HHS mandate. The Register is a service of EWTN.

The Third Circuit ruling was a victory for the Obama administration, which has consistently argued that for-profit employers have no religious-freedom protections.

"Since Conestoga is distinct from the Hahns, the mandate does not actually require the Hahns to do anything," stated Third Circuit Judge Robert Cowen, in his majority opinion that echoed the administration's position.

"It is Conestoga that must provide the funds to comply with the mandate — not the Hahns."

Judge Cowen noted that the court did not question the sincerity of the Hahns' objections to the mandate.

"We accept that the Hahns sincerely believe that the termination of a fertilized embryo constitutes an intrinsic evil and a sin against God, to which they are held accountable, and that it would be a sin to pay for or contribute to the use of contraceptives which may have such a result," read the majority opinion.

"We simply conclude that the law has long recognized the distinction between the owners of a corporation and the corporation itself," the ruling continued.

Dueling Rulings

University of Virginia law professor Douglas Laycock, an expert on religious-freedom issues, agreed that the split appelate rulings made it more likely that the high court would hear the case. But he disputed the Third Circuit's refusal to consider religious exemptions for businesses.

"The court failed to take the Religious Freedom Restoration Act seriously. Congress plainly understood RFRA to apply to for-profit corporations," Laycock told the Register, while noting that the courts would likely distinguish between the merits of First Amendment cases brought by family-owned businesses and large, publicly held corporations.

"'How big is too big?' is a serious question. But the court's holding that no for-profit corporation can ever be protected by RFRA is simply inconsistent with what Congress enacted," said Laycock.

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Duncan Attach 0608

Alliance Defending Freedom's Matt Bowman, who has joined the team defending Conestoga, told the Register that the Third Circuit's decision "declares that families are not allowed to exercise religion in their business companies, and that is incompatible with religious freedom in the Constitution."

HHS Arguments Targeted

The Hahn family has strongly objected to the federal mandate's requirement that it cover "abortifacient" drugs in its employee health plan. And in his 34-page dissent, Third Circuit Judge Kent Jordan took aim at the Obama administration's counsel, who, in oral arguments, sought to characterize "abortifacient" as a purely "theological term."

Judge Jordan stated that the administration's legal argument "must come as a surprise to the editors of dictionaries that include entries like the following: 'abortifacient [MED]: any agent that induces abortion.'"

"The government evidently would like to drain the debate of language that might indicate the depth of feeling the Hahns have about what they are being coerced to do," stated Judge Jordan.

"Don't let anything that sounds like 'abortion' come up, lest the weight of that word disturb a happily bland consideration of corporate veils and insurance contracts. Like it or not, however, big issues — life and death, personal conscience, religious devotion, the role of government and liberty — are in play here," the judge said.

His dissent challenged the administration's effort to block statutory protections for businesses.

Said Jordan, "The government takes us down a rabbit hole where religious rights are determined by the tax code, with nonprofit corporations able to express religious sentiments, while for-profit corporations and their owners are told that business is business and faith is irrelevant.

"Meanwhile, up on the surface, where people try to live lives of integrity and purpose, that kind of division sounds as hollow as it truly is."

Church Supports Plaintiffs

Archbishop William Lori of Baltimore, the U.S. bishops' point man on religious-freedom issues, noted the broad effort to downplay the moral concerns of all plaintiffs involved in HHS mandate cases, not only in the administration's arguments included in legal briefs, but also in media commentary.

"*The New York Times* ran stories that tried to convince us that these drugs are not abortifacient," said Archbishop Lori during a July 30 interview with the Register.

"The Church's teaching is not a matter of dogma or sectarian doctrine; it is based entirely on reason. It is a well-accepted medical definition. The Church's teaching is eminently reasonable, and the attempt to put it in a theological box is intellectually dishonest, in my opinion."

The U.S. bishops have consistently defended the right of businesses that oppose the federal mandate to secure religious exemptions that would shield them from any financial penalties for non-compliance.

The Pennsylvania-based Conestoga Corp., which employs 950 people, has not been able to secure a reprieve and chose to provide the drugs in its health plan, while Hobby Lobby, like the majority of for-profit HHS mandate plaintiffs, has secured an injunction that will shield the company from penalties that will be triggered after the company updates its health benefits.

While some critics within the Church have questioned whether the U.S. bishops should defend the religious freedom of for-profit employers opposed to the mandate, Archbishop Lori expressed the hope that other businesses "will show the kind of courage and tenacity

that Hobby Lobby has manifested. At the end of the day, our hope is that these cases will ripen and make their way to the Supreme Court."

He noted that, within the Church, "there is a fairly broad consensus that religious liberty first and foremost adheres in the individual before it adheres in the institution. The right of individuals to bring their faith to the marketplace is well established in *Dignitatis Humanae*. Almost all bishops that I know of look with great admiration at the efforts of these for-profits to defend their religious liberty."

The Bishops' Next Step

The U.S. Conference of Catholic Bishops is still fully engaged in defending the right of Catholic social agencies, universities and hospitals to secure a full exemption from the mandate. The U.S. bishops are clearly dissatisfied with the finalized "accommodation" for non-exempt religious nonprofits, but they have yet to outline their plans for the future — beyond the legal challenges that have already been filed and are slowly moving through the courts.

Said Archbishop Lori, "We are in the middle of working on our next step, and you will hear about that soon."

Joan Frawley Desmond is the Register's senior editor.

View Comments

Duncan Attach 0610

Conflicting rulings on contraceptive mandate

The Washington Post

July 27, 2013 Saturday, Suburban Edition

Distribution: Every Zone

Section: A-SECTION; Pg. A02

Length: 555 words

Byline: Robert Barnes

Body

A federal appeals court ruling on Friday increased the chances that the Supreme Court in its coming term will need to settle whether secular, for-profit corporations must provide contraceptive coverage to employees despite the owners' religious objections.

A divided panel of the U.S. Court of Appeals for the 3rd Circuit ruled that a Pennsylvania cabinet-making company owned by a Mennonite family must comply with the contraceptive mandate contained in the Affordable Care Act.

The majority said it "respectfully disagrees" with judges in the U.S. Court of Appeals for the 10th Circuit in Denver, who recently narrowly found just the opposite. A split in interpreting federal statutes is usually an invitation for the Supreme Court to resolve the issue.

This one is novel: The justices have never said whether a secular corporation is protected by the Constitution or federal statute from complying with a law because of religious objections from its owners.

The 3rd Circuit majority noted that the court has numerous times - most recently in Citizens United v. Federal Election Commission - found that corporations have free speech rights. But it said there was a "total absence of caselaw" to support the argument that corporations are protected by the Constitution's guarantee of free exercise of religion.

"Even if we were to disregard the lack of historical recognition of the right, we simply cannot understand how a for-profit, secular corporation - apart from its owners - can exercise religion," wrote Circuit Judge Robert E. Cowen, who was joined by Circuit Judge Thomas I. Vanaskie.

Cowen said it did not seem plausible that an entity "created to make money could exercise such an inherently 'human' right."

Circuit Judge Kent A. Jordan said in a dissent twice as long as the majority opinion that if there is a lack of case law establishing a corporation's religious rights, "that is in all probability because there has never before been a government policy that could be perceived as intruding on religious liberty as aggressively as the mandate."

The mandate requires companies with 50 or more employees to provide insurance that covers federally approved birth control measures. Conestoga Wood Specialties Company, which has 950 employees, is owned by the Hahn family, who say their Mennonite religion teaches that life begins at conception. They particularly object to having to cover the "morning-after" and "week-after" pills.

The lawsuit is among more than 60 filed across the country objecting to the contraceptive mandate. Some are filed by companies such as Conestoga and others by nonprofit groups and organizations with religious connections.

In a decision by the entire 10th Circuit, the closely divided judges ruled that the chain store Hobby Lobby was likely protected by the Constitution and the Religious Freedom Restoration Act from having to provide contraceptive coverage that violated the owners' religious beliefs.

"It looks like we're heading for a Supreme Court review," said Kyle Duncan, general counsel of the Becket Fund for Religious Liberty, which is active in opposing the contraceptive mandate.

Marcia Greenberger of the National Women's Law Center, which supports the law, agreed, and noted that other appeals courts will likely soon be deciding other cases on the issue.

robert.barnes@washpost.com

Load-Date: July 27, 2013

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WASHINGT**ON, DC** – Today, a federal court granted **Hobby Lobby Stores, Inc.** a preliminary injunction against the HHS abortion-drug mandate, preventing the government from enforcing the mandate against the Christian company. This victory comes less than a month after a landmark decision by the full 10th Circuit Court of Appeals, which ruled 5-3 that Hobby Lobby can exercise religion under the First Amendment and is likely to win its case against the mandate.

"The tide has turned against the HHS mandate," said **Kyle Duncan, General Counsel with Becket,** and lead attorney for Hobby Lobby.

In an opinion read from the bench, the court said, "There is a substantial public interest in ensuring that no individual or corporation has their legs cut out from under them while these difficult issues are resolved."

This is a major victory for not only Hobby Lobby, but the religious liberty of all for-profit businesses.

There are now 63 separate lawsuits challenging the HHS mandate. Becket led the charge against the unconstitutional HHS mandate. Becket currently represents: Hobby Lobby, Wheaton College, East Texas Baptist University, Houston Baptist University, Colorado Christian University, the Eternal Word Television Network, Ave Maria University, and Belmont Abbey College.

For more information, or to arrange an interview with one of the attorneys, please contact Melinda Skea at media@becketlaw.org or 202.349.7224.

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Duncan Attach 0613

WASHINGT**ON, DC** – The following statement can be attributed to **Kyle Duncan, General Counsel for Becket**:

In a blog post yesterday afternoon, the Treasury Department announced that it will delay enforcing three sections of the Affordable Care Act (ACA) until 2015. **This announcement says nothing about the HHS abortion-drug mandate, which has now been** finalized **and which continues to severely burden the religious liberty of millions of Americans. The HHS mandate is being challenged** with increasing success **in numerous lawsuits around the country**.

According to the Treasury statement, employers will now have until 2015 to comply with two of the ACA's technical reporting requirements, and will also have an additional year before they must pay the $2-3,000 per year "employer shared responsibility payments" imposed on large employers who fail to offer any health insurance at all.

The Treasury, however, does not announce any plans to suspend or delay the requirement that all large group employer health plans comply with the HHS abortion-drug mandate. **The HHS mandate therefore remains fully in force.**

The announcement also says nothing about the $100 per employee daily tax penalty, which is in a different statute and subject to an entirely separate reporting requirement not mentioned in the Treasury statement.

We will continue to defend the conscience of millions of Americans impacted by the HHS abortion-drug mandate.

There are now 62 separate lawsuits challenging the HHS mandate. Becket led the charge against the unconstitutional HHS mandate. Becket currently represents: Hobby Lobby, Wheaton College, East Texas Baptist University, Houston Baptist University, Colorado Christian University, the Eternal Word Television Network, Ave Maria University, and Belmont Abbey College.

Becket *is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 18 years its attorneys have been recognized as experts in the field of church-state law. Becket recently won a 9-0 victory in* Hosanna-T*abor v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half* century."

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Duncan Attach 0614

WASHINGT**ON, DC** – Today, for the first time, a federal court has ordered the government not to enforce the HHS abortion-drug mandate against **Hobby Lobby Stores, Inc.** The ruling comes just one day after a dramatic 168-page opinion from the en banc 10th Circuit recognizing that business owners have religious liberty rights. This was the first definitive federal appellate ruling against the HHS mandate.

"Hobby Lobby and the Green family faced the terrible choice of violating their faith or paying massive fines starting this Monday morning," said **Kyle Duncan, General Counsel with Becket,** who represents Hobby Lobby. "We are delighted that both the 10thCircuit and the district court have spared them from this unjust burden on their religious freedom."

In its landmark opinion yesterday, the 10th Circuit majority found that "no one" – not even the government – "disputes the sincerity of Hobby Lobby's religious beliefs." The court ruled that denying them the protection of federal law just because they are a profit-making business "would conflict with the Supreme Court's free exercise precedent."

Today, following the 10th Circuit ruling, the trial court granted Hobby Lobby a temporary restraining order against the HHS mandate. Further proceedings are scheduled for July 19, 2013, in Oklahoma City.

There are now 60 separate lawsuits challenging the HHS mandate. Becket led the charge against the unconstitutional HHS mandate. Becket currently represents: Hobby Lobby, Wheaton College, East Texas Baptist University, Houston Baptist University, Colorado Christian University, the Eternal Word Television Network, Ave Maria University, and Belmont Abbey College.

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Duncan Attach 0615

WASHINGT**ON, DC** – Today, the en banc 10th Circuit Court of Appeals granted a major victory to **Hobby Lobby Stores, Inc.**, by reversing and remanding the district court's erroneous ruling. The circuit court returned the case to the district court with instruction to consider whether to grant Hobby Lobby a preliminary injunction.

"Today marks a milestone in Hobby Lobby's fight for religious liberty," said **Kyle Duncan, General Counsel for Becket**. "This is a tremendous victory not only for the Green family and for their business, but also for many other religious business owners who should not have to forfeit their faith to make a living."

The 10th Circuit sent the case back to the district court for swift resolution of the injunction proceeding. The court reasoned Hobby Lobby has, "established a likelihood of success that their rights under this statute are substantially burdened by the contraceptive-coverage requirement, and have established an irreparable harm. But we remand the case to the district court for further proceedings on two of the remaining factors governing the grant or denial of a preliminary injunction."

"We are encouraged by today's decision from the 10th Circuit," **said David Green, founder and CEO of Hobby Lobby Stores, Inc.** "My family and I believe very strongly in our conviction that life begins at conception, and the emergency contraceptives that we would be forced to provide in our employee health plan under this mandate are contrary to that conviction. We believe that business owners should not have to be forced to choose between following their faith and following the law. We will continue to fight for our religious freedom, and we appreciate the prayers of support we have received."

Founded in an Oklahoma City garage in 1972, the Green family has grown Hobby Lobby from one 300-square-foot retail space into more than 500 stores in over 40 states. "It is by God's grace and provision that Hobby Lobby has endured," **said Green.** "Therefore we seek to honor God by operating the company in a manner consistent with Biblical principles."

Hobby Lobby is the largest business to file a lawsuit against the HHS mandate. The Green family has no moral objection to the use of preventive contraceptives and will continue covering them in Hobby Lobby's health plan. However, the Green family's religious convictions prohibit them from providing or paying for the abortion-inducing drugs, the "morning-after" and "week-after" pills, which would violate their deeply held religious belief that life begins at conception.

The business's lawsuit acts to preserve its right to carry out its mission free from government coercion.

There are now 60 separate lawsuits challenging the HHS mandate. Becket led the charge against the unconstitutional HHS mandate. Becket currently represents: Hobby Lobby, Wheaton College, East Texas Baptist University, Houston Baptist University, Colorado Christian University, the Eternal Word Television Network, Ave Maria University, and Belmont Abbey College.

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Duncan Attach 0616

Hobby Lobby Has Its Day in Court; Argues Case for Religious Freedom

BY MELISSA BARNHART , CP REPORTER

May 24, 2013 | 6:45 PM

Hobby Lobby's case for exemption from a part of the Affordable Care Act that requires religious employers to cover Plan B and Ella One emergency contraceptives that can cause early abortion was argued in court on Thursday.

An eight-judge panel (one judge was absent) in the 10th Circuit of the U.S. Court of Appeals in Denver, Colo., granted the Oklahoma City-based arts-and-crafts chain a full court hearing, which Hobby Lobby's attorneys' believe is significant because a full-court hearing is rarely granted. "It's a very rare step, because the nine-judge panel hears the most significant cases," said Lori Windham, senior counsel at the Becket Fund for Religious Liberty, who's one of six attorneys working on behalf of Hobby Lobby.

Kyle Duncan, general counsel for The Becket Fund, argued the case Thursday for the Green family, who own Hobby Lobby and the Christian bookstore Mardel, in *Hobby Lobby v. Sebelius*, and the government was represented by the Justice Department. Each side had 30 minutes to present their arguments to the court.

Windham told CP that the appellate court usually takes several months to make its decision, but they're hopeful the ruling will be expeditious because on July 1 the mandate will kick-in and Hobby Lobby will begin accruing penalties that could amount to $1.3 million a day, which is why they're asking the court to act quickly.

If Hobby Lobby loses its case, Windham said the next step will be to argue the case before the Supreme Court, although her team is confident the court's decision will be in their favor.

"This is a very important case because what's at stake here is whether you have to give up your religious beliefs if you go into business and whether the government can take your religious freedom away," Windham said. "The government has said the mandate is not a substantial burden on the Green family, but they're clearly wrong."

A lawyer for the U.S. Department of Justice argued that allowing for-profit corporations to exempt themselves from requirements that violate their religious beliefs would be tantamount to businesses imposing their beliefs on employees, according to Fox News.

Duncan believes the government is taking the position that if you're in a profit-driven business, you have no rights. "Business owners ought to be able to go into a court and argue that their rights should be protected," Duncan said. "This case is at the forefront of the challenge to the mandate."

"Hobby Lobby has no objections to most contraceptives," Duncan added. "They're objecting to a narrow subset of drugs – sometimes called emergency contraceptives – that violates their belief that life should be protected from the moment of conception. The government admits that these drugs can act that way – to put newly conceived life at risk."

"The only issue here is whether Hobby Lobby and the Green family can be forced to violate their religious beliefs to cover this narrow subset of drugs, or whether the government can threaten them with draconian penalties to force them to give up their faith.

According to the Becket Fund website, there are 52 separate lawsuits challenging the Health and Human Services mandate.

Although the 10th Circuit of the U.S. Court of Appeals is a nine-judge panel, the case was heard by only eight judges because one judge has senior status and is semi-retired.

Following the en banc hearing before the 10th Circuit Court of Appeals, Becket has released the following statement:

"We are encouraged by today's hearing before the full 10th Circuit Court of Appeals," said Kyle **Duncan, General Counsel for Becket and counsel on the case**. "Being heard before all eight judges – rather than the typical three-judge panel – signifies the importance of the case and the arguments being made. We stand firm in our belief that Hobby Lobby should have the right to opt out of a provision that infringes on their religious beliefs, and we look forward to a favorable outcome."

Becket *is a non-profit, public-interest law firm dedicated to protecting the free expression of all faiths—from Anglicans to Zoroastrians. For 18 years its attorneys have been recognized as experts in the field of church-state law*.

Duncan Attach 0619

Contraception Mandate Likely Headed To Supreme Court, Experts Say

The Huffington Post

April 5, 2013 Friday 8:08 PM EST

Length: 675 words

Body

Apr 05, 2013 (The Huffington Post:*http://www.huffingtonpost.com*/ Delivered by Newstex)
The number of lawsuits challenging the Obama administration's contraception coverage mandate climbed to 60 last week, and legal experts on both sides of the issue are predicting that the Supreme Court will take up the issue within the year.

Thirty-two nonprofit organizations, including religious hospitals and schools, have challenged the rule. The mandate is part of the Affordable Care Act, and it requires third-party insurance companies to provide contraception coverage to the nonprofits' employees if they decide not to do so. While many of the lawsuits are either failing in court or moving slowly because they fall under President Obama's one-year grace period for nonprofits, the 28 for-profit companies that are suing the administration are seeing their cases move much more quickly.

The most prominent of those cases -- Hobby Lobby v. Sebelius -- took a significant step forward last week, when the 10th Circuit Court of Appeals granted Hobby Lobby's request[1] to expedite the case and hear it en banc (by all judges on the court). Kyle Duncan, the attorney representing the Christian-owned Hobby Lobby against the Department of Health and Human Services, said he expects one or more of these cases to catch the Supreme Court's attention soon.
"The action of the court on Friday really raises the prominence of what was already a prominent case even higher," Duncan told HuffPost in a phone interview. "I think there's a very good chance the Supreme Court takes this up. You've got a nationwide mandate and many different plaintiffs all suing at the same time--presumably you're going to have courts going in different directions, so you've got very good conditions for Supreme Court review."
According to the rules of the Affordable Care Act, religiously affiliated nonprofit organizations, such as schools and hospitals, can opt out of paying for contraception coverage for their employees by instructing the third-party insurer to absorb the cost of the coverage and provide it directly to women. For-profit companies, such as Hobby Lobby, are not exempt from covering contraception and face large fines if they refuse to do so.
So far, 21 companies have petitioned for preliminary injunctions against the mandate so as to avoid the fines. Of those cases, 16 have been granted injunctions and five have been denied.
The Becket Fund is arguing in court that the religious exemption is too narrow because it excludes people like the Christian owners of Hobby Lobby, who morally object to contraception. Reproductive rights groups, including the National Women's Law Center, contend that "religious freedom" should be interpreted to allow women to decide for themselves whether to take contraception, rather than to allow their employers to decide for them.
Judy Waxman, vice president for health and reproductive rights at the National Women's Law Center, said the Supreme Court could take up the contraception mandate as soon as this winter. But she said the court will likely not strike down the entire policy -- it would probably instead decide on some narrow aspect of it.
"Some of these lawsuits are asking for the whole [contraception mandate] to be struck down, but the Supreme Court generally decides issues in the narrowest way that answers the question on the table," she said. "It could mean that they would make some more narrow deicision about whether the religious accommodation works and which group should get it."

Jennifer Bandy

Duncan said he thinks the Christian-owned Hobby Lobby is a perfect example of the dilemma that for-profit companies across the country face now that the government is requiring them to include birth control coverage in their insurance plans. "We think Hobby Lobby is an excellent vehicle for all these issues," he said. "It's the largest, most prominent business to have sued, and it's got a lot on the line."

[1]: *http://www.salon.com/2013/04/01/tenth_circuit_will_hear_hobby_lobby_birth_control_benefit_appeal/*

Load-Date: April 5, 2013

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Federal appeals court grants Hobby Lobby's request to speed court case

by Brianna Bailey • Published: March 30, 2013 12:00 AM CDT • *Updated: March 30, 2013 12:00 AM CDT*

A woman leaves a Hobby Lobby store in Little Rock, Ark. AP Photo

A federal appeals court in Denver has granted Hobby Lobby Stores Inc.'s request for the entire court to hear its legal challenge over part of the Affordable Care Act that requires the company to cover emergency contraceptives for its employees.

Typically, appeals cases are heard by a panel of three judges, but Hobby Lobby had asked the full court to hear the case — a request that federal appeals courts seldom grant, said Kyle Duncan, general counsel for the Becket Fund for Religious Liberty, which is defending Hobby Lobby in its lawsuit.

"It's extraordinarily rare for the court to do that — we think the takeaway is that the court as a whole recognizes how important the case is and wants to devote their full attention to it," Duncan said.

The 10th U.S. Circuit Court of Appeals on Friday also granted the Oklahoma City-based crafts retailer's request to expedite the court case.

A hearing date has yet to be set, but Hobby Lobby hopes to have a nine-judge panel will hear oral arguments in the case in April or May.

The company had asked the court to speed up the legal process because it faces potential fines of up to $1.3 million per day for failing to comply with the health care law beginning in July.

Hobby Lobby is poised to be the first of several companies that have challenged the contraceptives mandate in the Affordable Care Act to have its case heard by an appellate court. That also could put the company first in line to eventually have its case heard by the U.S. Supreme Court.

Hobby Lobby founder David Green and his family believe some types of emergency contraceptives, including the morning-after pill, are forms of abortion, which conflicts with the family's Christian religious beliefs.

The federal government argues that constitutional rights to religious freedom do not apply to Hobby Lobby because the company is a secular, for-profit corporation.

Brianna Bailey

Brianna Bailey joined The Oklahoman in January 2013 as a business writer. During her time at The Oklahoman, she has walked across Oklahoma City... read more ›

36 Comments

WASHINGT**ON, DC** – On Friday, the 10th Circuit Court of Appeals granted Hobby Lobby's petition for en banc hearing, agreeing to place Hobby Lobby's appeal before the entire court rather than the usual three-judge panel. The full court will consider whether to halt enforcement of the HHS mandate, which forces **Hobby Lobby Stores, Inc.**, a Christian-owned-and-operated business, to provide and pay for emergency contraceptives, such as the "morning-after pill" and "week-after pill", in violation of the religious beliefs of its owners, the Green family. The court also announced it will expedite oral arguments, with a hearing date expected soon.

"We are grateful that the court granted Hobby Lobby's petition," said **Kyle Duncan, General Counsel for Becket**. "Full court review is reserved only for the most serious legal questions. This case asks whether the First Amendment protects everyone's right to religious freedom, or whether it leaves out religious business owners like the Greens."

In December, a two-judge panel of the 10th Circuit denied Hobby Lobby's request to temporarily stop enforcement of the abortion pill mandate. Now, nine 10th Circuit judges will hear Hobby Lobby's case. Arguments are expected to take place this Spring.

There are now 52 separate lawsuits challenging the HHS mandate, which is a regulation under the Affordable Care Act (aka "Obamacare"). Becket led the charge against the unconstitutional HHS mandate, and along with Hobby Lobby represents: Wheaton College, East Texas Baptist University, Houston Baptist University, Belmont Abbey College, Colorado Christian University, the Eternal Word Television Network and Ave Maria University.

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Duncan Attach 0624

Retailer asks court to hasten its appeal

The Daily Oklahoman (Oklahoma City, OK)

March 9, 2013 Saturday, Drive Edition

Section: BUSINESS; Pg. 1B

Length: 408 words

Byline: BRIANNA BAILEY, Business Writer

Body

Hobby Lobby Stores Inc. is asking a federal appeals court to expedite its case against the U.S. Department of Health and Human Services in hopes of avoiding millions of dollars in fines the company could face this summer for failing to cover the cost of emergency contraceptives for its employees.

The company now hopes to have its case heard by the U.S. 10th Circuit Court of Appeals in Denver in April or early May to have a ruling by July 1.

If the court grants the company's motion to expedite the case, the Oklahoma City retailer would likely become the first of several companies that challenged the federal mandate on emergency contraceptives to have its case heard by an appellate court. That also could put the company first in line to eventually have its case heard by the U.S. Supreme Court, said Kyle Duncan, general counsel for the Becket Fund for Religious Liberty, which is defending Hobby Lobby in its lawsuit.

"These cases are ultimately going to have to be decided by the U.S. Supreme Court," Duncan said.

U.S. Justice Department attorneys defending the federal government in Hobby Lobby's lawsuit are not expected to oppose Hobby Lobby's motion to speed up the legal process, Duncan said.

In court documents filed Thursday, Hobby Lobby said it would begin incurring massive fines July 1 for failing to comply with a federal mandate that is part of the Affordable Care Act that requires it to pay for emergency contraceptives.

Short-term fix in place

The company shifted the beginning of its employee health plan year in January to temporarily stave off incurring the penalties. Hobby Lobby has said previously that it could face fines of up to $1.3 million a day for failing to provide the emergency contraceptives coverage for its workers.

The company will continue to offer health insurance coverage for its workers without paying for emergency contraceptives, even if that means incurring millions in fines, Duncan said.

"But if and when the government tries to fine them, they will take all legal means to minimize and avoid those fines," he said.

Retailer asks court to hasten its appeal

Hobby Lobby founder David Green and his family believe some types of emergency contraceptives, including the morning-after pill, are forms of abortion, which conflicts with the family's Christian religious beliefs.

The federal government argues that constitutional rights to religious freedom do not apply to Hobby Lobby because the company is a secular, for-profit corporation.

Load-Date: March 11, 2013

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POLITICO

The 'religious beliefs of the corporation's officers' can't provide a basis, the DOJ writes.

Lawsuits hit contraception rule

Duncan Attach 0627

By KATHRYN SMITH and **JENNIFER HABERKORN** | 02/25/2013 04:41 AM EST

The Obama administration is aggressively defending its contraception coverage policy in the courts, asking judges to require the companies bringing the lawsuits to provide contraceptives to their employees even before the legal fight over religious freedom is resolved.

A mounting pile of lawsuits challenge the new White House policy requiring most employers to provide no co-pay contraceptives in their employee health plans or to face fines. Nearly 50 lawsuits have been filed by religious organizations and private businesses that say the Obama White House is shredding the nation's constitutionally protected religious freedoms.

Courts have put many of the religious groups' cases on hold because the policy doesn't affect them until this fall. But trial courts have allowed at least seven companies to get out of the requirements until the courts settle the underlying issue.

In the past few weeks, the Department of Justice has appealed the majority of those injunctions. (Appeals courts have granted similar temporary injunctions to four other companies but DOJ has not appealed those.)

The administration, in the courts and in the complex regulatory process, is arguing strenuously that businesses other than religious organizations must comply. Private, for-profit companies, it argues, aren't entitled to the same protection granted to religious organizations or individuals.

"It is common ground that a religious organization can engage in the exercise of religion ... but Hercules Industries is not a religious organization," DOJ officials wrote in a brief to the 10th Circuit Court of Appeals, asking it to reverse a lower-court decision to grant a preliminary injunction to a private HVAC company.

"The personal religious beliefs of the corporation's officers ... cannot provide a basis for the Hercules Industries plan to deny federally required employee benefits to Hercules Industries employees and their families," DOJ lawyers wrote.

Nearly 50 lawsuits are working their way through the courts, and legal experts predict the issue is all but certain to end up in the Supreme Court. That could happen as soon as next winter.

Opponents of the policy “are filing cases across the country in almost every circuit, aiming to get a circuit split,” said Gretchen Borchelt, senior counsel at the National Women’s Law Center. Such a split — when there are different, contradictory rulings — is part of what the Supreme Court justices look for when deciding whether to accept a case. “So it seems likely that they will get to the Supreme Court.”

The question at the heart of the cases is whether the Religious Freedom Restoration Act prevents the administration from requiring that nearly all employers provide coverage of contraceptives in their employee health insurance, even if the employer has a religious-based objection to the use of birth control and so-called morning-after pills.

Opponents say the religious freedom law’s protections extend to corporations. The government, they argue, can’t order business owners to defy their religious convictions.

In recent weeks, the Obama administration has stepped up its defense of the policy. It has asked several appeals courts to undo decisions that temporarily exempt several companies from the policy. And it released an updated regulation that slightly broadened who can get out of the strict requirements to cover the drugs.

White House allies say the Obama administration is aggressively defending the policy.

NATIONAL CATHOLIC REGISTER

COMMENTARY

HHS' Flawed Egalitarian Logic

By Gerald J. Russello – Posted 2/23/13 at 11:31 AM

Since its unveiling, the U.S. Department of Health and Human Services' contraception mandate has caused a public outcry, resulting in 44 (and counting) legal challenges, filed by religious institutions and family businesses of a number of different faiths.

Although the most recent proposed amendments Feb. 1 were meant to address this outcry and the unconstitutional nature of the mandate, it is too little.

The Obama administration still does not see that its mandate fundamentally attacks the American tradition of religious liberty.

First, some context. The controversy over the HHS mandate did not actually begin with the Obama administration. For the last few years, the logic of an understanding of equality has worked its way through a variety of state laws. Under the guise of "equality" or "health," these laws substitute a government determination for the religious sensibilities of private institutions.

For example, California and New York both passed laws on the books prior to the mandate that sought to impose similar obligations. In the case of California, the evidence of anti-Catholic bias was quite plain. Illinois and Massachusetts focused on adoption agencies run by the Church; the result of these laws was to force the Church out of the adoption services in which it had been active for many decades. There, too, it was hard to see these initiatives as anything other than attempts to cabin the voice of the Church and her adherents.

The egalitarian logic behind these laws cannot allow other viewpoints, including religious viewpoints, to be respected in the public square.

Instead, they must be marginalized and replaced by values more in line with a secular state. That is why these laws attack the Church's charitable works: Once those are excluded, being Catholic — or any religion for that matter — becomes merely a matter of rituals in a church or silent thoughts. The critical witness of faith is curbed.

Catholics must acknowledge that we bear some of the blame for allowing this to happen.

Since the 1960s, too many Catholics have become comfortable with working with the government to provide social services. Although these partnerships have had benefits, such as

being able to expand the scope of services being provided, they came at a cost.

First, too often, Catholics disregarded their tradition of subsidiarity, which essentially means treating social and political problems at the lowest level available to adequately manage them, instead of seeking bigger and more extensive state intervention.

Second, and more important, Catholic institutions risked losing their distinctive character as entities preaching the Gospel through acts of charity. Instead, they risked being seen (and perhaps at times saw themselves) as other conduits for state aid.

This may have made sense when Catholics broadly shared the goals of a larger society still nominally Christian, but that is no longer the case. Now, the state routinely places its thumb on the scale in favor of those seeking to limit the freedom to exercise one's religion.

Under those circumstances, the dilution of the Gospel message in a bath of egalitarian, rights-oriented language made things like the mandate possible and even considered normal — as is evident from the large numbers of Catholics who voted for Obama in 2012.

The HHS mandate perfectly expresses this secular logic. The Obama administration is putting the force of the state behind certain understandings of what counts as "health care" and a "right" to such health care. Then it declared any other way of understanding that right to be invalid — indeed, unlawful — and exposed institutions that held such views to punishing penalties. The administration — rather than letting the market or individual decisions guide this question — is guiding the question of how health care should be provided consistent with religious belief.

The initial HHS mandate was brazen in its treatment of religious institutions. The original proposal basically exempted only those institutions staffed and served by people of the same faith.

This made a mockery of the religious mission of many faiths, including that of Catholicism, which serve others as a witness to their faith.

The amendment does not change this logic in any substantive way: According to Kyle Duncan, general counsel of the Becket Fund for Religious Liberty, "the proposed 'accommodation' does not sufficiently protect religious liberty. The proposal gives only unclear second-class-citizen protection to religious nonprofits, and it gives no protection at all to religious Americans who try to live their faith in the business world. The government could easily solve this problem simply by exempting all religious objectors. That is the one proposal acceptable under our religious-freedom laws, and it is the only one that will resolve this unnecessary problem."

In particular, the amendment does not address cases like those brought by the family-run business Hobby Lobby, now engaged in litigation over the mandate. The owners of the business wish to organize it along the lines of their faith; this amendment gives them no relief

and simply emphasizes the point. The state cannot fairly dictate how and under what circumstances people seek to exercise their faith.

The other accommodations to religious sensibilities place the onus on the religious institutions themselves to be granted an exemption.

The HHS mandate has opened up an important debate over what we mean when we say the Constitution guarantees "free exercise of religion," since the logic embodied in the mandate need not stop at issues of health, but can spread to any issue that the government deems worthy of its attention.

Although "health care" speaks to one concern of many Americans, the logic behind the mandate knows no such boundaries.

The HHS amendment shows that the administration believes religious liberty is its to grant, or withhold, based on its own values.

That is not what the Constitution provides — and that is what the 44 cases and counting will hopefully prove.

Gerald J. Russello is the

editor of

The University Bookman

(KirkCenter.org).

Washington, D.C. — Last night, nine U.S. Senators and two U.S. Representatives, along with the Oklahoma Attorney General and 11 other key groups, filed friend-of-the-court briefs supporting Becket' s challenge to the HHS mandate on behalf of **Hobby Lobby Stores, Inc**. The HHS mandate forces the Christian-owned-and-operated business to provide the "morning after pill" and "week after pill" in their health insurance plan or face crippling fines.

"While any brief by sitting members of Congress is significant, this one comes from members who originally supported the federal civil rights law—the Religious Freedom Restoration Act of 1993—which is at the heart of the mandate challenges," **said Kyle Duncan, General Counsel for Becket** Law. "The brief leaves no doubt that Congress intended to protect the religious freedom of those like Hobby Lobby and its founder, David Green, against federal attempts to force them to insure abortion-inducing drugs."

The case is currently before the 10th Circuit Court of Appeals. A hearing could take place as early as this spring.

Signed by **Senators Orrin G. Hatch, Daniel R. Coats, Thad Cochran, Mike Crapo, Charles** Grassley **, James M. Inhofe, Mitch McConnell, Pat Roberts, Richard Shelby and Congressmen Lamar Smith and Frank W**olf, the Congressional brief states:

- "Congress plainly wrote [the Religious Freedom Restoration Act or "RFRA"] to include corporations[.]"
- The federal government "may not pick and choose whose exercise of religion is protected and whose is not."

The federal government's "refusal to apply RFRA . . . turns the law of religious freedom upside down. RFRA places a heavy burden on Government and protects religion by default. But the HHS mandate places a heavy burden on religion and protects Government by default."

An extraordinary example of bipartisanship, versions of RFRA were introduced by then-**Senator Joe** Biden , **Senator Orrin Hatch** and the late **Senator Ted Kennedy**, as well as then-Congressmen **Chuck Schumer** and **Christopher Cox**. It drew support from groups ranging from the ACLU, the **Christian Legal Society**, **People for the American W**ay, the **Southern Baptist** Convention and **Concerned Women for America**. RFRA was signed in 1993 by **President Bill** Clinton .

In addition, 11 other key briefs were filed on behalf of Hobby Lobby stores, including the State of Oklahoma, the Christian Medical Association and the Archdiocese of Oklahoma City, to name a few.

Brief of the State of Oklahoma:

- "Operation of the Green Family's corporations in a manner consistent with the Green Family's religious faith is **no less worthy of respect and protection than is the religious** faith **practiced by church members** through a church also organized as a corporation under Oklahoma General Corporation Act."

Brief of the Association of American Physicians & Surgeons, American Association of Pro-Life Obstetricians & Gynecologists, Christian Medical Association, Catholic Medical Association, National Catholic Bioethics Center, Physicians for Life and National Association of Pro Life Nurses:

- "'[E]mergency contraception'" [such as the "morning after" and "week after" pill] **has the potential to terminate the lives of unborn children.** Being forced to pay for the termination of a human life is **just as objectionable as being forced to participate in the termination of the human life."**

Duncan Attach 0633

Brief of Emeritus Professor of Law Charles E. Rice, Professor of Law Bradley P. Jacob, The Texas Center for Defense of Life and The National Legal Foundation

- "Just as a person **who believes killing animals is morally wrong would reasonably think it wrong to give a gift certificate to a steakhouse, so a person who believes abortion is morally wrong could reasonably believe it wrong to provide health insurance that can be used to pay only for those goods and services** the policy covers and that specifically covers abortifacients."

Brief of the Association of Gospel Rescue Missions, Prison Fellowship Ministries, Association of Christian Schools International, National Association of Evangelicals, Ethics & Religious Liberty Commission of the Southern Baptist Convention, Institutional Religious Freedom Alliance, The C12 Group and Christian Legal Society as Amici Curiae in Support of Appellants and Reversal

- "Former Representative Bart Stupak (D-Mich.) and several other **pro-life Democrats voted for ACA based on their belief that Executive Order 13535 would protect conscience rights** as to ACA's implementation. Former Representative Stupak has stated that the **Mandate 'clearly violates Executive Order 13535.'"**

Brief of the Archdiocese of Oklahoma City

- "Nadine Strossen, then president of the **ACLU, testified in support of RFRA**, noting that the statute safeguarded 'such familiar practices as. . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services' to others."

- "**The notion that a federal court may don ecclesiastical robes and purport to tell citizens that they do not correctly perceive the tenets of their faith is entirely foreign** to American legal practice and experience."

Briefs in support of Hobby Lobby also include:

- Brief of Breast Cancer Prevention Institute, Bioethics Defense Fund and Life Legal Defense Foundation
- Brief of The Right Reverend W. Thomas Frerking, OSB and Missouri Roundtable for Life
- Brief for Liberty, Life, and Law Foundation as Amicus Curiae in Support of Plaintiffs-Appellants and Urging Reversal
- Brief for United States Justice Foundation
- Brief of WyWatch Family Action, Inc. and Eagle Forum
- Brief of American Center for Law & Justice

Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 18 years its attorneys have been recognized as experts in the field of church-state law. Becket recently won a 9-0 victory in Hosanna-Tabor v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half century."

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Duncan Attach 0634

U.S. legislators come to Hobby Lobby's defense in contraception lawsuit

By Matthew Brown @deseretborwn
Published: Feb. 20, 2013 7:55 p.m.

23 Comments

1 of 1

The owners of Hobby Lobby and a sister company, Mardel Inc., a Christian bookstore, sued the government in September, claiming the Affordable Care Act's mandate to provide certain emergency contraceptives violates their Christian beliefs.

A group of U.S. legislators came to the defense of Hobby Lobby this week, accusing the Obama administration of violating a federal law they passed, and that they contend should exempt religious business owners from the government's mandated birth control coverage.

The legal brief by nine senators and two representatives, all Republicans, was among a dozen filed late Tuesday in the U.S. 10th Circuit Court of Appeals, which denied Hobby Lobby's

Duncan Attach 0635

request in December to temporarily block enforcement of the mandate.

The court this spring is expected to hear Hobby Lobby's appeal of a federal district judge's ruling in Oklahoma that found for-profit businesses, like the craft store chain, aren't religious organizations protected by the Religious Freedom Restoration Act.

But the veteran legislators, who all voted for RFRA in 1993, argued the law was intended to prevent the government or the court from carving out a class of believers whose religious liberty wouldn't be protected.

"That ruling was incorrect, and the (government's) continued relegation of for-profit corporations to third-class status in the administration's invented hierarchy of religious objectors is similarly wrong," the brief stated.

The owners of Hobby Lobby and a sister company, Mardel Inc., a Christian bookstore, sued the government in September, claiming the Affordable Care Act's mandate to provide certain emergency contraceptives violates their Christian beliefs. In particular, Hobby Lobby CEO David Green and his family contend the morning-after and week-after birth control pills are tantamount to abortion. They also object to providing coverage for certain kinds of intrauterine devices.

The legislators, who tell the court they have an interest in "vindicating RFRA's blanket protections against the selective and stingy approach adopted by (the administration)," back the Greens' claim that the mandate violates the religious exemption intended under the law.

"While any brief by sitting members of Congress is significant, this one comes from members who originally supported the federal civil rights law — the Religious Freedom Restoration Act of 1993 — which is at the heart of the mandate challenges," Kyle Duncan, general counsel for the Becket Fund for Religious Liberty, which is representing Hobby Lobby, said in a statement. "The brief leaves no doubt that Congress intended to protect the religious freedom of those like Hobby Lobby and its founder, David Green, against federal attempts to force them to insure abortion-inducing drugs."

The brief was filed in behalf of Daniel R. Coats, R-Ind., Thad Cochran, R-Miss., Mike Crapo, R-Idaho, Charles Grassley, R-Iowa, Sens. Orrin G. Hatch, R-Utah, James M. Inhofe, R-Okla.,

Duncan Attach 0636

Mitch McConnell, R-Ky., Pat Roberts, R-Kan., Richard Shelby, R-Ala., and Reps. Lamar Smith, R-Texas, and Frank Wolf, R-Va.

In addition to the congressional brief, the State of Oklahoma, the Christian Medical Association, Archdiocese of Oklahoma City, the Bioethics Defense Fund and seven other groups filed briefs in support of Hobby Lobby.

A spokesman for Health and Human Services Secretary Kathleen Sibelius said the department won't comment on pending litigation.

Legal experts watching the mandate cases agree the strongest challenges by Hobby Lobby and more than 40 other business and nonprofit religious groups that have sued the government over the mandate are under RFRA.

Congress passed the Religious Freedom Restoration Act in response to a 1990 Supreme Court ruling in a case that involved an Oregon man who was fired as a counselor at a drug rehabilitation clinic for using peyote as part of a religious ritual. The high court determined the state could deny unemployment benefits to the man even if use of the illegal drug was for a religious purpose.

The congressional brief states that Congress created RFRA as a "super-statute" to cut across all federal laws that burden the free exercise of religion and to protect religious freedom from special interest politics. They point out how an attempt during debate of the bill to restrict the religious rights of prison inmates was rejected, vindicating "the one-rule-for-everybody principle reflected in RFRA’s text and structure."

To override RFRA's blanket protection, the government must show a law furthers a compelling government interest and uses the least restrictive means of applying that law.

The government included contraception, along with several other services, in the ACA's preventative health care mandate to promote women's health. The services are to be provided for free through worker health care plans. The government has also proposed third parties can provide contraception coverage for religious employers who object to contraception.

But the legislators contend the administration undermined its compelling interest and violated RFRA when it decided to exempt some religious employers from the contraception mandate and not others. Churches and some nonprofits are

exempt, but most religiously affiliated schools and hospitals along with all for-profit businesses, like Hobby Lobby, must comply or face fines.

The brief also argues that corporations were intended to be protected under RFRA.

"Congress could have carved out such a category of unprotected 'persons' in RFRA itself or in a later statute, but it did not," the brief states. "And this judicially created carve-out is directly contrary to one of the primary reasons Congress enacted RFRA in the first place: to prevent those charged with implementing the law from picking and choosing whose exercise of religion is protected and whose is not."

In a motion opposing Hobby Lobby's request to block enforcement of the mandate, the government offers a different interpretation of RFRA, saying Congress intended for the law to apply only to religious employers that "rely on religion as a reason to deny employees protections of federal law" and not to private corporations.

The government said granting Hobby Lobby an exemption to the birth control mandate would have far-reaching implications. "(Hobby Lobby's) position would extend to for-profit, secular employers the very prerogatives that Congress — and the Constitution — have reserved for religious employers alone, and it would undermine a wide array of measures that protect the general welfare through corporate regulation."

Nonprofits take contraception issue to court; Object to health care mandate

The Washington Times

February 20, 2013 Wednesday

Section: A, NATION; Pg. 6

Length: 613 words

Byline: By Tom Howell Jr. THE WASHINGTON TIMES

Body

Religious nonprofits have begun to respond in court to the plan the Obama administration offered this month to shelter them from a mandate requiring certain employers to insure contraception - and it's probably not what the White House wanted to hear.

East Texas Baptist University and Houston Baptist University filed court papers that make it clear their dispute with the Department of Health and Human Services is not over, even after the agency proposed an accommodation on Feb. 1. That proposal would require insurers to set up separate policies to handle birth control, morning-after pills and other forms of contraception covered by the requirement in the Patient Protection and Affordable Care Act.

The universities said little would change under the proposal, since the administration did not extend the religious exemption that, as it stands, applies only to houses of worship.

"The same drugs would be provided by the same insurer to the same employees, all as an automatic result of plaintiffs' offering health insurance," the Baptist nonprofits said in a status report filed Friday with the U.S. District Court for the Southern District of Texas.

When HHS officials unveiled their accommodation, they stressed it was merely a proposal that is open for comment. But the nation's Catholic bishops flatly rejected the plan, and legal advocacy groups that are handling lawsuits against the Obama administration show no signs of standing down.

The lawsuits - mostly from universities with religious affiliations - were placed on hold while the Obama administration devised a compromise for religious nonprofits. While attorneys for Baptist universities in Texas were quick to update the courts with their reaction to Mr. Obama's olive branch, other plaintiffs have yet to reignite their legal disputes through legal briefs, motions or status reports. The Obama administration's rule must be finalized by Aug. 1.

"We haven't had to file anything new, because nothing has really changed," said Matt Bowman, senior legal counsel for the Alliance Defending Freedom, which is representing several religious nonprofits and religiously devout corporate owners who have sued over the mandate.

He said the lawsuits will continue and likely pick up by August if the exemption is not broadened to cover all religious employers.

Victor Nakas, a spokesman for Catholic University in Washington, said Tuesday the university is "still evaluating all our options and [we] are not yet prepared to announce our next steps with regards to the HHS mandate."

"The administration could have made this very simple by simply exempting all objecting organizations from the mandate, out of respect for their consciences," said S. Kyle Duncan, general counsel at the Becket Fund for Religious Liberty that is handling the Texas lawsuits and other cases. "It didn't do that, however."

HHS has said the contraception mandate provides services that most women rely on, yet many in the 18 to 34 age bracket find hard to afford. As a legal argument, supporters of the mandate say employers are not entitled to push their religious beliefs onto their employees.

Attorneys for the federal government filed their own status report Monday - in Texas and other federal courts - to note the HHS proposal fulfills a December court order that delays the nonprofits' lawsuits while the Obama administration worked on its accommodation.

Under the proposal, religious nonprofits must self-certify that they object to the "Obamacare" mandate so their insurers can divorce contraception coverage from the nonprofits' regular health plans. Objecting institutions that self-insure would be assisted by a third-party administrator.

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Groups file briefs in support of Oklahoma City-based Hobby Lobby

BY BRIANNA BAILEY bbailey@opubco.com • **Published: February 19, 2013 12:00 AM CDT** • ***Updated: February 19, 2013 12:00 AM CDT***

OKLAHOMA CITY - The Oklahoma attorney general's office and other groups opposed to the Affordable Care Act have filed or plan to file legal briefs in support of Hobby Lobby Stores Inc.'s court battle against the federal government.

Attorneys for Hobby Lobby expect as many 10 amicus curiae briefs to be filed in support of Hobby Lobby this week, said Kyle Duncan, general counsel for the Becket Fund for Religious Liberty, which is representing the crafts retailer in its court case.

Federal lawmakers, theologians, law professors and other businesses that have challenged the Affordable Care Act also are expected to file briefs in support of Hobby Lobby with the court, Duncan said.

Hobby Lobby is challenging a mandate that is part of the health care law that requires the company to cover the cost of emergency contraceptives such as the morning-after pill for its employees through its employee health plan. Hobby Lobby CEO David Green and his family believe some kinds of emergency contraceptives are a type of abortion and object to covering the pills because of their family's Christian beliefs.

The federal government argues that religious freedoms outlined in the U.S. Constitution don't apply to Hobby Lobby because it is a secular, for-profit corporation.

Tuesday is the deadline for interested parties to file briefs in support of the company with the U.S. 10th Circuit Court of Appeals in Denver.

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Oklahoma Attorney General Scott Pruitt will file a brief in support of Hobby Lobby on Tuesday, said Diane Clay, spokeswoman for the attorney general's office.

Pruitt also has moved to sue the federal government over the Affordable Care Act. The state's lawsuit is pending in U.S. District Court for the Eastern District of Oklahoma and challenges various details of the health care law's implementation.

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“We feel in the state's lawsuit and also in case of Hobby Lobby that religious liberty and freedoms are being challenged through the Affordable Care Act,” Clay said.

The politically conservative Association of American Physicians and Surgeons also plans to file a brief in support of Hobby Lobby.

That group has monitored Hobby Lobby's court case because of the group's objections to the Affordable Care Act, said Andy Schlafly, a conservative activist and chief legal counsel for the association.

“It's a leading case by a private corporation that objects as a matter of conscience to paying for these abortion-related drugs,” Schlafly said. “We think people should have a right to object based on moral grounds to buying something they don't want to buy. Hobby Lobby has been particularly courageous for standing up for its principles.”

The conservative United States Justice Foundation also has filed a brief with the appellate court in support of Hobby Lobby.

In its court filing, the Justice Foundation argues that the Greens' stance on emergency contraceptives is protected by the First Amendment.

“The mandate forces employers like Hobby Lobby to choose between paying for contraceptives and abortifacient services they find immoral or suffering the imposition of significant fines. If employers want to avoid both of these consequences, they must close their businesses entirely,” The Justice Foundation said in its brief. “For any business owner — though perhaps especially for the Greens, who are running a company that has been family-owned and operated for more than 40 years — this coerced choice from among three equally injurious evils constitutes a substantial burden.”

The Breast Cancer Prevention Institute, an organization that claims some types of contraceptives cause breast cancer, and anti-abortion groups the Bioethics Defense Fund and the Life Legal Defense Foundation, also have notified the court that they intend to file briefs in support of Hobby Lobby.

Hobby Lobby is asking the appellate court for an injunction against the health care law mandate that requires the company to cover emergency contraceptives for its employees. The company has said it faces fines of up to $1.3 million a day for failing to provide the coverage to its employees.

The court is expected to hear oral arguments in Hobby Lobby's case this spring.

Religious ties split coverage for birth control; 2 rules for 1 businessman

The Washington Times

February 19, 2013 Tuesday

Section: A, PAGE ONE; Pg. 1

Length: 1011 words

Byline: By Tom Howell Jr. THE WASHINGTON TIMES

Body

Religious employers battling the Obama administration in court over a mandate in the president's health care law requiring them to offer contraceptive and birth control insurance to their employees could summarize their arguments neatly by pointing to the founder of Domino's Pizza.

Thomas Monaghan, who sold off the ubiquitous franchise in 1998 and devoted his time and vast wealth to Catholic causes and institutions, is uniquely tied to two classes of employers under the mandate. The Catholic nonprofit school he founded, Ave Maria University in southwestern Florida, has been granted flexibility from the Obama administration in contraceptive coverage, but the large corporate office park that the onetime pizza magnate owns in Michigan, known as Domino's Farms, has not.

"They're really making the same claims, but they're divided up into different tiers, so to speak," said S. Kyle Duncan, general counsel at the Becket Fund for Religious Liberty.

When the controversy over contraception broke, the Obama administration sorted those objecting to the mandate into three categories, ranging from inherently religious entities such as churches to outwardly secular establishments. Houses of worship are exempt from the mandate, and President Obama tried to accommodate religious-affiliated universities, charities and hospitals by placing a firewall between the nonprofits' health care plans and contraception policies administered and paid for by insurers. He has not made a similar offer to for-profit operations.

Ave Maria University and Domino's Farms are among dozens of entities in the latter categories - religious nonprofits and corporations - that have sued the Obama administration in federal courts. Mr. Monaghan has a foot in each camp, offering a direct line to the plaintiffs' line of thinking - why, they ask, is one objector's claims to religious freedom more valid than another's?

"To my knowledge, he's the only person involved in both sides of the cases," said Mr. Duncan, who is handling the Ave Maria case.

Defending the mandate

In defense of the mandate, the Obama administration said contraceptive services can have "tremendous health benefits" and save costs through fewer unexpected pregnancies, with 99 percent of American women relying on artificial birth control methods at some point in their lives. Yet more than half of all women ages 18 to 34 have trouble meeting the cost, the department said.

Chris Pumpelly, a spokesman for the progressive Catholics United, said the administration has acted appropriately by addressing the objectors' concerns in a three-pronged fashion. Houses of worship were exempted from Day One, and he said religious nonprofits received a good deal in Mr. Obama's recent compromise.

"To insist the employees of a secular, for-profit entity abide by the moral dictates of their employer is not appropriate," he said of corporations in the third category. "The fact of the matter is, the Affordable Care Act helps ensure employees are treated fairly and have equitable access to the care they deserve, regardless of the opinions of their employer."

But in their lawsuits, dozens of religious nonprofits and private businesses argue that offering coverage of contraceptives, sterilization or abortion-inducing "morning after" drugs is anathema to the Catholic Church and other faiths. The plaintiffs are forced to choose between health care coverage and their moral principles, their attorneys said, violating basic American precepts of religious freedom.

Adding complexity to the issue, America's Catholic bishops and many religious nonprofits have rejected the compromise Mr. Obama proposed Feb. 1, citing the need for a solution that provides exemptions for religious employers besides houses of worship.

Eleven out of 14 corporations that have filed suit have obtained temporary relief from the mandate in federal courts, and preliminary rulings from several circuit courts have come down on both sides of the issue, according to the Becket Fund.

"I think it has to go to the Supreme Court," said Erin Mersino, a lawyer at the Thomas More Law Center and lead counsel in the Domino's office-park case.

Monaghan's dilemma

Although Mr. Monaghan could be the best-known figure in the dispute - he used to own the Detroit Tigers - he is "actually pretty low-profile" and not speaking directly to the media about the cases, Ms. Mersino said.

At Ave Maria, Mr. Monaghan sits on the board of trustees and may assist fundraising, but is not involved in the day-to-day operations of the school, said university President H. James Towey.

However, Mr. Monaghan offered a founding vision for the institution and donated $250 million to establish its campus about 30 miles from Naples, Fla., according to the university's website.

Like many other institutions, the university is pressing forward with its legal claims after rejecting the Obama administration's solution to the contraception question.

"The fact remains, they are trying to make us complicit," Mr. Towey said.

On the corporate side, Mr. Monaghan is the owner and sole shareholder of Domino's Farms, a 937,203-square foot office park in suburban Ann Arbor, Mich., that includes a Catholic bookstore and chapel that holds Mass four times per day, Ms. Mersino said. The corporation does not offer contraceptive coverage to its 45 full-time and 44 part-time employees, nor does it plan to, its lawsuit says.

According to the lawsuit, the Obama administration, "in an unprecedented despoiling of religious rights, forces religious employers and individuals, who believe that funding and providing for contraception, sterilization, abortion, and abortifacients is wrong, to participate in acts that violate their beliefs and their conscience - and are forced out of the health insurance market in its entirety in order to comply with their religious beliefs."

Michigan Attorney General Bill Schuette has filed legal briefs in support of Mr. Monaghan's company and two other plaintiffs from his state.

"Religious liberty," he wrote, "cannot be confined to the sanctuary and sacristy."

Religious ties split coverage for birth control; 2 rules for 1 businessman

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The New York Times | https://nyti.ms/U3tc8s

The Opinion Pages | OP-ED COLUMNIST

The Conscience of a Corporation

Bill Keller FEB. 10, 2013

DAVID GREEN, who built a family picture-framing business into a 42-state chain of arts and crafts stores, prides himself on being the model of a conscientious Christian capitalist. His 525 Hobby Lobby stores forsake Sunday profits to give employees their biblical day of rest. The company donates to Christian counseling services and buys holiday ads that promote the faith in all its markets. Hobby Lobby has been known to stick decals over Botticelli's naked Venus in art books it sells.

And the company's in-house health insurance does not cover morning-after contraceptives, which Green, like many of his fellow evangelical Christians, regards as chemical abortions.

"We're Christians," he says, "and we run our business on Christian principles."

This has put Hobby Lobby at the leading edge of a legal battle that poses the intriguing question: Can a corporation have a conscience? And if so, is it protected by the First Amendment.

The Affordable Care Act, a k a Obamacare, requires that companies with more than 50 full-time employees offer health insurance, including coverage for birth control. Churches and other purely religious organizations are exempt. The Obama administration, in an unrequited search for compromise, has also proposed to excuse nonprofit organizations such as hospitals and universities if they are affiliated with religions that preach the evil of contraception. You might ask why a clerk at Notre Dame or an orderly at a Catholic hospital should be denied the same birth

control coverage provided to employees of secular institutions. You might ask why institutions that insist they are like everyone else when it comes to applying for federal grants get away with being special when it comes to federal health law. Good questions. You will find the unsatisfying answers in the Obama handbook of political expediency.

But these concessions are not enough to satisfy the religious lobbies. Evangelicals and Catholics, cheered on by anti-abortion groups and conservative Obamacare-haters, now want the First Amendment freedom of religion to be stretched to cover an array of for-profit commercial ventures, Hobby Lobby being the largest litigant. They are suing to be exempted on the grounds that corporations sometimes embody the faith of the individuals who own them.

"The legal case" for the religious freedom of corporations "does not start with, 'Does the corporation pray?' or 'Does the corporation go to heaven?' " said Kyle Duncan, general counsel of the Becket Fund for Religious Liberty, which is representing Hobby Lobby. "It starts with the owner." For owners who have woven religious practice into their operations, he told me, "an exercise of religion in the context of a business" is still an exercise of religion, and thus constitutionally protected.

The issue is almost certain to end up in the Supreme Court, where the betting is made a little more interesting by a couple of factors: six of the nine justices are Catholic, and this court has already ruled, in the Citizens United case, that corporations are protected by the First Amendment, at least when it comes to freedom of speech. Also, we know that at least four members of the court don't think much of Obamacare.

In lower courts, advocates of the corporate religious exemption have won a few and lost a few. (Hobby Lobby has lost so far, and could eventually face fines of more than $1 million a day for defying the law. The company's case is now before the Court of Appeals for the 10th Circuit.)

You can feel some sympathy for David Green's moral dilemma, and even admire him for practicing what he preaches, without buying the idea that *la corporation,*

c'est moi. Despite the Supreme Court's expansive view of the First Amendment, Hobby Lobby has a high bar to get over — as it should.

For one thing, under Title VII of the Civil Rights Act — which was enacted at the behest of religious groups — companies cannot impose religious tests on their employees. They can't hire only Catholics, or refuse to hire Catholics. They cannot oblige you to practice the same faith their owners do. Companies are, by legal design, zones of theological diversity and tolerance. So Green, whose company is privately held, can spend his own money to promote his faith, but it would be an act of legal overreach to say that he can impose his faith on his employees by denying them benefits the government has widely required.

"If an employer can craft a benefits system around his religious beliefs, that's a slippery slope," said Marci Hamilton, a professor at the Benjamin N. Cardozo School of Law and a critic of religious exemptions. "Can you deny treatment of AIDS victims because your religion disapproves of homosexuals? What if your for-profit employer is a Jehovah's Witness, who doesn't believe in blood transfusions?"

Also, courts tend to distinguish between laws that make you do something and laws that merely require a financial payment. In the days of the draft, conscientious objectors were exempted from conscription. A sincere pacifist could not be obliged to kill. But a pacifist is not excused from paying taxes just because he or she objects to the money being spent on war. Doctors who find abortions morally abhorrent are not obliged to perform them. But you cannot withhold taxes because some of the money goes to Medicaid-financed abortion.

"Anybody who pays taxes can find something deeply offensive in what the government does," said Robert Post, a First Amendment expert at Yale Law School. " 'I'm not paying my taxes because of torture at Guantánamo.' 'I'm not paying my taxes because of drones.'

"People can't pick and choose their taxes, because you couldn't have a functioning tax system."

I don't know what the courts will say, but common sense says the contraception dispute is more like taxation than conscription. Nothing in the Obamacare mandate

obliges anyone to *use* contraception if, for example, she is in the tiny minority of American Catholics who take the church's doctrine on birth control seriously. And Hobby Lobby's policy doesn't prevent the use of morning-after pills: it just assures that if an employee does use emergency contraception, she pays for it out of her Hobby Lobby paycheck rather than her Hobby Lobby insurance.

Douglas Laycock, a law professor at the University of Virginia who often sides with proponents of broader religious liberty, has taken to warning his friends that their aggressive positions on abortion, gay rights and now contraception are undermining the longstanding American respect for free exercise of religion.

"The religious community cannot take religious liberty for granted," he said in a speech before the contraceptive issue blew up. "It needs to expend a lot more energy defending the right to religious liberty, and it would help to spend a lot less energy attacking the liberty of others."

Cases like Hobby Lobby, he told me, have compounded his worry.

"Interfering with someone else's sex life is a pretty unpopular thing to do," he said. "These disputes are putting the conservative churches on the losing side of the sexual revolution. I think they are taking a risk of turning large chunks of the population against the idea of religious exemptions altogether."

But Laycock's is a lonely voice among advocates of religious exemptions. More typical is Rick Warren, the evangelical megachurch pastor, who says the battle to preserve religious liberty "in all areas of life" may be "the civil rights movement of this decade." Warren goes on to say — I am not making this up — that "Hobby Lobby's courageous stand, in the face of enormous pressure and fines," is the equivalent of the Birmingham bus boycott.

When I read that kind of rhetoric from our country's loftier pulpits, I understand why the fastest-growing religious affiliation in America is "none."

A version of this op-ed appears in print on February 11, 2013, on Page A19 of the New York edition with the headline: The Conscience of a Corporation.

Religious Freedom Concerns Continue After Birth Control Mandate Revision

BY NAPP NAZWORTH , CHRISTIAN POST REPORTER

Feb 6, 2013 | 4:51 AM

The Department of Health and Human Services announced last Friday a proposed change to its birth control mandate. The change, which HHS considers an "accommodation" for nonexempt religious groups, does not, however, address the underlying religious freedom concerns of the over 40 plaintiffs who have sued HHS citing their First Amendment religious freedom rights, according to Kyle Duncan, general counsel for The Becket Fund, which represents some of the plaintiffs, in a Monday interview with The Christian Post.

The birth control mandate, first announced in January 2012, requires employers to provide contraceptives, sterilization and some abortifacients without a co-pay in their employees' health insurance coverage.

The proposed rule change would require employees of religious employers covere

The proposed change does not address t violates their religious conscious protectio profit companies. The administration take rights.

Another one of the main issues of concer religious groups is written so narrowly tha

which are granted full religious freedom rights, and another tier for every other type of religious organization, such as schools, camps, soup kitchens, homeless shelters and a host of other social service organizations, which are not granted full religious freedom rights but are promised an "accommodation."

The proposal would change some of the language regarding the two tiered approach to religious freedom, but no substantive changes are made, Duncan explained, because it is still only houses of worship who would receive religious freedom protections.

Duncan also called the proposal "convoluted" and "incomplete" because it is not clear how exactly it would work.

Another shortfall with the proposal, for instance, is that it does nothing to address those religious organizations that self-insure. Telling the insurance company to provide the birth control coverage for these organizations is meaningless because the organization itself is the insurance company.

For the non-profit religious groups, there will likely be some other issues with the proposal. One concern is that the insurance companies would pay for the additional coverage by increasing premiums for everyone, which means they would still be paying for the coverage of services that are in opposition to their religious beliefs.

Additionally, employees would obtain the coverage because their religious employer objected to providing it. So, it is through the actions of the religious employer that the employee would be obtaining services that is in opposition to its religious teachings. The government would still, therefore, be forcing the religious group to participate in an act it finds morally objectionable.

Dow Drops 100+ Points at Open; Ravens Overcome Blackout, 49Ers; At Least Eight Killed in Tour Bus Crash; Compromise for Contraceptive Mandate; Super Bowl Becomes a Cultural War

CNN CNN NEWSROOM 10:00 AM EST

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Section: NEWS; Domestic

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Guests: Kyle Duncan, Debra Ness, Brendon Ayanbadejo

Highlight: The Dow was within striking distance of its all-time high we are seeing this pullback. It was kind of fun on Friday watching the Dow hit 14,000. In fact, it went past that for first time in five years. But now we are watching the Dow pull further away from that milestone. Now what happened was on Friday, you saw the Dow rally pretty much on an upbeat jobs report from January. To the Super Bowl, the Baltimore Ravens might have won Super Bowl XLVII, but the game might be forever known as the blackout Bowl. The power outage hit early in the third quarter plunging the Super Dome into darkness. The NFL title game grinding to a halt for about 34 minutes, the loss of power frustrated players and coaches and forced to stay on the field. But it proved to be a huge turning point in the game for a time. It is a moment the NFL in the city of New Orleans wants to forget. Investigators remain at the scene of a tour bus crash in Southern California that killed at least eight people. That number expected to rise, too. The bus overturned last night after rear ending a car and then crashing with a pickup truck on a narrow sloping road. Witnesses report seeing smoke coming from the back of the bus indicating a possible problem with the brakes.

Body

CAROL COSTELLO, CNN ANCHOR: Happening now in the NEWSROOM, blackout. The 34-minute power outage everyone is talking about this morning. Straight ahead, why it happened? What the energy company is saying and did Beyonce's halftime show have anything whatsoever to do with it?

Gun proposal push, President Obama is leaving this hour to promote his plan to reduce gun violence. We will tell you where he is headed.

Plus, the new controversy over the Obama administration's contraception compromise, why some companies are not so happy about it still. You will hear from one.

And a former Marine is accused of killing the man known as America's deadliest sniper at a resort lodge. We'll have a live update. NEWSROOM starts now.

(MUSIC)

COSTELLO: Good morning. Thanks for being with me. I'm Carol Costello reporting from Washington. This is just in to CNN. We are keeping our eyes on the stock market as we cross the top of the hour because the Dow is tanking. It has been down around 100 points since the opening bell rang 30 minutes ago.

Alison Kosik is at the New York Stock Exchange. Why is this happening, Alison?

ALISON KOSIK, CNN BUSINESS CORRESPONDENT: Carol, so close, yet so far. Just when the Dow was within striking distance of its all-time high we are seeing this pullback. It was kind of fun on Friday watching the Dow hit 14,000.

In fact, it went past that for first time in five years. But now we are watching the Dow pull further away from that milestone. Now what happened was on Friday, you saw the Dow rally pretty much on an upbeat jobs report from January.

That really was the reason for that rally. But now the question marks are coming out over whether all of that momentum can continue especially since there is not much out there to guide investors as earnings season winds down. So you have a lot of question marks floating around the market and that's one reason you are seeing the pullback today -- Carol.

COSTELLO: Alison Kosik reporting live from the New York Stock Exchange.

On to the Super Bowl now, the Baltimore Ravens might have won Super Bowl XLVII, but the game might be forever known as the blackout Bowl. The power outage hit early in the third quarter plunging the Super Dome into darkness.

The NFL title game grinding to a halt for about 34 minutes, the loss of power frustrated players and coaches and forced to stay on the field. But it proved to be a huge turning point in the game for a time. It is a moment the NFL in the city of New Orleans wants to forget.

(BEGIN VIDEOTAPE)

COSTELLO (voice-over): The third quarter was off to a roaring start. Baltimore returned the kickoff with a 108-yard Jacoby Jones touchdown. That has put the Ravens ahead at 28-6. San Francisco was on the ropes and then the lights went out, really?

Look at Ravens Coach John Harbaugh point to the darkened section of the Super Dome, the 71,000 fans inside and the millions of TV viewers wondering what the heck just happened.

UNIDENTIFIED MALE: I didn't know what to think. I was -- it's just crazy.

UNIDENTIFIED FEMALE: I didn't want to stay in my seat. I wanted to get close to the door just in case.

UNIDENTIFIED MALE: I wasn't sure if it was a rat that ate the wire or somebody pulled a chip out of the computer.

COSTELLO: The power outage did anger Ravens Coach John Harbaugh but he later admitted --

JOHN HARBAUGH, RAVENS COACH: I made too big a deal about that. It had to do with the phones and -- you know, whether we were going to have communication or we would have to take communication away.

COSTELLO: And finally, more than 33 minutes after the lights went out --

UNIDENTIFIED MALE: Third down and 13. Let's go.

COSTELLO: -- the Ravens held on and won. Quarterback Joe Flacco, he took tonight stride.

UNIDENTIFIED MALE: It was just one of those things that happens, you have to deal with it.

COSTELLO: The Super Dome said the outage happened when a piece of equipment that is designed to monitor electrical load sensed an abnormality in the system. It evidently flipped a breaker and poof, the Super Dome apologized for the incident. So will this be a bruise to New Orleans' image?

UNIDENTIFIED FEMALE: This will be a blip. Everybody has been wonderful, kind, happy and polite. Everybody has been great here.

(END VIDEOTAPE)

COSTELLO: The power outage came at a time when the Ravens were running away with the game. The Ravens were leading by 28-6 at the time. When the lights came back on, San Francisco went on a 25-6 run. It wasn't enough for the win.

CNN's Rachel Nichols was at the game. Good morning, Rachel. Were the Niners simply better at managing the blackout?

RACHEL NICHOLS, CNN CORRESPONDENT: Yes. You talk to the Ravens after the game and they admitted the 49ers won the blackout. Of course, they won the game to get some solace there. But Ed Reed, the future hall of famer from the Ravens said that they started talking during the blackout amongst themselves.

Is this going to kill our momentum? What's going on here? He said, once you start talking about it. It gets into your head and several guys said that they thought it was part of their problem.

On the 49ers' side, however, well, they had an unusual practice for the moment that happened last night. Had never happened before in a Super Bowl, but last year during the very high-profile "Monday night football" game against Pittsburgh, there had been a power outage and stoppage of play in that game.

They had come out of that power outage like gangbusters. They did it once again last night. They felt more comfortable. It was a worrying few minutes for all of the Ravens, but especially for Ray Lewis who is retiring after this game ending a stellar 17-year career.

Take a listen to what he said once it was all over.

(BEGIN VIDEO CLIP)

RAY LEWIS, RAVENS' LINEBACKER: I think that's the first time that ever happened in the Super Bowl. You know, for something that strange to happen, this had to keep your focus. You know, we were on a roll. We were on a roll just then.

To stop that momentum the way it did, you know, you saw the way things started to shift, but we finished it. We finished it, man. Again, it just shows what our team is built for, you know.

No matter what we have been faced with. Coach called us up during that break and he said no matter what's go on here, it doesn't matter. We are here to finish this race. We finished it.

(END VIDEO CLIP) COSTELLO: Roger Goodell, the commissioner of the NFL, spoke this morning. He says that the NFL is still looking into exactly what happened, abnormality that you referred to although he noted there were no safety issues on the field. The only injury he said at the Super Dome was very minor when an escalator stopped out on the concourse.

COSTELLO: Rachel Nichols, thanks so much, reporting live from New Orleans this morning.

Beyonce may have stolen the show, but Alicia Keys is grabbing headlines of her own after her rendition of the national anthem.

Alicia Keys adding a few extra words to the "Star Spangled Banner." Nischelle Turner joins us now. I thought she was great.

NISCHELLE TURNER, CNN ENTERTAINMENT CORRESPONDENT: Living in the home of the brave. Yes, she was. She was. Pitch perfect. But Carol, in New Orleans, when you add a little more on to something, they call it land yap. So Alicia Keys added a little land yap on to her take of the national anthem.

She even had as you saw some of the players on the sidelines in tears. She took to her piano and belted out the slower-paced version of the song, a lot slower. She even took brief pauses during her performance.

She stretched the song to a total of 2 minutes, 36 minutes. That, Carol, made her rendition of the national anthem the longest in Super Bowl history.

COSTELLO: She set a record.

TURNER: She set her own record.

COSTELLO: Let's talk about Jennifer Hudson because she performed "America the Beautiful" with the Sandy Hook Elementary School chorus. It was touching.

TURNER: Yes. You know, this has become one of the most touching and talked about moments from the Super Bowl. Just as a viewer, it is the moment that stuck with me, Jennifer Hudson performing with the Sandy Hook's children choir.

It was touching because both Hudson and these children have been affected by gun violence in their lives, a lot of layers to this performance here. Hudson's mother, brother and her 7-year-old nephew were shot and killed back in October of 2008. Remember that, by her sister's estranged husband, William Balfour.

Now ironically Jennifer Hudson's first appearance after that tragedy was singing the national anthem at the Super Bowl in 2009. It was so poignant to see her standing there as someone whose life was forever changed by gun violence with these children who experienced the same type of grief. I don't know anybody who wasn't watching that, my Twitter timeline, exploded last night with people saying I'm sitting here and n a pool of tears because that just really stuck.

COSTELLO: It was really touching. Nischelle Turner, many thanks.

The moment that got everyone talking during the Super Bowl was than about my touchdown. It was actually when the lights went out at the Super Dome then the internet exploded. Some blamed the power outage on Beyonce. Others blamed it on the Batman villain Bain.

Don Lemon is following that part of the story this morning.

DON LEMON, CNN CORRESPONDENT: I think it was a giant lighted Beyonce that made the lights go out in the Super Dome. Lights just went out here. That was the moment really. That was a moment that everybody -- let's talk about Twitter exploding, really.

People are talking about that. They are talking about the night the lights went out in New Orleans. First let's go to the tweets now. Mo Rock, everyone knows Mo Rock. In the cartoon Super Bowl, they just keep playing during the blackout. All you see are eyes.

Then someone else says, Super Dome I.D. guy smuggling dinosaur DNA samples out of the stadium. Someone else says just plug in a generator to Beyonce's hips and the problem would be solved. This never would have happened if the Super Dome had a gun. People are getting in on the big gun talk here.

And then our very own Van Jones, who knew, Van Jones has a sense of humor. Beyonce sings so well, Carol, I hardly noticed her outfit or dance moves at all. Did she look OK, very funny.

Carol, just quickly a couple of companies getting in, Nabisco said, Oreo cookie said you can still dunk in the dark. Tide said we can't get your black out, but we can get your stains out, Super Bowl tide power. Those were their hash tags.

COSTELLO: Yes, they are taking advantage of the situation, right?

LEMON: How do you like that?

COSTELLO: I like it. I think you should stick to talking, but I like the hand gesture.

LEMON: I haven't had any sleep so a little punch drunk.

COSTELLO: I understand. Don Lemon, thanks so much.

By the way, Don, later today, Super Bowl MVP ravens quarterback Joe Flacco joins Brooke Baldwin to talk about what it was like to be part of one of the most memorable Super Bowls in history. That's today at 2:00 Eastern right here on CNN.

A compromised some say does not go far enough. Why a new White House proposal on the controversial contraception mandate is still angering some.

COSTELLO: Time to check our top stories. Investigators remain at the scene of a tour bus crash in Southern California that killed at least eight people. That number expected to rise, too.

The bus overturned last night after rear ending a car and then crashing with a pickup truck on a narrow sloping road. Witnesses report seeing smoke coming from the back of the bus indicating a possible problem with the brakes.

We're also watching the markets, the Dow backing off from last week's momentum. After the opening bell retreated from the 14,000 mark it hit Friday. That was the highest day of closing for the Dow in more than five years.

In other news this morning, the Obama administration is offering a compromise on a contraceptive mandate that made headlines and angered some religious leaders under the proposal women will get free birth control, but insurance companies will pay for it. Not religious affiliated organizations like, you know, churches.

Finally, birth control will be offered as a separate benefit allowing groups that are opposed to it to distance themselves. Kyle Duncan is with the Becket Fund for Religious Liberty and lead council for Hobby Lobby, a retailer that filed a lawsuit against the mandate saying it violates religious freedoms. Good morning.

KYLE DUNCAN, BECKET FUND FOR RELIGIOUS LIBERTY: Good morning, Carol. Thanks for having me back.

COSTELLO: Well, thanks for being with us again. We appreciate it. So the Obama administration is trying to compromise here. It is now ex- -- it exempted churches and -- Catholic hospitals and the like from buying their female employees contraception. It doesn't apply to private companies likes yours. So what's your reaction this morning?

DUNCAN: Right, Carol. Well, you know, the accommodation that's being offered and proposed is really quite disappointing. As you point out, the first thing it doesn't do is it doesn't do anything for religious business owners like Hobby Lobby. That's disappointing.

That the administration continues to say business owners don't have any religious rights in connection with their business. Second thing it doesn't do, it doesn't expand the exemption at all.

The administration admits the religious employeyer exemption, which really separate religious organizations from these -- from the drugs and practices, does not expand at all. What the proposal does is propose a bookkeeping arrangement.

Unfortunately, it is still going to leave many religious organizations still tangled up with practices that they oppose. It also seems that the government is not really sure how that is supposed to work especially when an organization insurance itself. It is not clear from this proposal how that is supposed to work. So it leaves really a lot of questions. The main question is -- why not expand the exemption itself to include the religious hospital or the religious charity or the religious university n that's really how our laws have dealt with conscience problems in the past. They have exempted them and allowed the distance.

COSTELLO: It kind of does. It is really complicated. It seems like it is still a work in progress, too, right?

DUNCAN: It does.

COSTELLO: But I wanted to ask you this. The Supreme Court denied Hobby Lobby's claim to avoid this mandate. So where does that leave your company?

DUNCAN: Well, all Justice Sotomayor did was just one justice. All she said was that she would not get involved at this time and that she would let the normal appeals process go forward. Now Lobby Hobby is currently on appeal in Denver in the 10th Circuit Court of Appeals as our many other businesses.

Something like, you know, six, seven, eight other business. These appellate courts are going to be weighing in. It is for to realize so far the businesses are winning by a score of 11-3 on these cases. The courts are really saying you have strong claims.

Hobby Lobby is going to get its day in court in the tenth circuit very soon. You have strong claims. It is surprising the administration would leave them completely out of this proposed compromise. It is disappointing and it is surprising since the courts are taking these arguments very, very seriously.

COSTELLO: It is not over yet. Thank you so much.

DUNCAN: Thanks, Carol.

COSTELLO: Joining me, Debra Ness, the president of the National Partnership for Women and Families. Good morning.

DEBRA NESS, PRESIDENT, NATIONAL PARTNERSHIP FOR WOME AND FAMILIES: Good morning, Carol.

COSTELLO: Thank you for being with us. You say it is time for stop politicizing women's health. But those people you just heard say it is a violation of their faith.

NESS: Well, first of all, this issue is really about whether private employers get to make decisions about women's health care. I think the administration has struck a very reasonable compromise. They exempt religious institutions, like churches and houses of worship from being held responsible for providing contraception.

If you are a religious organization that's affiliated in a non-profit way with a religion and against your beliefs, for example if you are a university or if you are a health system, they have made accommodations to ensure that you don't have to be involved in the direct provision the payment, the contracting the referral or any of the arrangements for ensuring that --

COSTELLO: What about -- what about private companies like Hobby Lobby? The owners object on, you know, moral reasons that they don't want to pay for contraception for their employer, employees.

NESS: I know folks have tried to talk about this as a religious liberty issue. That feels a bit like a smoke screen for folks who are really trying to impose their views about birth control on others. There is nothing in this law, which in any way impedes an employer's ability to exercise his or her own religious beliefs.

But there is nothing which says that religious liberty requires you to impose your beliefs on others. And by allowing for these accommodations for religious institutions but ensuring that -- in the private sector, if you are a business that's operating in the public sector, you have to operate by public laws.

We are saying that employers cannot make these decisions about their women's health -- women employees' health care for them. They cannot impose their religious beliefs on their women employees. And really, if you think about other types of health care and other types of religious beliefs, take, for example, blood transfusions.

If you are an employer who happens to believe that blood transfusions are against your religion, we wouldn't say that it would be okay for you to say to your employees, you can't be covered for blood transfusions.

There are lots of things that we ask employers to do that are for the public good, for public safety, for public health reasons and that is part of doing business in the public sphere.

COSTELLO: Debra Ness with the National Partnership for Women and Families, thank you for being with us this morning.

NESS: Thank you for having me.

COSTELLO: We will be right back.

INDRA PETERSONS, AMS METEOROLOGIST: Chicago is seeing more snow than it has all season, big story, a pattern change. We will be warming up in the east and cooling off in the west. We wouldn't see an example of the warm up. Take a look at Houston right now, currently above average at 74 degrees expected this afternoon.

COSTELLO: Super Bowl is not longer just a football game. It has become like a platform for the culture wars including gay rights. Don Lemon managed to snag an interview with Brendon Ayanbadejo and he joins us with that interview. Good morning, Don. LEMON: Good morning to you, Carol. Thank you so much. You know, the Super Bowl is no longer just a game of football besides the commercials and the star performances, becoming really a cultural war, a new battlefield for social issues including same-sex marriage.

Baltimore Ravens linebacker Brendan knows all about this battle and he joins us not from New Orleans. First of all, I want to talk to you about this platform you wanted to talk about so much.

First of all, to the issue at hand, let's talk about that blackout first. You were there at the Super Bowl. You guys had the momentum going into the third quarter. What was -- what went through your mind when the lights went out?

BRENDON AYANBADEJO, BALTIMORE RAVENS' LINEBACKER: I was like, man, they are trying to take the wind out of our sails. They are delaying destiny. We tried to turn it into a positive thing. It definitely helped the 49ers a lot more than it helped us, Don.

LEMON: Yes, so you were -- were you worried, you know, 49ers started to come back and then, you know, ended up being three points separating you and the 49ers?

AYANBADEJ: Yes. I mean, we are definitely concerned. We never lost faith in -- in what we decided to accomplish 54 weeks ago in New England. Nothing was going to stop us from doing that.

LEMON: Brendon, you have been outspoken about marriage equality for a very long time. You grew up around gay people, people thought that you were gay and some still think you are. You are not, but you are still a proponent for gay rights and supporter of gay people.

We are -- we have been Twitter buddies. We have been friends for a little bit chatting by text and you have been wanting to come on CNN, but your schedule has been busy. Why have you chosen this Super Bowl to talk about, make a platform out of marriage equality?

AYANBADEJO: I don't consider it gay rights. It is rights. Everyone deserves to be treated equally. It is a cause I have been really outspoken for since 2009. On the biggest platform in the world and everybody's watching, a billion people watching, everybody hears your voice.

I decided that -- I knew organically it would happen. We were going to talk about equal rights and equality and -- marriage equality and whatnot. But now that I'm a Super Bowl champion, my voice just projects that much further and hopefully we can lead to even more change and more positive things for the LGBT community.

LEMON: You said equal rights. When people equate it to the civil rights movement, some people are offended by that. Others see it as the same thing. What do you make of it?

AYANBADEJO: The thing is if you are educate order the issue and sit down and talk to a gay person, you know, I have been talking to gay people. Everyone has been talking to gay people our entire lives whether we know it or not.

But we really believe that you are born gay and if -- I had plenty of conversation was people that are gay and say they are born gay. No different than me being born this beautiful almond coconut color I am. People are born gay. So why treat them any differently?

It is time we treat everybody fairly and not only are we trying to dictate who people should love. We are also trying to dictate who people should be. If a woman wants to wear a man clothes man wants to wear women's clothes, you feel like you are a woman on the inside and you are really a man, who cares?

Let's just -- let's just treat everybody equally. Let's move on and evolve as a culture, as a people. Especially, I mean, we think it is bad in the United States. I'm half Nigerian. In Nigeria I get so many letters from young Nigerians being persecuted or thrown in jail or murdered for being who they are.

We think we have it bad here. It is not bad here. We can make a change in the United States that can affect the whole world.

LEMON: Brendon, during Super Bowl week, San Francisco 49ers corner back Chris Culliver made controversial remarks over not welcoming gay football players in the locker room. I want you to listen to this. Do we have that? Apparently, we don't have it, Brendon.

Load-Date: February 5, 2013

End of Document

The Washington Post

Health & Science

Obama proposal allows contraceptives to go under stand-alone insurance policy

Clarification: Earlier versions of this article said "federal courts" that have considered challenges from business owners opposed to the Affordable Care Act's contraceptives mandate have split their decisions, two granting injunctions and two denying. Those numbers refer to the four circuit courts of appeal that have ruled on injunction requests from the private employers. The article has been updated.

By Sarah Kliff and Michelle Boorstein February 2, 2013

The Obama administration proposed new rules Friday that would guarantee widespread access to contraceptives under the Affordable Care Act, but seemed unlikely to head off legal battles that could return a part of the health-care law to the Supreme Court.

The regulations allow religious nonprofit organizations that morally object to contraceptives to not offer that benefit for their employees. But their workers would receive a stand-alone private insurance policy providing birth control coverage at no cost.

Some religious groups criticized the proposed rules. For more than a year, they have mounted a high-profile protest and filed dozens of lawsuits against the contraceptive mandate, arguing that it is a violation of their religious freedom.

These nonprofits worry that their premium dollars might help pay for the stand-alone plans. Separately, some private businesses owned by individuals with strong religious objections to the mandate have sued because they don't want to provide contraceptive coverage to their workers.

"We were extremely disappointed with this inadequate proposal," said Kyle Duncan, general counsel for the Becket Fund for Religious Liberty. His group represents both private employers and faith-based nonprofits. "This is not what many of our clients were hoping and praying for: That they would be given a way of not being subject to the mandate at all."

The required coverage of contraceptives has proved a vexing challenge for the Obama administration. Its attempt to strike a satisfying balance between reproductive health coverage and religious freedom became a key campaign issue.

Women's health groups, which have been vociferous advocates of the contraceptives provision, quickly lauded the administration's decision.

"Today's draft regulation affirms yet again the Obama administration's commitment to fulfilling the full promise of its historic contraception policy," NARAL Pro-Choice America President Ilyse Hogue said. "Thanks to this commitment, most American women will get birth-control coverage without extra expense. Increased access to birth control is a huge win for women."

The Affordable Care Act initially required almost all employers to cover contraceptives as part of a larger package of preventive health benefits for women. Some religious groups opposed the requirement, which they argued would force them to go against their beliefs. Houses of worship, such as churches and synagogues, would be exempt.

Last February, the administration announced an accommodation for faith-based nonprofits: Insurance companies would cover the cost of contraceptive coverage.

Religious leaders derided the policy as an "accounting gimmick," arguing that the premiums they pay to health insurers could end up paying for the contraceptives they oppose.

The compromise did not address large companies that self-insure, meaning they foot the bill for their employees' health care rather than pay premiums to insurance plans. The Obama administration outlined a number of policy suggestions in March that could address those concerns. It included proposals such as contracting with a national insurance plan to provide coverage or tapping into other streams of federal dollars.

Under the policy proposed Friday, self-insured plans that decided to opt out of contraceptive coverage would notify the company that administers their health benefits. That third-party administrator would then be responsible for arranging "separate individual health insurance policies for contraceptive coverage from an issuer providing such policies," according to the proposed regulation.

Insurers that create these plans for self-insured companies will receive an offset from the federal government: lower fees to sell plans on the new health exchanges run by the administration.

Reaction from Catholic institutions seemed cautious. Cardinal Timothy Dolan, leader of the U.S. Conference of Catholic Bishops — essentially the spokesman for the U.S. church — said the bishops and their lawyers would review the new regulations.

"We welcome the opportunity to study the proposed regulations closely," Dolan said in a statement issued midday Friday. "We look forward to issuing a more detailed statement later."

Reactions reflected the diversity of views among Catholics.

The University of Notre Dame, a key battleground of American Catholicism, said in a statement that officials wouldn't comment until they had studied the proposal more closely. Notre Dame stirred the ire of traditional Catholics when it honored President Obama in 2009 by giving him an honorary degree and hosting him as commencement speaker. Three years later, the school joined dozens of other mostly Catholic nonprofits in suing the administration over the mandate.

Liberal Catholic figures applauded the White House on Friday.

The Department of Health and Human Services and "the administration have gone out of their way to resolve the concerns of religious institutions that object to covering contraceptives in their insurance programs," said the Rev. Thomas Reese, former editor of the prominent Catholic magazine America and a well-known writer. "They have also found creative ways to provide contraceptives to the employees of religious colleges and hospitals without the involvement of these institutions."

In the District, the U.S. Court of Appeals has held off ruling on a lawsuit filed by two colleges — Belmont Abbey in Belmont, N.C., and Wheaton College in Wheaton, Ill. — as the Obama administration worked to issue the new rules. The same court dismissed a lawsuit brought by the Catholic Archdiocese of Washington on similar grounds.

Four U.S. circuit courts of appeal that have considered the separate challenges brought by business owners have split about whether they should have to comply with the law while it is being challenged. Two have granted business owners injunctions, while two others have denied similar appeals.

Michelle Boorstein is the Post's religion reporter, where she reports on the busy marketplace of American religion.
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POLITICS

Contraception Opt-Out Offer

Employers Who Object to Coverage Could Shift Responsibility, Cost to Insurers

By Louise Radnofsky
Updated Feb. 2, 2013 2:08 p.m. ET

The Obama administration on Friday offered an updated compromise to its requirement that employers cover contraception in workers' insurance plans, a step aimed at settling a yearlong contretemps over a mandate in the health-care overhaul.

The proposal is aimed at addressing the argument of Catholic bishops, along with religiously affiliated universities, hospitals and charities, that requiring employers to provide contraception violates their religious freedom. These objections sparked an election-year furor, along with a number of lawsuits seeking to void the requirement.

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- Contraception Plan Gets Cautious Praise — and Some Criticism
- Text of Proposed Rules

The updated policy, proposed Friday by the Department of Health and Human Services, still guarantees that workers at religious nonprofits would get such coverage. But it specifies a way for employers to avoid funding it. The employers would be allowed to omit contraception, including the morning-after pill, from their insurance plans if they morally object to it.

Instead, insurance companies handling the policies would be responsible for informing employees that they were eligible for separate insurance plans covering contraception with no additional premium or out-of-pocket expense. The new rules would require insurers to pay the upfront cost.

The White House first outlined a compromise last year, but it was rejected by the bishops and Catholic institutions who had been its main opponents, and they went on to file several dozen new lawsuits challenging the requirement.

What is new about Friday's proposal is how insurers would pay for contraception coverage, and how the workaround applies to employers that directly pay workers' medical claims. The federal government would credit insurers for providing the stand-alone coverage for those employers by reducing a user fee insurers must pay starting in 2014 to sell policies to millions of Americans through a federally run health-insurance exchange.

Shirley Bierman, of Meridian, Idaho, stands with fellow protesters during a demonstration in Boise to oppose the Obama administration's health-care mandate for religious institutions in June 2012. AP

"Nonprofit religious organizations like universities, hospitals or charities with religious objections won't have to arrange, contract, pay or refer for coverage of these services for

their employees or students," said Chiquita Brooks-LaSure, an official at the Department of Health and Human Services. "At the same time, women who work or go to school at these institutions will have free contraceptive coverage and will no longer have to pay hundreds of dollars a year that could be going to rent or groceries."

As of late Friday afternoon, it wasn't clear whether the latest offer would win over the policy's main opponents. The U.S. Conference of Catholic Bishops, associations representing Catholic hospitals and schools including the University of Notre Dame didn't immediately offer a substantive response, saying they were still studying the proposals.

But it was evident the deal didn't appease some opponents of the policy, including several businesses suing the administration. The revised policy would provide no relief for companies that don't have formal religious affiliation but whose owners oppose contraception coverage. Many foes of the mandate have said they wouldn't be satisfied unless the requirement were eliminated altogether.

"The federal government continues to rely upon accounting gimmicks to address the concerns of religious nonprofits that do not qualify for the exemption," said Nebraska Attorney General Jon Bruning, a Republican who brought an early suit against the requirement. "This rule utterly fails to address the concerns of for-profit corporations with religious objections to providing coverage for services contrary to their beliefs."

Supporters of contraception coverage cautiously praised Friday's proposal. Cecile Richards, president of Planned Parenthood Federation of America, said in a written statement that it "delivers on the promise of women having access to birth control without copays no matter where they work."

The contraception requirement stems from a piece of the 2010 Affordable Care Act that requires insurance policies to cover preventive health services without charging out-of-pocket fees to enrollees. The Obama administration decided in 2011 that contraception counted as such a service, citing the health benefits of planned pregnancies for women.

Catholic hospitals, universities and charities are among the leading plaintiffs in the lawsuits challenging the requirement. For-profit companies suing include Hercules Industries Inc., a Catholic-owned Colorado heating-and-cooling company, and Hobby Lobby Stores Inc., an Oklahoma City craft chain whose Christian owners consider the morning-after pill to be a form of abortion.

A handful of judges have allowed cases against the requirement to proceed on the grounds that the employers could be protected by a 1993 statute that requires the federal government to consider the rights of religious groups when crafting policy. Some have been tossed out by judges that contended they could not be considered until the administration's proposals had been fully detailed.

"Today's proposed rule does nothing to protect the religious liberty of millions of Americans," said Kyle Duncan, general counsel, the Becket Fund for Religious Liberty, a law firm representing several of the companies. "We are confident that we have the support of the Catholic Church and other religious organizations in the for-profit cases."

The fight over the requirement has been bruising for both sides. The White House has struggled for months to reconcile the objections of the religious groups, as key allies including women's groups insisted President Barack Obama stand by a commitment to expanding access to contraception. The issue has divided Catholic groups, and priests across the country have used Sunday homilies to take sides on it.

Earlier efforts to come to an accommodation with religious groups had run into problems because many large employers, including big Catholic institutions, self-insure, meaning they act as insurance companies by assuming the full responsibility for the health costs of their workers and use traditional insurance companies only for administrative services.

The proposal to shift the costs and responsibilities for contraception coverage directly to traditional insurance companies is likely to be met with skepticism by the industry. The main trade group, America's Health Insurance Plans, said Friday it was still reviewing details of the plan.

—Colleen McCain Nelson contributed to this article.

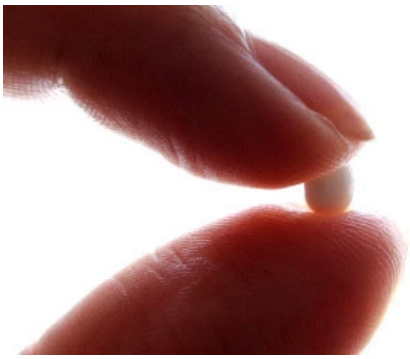
Write to Louise Radnofsky at louise.radnofsky@wsj.com

Religious Groups Remain Concerned About Contraception Mandate

Religious nonprofits won't have to pay for contraception coverage under ObamaCare, but their employees must be offered the benefit, the Department of Health and Human Services confirmed Friday in a rule-making proposal.

By Elizabeth Dias @elizabethjdias | Feb. 01, 2013

Religious nonprofits won't have to pay for contraception coverage under ObamaCare, but their employees must be offered the benefit, the Department of Health and Human Services confirmed Friday in a rule-making proposal.



REUTERS/Eric Gaillard

An illustration picture shows a woman holding a birth control pill at her home in Nice January 3, 2013.

The announcement was mostly a codification–not a change–from the somewhat tangled religious exemptions that the administration proposed last year. Under the framework, houses of worship, like mosques and churches, would not be required to offer contraceptive coverage to employees. But the employees of other religious nonprofits, like Catholic hospitals and evangelical colleges, would get contraception coverage, though it would be paid for by insurers, not employers. For-profit companies would be required to pay for contraception coverage themselves, even if the owners objected on religious grounds.

The announcement Friday expended the definition of religious nonprofits who could benefit from insurer-funded contraception, and offered new options and procedures for self-insured religious non-profits that do not want to shoulder the direct cost of contraceptive coverage. But the new proposal left in place its most controversial elements, earning more praise from Planned Parenthood than from the Catholic Church and conservative evangelicals.

The announced rules offer no relief for private for-profit companies, whose owners object to contraception. The Christian-run crafts store Hobby Lobby, for example, has filed suit against the administration, saying it should not be required to pay for insurance that covers treatments that violate its owner's beliefs. More than 40 other lawsuits have been filed by both secular non-profits and religious for-profits, claiming that the mandate violates their religious beliefs. "Today's proposed rule does nothing to protect the religious liberty of millions of Americans. The rights of family businesses like Hobby Lobby are still being violated," says Kyle Duncan, General Counsel at the Becket Fund. "The Becket Fund continues to study what effect, if any, the Administration's proposed rule has on the many lawsuits currently pending on behalf of non-profit religious organizations like Ave Maria University, Belmont Abbey College, Colorado Christian University, East Texas Baptist University, EWTN, Houston Baptist University, and Wheaton College."

Cardinal Dolan of the United States Conference of Catholic Bishops was also cautious upon hearing about the rule. He issued only a very short statement: "We welcome the opportunity to study the proposed regulations closely. We

Duncan Attach 0667

look forward to issuing a more detailed statement later."

Liberal groups, by contrast, were effusive. Catholics United executive director James Salt called the announcement "a victory not only for the Obama administration, but for the Catholic Church" and "a good day for Americans." Women's groups Planned Parenthood and NARAL Pro-Choice America both applauded the measure, with the caveat that they would review the technical aspects of the proposal to ensure a woman's rights were protected, no matter who her boss is.

The idea that birth control coverage would still be available for women whose religiously-affiliated employers object to it is by no means new. TIME's Kate Pickert wrote about it on Swampland almost a year ago to the day.

> In the face of mounting pressure from Catholic leaders and politicians, the White House on Friday tweaked its position on contraception coverage mandates in the Affordable Care Act. Rather than require large religious institutions like Catholic colleges and hospitals to provide employees with free health insurance coverage for contraception, insurance companies themselves will have to pick up the tab. "We fought for this because it saves lives and it saves money," President Obama said in a midday appearance at the White House. "As we move to implement this rule, however, we've been mindful that there's another principle at stake here. That's the principle of religious liberty.'"
>
> Here's how the new rule will work: A Catholic hospital will provide health insurance to employees that does not include contraception; the insurance company servicing the hospital will reach out to female employees and offer contraception or contraception coverage without any copays or coinsurance. At least one powerful Catholic organization has already endorsed the change.
>
> On a conference call with reporters, senior Administration officials pointedly called the change an "accommodation," not a compromise, and said that the new policy had actually been in the works for a long time. This seems unlikely, given that this more nuanced contraception setup has been floating around in policy circles for months and the Administration opted to initially present a more stringent set of insurance guidelines for religious organizations.
>
> The time lapse between the initial policy and its new and improved version allowed a major political storm to develop. Despite the best efforts of Catholic power players in the Obama Administration, the President appears to have made his original decision based on women's rights, but also on politics. As I and others have previously written, it seemed – on paper – that requiring large Catholic institutions to provide free contraception to employees would be a net political positive. By a fairly thin margin, U.S. Catholics agree with the President's position; an even larger margin of support than among women.

You can read her full story here.

The new proposal will be open for public comment for the next 60 days, after which the final rule will be published. The issue is then likely to be litigated in the courts.

Duncan Attach 0668

Contraception Rule Revised by Obama Administration

BY JENNY GOLD AND KAISER HEALTH NEWS *February 1, 2013 at 12:46 PM EDT*

After a year of lawsuits and public outcry, the Obama administration proposed Friday a way for women who work at nonprofit religious institutions to get free birth control without requiring their employers to pay for it.

Instead, institutions that insure themselves, such as hospitals and universities, could use a third party to find a separate health policy that would pay for and provide the coverage. The costs would be offset by the fees insurers pay to participate in the new online health marketplaces set to open in October under the health law.

“Today, the administration is taking the next step in providing women across the nation with coverage of recommended preventive care at no cost, while respecting religious concerns,” Health and Human Services Secretary Kathleen Sebelius said in a press release. “We will continue

to work with faith-based organizations, women's organizations, insurers and others to achieve these goals."

The proposed rule is aimed mainly at groups affiliated with churches, such as hospitals and educational institutions. It is unlikely to satisfy the concerns of private businesses, however, which have brought several dozen lawsuits against the health law's contraceptive mandate saying it violates their religious beliefs. "The rights of family businesses like Hobby Lobby are still being violated," said Kyle Duncan, general counsel of The Becket Fund for Religious Liberty, which represents several groups that have filed suit. Some of those lawsuits are expected to make their way to the U.S. Supreme Court.

Cardinal Timothy Dolan of New York, president of the U.S. Conference of Catholic Bishops, said in a statement that the organization welcomes "the opportunity to study the proposed regulations closely. We look forward to issuing a more detailed statement later." A similar statement was issued by the Catholic Health Association, which includes scores of hospitals and health groups affiliated with the Roman Catholic Church.

Here's the way the proposed rule would work:

It clarifies the definition of "religious employers" to follow that of Internal Revenue Service code, and to include all houses of worship and their affiliated organizations.

Religious organizations that self-insure, as well as student health plans, would let their third party administrator know that they object to providing contraceptive coverage on moral grounds. The administrator would then work with a health insurer to provide separate individual contraceptive coverage at no cost to the enrollees. The cost would be

Duncan Attach 0670

"offset by adjustments in federally-facilitated exchange user fees that insurers pay," according to the administration.

Nothing would change for a religious organization that offers a group plan: Under the compromise offered by the administration last February, the insurer would provide separate contraception coverage at no cost to participants. The administration argues that such services would be cost-neutral to insurers because they would result in fewer births.

Under the health law, employers who insure their workers are required to cover government-recommended preventive services without co-payments. In August 2011, the Obama administration said those would include contraceptive services, such as birth control pills, implants and sterilization procedures.

Religious organizations opposed to birth control sought to be exempt. The Obama administration initially gave them a one-year delay, until August of this year, to comply, while promising further compromise.

Ilyse Hogue, president of NARAL Pro-Choice America, praised the latest proposal, saying it will ensure that "most American women will get birth-control coverage without extra expense."

But others were skeptical the changes would mollify critics.

Insurance consultant Robert Laszewski of Health Policy and Strategy Associates said the administration "way underestimated" the strong feelings about contraceptive services among some religious Americans. To fulfill its promise of no-cost contraceptive services, he said, the latest compromise transfers the costs of covering a relatively small number of women to the new health insurance marketplaces.

While that cost will eventually be passed onto consumers, he said, “we’re talking nickels and dimes here. The Obama administration is correctly assuming that the cost is going to be a rounding error.”

Nonetheless, that’s unlikely to satisfy religious employers for whom the issue was never about cost, but about religious principles, Laszewski said.

HEALTH NEWS | Fri Feb 1, 2013 | 4:51pm EST

Obama offers compromise on birth control health coverage

U.S. President Barack Obama delivers remarks at the White House in Washington November 28, 2012. REUTERS/Kevin Lamarque

By David Morgan | WASHINGTON

The Obama administration on Friday sought to settle a dispute with some religious leaders over the inclusion of contraceptives in employees' health insurance plans by proposing to separate birth control from other benefits.

The approach offers religious employers a way to avoid paying for women's contraceptives through employer-provided health insurance, while still guaranteeing their workers access to birth control coverage with no out-of-pocket costs as called for in President Barack Obama's healthcare reform law.

It follows months of protest and legal action by groups representing Roman Catholics, Protestant evangelicals and private employers, who argued that the 2010 healthcare law forced them to violate their religious tenets against contraception.

For more than a year, the Obama administration has grappled with how to balance its desire to guarantee universal, free contraceptive coverage with religious freedoms provided in the U.S. Constitution.

Faced with the ire of religious leaders and social conservatives in the midst of a heated presidential campaign, Obama said last February that he would create some sort of accommodation for religious employers.

The new rules, which would largely leave contraceptive coverage to outside insurers, consolidate many of the ideas administration officials voiced a year ago, but in greater detail

Duncan Attach 0673

but in greater detail.

"Today, the administration is taking the next step in providing women across the nation with coverage of recommended preventive care at no cost, while respecting religious concerns," Health and Human Services Secretary Kathleen Sebelius said in a statement.

"We will continue to work with faith-based organizations, women's organizations, insurers and others to achieve these goals."

Cardinal Timothy Dolan of New York and other leading voices in the Roman Catholic community said they would study the proposal but offered no immediate response. However, other groups expressed disappointment over the rule, including the exclusion of for-profit businesses from its terms.

"This proposal does nothing to change the scope of religious employer exemption," said Kyle Duncan, general counsel for the Becket Fund for Religious Liberty, which is assisting in the legal challenges to the policy. He called it "very disappointing."

"The proposal has nothing to do with millions of family businesses and owners who are having their rights violated by the mandate and are currently in litigation," he said.

Meanwhile, Catholics United, a group with a history of supporting liberal causes, applauded the move. "This is a victory not only for the Obama Administration, but for the Catholic Church," said James Salt, executive director of Catholics United.

GUARANTEES ACCESS

The mandate contained in Obama's Patient Protection and Affordable Care Act requires most employers to provide coverage for contraceptives and sterilization procedures approved by the U.S. Food and Drug Administration, including the so-called morning-after pill.

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The new rule makes clear that churches and other places of worship remain exempt even when they operate parochial schools and social services such as soup kitchens that benefit or employ people of different religious faiths.

But the change did not alter the administration's position that employees and students at religiously affiliated nonprofit groups should have access to contraceptive coverage even if their institutions object.

The rule, which requires the institutions to self-certify their status as religious nonprofits, calls on private insurers to cover contraceptives through separate individual plans with the insurer covering the cost. Officials said insurers would be compensated by lower healthcare expenses due to fewer births.

People who work for religious affiliates that self-insure would receive coverage through a private insurer arranged by a third-party administrator. Those insurers would be compensated by lower user fees for participation in state-based

healthcare exchanges, which are scheduled to begin operating on January 1, 2014.

The proposed rules, published in the Federal Register, are open for public comment through April 8.

(Additional reporting by Atossa Abrahamian in New York; Editing by Karey Wutkowski and Jackie Frank)

WASHINGT**ON, DC** – Today's announcement of the Notice of Proposed Rulemaking on the HHS mandate leaves the religious liberty of millions of Americans unprotected.

"Today's proposed rule does nothing to protect the religious freedom of millions of Americans. For instance, it does nothing to protect the rights of family businesses like Hobby Lobby," said Kyle **Duncan, General Counsel for Becket Law**. "The administration obviously realizes that the HHS mandate puts constitutional rights at risk. There would have been an easy way to resolve this—expanding the exemption—but the proposed rule expressly rejects that option."

The proposed rule fails to fix the HHS mandate's fundamental problems:

- The proposed rule provides no coverage for family businesses like Hobby Lobby.
- The proposed rule does not meaningfully expand the "church-only" exemption – which is the real relief that our clients are entitled to under our constitution.
- For other religious non-profits, HHS proposes a convoluted "accommodation" that may not resolve religious organizations' objections to being coerced into providing contraceptives and abortifacients to their employees.
- Finally, the long-awaited rule provides no concrete guidance for religious groups that are self-insured.

"We are extremely disappointed with today's announcement. HHS waited nearly a year and then gave us a proposed rule that still burdens religious liberty. It also gives no concrete guidance to self-insured religious organizations like Wheaton College. Given that today's proposed rule was prompted in part by the D.C. Circuit's order in the Wheaton College case, that is a remarkable and surprising omission," says **Kyle Duncan, General Counsel for Becket Law**. "We remain committed to protecting religious liberty until the Administration recognizes the conscience rights of all Americans."

There are now 44 separate lawsuits challenging the HHS mandate, which is a regulation under the Affordable Care Act (aka "Obamacare"). Becket led the charge against the unconstitutional HHS mandate, and along with Hobby Lobby represents: Ave Maria University, Belmont Abbey College, Colorado Christian University, East Texas Baptist University, EWTN, Houston Baptist University, and Wheaton College.

Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 18 years its attorneys have been recognized as experts in the field of church-state law. Becket recently won a 9-0 victory in Hosanna-Tabor v. *EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half* century."

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Duncan Attach 0676

A Flood of Suits Fights Coverage of Birth Control

By ETHAN BRONNER JAN. 26, 2013

1086

President Obama, with his health secretary, Kathleen Sebelius, offering a compromise on the contraception mandate last year. Shawn Thew/European Pressphoto Agency

In a flood of lawsuits, Roman Catholics, evangelicals and Mennonites are challenging a provision in the new health care law that requires employers to cover birth control in employee health plans — a high-stakes clash between religious freedom and health care access that appears headed to the Supreme Court.

In recent months, federal courts have seen dozens of lawsuits brought not only by religious institutions like Catholic dioceses but also by private employers ranging from a pizza mogul to produce transporters who say the government is forcing them to violate core tenets of their faith. Some have been turned away by judges convinced that access to contraception is a vital health need and a compelling state interest. Others have been told that their beliefs appear to outweigh any state interest and that they may hold off complying with the law until their cases have been judged. New suits are filed nearly weekly.

“This is highly likely to end up at the Supreme Court,” said Douglas Laycock, a law professor at the University of Virginia and one of the country’s top scholars on church-state conflicts. “There are so many cases, and we are already getting strong disagreements among the circuit courts.”

President Obama’s health care law, known as the Affordable Care Act, was the most fought-over piece of legislation in his first term and was the focus of a highly contentious Supreme Court decision last year that found it to be constitutional.

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But a provision requiring the full coverage of contraception remains a matter of fierce controversy. The law says that companies must fully cover all “contraceptive methods and sterilization procedures” approved by the Food and Drug Administration, including “morning-after pills” and intrauterine devices whose effects some contend are akin to abortion.

As applied by the Health and Human Services Department, the law offers an exemption for “religious employers,” meaning those who meet a four-part test: that their purpose is to inculcate religious values, that they primarily employ and serve people who share their religious tenets, and that they are nonprofit groups under federal tax law.

But many institutions, including religious schools and colleges, do not meet those criteria because they employ and teach members of other religions and have a broader purpose than inculcating religious values.

“We represent a Catholic college founded by Benedictine monks,” said Kyle Duncan, general counsel of the Becket Fund for Religious Liberty, which

Duncan Attach 0678

has brought a number of the cases to court. "They don't qualify as a house of worship and don't turn away people in hiring or as students because they are not Catholic."

In that case, involving Belmont Abbey College in North Carolina, a federal appeals court panel in Washington told the college last month that it could hold off on complying with the law while the federal government works on a promised exemption for religiously-affiliated institutions. The court told the government that it wanted an update by mid-February.

Defenders of the provision say employers may not be permitted to impose their views on employees, especially when something so central as health care is concerned.

"Ninety-nine percent of women use contraceptives at some time in their lives," said Judy Waxman, a vice president of the National Women's Law Center, which filed a brief supporting the government in one of the cases. "There is a strong and legitimate government interest because it affects the health of women and babies."

She added, referring to the Centers for Disease Control and Prevention, "Contraception was declared by the C.D.C. to be one of the 10 greatest public health achievements of the 20th century."

Officials at the Justice Department and the Health and Human Services Department declined to comment, saying the cases were pending.

A compromise for religious institutions may be worked out. The government hopes that by placing the burden on insurance companies rather than on the organizations, the objections will be overcome. Even more challenging cases involve private companies run by people who reject all or many forms of contraception.

The Alliance Defending Freedom — like Becket, a conservative group — has brought a case on behalf of Hercules Industries, a company in Denver that makes sheet metal products. It was granted an injunction by a judge in Colorado who said the religious values of the family owners were infringed by the law.

"Two-thirds of the cases have had injunctions against Obamacare, and most are headed to courts of appeals," said Matt Bowman, senior legal counsel for the alliance. "It is clear that a substantial number of these cases will vindicate religious freedom over Obamacare. But it seems likely that the Supreme Court will ultimately resolve the dispute."

The timing of these cases remains in flux. Half a dozen will probably be argued by this summer, perhaps in time for inclusion on the Supreme Court's docket next term. So far, two- and three-judge panels on four federal appeals courts have weighed in, granting some

injunctions while denying others.

One of the biggest cases involves Hobby Lobby, which started as a picture framing shop in an Oklahoma City garage with $600 and is now one of the country's largest arts and crafts retailers, with more than 500 stores in 41 states.

David Green, the company's founder, is an evangelical Christian who says he runs his company on biblical principles, including closing on Sunday so employees can be with their families, paying nearly double the minimum wage and providing employees with comprehensive health insurance.

Mr. Green does not object to covering contraception but considers morning-after pills to be abortion-inducing and therefore wrong.

"Our family is now being forced to choose between following the laws of the land that we love or maintaining the religious beliefs that have made our business successful and have supported our family and thousands of our employees and their families," Mr. Green said in a statement. "We simply cannot abandon our religious beliefs to comply with this mandate."

The United States Court of Appeals for the 10th Circuit last month turned down his family's request for a preliminary injunction, but the company has found a legal way to delay compliance for some months.

These cases pit the First Amendment and a religious liberty law against the central domestic policy of the Obama administration, likely affecting many tens of thousands of employees. The First Amendment says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," and much attention has been focused in the past two decades on the issue of "free exercise," meaning preventing governmental interference with religious practices.

Free-exercise cases in recent years have been about the practices of small groups — the use of a hallucinogen by a religious group, for example — rather than something as central as the Affordable Care Act.

The cases also test the contours of a 1993 law known as the Religious Freedom Restoration Act. The law prohibits the federal government from imposing a "substantial burden" on any religious practice without a "compelling state interest." The burden must also be the least restrictive possible.

Professor Laycock of the University of Virginia said: "The burden is clear especially for religious organizations, which ought to be able to run themselves in accordance with their religious teachings. They are being asked to pay for medications they view as evil." He added that because the health care law had many exceptions, including for very small companies, the government might find it hard to convince the courts that contraception coverage is, in fact, a compelling interest.

But William Marshall, a First Amendment scholar at the University of North Carolina Law School, said the Supreme Court asserted in a 1990 opinion by Justice Antonin Scalia that religious groups had a big burden in overcoming "a valid and neutral law of general applicability."

"You could have an objection of conscience to anything the government wants you to do — pay taxes because they will go to war or to capital punishment, or having your picture on your driver's license," Mr. Marshall said. "The court has made clear that religious groups have no broad right for such exceptions."

Mr. Laycock said that while judges are supposed to be neutral, they too can get caught up in the culture wars. Judges sympathetic to women's sexual autonomy would probably come down on one side of the dispute, and those more concerned with religious liberty on the other, he said.

"There is a lot of political freight on this issue," he said.

A version of this article appears in print on January 27, 2013, on Page A1 of the New York edition with the headline: A Flood of Suits On the Coverage Of Birth Control. Order Reprints | Today's Paper | Subscribe

Obama birth control mandates loosens lawsuits

Jan. 26, 2013, at 5:03 p.m.

MORE

AP

By RACHEL ZOLL, Associated Press

NEW YORK (AP) — The legal challenges over religious freedom and the birth control coverage requirement in President Barack Obama's health care overhaul appear to be moving toward the U.S. Supreme Court.

Faith-affiliated charities, hospitals and universities have filed dozens of lawsuits against the mandate, which requires employers to provide insurance that covers contraception for free. However, many for-profit business owners are also suing, claiming a violation of their religious beliefs.

The religious lawsuits have largely stalled, as the Department of Health and Human Services tries to develop an accommodation for faith groups. However, no such offer will be made to individual business owners. And their lawsuits are yielding conflicting rulings in appeals courts around the country.

"The circuits have split. You're getting different, conflicting interpretations of law, so the line of cases will have to go to the Supreme Court, " said Carl Esbeck, a professor at the University of Missouri Law School who specializes in religious liberty issues.

Last year, the Supreme Court ruled that Obama's fiercely contested health care overhaul, known as the Affordable Care Act, was constitutional. But differences over the birth control provision in the law have yet to be resolved.

Under the requirement, most employers, including faith-affiliated hospitals and nonprofits, have to provide health insurance that includes artificial contraception, including sterilization, as a free preventive service. The goal, in part, is to help women space pregnancies as a way to promote health.

Religious groups who employ and serve people of their own faith — such as churches — are exempt. But other religiously affiliated groups, such as Catholic Charities, must comply.

Roman Catholic bishops, evangelicals and some religious leaders who have generally been supportive of Obama's policies have lobbied fiercely for a broader exemption. The Catholic Church prohibits the use of artificial contraception. Evangelicals generally permit the use of birth control, but they object to specific methods such as the morning-after contraceptive pill, which they argue is tantamount to abortion.

Obama promised to change the birth control requirement so insurance companies and not faith-affiliated employers would pay for the coverage, but religious leaders said more changes were needed to make the plan work.

The Health and Human Services Department said it could not comment on litigation. A spokeswoman also did not respond to a question about when the latest revisions in the birth control rule would be made public.

However, government attorneys responding to a lawsuit said an announcement was expected by the end of March. In the suit filed by the evangelical Wheaton College in Illinois and Catholic Belmont Abbey in North Carolina, the court ordered government attorneys to provide a progress report on the new rule every 60 days. Whatever its final form, the mandate will take effect for religious groups in August.

At the center of the cases is the Religious Freedom Restoration Act, the 1993 law that bars the government from imposing a substantial burden on the exercise of religion for anything other than a compelling government interest pursued in the least restrictive way. The question of how or whether these criteria apply when owners of for-profit businesses have a religious objection to a government policy hasn't been fully tested.

"It's more natural for people to say Notre Dame exercises religion, but when you say this power tool company exercises religion, you have to explain it little more, I think the claims are really the same," said Kyle Duncan, general counsel for the Becket Fund for Religious Liberty, which represents many of the plaintiffs.

Brigitte Amiri, senior staff attorney at the American Civil Liberties Union, argued the business owners are trying to use a religious liberty claim to deny benefits to someone else.

"We don't think that religious liberty claims can be used as a way to discriminate against women employees — using those claims to take away someone else's benefits and services," Amiri said.

In the lawsuits from faith-affiliated groups, such as the University of Notre Dame, judges around the country have generally said it would be premature to decide the legal issues until the federal rule for religiously affiliated organizations is finalized.

In the cases involving business owners, judges have granted temporary injunctions to businesses in nine of 14 cases they've heard, while questions about for-profit employers and religious rights are

decided, according to a tally by the Becket Fund.

In a case brought by Cyril and Jane Korte, Catholic owners of Korte & Luitjohan Contractors in Illinois, a three-judge panel granted a temporary injunction, ruling 2-1 that providing employees insurance coverage that includes birth control would violate the Kortes' faith.

"It is a family-run business, and they manage the company in accordance with their religious beliefs," the judges wrote.

The dissenting judge argued that the company will not be paying directly for contraception but instead will purchase insurance that covers a wide range of health care that could include birth control, if the woman decides with her physician that she needs it.

"What the Kortes wish to do is to preemptively declare that their company need not pay for insurance which covers particular types of medical care to which they object," the dissenting judge wrote.

Similar reasoning was used by courts denying an injunction requested by the arts and crafts chain Hobby Lobby and religious book-seller Mardel Inc., which are owned by the same evangelical family. Oklahoma-based Hobby Lobby calls itself a "biblically founded business" and is closed on Sundays.

The U.S. district judge who first considered the request said, "Hobby Lobby and Mardel are not religious organizations."

"Plaintiffs have not cited, and the court has not found, any case concluding that secular, for-profit corporations such as Hobby Lobby and Mardel have a constitutional right to the free exercise of religion," the ruling said.

Challenges to contraception rule mount rapidly

The Washington Post

January 21, 2013 Monday, Suburban Edition

Distribution: Every Zone

Section: A-SECTION; Pg. A17

Length: 1063 words

Byline: Robert Barnes

Body

Enjoy the festivities, President Obama, and while you're on the grand stage Monday, it might be wise to make nice with the assembled Supreme Court justices.

The next legal challenge to the Affordable Care Act is moving quickly to the high court, and bringing potent questions about religious freedom, gender equality and corporate "personhood."

The issue is the health-care law's requirement that employers without a specific exemption must provide workers with insurance plans that cover a full range of birth-control measures and contraceptive drugs.

Inclusion of the no-cost contraceptive coverage for female workers has always been a controversial part of the legislation. It has now sparked more than 40 lawsuits around the nation involving more than 110 individuals, colleges, hospitals, church-affiliated nonprofits and private companies.

The cases involving those with religious affiliations are in limbo, as the Obama administration works on regulations that might provide a compromise. In a case involving two such institutions - Wheaton College in Illinois and Belmont Abbey College in North Carolina - a panel of the U.S. Court of Appeals for the D.C. Circuit is requiring administration officials to report by mid-February about the new rule, which is to be issued by spring.

At the same time, "the business cases are moving quickly," said Kyle Duncan, general counsel of the Becket Fund for Religious Liberty, one of the groups coordinating the challenges to the law. Duncan said he thinks the cases will be decided in lower courts in plenty of time for the Supreme Court to decide whether to review the issue in its term that begins in October.

By Duncan's count, there are 14 cases filed by business owners who say the law forces them to choose between running their companies and following their religious beliefs. In nine of those cases, courts have issued injunctions until the conflicts can be decided on their merits.

The cases differ by what the business owners say they are willing to provide - some say all contraceptives would violate their religious beliefs, others object only to abortifacients such as the "morning-after pill" and intrauterine devices. But all rely on protections in the First Amendment regarding free exercise of religion and in the Religious Freedom Restoration Act (RFRA).

The 1993 act prohibits the federal government from imposing a "substantial burden" on a person's exercise of religion unless there is a "compelling governmental interest" and the measure is the least-restrictive method of achieving the interest.

No court of appeals has reached the merits of the challenges, but two - the 7th and 8th circuits in Chicago and St. Louis respectively - have granted business owners injunctions, and two - the 6th in Cincinnati and the 10th in Denver - have denied them.

And along the way, those decisions give a pretty clear indication of the fight ahead.

The most promising for the challengers is a ruling by a three-judge panel of the 7th Circuit. Cyril and Jane Korte, owners of K & L Contractors, said the new law offends their Roman Catholic beliefs. They wanted to replace the insurance program they offered their workers, which they found provided contraceptive services, with one that did not.

The Kortes made their main challenge under RFRA. The government opposed, saying that, among other things, RFRA did not apply to corporations, and that whether their employees took advantage of contraceptive services had no impact on the Kortes' practice of religion.

The panel split 2 to 1 for the Kortes. "The contraception mandate applies to K & L Contractors as an employer of more than 50 employees, and the Kortes would have to violate their religious beliefs to operate their company in compliance with it," wrote Circuit Judges Joel M. Flaum and Diane S. Sykes in granting the couple an injunction.

They suggested the corporation had rights under RFRA by citing the Supreme Court's decision in Citizens United v. Federal Election Commission, which said corporations at least had political speech rights under the First Amendment.

The judges said it didn't matter that the employees would be the ones to make use of the covered contraceptives. "The religious liberty violation at issue here inheres in the coerced coverage of contraception, abortifacients, sterilization, and related services, not - or perhaps more precisely, not only - in the later purchase or use of contraception or related services."

Circuit Judge Ilana Diamond Rovner disagreed. "What the Kortes wish to do is to preemptively declare that their company need not pay for insurance which covers particular types of medical care to which they object," she wrote. If that were right, she added, what limits might apply to employers limiting coverage.

That is essentially what judges in the 10th Circuit found regarding the company Hobby Lobby, which has 500 stores in 41 states. "It is by God's grace and provision that Hobby Lobby has endured," founder and CEO David Green said in a statement.

But the judges in the Hobby Lobby case said that Green's exercise of religion was not affected by the decisions of his workers. It is only after a "a series of independent decisions by health care providers and patients" that Green's health care plan might subsidize an activity to which he objects, the court said.

Hobby Lobby's case briefly reached the Supreme Court, where Justice Sonia Sotomayor, as the justice responsible for that circuit, turned down its request for an injunction. The Supreme Court's standards for such grants are more demanding than those of appeals courts, she said.

And she noted that the question of whether corporations are covered by RFRA has not been considered by the high court.

The legal battles have mobilized forces on both sides. The National Women's Law Center filed a brief in one of the cases that said the contraceptive requirements "further the compelling governmental interests of safeguarding public health and promoting gender equality in the least restrictive means possible."

The center's senior counsel, Gretchen Borchelt, said in an interview that an employer should have no more right to make health care choices for its workers than it could claim in telling them how to spend their paychecks.

barnesr@washpost.com

To see a list of challenges, go to High Court on the Fed Page: *www.washingtonpost.com/politics/federal-government*.

Load-Date: January 21, 2013

End of Document

W**ashington, DC.-**"Today we welcome the President's Proclamation on Religious Freedom Day. However, we deeply regret that the President does not mention the HHS mandate, which was issued by his administration and which is now trampling the religious freedom of millions of individuals, schools, hospitals, charities, and businesses throughout our nation. Perhaps this mismatch between words and deeds can be explained by the phrase "freedom of worship," which the President uses in the first sentence of his proclamation. Religious freedom certainly includes worship, but it extends beyond the four walls of a church. If it is not to be an empty promise, religious freedom must also include acting on one's deepest religious beliefs when one is feeding the poor, caring for the sick, educating the young, or running a business. The HHS mandate ignores that simple truth and is therefore out of step with our traditions and our laws, which promise religious freedom for all." — Kyle Duncan**, General Counsel for Becket Law**

There are now 43 separate lawsuits challenging the HHS mandate. Becket led the charge against the unconstitutional HHS mandate filing the first lawsuit on behalf of Belmont Abbey College, and currently represents: Hobby Lobby, Wheaton College, East Texas Baptist University, Houston Baptist University, Colorado Christian University, the Eternal Word Television Network, Ave Maria University, and Belmont Abbey College.

Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 18 years its attorneys have been recognized as experts in the field of church-state law. Becket recently won a 9-0 victory in Hosanna-Tabor v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half century."

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Duncan Attach 0688

Hobby Lobby Delays Obamacare Fines for Now; Avoids $18.2 Million Penalty

BY ANUGRAH KUMAR , CHRISTIAN POST CONTRIBUTOR

Jan 14, 2013 | 7:25 AM

Craft chain Hobby Lobby said it has found a way to delay compliance with the Obamacare mandate, which requires companies to cover contraception in their employees' health care. Pastor Rick Warren has warned that religious freedom, at the heart of the company's battle, might become this decade's civil rights movement.

The evangelical Christian-owned company plans to shift the beginning of its employee health plan to temporarily avoid $1.3 million a day in fines for each day since Jan. 1 that it did not comply with the Affordable Care Act. Without the delay, the fine would now have totaled $18.2 million.

"Hobby Lobby discovered a way to shift the plan year for its employee health insurance, thus postponing the effective date of the mandate for several months," Peter M. Dobelbower, company's general counsel, said in a statement.

Dobelbower added that Hobby Lobby "does not provide coverage for abortion-inducing drugs in its healthcare plan," alluding to "morning-after" and "week-after" pills. The company will continue to "vigorously defend its religious liberty and oppose the mandate and any penalties."

to Retailer

Christians Question Hobby Lobby's Defense, Biblical Stance Against Obamacare

Hobby Lobby Donates Property to Chicago Megachurch

On Dec. 26, Supreme Court Justice Sonia Sotomayor denied the company's emergency request to block enforcement of the Health and Human Services "preventive services" mandate, which forces the company to go against their religious beliefs and cover contraception, sterilization and abortifacients in employees' health care.

However, the day after the company's plea for an emergency injunction was rejected, Kyle Duncan, general counsel for the Becket Fund for Religious Liberty, which is legally representing Hobby Lobby, said the retail chain will continue their appeal.

"The Supreme Court merely decided not to get involved in the case at this time," Duncan said. "It left open the possibility of review after their appeal is completed in the Tenth Circuit. The company will continue to provide health insurance to all qualified employees. To remain true to their faith, it is not their intention, as a company, to pay for abortion-inducing drugs."

David Green, Hobby Lobby CEO and founder, has said, "We simply cannot abandon our religious beliefs to comply with this mandate… We're Christians, and we run our business on Christian principles." Headquartered in Oklahoma, Hobby Lobby has 500 arts and crafts stores in 41 states.

Warren, author and pastor of Saddleback Church in Lake Forest, Calif., has described the company's battle against Obamacare as "nothing less than a landmark battle for America's FIRST freedom, the freedom of religion and the freedom from government intervention in matters of conscience."

Warren said in a statement earlier this month that every American who loves freedom should "shudder at the precedent the government is trying to establish by denying Hobby Lobby the full protection of the First Amendment."

He blasted the government for trying to reinterpret the First Amendment "from freedom to PRACTICE your religion, to a more narrow freedom to worship, which would limit your freedom to the hour a week you are at a house of worship." This, he added, is not only a subversion of the Constitution, "it is nonsense," because "any religion that cannot be lived out … at home and work, is nothing but a meaningless ritual."

Warren predicts that "the battle to preserve religious liberty for all, in all areas of life, will likely become the civil rights movement of this decade."

Hobby Lobby Retail Store

Duncan Attach 0690

"Following Justice Sonia Sotomayor's decision on December 26th denying Hobby Lobby temporary relief from the HHS mandate to provide abortion-causing drugs as part of its healthcare plan, the company faced exposure to penalties beginning January 1. Subsequently, Hobby Lobby discovered a way to shift the plan year for its employee health insurance, thus postponing the effective date of the mandate for several months. Hobby Lobby does not provide coverage for abortion-inducing drugs in its healthcare plan. Hobby Lobby will continue to vigorously defend its religious liberty and oppose the mandate and any penalties." — **Peter M. Dobelbower, General Counsel – Vice President, Legal, Hobby Lobby Stores, Inc.**

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Statement Regarding Sotomayor Opinion
For Immediate Release: December 27, 2012

"Hobby Lobby will continue their appeal before the Tenth Circuit. The Supreme Court merely decided not to get involved in the case at this time. It left open the possibility of review after their appeal is completed in the Tenth Circuit. The company will continue to provide health insurance to all qualified employees. To remain true to their faith, it is not their intention, as a company, to pay for abortion-inducing drugs." — **Kyle Duncan, General Counsel, Becket Law**

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Duncan Attach 0691

HOBBY LOBBY TO DEFY HHS MANDATE

States News Service

January 2, 2013 Wednesday

Length: 420 words

Byline: States News Service

Dateline: Colorado Springs, CO

Body

The following information was released by CitizenLink (a Focus on the Family Affiliate):

by Bethany Monk

Supreme Court Justice Sonia Sotomayor last week rejected Hobby Lobby's request for a temporary exemption from a government mandate requiring most businesses offer contraceptives and potential abortion-inducing drugs.

The Evangelical-owned arts and crafts chain filed a lawsuit against the Health and Human Services (HHS) mandate on Sept. 12. In November, the 10th U.S. Circuit Court of Appeals denied the store's request for temporary relief from the mandate as its case moved forward. A few days later, Hobby Lobby filed an appeal to the Supreme Court seeking relief from the new law.

"Hobby Lobby will continue their appeal before the Tenth Circuit," said Kyle Duncan, general counsel for The Becket Fund for Religious Liberty, representing Hobby Lobby in the case. "The Supreme Court merely decided not to get involved in the case at this time. It left open the possibility of review after their appeal is completed in the Tenth Circuit."

Duncan said Hobby Lobby will continue to provide health insurance to all qualified employees.

However, to remain true to their faith, Duncan added, "it is not their intention, as a company, to pay for abortion-inducing drugs."

The Obama administration gave most businesses until Aug. 1, 2012 to comply with the mandate's requirements. Some faith-based organizations were granted a so-called "safe-harbor," meaning they have until August 2013 to comply.

More than 110 individuals in 43 separate cases - representing hospitals, universities, diocese, businesses and schools - are challenging the HHS mandate.

Of the twelve for-profits that have obtained rulings on their claims, Hobby Lobby is the third business not to receive relief from the mandate. A court last Thursday denied Grote Industries' - a vehicle safety equipment manufacturer based in Indiana - request for a preliminary injunction. In November, a federal judge refused to expedite consideration of Michigan's Autocam Corp.'s lawsuit against the mandate.

Of the nine for-profits that have received temporary reprieve from the mandate, some of the recent rulings include a preliminary injunction issued on Dec. 28 for Korte and Luitjohan Contractors and a temporary restraining order, issued the same day, for Conestoga Wood Specialties. On Dec. 30, Domino's Farm Corp. received a temporary restraining order against the mandate; the following day, Sharpe Holdings, Inc. received its restraining order against the mandate.

Load-Date: January 2, 2013

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No Headline In Original

South Jersey Times (New Jersey)

December 31, 2012 Monday

Length: 701 words

Body

"In essence, if you are Catholic in this country you no longer can own a company," Frank O'Brien explains.

O'Brien, a St. Louis distributor, is one of more than 42 plaintiffs suing the federal Department of Health and Human Services over its mandate that forces employers to provide health insurance that includes access to contraception and abortion. This controversial Obamacare regulation threatens the religious liberty of not only Catholics but also evangelicals and others with objections of conscience to any of these policies.

"By means of this mandate, the Obama administration has mandated that no Catholic can own a business and provide health insurance to their employees without crippling fines," O'Brien says. It's a policy that the Department of Justice has been defending in court, arguing that an individual absolutely makes a choice to put these religious-liberty claims aside when he or she decides to run a company.

"Kosher butchers around the country must be shocked to find that they now run 'secular' businesses. On this view of the world, even a seller of Bibles is secular," Kyle Duncan of the Becket Fund for Religious Liberty explains.

The legal battle has been tumultuous to watch, with some procedural victories for religious entities, including the Archdiocese of New York and Wheaton College. A three-judge panel has given O'Brien's company temporary relief from having to implement the policy, sparing him from the crippling fines that come with noncompliance. The temporary injunction issued in late November "marked the first time a Court of Appeals has weighed in to any extent on an HHS-mandate case," as his lawyer, Francis J. Manion, at the American Center for Law and Justice, noted at the time.

O'Brien tries to inject a sober reality check to the public discourse on the matter. "The opposition posits that those of my side are trying to deny the right of anyone to use birth control," he says, countering: "We simply don't want to be forced to pay for it, be a party to it."

A legal win for O'Brien is not going to affect contraceptive access in the United States; his lawsuit is not a stealth pro-life strategy to curb legal abortion. "I don't want to know what my employees do in the privacy of their bedrooms. When I am forced to pay for what they do there, I am brought into their bedrooms," he explains.

The federal government shouldn't be forcing this choice. O'Brien's freedom to live his faith in the public square is one that everyone has a stake in defending.

Not qualifying for any of the relatively arbitrary exceptions to the HHS mandate, O'Brien acted early to request relief. Religious nonprofits were given a little more time to figure out how to violate their consciences lest they face the government's wrath - a brilliant election-year move on the administration's part. Should Catholic and evangelicals schools, among others, get some relief, there will still be the Frank O'Briens of the country, against whom the Obama administration has actively gone to court to keep from exercising their religious liberty.

Jennifer Bandy

"Regardless of anyone's beliefs, I think that our customers will find it beneficial to do business with a firm that will treat them the way that the firm wishes to be treated," O'Brien tells me. It's not a bad attitude to have in business. Agents of character build strong moral climates. A little more stewardship might keep us from future fiscal cliff standoffs.

"I see myself as just an individual struggling to be good. I am not the smartest or most hard-working person that I know. God gave me the opportunity to be the steward of my companies during my lifetime. I am simply trying to follow His will as my conscience and church direct to the best of my ability," O'Brien sums up.

O'Brien should be a source of inspiration for so many of us who have been known to privatize and compartmentalize our professed beliefs. He's got that integrity thing down, demanding an authenticity to his faith and challenging himself daily. This is someone to do business with! Instead, we might shut him down.

Kathryn Lopez, editor of National Review Online, writes for the Newspaper Enterprise Association. Her e-mail address is: *klopez@nationalreview.com*

Load-Date: December 30, 2012

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Atty: Hobby Lobby won't offer morning-after pill

The Associated Press

December 28, 2012 Friday 12:12 AM GMT

Section: BUSINESS NEWS

Length: 312 words

Dateline: WASHINGTON

Body

An attorney for Hobby Lobby Stores said Thursday that the arts and crafts chain plans to defy a federal mandate requiring it to offer employees health coverage that includes access to the morning-after pill, despite risking potential fines of up to $1.3 million per day.

Hobby Lobby and religious book-seller Mardel Inc., which are owned by the same conservative Christian family, are suing to block part of the federal health care law that requires employee health-care plans to provide insurance coverage for the morning-after pill and similar emergency contraception pills.

The companies claim the mandate violates the religious beliefs of their owners. They say the morning-after pill is tantamount to abortion because it can prevent a fertilized egg from becoming implanted in a woman's womb.

On Wednesday, Supreme Court Justice Sonia Sotomayor denied the companies' request for an injunction while their lawsuit is pending, saying the stores failed to satisfy the demanding legal standard for blocking the requirement on an emergency basis. She said the companies may still challenge the regulations in the lower courts.

Kyle Duncan, who is representing Hobby Lobby on behalf of the Becket Fund for Religious Liberty, said in a statement posted on the group's website Thursday that Hobby Lobby doesn't intend to offer its employees insurance that would cover the drug while its lawsuit is pending.

"The company will continue to provide health insurance to all qualified employees," Duncan said. "To remain true to their faith, it is not their intention, as a company, to pay for abortion-inducing drugs."

In ruling against the companies last month, U.S. District Judge Joe Heaton said churches and other religious organizations have been granted constitutional protection from the birth-control provisions but that "Hobby Lobby and Mardel are not religious organizations."

Load-Date: December 28, 2012

High court asked to block morning-after pill rule

The Associated Press State & Local Wire

December 22, 2012 Saturday 12:46 AM GMT

Section: STATE AND REGIONAL

Length: 581 words

Byline: By TIM TALLEY, Associated Press

Dateline: OKLAHOMA CITY

Body

Hobby Lobby Stores asked the U.S. Supreme Court on Friday to block part of the federal health care law that requires it to provide insurance coverage for the morning-after pill and similar emergency contraception pills.

Owned by a conservative Christian family, the arts-and-crafts company argues that the drugs are tantamount to abortion because they can prevent a fertilized egg from implanting in a woman's womb. Company officials say they must decide whether to violate their faith or face a daily $1.3 million fine beginning Jan. 1 if they ignore the law.

"They're going to have to make a hard decision they shouldn't have to make," said company attorney Kyle Duncan, general counsel for the Becket Fund for Religious Liberty.

"Hobby Lobby is very strong and steadfast in their beliefs," he added. "They are confident that the courts will act."

Oklahoma City-based Hobby Lobby is the largest business to file a lawsuit against the mandate. Founded in 1972, the company now operates more than 500 stores in 41 states and employs more than 13,000 full-time employees who are eligible for health insurance coverage. Hobby Lobby is self-insured.

The company filed a 36-page application with the nation's highest court seeking an emergency injunction to block a mandate that requires it to provide the morning-after pill and week-after pill in its employee health-care plans beginning Jan. 1. The company also objects to providing coverage for certain kinds of intrauterine devices.

Attorneys for the government have said the drugs do not cause abortions and that the U.S. has a compelling interest in mandating insurance coverage for them.

Hobby Lobby asked the Supreme Court to take up the case a day after a federal appeals court rejected the company's request. A U.S. District judge also turned down the company last month.

Hobby Lobby and a sister company, Mardel Inc., sued the government in September, claiming the mandate violates the religious beliefs of its owners, the Green family. Duncan has said members of the family run their businesses according to their religious faith, "and regularly engage in what can only be called exercises of religion."

Among other things, Hobby Lobby takes out hundreds of full-page ads every Christmas and Easter celebrating the religious nature of the holidays. Stores are closed on Sundays to give employees a day of rest, and the company

excludes contraceptive devices and drugs that its owners maintain can cause abortion from its employee prescription drug coverage plan, according to the appeal.

In ruling against the companies last month, U.S. District Judge Joe Heaton said churches and other religious organizations have been granted constitutional protection from the birth-control provisions, but "Hobby Lobby and Mardel are not religious organizations."

Heaton recognized that the Green family has sincere religious beliefs, but the judge ruled that complying with the new health care guidelines creates only an indirect burden on Hobby Lobby's owners and it is not personal to them.

Critics of emergency contraception say it is the equivalent of an abortion pill because it can prevent a fertilized egg from attaching to the uterus. If taken within 72 hours of unprotected sex, the morning-after pill can reduce the chances of an egg implanting in a woman's womb by as much as 89 percent.

The company's lawsuit also alleges that certain kinds of intrauterine devices can destroy an embryo by preventing it from implanting in a woman's uterus.

Load-Date: December 22, 2012

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WASHINGT**ON, DC** – Today, a federal court denied a request to temporarily stop enforcement of the abortion pill mandate, which would force the Christian-owned-and-operated **Hobby Lobby Stores,** Inc., to provide the "morning-after pill" and "week-after pill" in its health insurance plan, or face **crippling fines up to $1.3 million per day**.

"The Green family is disappointed with this ruling," said **Kyle Duncan, General Counsel for Becket** Law. "They simply asked for a temporary halt to the mandate while their appeal goes forward, and now they must seek relief from the United States Supreme Court. The Greens will continue to make their case on appeal that this unconstitutional mandate infringes their right to earn a living while remaining true to their faith."

The 10th Circuit judges denied the motion calling the religious burden to the Green family "indirect and attenuated."

Founded in an Oklahoma City garage in 1972, the Green family has grown Hobby Lobby from one 300-square-foot retail space into more than 500 stores in 41 states. "It is by God's grace and provision that Hobby Lobby has endured," **said David Green, founder and CEO.** "Therefore we seek to honor God by operating the company in a manner consistent with Biblical principles."

Hobby Lobby is the largest and only non-Catholic-owned business to file a lawsuit against the HHS mandate. The Green family has no moral objection to the use of preventive contraceptives and will continue covering preventive contraceptives for its employees. However, the Green family's religious convictions prohibit them from providing or paying for the abortion-inducing drugs, the "morning-after" and "week-after" pills, which would violate their most deeply held religious belief that life begins at conception.

The business's lawsuit acts to preserve its right to carry out its mission free from government coercion.

There are now 42 separate lawsuits challenging the HHS mandate, which is a regulation under the Affordable Care Act (aka "Obamacare"). Becket led the charge against the unconstitutional HHS mandate, and along with Hobby Lobby represents: Wheaton College, East Texas Baptist University, Houston Baptist University, Belmont Abbey College, Colorado Christian University, the Eternal Word Television Network and Ave Maria University.

Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 18 years its attorneys have been recognized as experts in the field of church-state law. Becket recently won a 9-0 victory in Hosanna-Tabor v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half century."

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Duncan Attach 0699

W**ashington, D.C.** — Today, a federal appeals court in Washington, D.C. handed Wheaton College and Belmont Abbey College a major victory in their challenges to the HHS mandate. Last summer, two lower courts had dismissed the Colleges' cases as premature. Today, the appellate court reinstated those cases, and ordered the Obama Administration to report back every 60 days—starting in mid-February—until the Administration makes good on its promise to issue a new rule that protects the Colleges' religious freedom. The new rule must be issued by March 31, 2013.

"The D.C. Circuit has now made it clear that government promises and press conferences are not enough to protect religious freedom," said **Kyle Duncan, General Counsel of Becket Law**, who argued the case. "The court is not going to let the government slide by on non-binding promises to fix the problem down the road."

The court based its decision on two concessions that government lawyers made in open court. First, the government promised "it would *never* enforce [the mandate] in its current form" against Wheaton, Belmont Abbey or other similarly situated religious groups. Second, the government promised it would publish a proposed new rule "in the first quarter of 2013" and would finalize it by next August. The administration made both concessions under intense questioning by the appellate judges. The court deemed the concessions a "binding commitment" and has retained jurisdiction over the case to ensure the government follows through.

"This is a win not just for Belmont Abbey and Wheaton, but for all religious non-profits challenging the mandate," **said Duncan.** "The government has now been forced to promise that it will never enforce the current mandate against religious employers like Wheaton and Belmont Abbey and a federal appellate court will hold the government to its word."

While the government had previously announced plans to create a new rule, it has not yet taken the steps necessary to make that promise legally binding. Lower courts dismissed the colleges' cases while the government contemplated a new rule, but the Court of Appeals for the District of Columbia Circuit decided the cases should stay alive while it scrutinizes whether the government will meet its promised deadlines. The court acted quickly, issuing Tuesday's order just days after hearing lengthy arguments.

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Duncan Attach 0700

W**ashington, D.C.** — Following yesterday's 8th Circuit ruling in *O'Brien v. HHS*, granting temporary relief from the HHS Mandate, Becket urged the 10th Circuit to grant identical relief in their appeal on behalf of **Hobby Lobby**, a Christian-owned-and-operated business that in five weeks faces crippling fines of up to $1.3 million per day if they do not comply with the HHS mandate against their religious beliefs.

"It is now the case that every other court to consider the issue has granted business plaintiffs interim relief against the mandate," said **Kyle Duncan, General Counsel for Becket and counsel for Hobby Lobby**. "The lower court's decision in Hobby Lobby, denying relief, now stands alone. That erroneous decision should not be permitted to leave Hobby Lobby to face the enormous government coercion from which four other courts have now protected similarly situated plaintiffs."

The lower court, which earlier this month denied Hobby Lobby emergency relief, relied heavily on the O'Brien dismissal in rejecting Hobby Lobby's religious freedom claims.

"The 8th Circuit's injunction now severely undermines that prior decision," **Duncan said.** "Granting Hobby Lobby the same relief provided by the 8th Circuit will simply preserve the status quo and avoid forcing the Green family to choose between their faith and their livelihood while the important legal issues presented by this case are resolved on appeal."

Hobby Lobby is the largest and was the first non-Catholic-owned business to file a lawsuit against the HHS mandate. The Green family has no moral objection to the use of preventive contraceptives and will continue covering preventive contraceptives for its employees. However, the Green family's religious convictions prohibit them from providing or paying for the abortion-inducing drugs, the "morning-after" and "week-after" pills, which would violate their most deeply held religious belief that life begins at conception.

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Duncan Attach 0701

Obamacare's many birth-control suits

Politico.com

November 28, 2012 Wednesday 4:39 AM EST

Length: 1600 words

Byline: Kathryn Smith

Body

War on women -- meet war on religious employers.

The first battle played out in the voting booth.

The second is unfolding in the courts -- and the Supreme Court may eventually weigh in on questions about constitutionally protected religious freedom, the public good and whether secular corporations can be, as one judge put it, the "alter ego" of their religious owners.

Dozens of lawsuits have been filed in protest of the Obama administration's policy that most employers include no-cost coverage of FDA-approved prescription contraceptives in health plans.

Churches and some -- not all -- religious organizations are exempt. But more than three dozen for-profit and nonprofit organizations have gone to court, citing religious objections to the birth control coverage rule, which itself is part of the women's health provisions in the controversial health law. The suits only affect this section of the law and wouldn't affect the rest of Obamacare -- except by keeping some of the opponents all fired up.

Here's a rundown on who is suing -- and the big legal issues at stake.

Businesses

For-profit companies have challenged the provision on religious liberty grounds.

In three cases so far, district court judges in Colorado, Michigan and Washington, D.C., have issued preliminary injunctions. That doesn't overturn the law, or spell out a complete legal victory. But the injunctions temporarily halt enforcement for a specific company -- and recognize the plaintiff is raising legitimate questions that deserve a day in court. These involved an HVAC company, a seller of outdoor power equipment and a Bible publisher.

But not all the judges have agreed. Plaintiffs in Oklahoma have been denied a preliminary injunction. And one district court judge in Missouri last month dismissed not just the request for a temporary injunction but the whole case.

Religious groups

The second category of plaintiffs are religiously affiliated entities -- schools, universities and dioceses. This week, the Supreme Court gave the go-ahead for the 4th Circuit to reconsider a broad challenge to several parts of the health law, including the contraception rules, brought by Liberty University.

But some of these suits have been tossed out as "unripe" or denied an injunction because they are temporarily exempt from the contraception coverage rule. That's because the Obama administration gave itself until next August to refine the exemption policy. Churches and some religious organizations already are exempt. But so far, a compromise has not been reached for religiously affiliated employers, who say they may still have to indirectly pay for coverage. But the courts say it's premature for them to weigh in.

Here's a look at some of the legal issues in the cases so far.

Can a business exercise religion?

The government argues: absolutely not. A for-profit company can't exercise religion -- and therefore, the contraception rule presents no "substantial burden" on religious exercise.

But the challengers counter: Who says businesses can't be religious? They point out that no law says a corporation can't exercise religion. And if businesses can exercise a First Amendment right under the Supreme Court's Citizens United campaign donation decision, why can't they exercise religious rights too?

So far, only one judge has addressed this question directly. In a Nov. 19 ruling, Judge Joe Heaton of the U.S. District Court for the Western District of Oklahoma denied a preliminary injunction request from the Hobby Lobby chain of craft stores.

"General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously motivated actions separate and apart from the intention and direction of their individual actors," he wrote. Hobby Lobby has appealed the injunction decision.

Other judges have steered clear of the issue so far.

"Judges are a little bit reluctant to take that on because it's a tough question. The law is really pretty unclear on this, as to whether a for-profit entity could have religious beliefs," said Julianna Gonen, acting director of government relations for the Center for Reproductive Rights.

And some judges have asked: Are there different types of corporations? Some that can exercise religion and some that cannot?

Case in point: Tyndale House Publishers, a closely held company that prints Bibles and donates most of its profit to charity. In his ruling granting a preliminary injunction, Judge Reggie B. Walton of the U.S. District Court for the District of Columbia found that Tyndale House owners could sue on behalf of their company because of its unusual structure. "When the beliefs of a closely held corporation and its owners are inseparable, the corporation should be deemed the alter-ego of its owners for religious purposes," Walton wrote.

Is mandatory contraception coverage a "substantial burden" on practicing religion?

Catholic challengers say offering contraception violates a clear, consistent and deeply held belief system. Evangelical challengers say that they're not opposed to all contraception -- but oppose emergency contraception or any form that they believe causes early abortions.

And both of those challengers say they either have to violate their own beliefs -- or pay crippling fines for flouting the contraception law. Hobby Lobby said its fines could amount to $1.3 million per day.

Judges have split on this in the handful of early rulings, most regarding preliminary injunctions.

For instance, Walton called the pressure on the plaintiffs to violate their beliefs "unmistakable" and found there was a substantial burden. But Judge Carol E. Jackson of the Eastern District of Missouri didn't. She said the contraception rule still allows plaintiff Frank O'Brien, who owns a company that mines and distributes refractory and ceramic materials, to practice religion, just not through his for-profit, secular business.

"Frank O'Brien is not prevented from keeping the Sabbath, from providing a religious upbringing for his children, or from participating in a religious ritual such as Communion," Jackson wrote. "Instead, plaintiffs remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives." O'Brien has appealed.

Body or soul? Women's health versus free exercise of religion

Under the federal Religious Freedom Restoration Act, the government is allowed to impose a substantial burden on religious practice if it can prove it has a "compelling interest" -- and it furthers that interest in the least restrictive way possible.

"The government's view is that [the rule] meets two compelling interests: One is in women's health and the other is women's equality," Gonen said.

But will those arguments satisfy the standard set by the religious freedom act?

"There's no question that [the statute] sets a high standard, and there's no question so far that courts, especially the Supreme Court, have read that statute so that it has teeth," Melissa Rogers, director of the Center for Religion and Public Affairs at Wake Forest University, said.

And some judges have said that by not applying the contraception policy across the board -- "grandfathering" some health plans out of it, exempting some religious groups, giving others a reprieve for a year -- the government is actually hurting its own legal arguments, and all those exceptions do on some level acknowledge the legitimacy of the religious argument.

"The government has exempted over 190 million health plan participants and beneficiaries from the preventive care coverage mandate; this massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to plaintiffs," Judge John L. Kane of the District Court of Colorado wrote in his ruling for an injunction for Hercules Industries, an HVAC distributor and manufacturer in Colorado. The government has appealed the injunction.

Supporters of the rule say grandfathering plans is an administrative mechanism for implementing a law, not a "massive exemption."

"The courts have held that if you have a narrow exception for certain religious organizations, that does not undercut the principle that everybody else has to participate," said Judy Waxman, vice president for health and reproductive rights at the National Women's Law Center, citing two cases in New York and California in which state laws requiring contraceptive coverage were upheld.

Can the administration find a compromise -- and make the lawsuits go away?

If the government does find a compromise that satisfies religiously affiliated nonprofit groups, that could render a majority of the cases from those groups moot.

But those on both sides doubt the government will be able to accommodate private companies. It's particularly challenging for those who "self-insure" -- where an insurer runs the health plan but all the bills actually come out of the employer's pocket. So those cases aren't likely to go away anytime soon.

"Business clients, I think, are holding out no hope whatsoever that the accommodation will do anything for them," Kyle Duncan, general counsel for the Becket Fund for Religious Liberty, said.

Gonen agreed. "The legal issues that we've been talking about so far are going to still remain live," she said.

And given the number of cases -- and the likelihood that the courts will continue to interpret then differently -- there's a good chance the Supreme Court will have the final word.

Jennifer Haberkorn contributed to this report.

Load-Date: November 29, 2012

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Hobby Lobby appeals morning-after pill decision

Durant Daily Democrat (Oklahoma)

November 23, 2012 Friday

Section: NEWS; Pg. 1

Length: 652 words

Byline: Tim Talley, ASSOCIATED PRESS

Body

OKLAHOMA CITY - Hobby Lobby Stores Inc. is asking a federal appeals court to block part of the federal health care law that requires the Christian family-owned arts and crafts company to provide insurance coverage for emergency contraception pills.

The Oklahoma Citybased company asked the 10th U.S. Circuit Court of Appeals to block enforcement of the law, which will require Hobby Lobby and a sister company, Mardel, Inc., to cover the morning-after pill and week-after pill as part of employee health insurance plans beginning Jan. 1. The company filed its appeal Tuesday, a day after a federal judge denied the request.

"There is a sense of urgency here," said Kyle Duncan, general counsel for the Becket Fund for Religious Liberty, which is representing Hobby Lobby.

The company, which is self-insured, has said it will face a daily $1.3 million fine beginning Jan. 1 if it ignores the law.

Hobby Lobby is the largest business to file a lawsuit against the mandate. Founded in 1972, it now operates more than 500 stores in 41 states and employs more than 13, 000 fulltime employees who are eligible for health insurance coverage. Hobby Lobby sued the government in September, claiming the mandate violates the religious beliefs of its Christian owners, the Green family. The owners maintain that the morning-after and week-after pills are tantamount to abortion because they can prevent a fertilized egg from implanting in a woman's womb. They also object to providing coverage for certain kinds of intrauterine devices.

"Appellants engage in an undisputed exercise of religion: they refrain from providing insurance coverage for abortioninducing drugs," Hobby Lobby's appeal states. "Yet the government puts appellants to an impossible choice: either give up the religious exercise, or pay millions in fines."

In ruling against the company Monday, U.S. District Judge Joe Heaton said churches and other religious organizations have been granted constitutional protection from the birth-control provisions, but "Hobby Lobby and Mardel are not religious organizations."

"Plaintiffs have not cited, and the court has not found, any case concluding that secular, forprofit corporations such as Hobby Lobby and Mardel have a constitutional right to the free exercise of religion," the ruling said.

But the companies' appeal argues that members of the Green family run their businesses according to their religious faith, "and regularly engage in what can only be called exercises of religion."

Among other things, Hobby Lobby takes out hundreds of full-page ads every Christmas and Easter celebrating the religious nature of the holidays, closes on Sundays to give employees a day of rest and excludes contraceptive devices and drugs that its owners maintain can cause abortion from its employee prescription drug coverage plan, according to the appeal.

"They exercise their personal religious faith in many ways in which that company is run," Duncan said.

Heaton recognized that the Green family has sincere religious beliefs, but the judge ruled that complying with the new health care guidelines creates only an indirect burden on Hobby Lobby's owners and it is not personal to them, he said.

In medical terms, pregnancy begins when a fertilized egg attaches itself to the wall of the uterus. If taken within 72 hours of unprotected sex, the morning-after pill can reduce the chances of an egg implanting in a woman's womb by as much as 89 percent.

Critics of the contraception say it is the equivalent of an abortion pill because it can prevent a fertilized egg from attaching to the uterus. The lawsuit also alleges that certain kinds of intrauterine devices can destroy an embryo by preventing it from implanting in a woman's uterus.

At a hearing earlier this month, a government lawyer said the drugs do not cause abortions and that the U.S. has a compelling interest in mandating insurance coverage for them.

Load-Date: November 24, 2012

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WASHINGT**ON, DC** – Following yesterday's decision denying its motion for preliminary injunction, Hobby Lobby appealed to the federal 10th Circuit Court of Appeals seeking relief from the abortion pill mandate, which forces the Christian-owned-and-operated **Hobby Lobby Stores, Inc.**, to providethe "morning-after pill" and "week-after pill" in its health insurance plan or face **crippling fines up to $1.3 million per day**.

The brief reads in part:

- "[I]n less than six weeks, [the Green family] must either violate their faith by covering abortion-causing drugs, or be exposed to severe penalties—including fines of up to $1.3 million per day, annual penalties of about $26 million and exposure to private suits."
- "The district court accepted that the Green family engages in a religious exercise by refusing to cover abortion-causing drugs in their self-funded health plan. There was thus no question that the Green family engages in 'religious exercise.'"
- "[T]he Supreme Court has long rejected any distinction between "direct" and "indirect" burdens in evaluating whether regulations infringe religious exercise."
- "The family . . . sign[s] a Statement of Faith and Trustee Commitment obligating them to "honor God with all that has been entrusted to them" and to "use the Green family assets to create, support and leverage the efforts of Christian ministries."
- Their beliefs are exercised through the businesses in numerous, concrete, and public ways:
  - They make chaplains available to employees;
  - give millions from profits to fund ministries;
  - buy hundreds of religious ads every Christmas and Easter;
  - [t]hey monitor merchandise and avoid allowing their property to support activities they believe to be immoral.

"Every American, including family business owners like the Greens, should be free to make a living without forfeiting their religious beliefs," said **Kyle Duncan, General Counsel for Becket Law**, which represents Hobby Lobby. "The Green family needs relief before Jan. 1, and so we have asked the federal appeals court in Denver to issue an injunction against the mandate."

Yesterday's decision by a federal judge in Oklahoma City did not question that the Green family has sincere religious beliefs forbidding them from providing abortion-causing drugs. The court ruled, however, that those beliefs were only "indirectly" burdened by the mandate's requirement that [Hobby Lobby] provide free coverage for specific, abortion-inducing drugs in [the company's] self-funded insurance plan.

Founded in an Oklahoma City garage in 1972, the Green family has grown Hobby Lobby from one 300-square-foot retail space into more than 500 stores in 41 states.

"It is by God's grace and provision that Hobby Lobby has endured," **said David Green, Founder and** CEO. "Therefore we seek to honor God by operating the company in a manner consistent with Biblical principles."

Hobby Lobby is the largest and was the first non-Catholic-owned business to file a lawsuit against the HHS mandate. The Green family has no moral objection to the use of preventive contraceptives and will continue covering preventive contraceptives for its employees. However, the Green family's religious convictions prohibit them from providing or paying for the abortion-inducing drugs, the "morning-after" and "week-after" pills, which would violate their most deeply held religious belief that life begins at conception.

Duncan Attach 0708

The business's lawsuit acts to preserve its right to carry out its mission free from government coercion.

There are now 40 separate lawsuits challenging the HHS mandate, which is a regulation under the Affordable Care Act (aka "Obamacare"). Becket led the charge against the unconstitutional HHS mandate, and along with Hobby Lobby represents: Wheaton College, Belmont Abbey College, East Texas Baptist University, Houston Baptist University, Colorado Christian University, the Eternal Word Television Network and Ave Maria University.

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Duncan Attach 0709

WASHINGT**ON, DC** – Today, a federal court denied a request to halt enforcement of the abortion pill mandate which forces the Christian-owned-and-operated **Hobby Lobby Stores, Inc.**, to provide the "morning after pill" and "week after pill" in their health insurance plan, or face **crippling fines up to $1.3 million dollars per day**.

"We disagree with this decision and we will immediately appeal it," says **Kyle Duncan, General Counsel for Becket.** "Every American, including family business owners like the Greens, should be free to live and do business according to their religious beliefs. The Green family needs relief now and we will seek it immediately from the federal appeals court in Denver."

The court did not question that the Green family has sincere religious beliefs forbidding them from participating in abortion. The court ruled, however, that those beliefs were only "indirectly" burdened by the mandate's requirement that they provide free coverage for specific, abortion-inducing drugs in Hobby Lobby's self-funded insurance plan.

Founded in an Oklahoma City garage in 1972, the Green family has grown Hobby Lobby from one 300-square-foot retail space into more than 500 stores in 41 states. "It is by God's grace and provision that Hobby Lobby has endured," **said David Green, Founder and CEO.** "Therefore we seek to honor God by operating the company in a manner consistent with Biblical principles."

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Duncan Attach 0710

WASHINGT**ON, DC** – On Friday, **Becket Law** filed its reply brief before the **D.C. Circuit Court of** Appeals , asking the Court to reinstate two HHS mandate lawsuits after the trial court held that the cases were premature due to the government's one-year "safe-harbor." This is the first time a federal Court of Appeals will consider the HHS mandate. The D.C. Circuit is set to hear oral arguments on the case December 14.

"The safe harbor's protection is illusory," **said Kyle Duncan, General Counsel for Becket Law**. "Even though the government won't make religious colleges pay crippling fines this year, private lawsuits can still be brought, schools are at a competitive disadvantage for hiring and retaining faculty, and employees face the specter of battling chronic conditions without access to affordable care. This mandate puts these religious schools in an impossible position."

Wheaton and Belmont Abbey are not the only schools to feel the immediate harms of the government's HHS mandate. In October, Ave Maria University filed a declaration in a separate lawsuit in federal court detailing the "excessive burdens and pressures" that are preventing the school from filling faculty positions.

On September 20, 2012, the U.S. Court of Appeals for the DC Circuit consolidated ***Belmont Abbey*** College **v.** Sebelius **and *Wheaton College* v.** Sebelius in an expedited appeal against the HHS Mandate, which forces the two religious schools to violate their deeply held religious convictions or pay crippling fines.

Highlights from Becket's brief:

- "[T]he final rule challenged here is the law right now, and it is not up to the Colleges or this Court to predict the future. " (P 4)
- "The Colleges should not be forced to wager that the Departments will relieve the mandate's burden on their religious exercise when—to date—the Departments have never acknowledged that the burden exists." (P 16)
- "[T]he mandate is a final rule that presently applies to the Colleges and presently interferes with their budgeting, planning, and hiring." (P 3)
- "Yet instead of litigating the Colleges' claims on the merits, the Departments have reacted to them with regulatory gamesmanship." (P 2)
- "The Departments cannot possibly meet [their] burden by pointing to a temporary one-year delay on government (but not private) enforcement accompanied by a vague, non-binding promise to fix it in the future." (P 4)
- "In short, delaying this lawsuit will burden the Colleges in numerous ways." (P 27)

There are now over 40 separate lawsuits challenging the HHS mandate, which is a regulation under the Affordable Care Act (aka "Obamacare").

Becket led the charge against the unconstitutional HHS mandate, and in addition to Wheaton and Belmont Abbey represents Hobby Lobby, Colorado Christian University, Houston Baptist University, East Texas Baptist University, the Eternal Word Television Network, and Ave Maria University.

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Duncan Attach 0711

POLITICO

Dozens of lawsuits have been filed challenging the contraceptive requirement.

ACA now faces contraception test

By KATHRYN SMITH and **JENNIFER HABERKORN** | 11/09/2012 04:41 AM EST

"Inevitably they're going to be decided both ways," Laycock said.

It's a common strategy: File lawsuits in multiple regions so there are conflicting rulings that the Supreme Court must straighten out.

And should one or more of the contraception cases make it to the Supreme Court, Kyle Duncan, general counsel for the Becket Fund for Religious Liberty — which represents several of the challengers — said he'd bet the justices could be willing to review it.

"Historically, they have a keen interest in religious liberty issues, especially when it comes to government coercion of conscience," he said. "If one or more of these cases gets up to the

Duncan Attach 0712

Supreme Court, this would be the next big Religious Freedom Restoration Act case."

Duncan pointed to the 2006 decision in *Gonzalez v. O Centro Espirita*, in which the Supreme Court unanimously ruled that the Religious Freedom Restoration Act allowed a small religious group to use an illegal drug during worship services, even though it violated federal narcotics laws.

Laycock said when it comes to the religious freedom law, "The Supreme Court has taken that statute seriously and enforced it according to its terms and unanimously."

But the law's supporters have reason to think the mandate will be upheld.

The American Civil Liberties Union argues that an important part of gender equality is the ability for women to have "full control of their reproductive lives." The group argues in an amicus brief filed in a lawsuit brought by a mining company that the plaintiffs are trying to "discriminate against women and deny them benefits because of [the employer's] religious beliefs."

The ACLU argues that in previous cases, the courts have said the right to religious liberty "does not encompass the right to discriminate against others. This court should come to the same conclusion here."

The National Women's Law Center points to two cases in which states tried to impose a similar requirement. Lawsuits filed against contraceptive coverage requirements in California and New York failed in 2004 and 2006, respectively.

"The highest courts in both states said that the laws did not violate the First Amendment or substantially burden a religious belief or practice, and that they promoted gender equality," said Gretchen Borchelt, senior counsel at the National Women's Law Center.

Plus, they believe they have public opinion on their side.

"When we've looked at polling, most people in this country don't think their bosses should be able to tell them what kind of medical care they should be able to get," said Judy Waxman, vice president for health and reproductive rights at the NWLC. "Those things, while they're not legal arguments, do have an influence."

So far, the lawsuits fall into two camps. One is the group of lawsuits filed by religious schools and nonprofit groups that qualify for a "temporary safe harbor" from the Obama administration. The White House says it is working on a compromise for religious-

affiliated institutions. Those lawsuits have been largely put “on hold” by judges who are willing to give the administration time to find a solution that works for both sides.

The other camp is lawsuits by private companies with no religious affiliation, such as an HVAC company. Those lawsuits have moved more quickly because they don’t qualify for the temporary reprieve — two plaintiffs have qualified for injunctions to block the policy. But in the end, they might not be as successful because a religious school could have a stronger case that its religious beliefs are being violated than a nonreligious company.

Hobby Lobby asks judge to block health care law

The Associated Press

November 1, 2012 Thursday 09:09 PM GMT

Section: DOMESTIC NEWS

Length: 640 words

Byline: By TIM TALLEY, Associated Press

Dateline: OKLAHOMA CITY

Body

An arts and craft supply company owned by a Christian family asked a judge Thursday to block a portion of the new federal health care law, claiming that mandated coverage for certain birth control violates its religious freedom rights.

Hobby Lobby Stores Inc.'s owners believe the use of morning-after and week-after birth control pills are tantamount to abortion because they prevent a fertilized egg from implanting in a woman's womb. At a federal court hearing Thursday, a government lawyer said the drugs do not cause abortions and that the U.S. has compelling interest in mandating insurance coverage for them.

The company, which is self-insured, says it will face a daily $1.3 million fine beginning Jan. 1 if it ignores the law. U.S. District Judge Joe Heaton did not rule on the company's request for an injunction but noted Hobby Lobby's deadline for compliance.

"This does raise a lot of new and different issues," he said. "There's not a lot of guidance out there."

Hobby Lobby is the largest business to file a lawsuit against the U.S. Department of Health and Human Services mandate that forces all companies, regardless of religious conviction, to provide coverage of drugs that the lawsuit alleges are abortion-inducing. The Green family also objects to providing coverage for certain kinds of intrauterine devices that the lawsuit alleges can destroy an embryo by preventing it from implanting in a woman's uterus.

Company lawyer Kyle Duncan said "millions of Americans" would consider drugs that prevent a fertilized egg from implanting in the womb an abortifacient.

"The purpose of these drugs is emergency contraception," Duncan said. "We don't cover pregnancy termination."

Government lawyer Michelle Bennett disagreed and said failing to mandate insurance coverage for the drugs would increase the number of unwanted pregnancies. Bennett said the drugs "do not terminate pregnancy," and instead prevent one from occurring.

The morning-after pill works by preventing ovulation or fertilization. In medical terms, pregnancy begins when a fertilized egg attaches itself to the wall of the uterus. If taken within 72 hours of unprotected sex, it can reduce a woman's chances of pregnancy by as much as 89 percent.

But critics of the contraceptive say it is the equivalent of an abortion pill because it can prevent a fertilized egg from attaching to the uterus.

The Green family filed suit in September, saying the law would force them to "to violate their deeply held religious beliefs under threat of heavy fines, penalties and lawsuits." It claims the mandate is unconstitutional.

Duncan said the company has no objection to other forms of birth control and includes them in its insurance plan.

"Hobby Lobby ought to be able to get a narrow exemption," Duncan said.

Hobby Lobby calls itself a "biblically founded business" and is closed on Sundays, provides spiritual counseling for its employees and does not sell products that are inconsistent with its owners' religion. Founded in 1972, the company now operates more than 500 stores in 41 states and employs more than 13,000 full-time employees who are eligible for health insurance coverage.

The lawsuit also was filed on behalf of Mardel Inc., another of the family's businesses. The bookstore and education company, also based in Oklahoma City, sells a variety of Christian-themed materials. It operates 35 stores in seven states and has 372 full-time employees.

In a separate case involving a Detroit-area company owned by Roman Catholics, Weingartz Supply Co. on Wednesday won an early round in its lawsuit challenging the health care law's mandate requiring contraception coverage. A federal judge blocked the government from taking any action against that company, which sells outdoor power equipment. The company is challenging the contraception mandate on religious grounds.

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Religious Freedom Is No Mere Hobby: Shocking Arguments Made By Obama Administration in Largest HHS Mandate Suit Yet

by KATHRYN JEAN LOPEZ *November 1, 2012 3:19 PM*

@KATHRYNLOPEZ

Today in a federal court in Oklahoma City, Becket Fund for Religious Liberty attorneys argued for the religious-liberty protection for David and Barbara Green. The Greens run Hobby Lobby with their children and have had to go to court to defend their religious liberty against the Obama administration's so-called contraception mandate. Evangelicals, the Greens are opposed to the abortion-inducing drugs included in that mandate, joined with Catholics and other people of faith in business, religious institutions, and faith-based social-service organizations (including schools, hospices,

hospitals…) who have gone to court in recent months in response to the coercive mandate.

In response, Barack Obama's Department of Justice argues, that religious-liberty rights to not extend to the Greens as businessmen. Recall that this is an administration whose posture toward religious liberty was slapped down unanimously earlier this year in the *Hosanna-Tabor* case involving a Lutheran religious school. And yet the administration continues to work to erode religious liberty.

"Hobby Lobby is not the first business to sue over the HHS mandate, but it is the largest," Kyle Duncan, general counsel of the Becket Fund, explains in an interview.

KATHRYN JEAN LOPEZ: Why is Hobby Lobby suing the Department of Health and Human Services important news?

KYLE DUNCAN: Hobby Lobby is an Oklahoma-based arts and crafts chain founded by David Green and operated by Mr. Green, his wife Barbara, and their children, Steve, Mart, and Darsee. Over 40 years ago, Mr. Green took out a $600 bank loan to start the business in his garage, and has built it into a multi-billion dollar success story, with over 500 stores in 41 states and more than 13,000 full time employees. If

this were not extraordinary enough, the Green family considers Hobby Lobby a ministry, and insists on running it in accordance with their evangelical Christian faith. So, for instance, they provide chaplains and spiritual counseling for any employee who wants it; they offer a Christian conciliation program for workplace disputes; they take out hundreds of full-page newspaper ads every Christmas and Easter celebrating the religious meaning of the holidays; they do not carry products inconsistent with their beliefs, like shot glasses and risqué greeting cards and gory Halloween costumes; and, most famously, they close every one of their stores on Sunday, even though they lose millions by doing so.

The Greens do not have a religious objection to contraceptives in general. But they do object to "emergency contraceptives" like the "morning after pill" (Plan B) and the "week after pill" (ella) because those drugs — as the FDA's own birth control guide explains — can prevent the implantation of a fertilized egg in the womb. For the Greens, like many Christians, that amounts to a chemical abortion. They cannot in good conscience offer those drugs in their health plan because they believe it implicates them in abortion. But the Health and Human Services mandate forces them to cover those drugs for free. If they refuse, they risk fines of about $1.3

million per day. This is an intolerable position, and so the Greens felt they had no other option than filing a lawsuit. The Becket Fund is deeply honored to represent such good, courageous people.

Hobby Lobby is not the first business to sue over the HHS mandate, but it is the largest. When a company this prominent feels compelled to sue its own government, something significant has happened. The lawsuit raises important questions about whether government can force religious believers to give up their faith as a cost of doing business. If government can do that, it would be profoundly disturbing.

LOPEZ: What is the government arguing when it says Hobby Lobby is looking to become a law unto itself? What is the Obama administration arguing here and is it consistent with it posture toward religious liberty?

DUNCAN: The administration's arguments in this case are shocking. Here's what they are saying: once someone starts a "secular" business, he categorically loses any right to run that business in accordance with his conscience. The business owner simply leaves her First

Amendment rights at home when she goes to work at the business she built. Kosher butchers around the country must be shocked to find that they now run "secular" businesses. On this view of the world, even a seller of Bibles is "secular." Hobby Lobby's affiliate, Mardel, sells Bibles and other Christian-themed material, but because it makes a profit the government has now declared it "secular."

#more#

The administration's position here — while astonishing — is actually consistent with its overall view of the place of religion in civil society. After all, this is the administration who argued in the Hosanna-Tabor case last year in the Supreme Court that the religion clauses of the First Amendment offered no special protection to a church's right to choose its ministers — a position that the Court rejected 9-0. This is the administration which has taken to referring to "freedom of worship" instead of "freedom of religion" — suggesting that religious freedom consists in being free to engage in private rituals and prayers, but not in carrying your religious convictions into public life. And this is the administration who crafted a "religious employer" exemption to the HHS mandate so narrow that a Catholic charity does

not qualify for conscience protection if it serves non-Catholic poor people.

As you point out, the administration is trying to justify its rigid stance against religious business owners by saying otherwise they would become a "law unto themselves," and be able to do all sorts of nasty things to their employees — like force them to attend Bible studies, or fire them if they denied the divinity of Christ. Nonsense. Hobby Lobby isn't arguing for the right to impose the Greens' religion on employees, nor for the right to fire employees of different religions. There's already a federal law that protects employees from religious discrimination and that's a very good thing. This case is about something entirely different: it's about stopping the government from coercing religious business owners. The government wants to fine the Greens if they do not violate their own faith by handing out free abortion drugs, and now it's saying they don't even have the right to complain in court about it.

LOPEZ: What did Hobby Lobby's deliberations look like? How did they get to the point of suing? How soon does the HHS mandate hit for them?

DUNCAN: The Greens are not happy about the fact that they have had to sue their own government. But they had no choice. The government has consistently refused to even discuss the rights of religious business owners to be exempted from the mandate. The government has issued waivers and exemptions and delays to millions of people for a variety of reasons, but it has turned a blind eye to religious people who are simply trying to make a living.

The mandate will hit Hobby Lobby in about two months — on January 1, 2013. At that point, it will face the choice of dropping employee health insurance altogether (and paying about $26 million a year in penalties), or continuing its current plan (which will expose it to about $1.3 million in fines per day). So it is not hard to imagine why the Greens felt they had no choice but to go to court. The Becket Fund is asking for an immediate injunction.

LOPEZ: There's no talk of any compromise on the HHS mandate that helps Hobby Lobby, is there?

DUNCAN: None whatsoever. The government has said that it would consider issuing some sort of "accommodation" for certain non-exempt

religious organizations before August 2013. That doesn't obligate the government to do anything, of course. But even that non-binding promise completely excludes religious business owners. Their rights have never been on the administration's radar.

LOPEZ: Hobby Lobby aren't the only non-Catholics suing the government over this mandate, are they?

DUNCAN: No, there are numerous non-Catholic plaintiffs. Evangelical schools like Wheaton College, Colorado Christian University, Louisiana College, Geneva College, Houston Baptist University, and East Texas Baptist University, for example. And there are other non-Catholic businesses, such as the well-known evangelical publishing company, Tyndale House. The litigation against the mandate is by no means a "Catholic-only issue." It's an assault on the religious freedom of people of all faiths. Even those religious denominations who have no problem with any form of contraception should be deeply concerned. If the mandate stands, then it will open the door to all manner of conscience violations.

LOPEZ: Should employers have the right to deny their employees the full range of health insurance coverage? The administration argues they shouldn't have that right. Might they have a point?

DUNCAN: Hobby Lobby's employees love Hobby Lobby, because the company provides them with gainful employment, excellent wages, generous benefits, and a wonderful place to work. The idea that Hobby Lobby is "denying" their employees "the full range of health coverage" is ludicrous. A government bureaucrat simply decided that abortion-inducing drugs should be offered for free in all employer health insurance. If a Hobby Lobby employee wants to use such drugs, no one — certainly not the Green family — will do a thing to stop them. There is no shortage of contraceptives in America today, and the government already spends billions a year to make sure they are accessible to anyone who wants them. All the Greens want is not to be forced to pay for abortion drugs.

LOPEZ: Do you expect more businesses to sue? Where does a business go if it feels the need to sue?

DUNCAN: More and more businesses are suing, and we expect to see the number rise — especially as the mandate begins hitting more and more business owners and they realize what is at stake. The courageous businesses who have already sued — Hobby Lobby, of course, but also other businesses like Hercules Industries, Weingartz Supply Company, O'Brien Industrial, and Tyndale House — will encourage others to do the same. If a business owner is interested in finding out more, go to the Becket Fund website — www.becketfund.org — to see an interactive map and information on all the cases. As far as the Becket Fund is concerned, we are delighted to see as many credible lawsuits as possible, because it dispels the false idea that there is some sort of "separation" between religion and business.

LOPEZ: So as of right now as we approach November 2012, what's the state of religious liberty in the United States? If you look around, people still are going in and out of places of worship. A cardinal prayed at two conventions.

Can religious liberty really be under threat? What can Americans do about it?

DUNCAN: Americans should never take for granted the immense blessing that we can worship freely. This is a great country, and our religious freedom is one of the best reasons to say that. Too often, however, we forget the tragic fact that millions of believers around the world do not enjoy even that basic freedom. Americans should be a beacon for them, demonstrating that a genuine, robust, and public religious freedom is perfectly compatible with — indeed, indispensable to — a free society.

But America ceases to be a beacon for others when its government denies religious freedom to its own people. Do not misunderstand. The HHS mandate is not equivalent to the grotesque abuses we see too often in other parts of the world — laws punishing religious conversion with death, to name a horrible example. But using the regulatory power of the government to coerce believers into violating their own faith is a subtle way of eroding the place of religion and religious believers in civic life. Americans — whose nation was founded on the revolutionary idea that our rights come from our Creator and not from our government — should not stand for it.

W**ashington, D.C.** — Today, the Green family—founders and owners of the arts and crafts chain, Hobby Lobby Stores, and Mardel, Christian and Education stores—filed the final brief in support of their motion for preliminary injunctive relief against the HHS mandate, a federal regulation that will force them, in two months, either to violate their faith by covering abortion drugs or to pay fines up to $1.3 million per day. In response to the Green's original motion, the government denied that Plaintiffs have any rights at all. Because Plaintiffs engage in what the government states is "secular" business, the government says they cannot exercise religion, by definition.

This comes as a surprise to the Green family, who openly run their businesses in line with their Christian faith. That faith is reflected in everything Hobby Lobby does—in its management and its store music, in what it sells and what it does not sell, in its chaplains and its Sunday closings, and its full-page ads proclaiming the Gospel of Jesus Christ every Christmas and Easter. By any definition, these actions are exercises of religion.

"When the government calls Hobby Lobby "secular" and thus incapable of exercising religion, it is wrong on the facts. It is also wrong on the law," **said Kyle Duncan, General Counsel for Becket** Law. "The government cannot label people or organizations as "secular" or "religious," and grant or withhold freedom accordingly. The law simply protects the exercise of religion—whether the Greens practice it in their church, in their home, or in running their businesses."

The government is asking the federal judge presiding over the case to be the first ever to adopt its narrow view of where, when and how American citizens may exercise religion.

"The government's view is supported neither by precedent nor common sense," said Duncan."Millions of Americans have gone into business to make a living, not to forfeit their faith. When the government compels them to violate that faith, the law does not leave them without a remedy."

The federal court in Oklahoma City has scheduled a hearing on Hobby Lobby's injunction motion for November 1, 2012. A decision is expected soon after that.

Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions. Becket has an 18-year history of defending religious liberty for people of all faiths. Its attorneys have been recognized as experts in the field of church-state law. Becket recently won a 9-0 victory at the U.S. Supreme Court in Hosanna-Tabor v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half century."

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Duncan Attach 0728

Debate fuels contraception-rule foes

By KATHRYN SMITH 10/13/2012 04:19 PM EDT

Joe Biden and Paul Ryan tangled over the Obama administration's contraception coverage requirement Thursday night, but the real fight has headed to the courts — and the rule's opponents say they're gaining steam.

They're certainly piling up lawsuits. But whether that's real momentum — or just a growing stack of legal briefs — remains to be seen.

Story Continued Below

There's no question that the opponents of the requirement, which has been issued as part of President Barack Obama's health care law, have been picking up the pace in filing new legal challenges. Three new suits were filed just this week, bringing the total to more than 100 plaintiffs in more than 30 cases.

That doesn't mean the lawsuits have been successful so far. For the most part, they haven't. But the lawyers fighting the rule in court were encouraged by the showdown in the vice presidential debate.They say the Thursday night debate — when two Catholic candidates clashed over it — got their cause more national attention.

"There's a lot of momentum right now," said Kyle Duncan, general counsel for the Becket Fund for Religious Liberty, which represents several organizations opposing the Obama administration rule that most employers include contraception in employee health plans with no co-pay.

Duncan said the plaintiffs “are grateful that it’s been mentioned in the debates,” though he asserted that Biden’s comment about the breadth of the religious exemption was “inaccurate.” Several news organizations found that Biden overstated it, and the Catholic bishops strongly objected to his description.

During Thursday night’s debate, Biden insisted that the contraception rule has a religious exemption that’s so broad that any religious objections are basically a non-issue.

(Also on POLITICO: Annotated transcript of the vice presidential debate)

“With regard to the assault on the Catholic Church, let me make it absolutely clear, no religious institution, Catholic or otherwise, including Catholic Social Services, Georgetown Hospital, Mercy Hospital, any hospital, none has to either refer contraception, none has to pay for contraception, none has to be a vehicle to get contraception in any insurance policy they provide. That is a fact,” Biden said.

Catholic groups opposing the requirement have pounced on that statement, saying the religious exemption for the requirement is narrow and a satisfactory compromise for those not exempted has not been found.

The U.S. Conference of Catholic Bishops blasted Biden in a statement Friday. “The HHS mandate contains a narrow, four-part exemption for certain 'religious employers.' That exemption was made final in February and does not extend to 'Catholic social services, Georgetown hospital, Mercy hospital, any hospital,' or any other religious charity that offers its services to all, regardless of the faith of those served,” the bishops said.

In reality, the Obama administration exempted churches and certain religious organizations, and others are getting a one-year exemption while the administration tries to come up with a solution. But they haven’t satisfied the opponents yet, including the bishops, religious colleges and universities, and the Catholic Health Association — and the Catholic Health Association had been a supporter of the health care law.

The problem for the religious groups is that in most of the compromises floated so far, their money could still — indirectly — subsidize birth control that they find morally wrong.

W**ashington, DC** — Today, some of the leading Catholic institutions in the United States are filing a brief in support of the Becket' s appeal to the D.C. Circuit on behalf of **Wheaton College and Belmont Abbey College** in their challenges to the HHS mandate. The filing by the **The Catholic University of America, The Catholic Archbishop of Washington, D.C., and Catholic Charities of the Archdiocese of Washington, D.C.,** details the severe burdens inflicted by the unconstitutional command that they insure free contraceptives, sterilization, and abortion-inducing drugs. These great institutions—which educate, feed, clothe, and serve millions—must plan now for the mandate's millions of dollars in fines, crippling their budgeting, planning and hiring. They urge the courts to act now to address this flagrant violation of religious liberty.

The brief of these venerable Catholic organizations comes less than one day after the Vice President of the United States stated in his debate with Congressman Paul Ryan:

"[L]et me make it absolutely clear. No religious institution—Catholic or otherwise, including Catholic social services, Georgetown hospital, Mercy hospital, any hospital—none has to either refer for contraception, none has to pay for contraception, none has to be a vehicle to get contraception in any insurance policy they provide. That is a fact. That is a fact."

"But the facts are exactly the reverse," said **Kyle Duncan, General Counsel of Becket Law**. "Under the mandate, nearly every Catholic hospital, charity, university, and diocese in the United States—along with millions of institutions of other faiths—*must* refer for, *must* pay for, and *must* act as a vehicle for contraception, sterilization, and abortion-inducing drugs. If they do not, they face millions in fines. That is a fact."

The Catholic institutions are not alone in supporting Becket's appeal. Briefs supporting Wheaton and Belmont Abbey are being filed today on behalf of:

- 13 States (Texas, Nebraska, Michigan, Indiana, Florida, Oklahoma, Alabama, Ohio, Georgia, Virginia, Colorado, South Carolina, and Idaho)
- The Catholic University of America, The Catholic Archbishop of Washington, D.C., and Catholic Charities of the Archdiocese of Washington, D.C.
- Women Speak for Themselves
- The Cato Institute, the American Civil Rights Union, and the Chapman University Center for Constitutional Jurisprudence
- The Association of American Physicians and Surgeons, American Association of Pro-Life Obstetricians and Gynecologists, Catholic Medical Association, The National Catholic Bioethics Center, Physicians for Life, and the National Association of Pro-Life Nurses
- Institutional Religious Freedom Alliance, Patrick Henry College, Ethics and Religious Liberty Commission of the Southern Baptist Convention, Diocese of the Mid-Atlantic of the Anglican Church in North America, Queens Federation of Churches, National Association of Evangelicals, Association of Christian Schools International, Christian Medical Association, Council for Christian Colleges and Universities, Prison Fellowship Ministries, Association of Rescue Gospel Missions and Christian Legal Society
- Eagle Forum Education and Legal Defense Fund
- The American Center for Law and Justice, and Regent University
- Alliance Defending Freedom–Universities and Businesses

There are now over 35 separate lawsuits challenging the HHS mandate, which is a regulation under the Affordable Care Act (aka "Obamacare").

Becket led the charge against the unconstitutional HHS mandate, and in addition to Wheaton and Belmont Abbey represents: East Texas Baptist University, Houston Baptist University, Hobby Lobby, Colorado Christian University, the Eternal Word Television Network, and Ave Maria University.

Duncan Attach 0731

Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 18 years its attorneys have been recognized as experts in the field of church-state law. Becket recently won a 9-0 victory in Hosanna-Tabor v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half century."

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Duncan Attach 0732

WASHINGT**ON, DC** – Today, Becket filed its opening brief before the **D.C. Circuit Court of** Appeals requesting the Court reverse the dismissal of two HHS mandate lawsuits after the trial court held that the government's "safe-harbor" protects the religious colleges from suffering any imminent harm and that their lawsuits were thus premature. This is the first time a federal Court of Appeals will consider the HHS mandate.

"The safe harbor's protection is illusory," **said Kyle Duncan, General Counsel for Becket**. "Even though the government won't make religious colleges pay crippling fines this year, private lawsuits can still be brought, schools are at a competitive disadvantage for hiring and retaining faculty, and employees face the specter of battling chronic conditions without access to affordable care. This mandate puts these religious schools in an impossible position."

On September 20, 2012, the U.S. Court of Appeals for the DC Circuit consolidated ***Belmont Abbey*** College **v.** Sebelius **and *Wheaton College* v.** Sebelius in an expedited appeal against the HHS Mandate, which forces the two religious schools to violate their deeply held religious convictions or pay crippling fines.

Highlights from Becket's brief:

- "In sum, both Wheaton and Belmont Abbey have suffered, are suffering, and will continue to suffer hardship if consideration of their legal challenges to the final rule is further delayed." (P 57)
- "Regardless of the Safe Harbor, the Colleges are now experiencing government pressure to violate their religious convictions, and suffering present harm as a result. Like any educational institutions, they must plan well in advance for their upcoming budget and hiring needs." (P 13)
- "The mandate currently puts the Colleges at a competitive disadvantage in recruiting, hiring, and retaining faculty members and other employees." (P 32)
- "[C]urrent employees at both institutions have expressed deep concerns about the possibility of losing health insurance, about the possible reduction in academic programming, and about increased costs passed on to them as a result of anticipated fines." (P 32-33)
- "These harms are real and significant. For example, several Wheaton employees have expressed fear that, if Wheaton is forced to terminate their insurance coverage, they will not be able to afford health care for themselves or their families. Some of them may have to seek expensive medical treatments before January 1 to be assured coverage. Others face the specter of battling chronic conditions without access to affordable care." (P 55)
- "The [government] cannot evade judicial review of the currently-binding final rule by vaguely promising to somehow accommodate the Colleges with some other rule at some other time." (P 5)

There are now over 30 separate lawsuits challenging the HHS mandate, which is a regulation under the Affordable Care Act (aka "Obamacare").

Becket led the charge against the unconstitutional HHS mandate, and in addition to Wheaton and Belmont Abbey represents Hobby Lobby, Colorado Christian University, the Eternal Word Television Network, and Ave Maria University.

Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 18 years its attorneys are recognized as experts in the field of church-state law, and they recently won a 9-0 victory in Hosanna-Tabor v.

Duncan Attach 0733

EEOC, which The Wall Street Journal called one of “the most important religious liberty cases in a half century.”

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Religious freedom, HHS mandate in spotlight as election draws near

CATHOLIC REVIEW OCTOBER 3, 2012 NEWS

By Maria Wiering

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This is the second in a four-part series examining election-related issues.

Evangelical-owned arts-and-crafts retailer Hobby Lobby filed suit against the federal government Sept. 12 over the U.S. Department of Health and Human Services mandate for employers to provide insurance without co-pay for controversial services.

The suit joins 28 similar lawsuits pending in federal courts. Although most plaintiffs are Catholic entities, Hobby Lobby's action underscores that opposition to the mandate cannot be dismissed as "a Catholic issue," but is a matter of religious freedom for all.

Those opposing the mandate hope policymakers are getting the message. Cardinal Timothy M. Dolan of New York prayed for a renewed respect for religious liberty in benedictions at recent Republican and Democratic national conventions.

The 2012 Republican Party platform adopted Aug. 29 includes a plank outlining its support for religious freedom and opposition to measures compelling faith-based institutions or individuals to violate their beliefs.

By contrast, the 2012 Democratic Party platform mentions freedom of religion only in passing, stating that President Barack Obama has "respected the principle of religious liberty" in regards to "(ensuring) that women have access to contraception in their health insurance plans."

The pending lawsuits – whose plaintiffs include Cardinal Dolan's Archdiocese of New York, the Archdiocese of Washington, The Catholic University of America in Washington, D.C., and the University of Notre Dame in South Bend, Ind. – argue otherwise.

Promulgated by HHS Secretary Kathleen Sebelius in January, the preventive services mandate is part of the 2010 health care reform law, and would force most employers to pay for contraception, female sterilization and abortion-causing drugs, which violate Catholic Church teaching.

The measure provides exemptions for "religious employers," but its narrow definition of "religious employers" would only apply to parishes, excluding most institutions the bishops consider church, as they put the faith into action.

According to the mandate, "a religious employer is one that (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization."

Under this definition, Catholic hospitals, charities, universities and other institutions do not qualify as "religious employers."

"It is a definition that reduces freedom of religion to freedom of worship, and seeks to confine the church's activities to the sacristy," Baltimore Archbishop William E. Lori said in a Sept. 9 presentation on the topic at St. John Neumann, Annapolis.

V**ocal leader**

As chairman of the U.S. Conference of Catholic Bishops' Ad Hoc Committee for Religious Liberty, Archbishop Lori has been a national leader in the cause.

The U.S. bishops brought their concerns to President Obama's administration last year, before the mandate was finalized. When it was released in January, the only concession the administration made was to postpone compliance for faith-based nonprofits for one year under a "safe harbor" provision.

Duncan Attach 0736

The mandate went into effect Aug. 1 for most companies and organizations, and will affect health care insurance policies at the next renewal date. Some plans are protected temporarily under a grandfathered status.

The HHS mandate is the first listed in a litany of concerns the U.S. bishops outlined in a March statement on religious liberty.

In requesting an expansion of the mandate's definition of "religious employer" and protection against other religious liberty infringements, Catholics are not asking for any special treatment under the law, the bishops say, only that the law allow its institutions to go about their work according to their religious convictions or church teaching – as they did before the advent of recent laws that have thrust them into conflict with local, state and federal governments.

"The administration is drawing lines where we, the sponsors of religious works, do not draw lines ourselves," Archbishop Lori said. "The government's attempt to tell the church which of our institutions seem religious to the state is profoundly offensive, and it entangles the government in the internal life of religious institutions." The administration has added several so-called "accommodations" to the mandate, but any changes made to the measure, Archbishop Lori said, have not altered its substance or the bishops' concerns, and none were created with direct input from the bishops.

Bishops say institutions such as schools and charities are an arm of the church and contribute to the common good. In Maryland, the Archdiocese of Baltimore is the largest provider of social services to the poor. It is also the largest private educator, and its students include many of the state's "most disadvantaged children," Archbishop Lori said.

This church's right to provide these services in accordance with its teachings is protected by the First Amendment, which lists freedom of religion first, anchoring the other freedoms the amendment outlines, Cardinal Dolan told a standing- room only crowd at the Newseum in Washington, D.C., Sept. 10.

"Simply put, government has no business interfering in the internal life of the soul, conscience or the church," said Cardinal Dolan, USCCB president.

In January, Pope Benedict XVI addressed his own concerns about religious freedom to American bishops, who later thrust the issue onto a national stage with the Fortnight for

Freedom that opened June 21 in Baltimore at the Basilica of the National Shrine of the Assumption of the Blessed Virgin Mary.

Archbishop Lori said this struggle is not about contraception, but about preserving the freedom to exercise religion free from government interference. He also rejects efforts by some to find ways to justify complying with the mandate.

Although the actual “cooperation with evil” is “fairly remote” in the case of the HHS mandate, he said, those looking for theological loopholes are missing the point.

“It is not just a question of applying the moral principles regarding cooperation with evil; it is also a question of our need to stand up for religious liberty,” he said.

Protecting consciences

Conscience protections for those with moral objections to the measures outlined in the HHS mandate have precedent in the case of abortion. Federal law protects the conscience rights of institutions and health care providers from participating in abortion or sterilization procedures, as well as the rights of health care entities and insurance companies who do not provide, pay for or refer for abortions, from government discrimination.

In lieu of an administrative concession or legislative fix, Catholics and others who oppose the mandate are following the federal lawsuits.

In August, the Obama administration asked the courts to dismiss the lawsuits, calling them premature and without standing. Lawyers representing the 43 Catholic dioceses, schools, hospitals and social service agencies who filed a dozen lawsuits May 21 countered the brief, explaining that even entities currently protected by the safe harbor provision must make costly and time-sensitive decisions regarding the impending mandate.

Archbishop Lori, meanwhile, said he was “heartened” when a Colorado federal judge in July awarded a Catholic-owned heating ventilation and air conditioning manufacturer temporary injunction from complying with the mandate as its litigation moves forward.

Hobby Lobby, the only other for-profit business to file suit, hopes to have the same emergency relief before the company renews its insurance plan Jan. 1, 2013.

Duncan Attach 0738

Unlike the Catholic plaintiffs, Hobby Lobby's owners do not morally oppose contraception, said David Green, founder and CEO of the Oklahoma City-based retailer. They do oppose abortion-causing drugs such as the "morning after pill" and "week after pill" which the Federal Drug Administration classifies as "emergency contraception," and are included in the mandate.

"We simply cannot abandon our religious beliefs to comply with this mandate," Green said in a Sept. 12 press call. "We believe whole-heartedly that it is by God's grace and provision that Hobby Lobby has been successful. Therefore, we seek to honor him in all that we do."

The Washington, D.C.-based Becket Fund for Religious Liberty is representing the retailer, as well as two Evangelical Christian colleges.

"This is by not any means a Catholiconly issue," said Kyle Duncan, general counsel for the Becket Fund.

Other efforts to push back against threats to religious liberty have drawn support from religious leaders from nonCatholic denominations and non-Christians, including Orthodox Jews, Muslims and Sikhs.

Earlier this summer, Archbishop Lori said that protecting the first freedom should be an "American issue" free from partisanship. He expects efforts to preserve the first freedom to continue well beyond November's election.

"Unless we stop it now, this attempt to narrow the role of religion in our culture will spread like a virus through our nation's laws and policies," he said in Annapolis. "The future will look like this: either we stay in the sacristy, or violate our consciences – not a good menu from which to choose."

Judge rejects company's suit over health law

St. Louis Post-Dispatch (Missouri)

October 2, 2012 Tuesday, THIRD EDITION

Section: NEWS; Pg. A1

Length: 745 words

Byline: BY ROBERT PATRICK , *rpatrick@post-dispatch.com*, > 314-621-5154

Dateline: 0

Body

ST. LOUIS - A federal judge here has dismissed a claim that the 2010 health care reform law's contraception mandate violates an employer's religious freedom. It is believed to be the first decision on the merits among more than two dozen such lawsuits across the country.

O'Brien Industrial Holdings, owned by Frank O'Brien, a devout Catholic, filed notice Monday of appeal.

The law requires coverage of prescription birth control pills and implants at no cost to enrollees in all private health insurance policies, starting in 2013.

U.S. District Judge Carol Jackson ruled late Friday that the "regulations do not impose a 'substantial burden' on either Frank O'Brien or OIH, and do not violate (their) rights."

O'Brien's lawyer, Francis Manion, said he thinks Jackson's ruling is "not well-supported by the law or logic." He added, "Court of appeals, here we go."

O'Brien sued the federal government in March, alleging the Patient Protection and Affordable Care Act violates the First Amendment, the Religious Freedom Restoration Act, and the Administrative Procedure Act, forcing a choice between moral beliefs and stiff fines.

Jackson said O'Brien was free to engage in religious practice by not using contraception and encouraging employees not to either.

"RFRA is a shield, not a sword," the judge wrote. "It protects individuals from substantial burdens on religious exercise that occur when the government coerces action one's religion forbids, or forbids action one's religion requires; it is not a means to force one's religious practices upon others. RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own."

Jackson also rejected the other lines of attack, saying that the mandate does not provide preferential treatment to any religion, and was passed to improve women's access to health care and lessen the disparity between health care costs for men and women.

Government lawyers have declined to comment.

Anthony Rothert of American Civil Liberties Union, who filed a friend-of-the-court brief, said Monday, "It's happened time and again that people have used religion as an excuse why they should not have to obey a general law that applies to everyone."

He said religion has been used in the past to try to preserve racial segregation and unequal pay for men and women. "This is just the latest gloss on it. What they're really trying to do is impose their religious views on their employees, which they're not allowed to do."

Manion said Jackson's decision is at odds with acknowledgments from public officials that the law is a burden on people's beliefs.

President Barack Obama and Health and Human Services Secretary Kathleen Sebelius have said the mandate can impact religious liberty, and pledged to work with religious organizations.

Manion and the Becket Fund for Religious Liberty, whose statistics were quoted by Jackson, said this was the first ruling on the merits among 30 similar suits.

Cases filed by several religious universities have been dismissed over timing issues. In late July, a Colorado company won a temporary delay to implementation of the law while its suit goes forward; the government is appealing.

"If a $100,000 fine isn't a burden on religious liberty, I don't know what is," Becket Fund lawyer Kyle Duncan said in a statement. "This decision conflicts with what another federal judge has already decided about the mandate, and it is out of step with Supreme Court precedent."

O'Brien's company, at 4641 McRee Avenue in St. Louis, includes several businesses that process ceramic materials, and the charitable St. Nicholas Fund.

The company website says, "Our conduct is guided by the Golden Rule and the Ten Commandments. We will not discriminate based on anyone's personal belief system."

Although there are several exemptions in the law, O'Brien's company does not qualify. It has 87 employees (companies with fewer than 50 need not provide health insurance) and is not defined as a "religious" employer. Its existing health plan does cover contraception, something the company has said was inadvertently included several years ago, contrary to past practice and its intentions.

The company's suit seeks to block enforcement when the insurance is renewed. Marion said he may seek an expedited appeal to try to get an appellate court ruling before Jan. 1.

Load-Date: October 3, 2012

Petition protests Hobby Lobby lawsuit against health mandate

The Daily Oklahoman (Oklahoma City, OK)

September 28, 2012 Friday, City Edition

Section: NEWS METRO/STATE; Pg. 13A

Length: 537 words

Byline: CARLA HINTON, Religion Editor

Body

An Oklahoma City clergyman delivered a petition to an Oklahoma City-based arts and crafts chain Thursday, urging the company to drop its lawsuit against a government health mandate.

The Rev. Lance Schmitz, a Church of the Nazarene preacher, said the petition he gave to a Hobby Lobby employee Thursday has more than 80,000 signatures of people concerned that the retailer is placing women's health care at risk by trying to strike down the targeted U.S. Health and Human Services mandate.

The mandate requires health coverage for women to include free preventive services such as contraception, including IUDs and the morning after pill.

Churches and other nonprofit religious organizations are exempted on the basis of religious objections, but insurance companies are not.

Hobby Lobby, being self-insured, apparently is not exempt.

Kyle Duncan, general counsel for the Becket Fund for Religious Liberty, based in Washington, D.C., said the petition, launched by national organizations Faithful America and UltraViolet, is based on misinformation.

He said Hobby Lobby's lawsuit, filed Sept. 12, does not have anything to do with the contraception requirement, but rather a requirement that employers must pay for abortion-inducing drugs. The company's lawsuit claims that the mandate, which is part of the Affordable Care Act adopted in 2010, violates business owners' freedoms of religion and speech.

"We basically want to push back against the notion that this is about birth control. It's really not," Duncan said.

Schmitz, 34, who said he was acting on his personal beliefs, not the Church of the Nazarene denomination, tried to deliver the petition Thursday at Hobby Lobby's headquarters at 7707 SW 44, but he said he was asked to leave the premises.

Instead, he went to a Hobby Lobby store on Reno Avenue and gave it to an employee there, asking for it to go to someone in the corporate division.

The petition, outlined in a news release distributed by Faithful America and UltraViolet, asks Hobby Lobby's leaders "not to use their Christian beliefs as an excuse to put women's health care at risk."

Schmitz said he agreed to deliver the petition because he opposes anything that limits access to contraception, as he believes Hobby Lobby's lawsuit is attempting to do.

He said he is concerned that limiting access to contraception will result in an increase in unplanned pregnancies, which could result in more abortions.

Duncan said he took issue with the petitioners' assertion that Hobby Lobby's leaders, the Green family of Oklahoma City, should not use their faith as a guideline for their lawsuit. He said Hobby Lobby has a generous health care plan, and the company is not trying to say health care reform is illegal.

He said the company's leaders simply do not wish to pay for drugs that cause abortion.

"Hobby Lobby is not trying to control their employees' lives. All Hobby Lobby is trying to say is 'please leave us out of providing these kind of drugs that our faith tells us is the wrong thing to do,' " he said.

Hobby Lobby founder David Green has long been known for his Christian religious convictions. The company operates more than 500 stories in 41 states.

CONTRIBUTING: The Associated Press

Notes

CONTRIBUTING: The Associated Press

Graphic

(Page 11A) The Rev. Lance Schmitz holds petitions he delivered to Hobby Lobby on Thursday in Oklahoma City urging the company to drop its lawsuit against a federal government health mandate. PHOTO BY PAUL HELLSTERN, THE OKLAHOMAN

Load-Date: October 1, 2012

End of Document

OKC Reverend speaks out against Hobby Lobby lawsuit

NBC - 4 KFOR (Oklahoma)

September 27, 2012 Thursday

Section: NEWS

Length: 1122 words

Byline: Ali Meyer

Body

OKLAHOMA CITY — A Church of the Nazarene Reverend is speaking out against the Hobby Lobby lawsuit filed recently in protest of a new law requiring companies to provide coverage for controversial contraception prescriptions.

Church of the Nazarene Reverend Lance Schmitz was asked to leave the Hobby Lobby corporation headquarters campus Thursday as he was trying to deliver a packet of petition signatures.

Reverend Schmitz, and 80,000 other Americans, have signed a petition requesting Hobby Lobby drop the lawsuit they filed against the federal government earlier this month.

Petitioners are calling on the company to not use their Christian faith as an excuse to do harm to women's health.

In their ongoing lawsuit Hobby Lobby has asked the federal government for an exception to the Affordable Health Care Act so that the $3 billion dollar arts and craft giant would not have to pay the $1.3 million a day fine for failing to provide coverage of two kinds of prescription contraception.

"We're asking them to drop their lawsuit because they're stating that this medication causes abortions, and the simple fact of the matter is that it does not. It's contraceptive coverage. When you increase access to contraception you decrease abortions, and no one's really against that." said Reverend Schmitz.

Hobby Lobby owner David Green said has always provided daily contraception coverage for the company's employees.

The Green family filed the lawsuit because they oppose a requirement to provide coverage for two controversial types of contraception: the morning after pill and the week after pill.

"Our family is now being forced to choose between following the laws of the land that we love or maintain the religious beliefs that have made our business successful." said Hobby Lobby owner, David Green, during a conference call earlier in September.

Reverend Schmitz and 80,000 Americans who signed the petition believe allowing a religious exception for Hobby Lobby will erode valuable health care protection for women.

"My decision to do this came to me after prayer and much reflection and discernment with friends and colleagues and ministers and doctors." said Rev. Schmitz.

The lawyers working on behalf of Hobby Lobby tell us the company will continue to provide coverage for traditional birth control medications, but they are opposed to the controversial “morning after” and “week after” pills for religious reasons.

The online petition of 80,000 signatures was organized by two non-profit organizations, Faithful America and UltraViolet.

Faithful America is an online community of over 175,000 people of faith taking action on pressing moral issues of social justice and the common good.

Faithful America’s petition reads: “Don’t use your Christian faith as an excuse to obstruct health care reform and deny women access to birth control. I won’t shop at your store until you drop this lawsuit, and I’ll tell my friends to do the same.”

UltraViolet is a community of women and men working to fight sexism and expand women’s rights. With hundreds of thousands of members in every state and congressional district, UltraViolet members make our voices heard to further the cause of full equality, empower women, and fight attacks on women’s rights.

UltraViolet’s petition reads: ”All women deserve affordable access to birth control and it’s a woman’s personal, medical decision on which form to use. I won’t be shopping at your store until you drop this suit, and I’ll be telling my friends to do the same.”

Hobby Lobby provided this statement regarding the petition of 80,000 signatures:

“The Green family respects every individual’s right to free speech and hopes that others will respect their rights also, including the right to live and do business according to their religious beliefs,” -Mandi Broadfoot, Hobby Lobby spokesperson.

The legal team helping Hobby Lobby in their lawsuit, The Beckett Fund, provided the following statement:

“The Green family respects the religious convictions of all Americans, including those who do not agree with them. All they are asking is for the government to give them the same respect by not forcing them to violate their religious beliefs.

“The Green family has no moral objection to the use of preventive contraceptives and will continue its longstanding practice of covering these preventive contraceptives for its employees. However, the Green family cannot provide or pay for two specific abortion-inducing drugs. These drugs are Plan B and Ella, the so-called morning-after pill and the week-after pill. Covering these drugs, as the government is forcing them to do under the threat of $1.3 million penalty per day, would violate their most deeply held religious belief that life begins at conception, when an egg is fertilized. The FDA-approved government birth control guide clearly states that these two drugs, the morning-after pill and the week-after pill, may prevent fertilized eggs from implanting in the womb, thus aborting the fertilized egg.

“Hobby Lobby is not ‘denying women healthcare,’ as the petition falsely claims. Hobby Lobby provides generous health care benefits and wages to all its employees. Their benefits have always included the vast majority of birth control drugs and will continue to do so. The government, however, wants to force Hobby Lobby to cover two specific drugs that can cause early abortions. This is illegal and unconstitutional. The only people who are being denied anything are Hobby Lobby and the Green Family, who are being denied the right to practice their religion or face millions of dollars in fines.

“The petition also claims that Hobby Lobby is ‘confusing matters’ by claiming that the morning after pill causes abortion, but it is the petition itself that is confusing matter by spreading misinformation. The federal government’s own birth control guide clearly states that drugs like the morning after pill and the week after pill can prevent implantation of a fertilized egg in the womb. Millions of Americans would consider that an early abortion.

"Finally, the petition says Hobby lobby 'needs to hear immediately' that it cannot 'use Christian faith as an excuse to undermine healthcare reforms.' The petitioners are flat wrong, the only thing being undermined here is Hobby Lobby's Christian faith, not 'healthcare reforms.' The morning after and week after pills are widely available and employees are free to purchase them as they please. The government itself spends billions of dollars a year on free family planning services. But what the petitioners "need to hear immediately" is that the government cannot use healthcare reform as an excuse for trampling on religious rights." -Kyle Duncan, The Becket Fund

Load-Date: January 3, 2013

End of Document

Pastors protest Hobby Lobby on morning-after pill

Associated Press Online

September 27, 2012 Thursday 10:53 PM GMT

Section: DOMESTIC NEWS

Length: 599 words

Byline: By TIM TALLEY, Associated Press

Dateline: OKLAHOMA CITY

Body

Christian activists attempted Thursday to deliver a petition to Hobby Lobby criticizing its challenge to a portion of the new federal health care law, but guards at the company's headquarters turned them away.

"I thought they'd let me drop off the package," said the Rev. Lance Schmitz, pastor of the Capitol Hill Church of the Nazarene in Oklahoma City.

Schmitz said more than 80,000 people had signed copies of a petition circulated nationwide by Faithful America, an online Christian group, and UltraViolet, which promotes women's rights. Schmitz said he intends to mail the petition to the company.

Lawyers representing Hobby Lobby this month sued the federal government claiming it should not be forced to provide workers with health insurance that covers the morning-after and week-after pills. Some say the drug's ability to prevent a fertilized egg from implanting in a woman's womb is tantamount to abortion.

Hobby Lobby operates 500 arts and crafts stores in 41 states. Its Christian owners allege in the lawsuit that providing coverage for certain medications violates their "deeply held religious beliefs."

An attorney for the company, Kyle Duncan, said the Green family, which owns Hobby Lobby, respects the religious convictions of others, "including those who do not agree with them."

"All they are asking is for the government to give them the same respect by not forcing them to violate their religious beliefs," Duncan said.

But Schmitz and spokespersons for the Christian groups said the drugs are contraceptives and that women have a right to make their own medical decisions.

"Access to contraceptive care is a very good thing," Schmitz said. "This isn't about abortion. These pills do not cause abortion. It's contraception."

Michael Sharrard, spokesman for Faithful America, said a large part of his group's efforts "is to try to counter extremists" and that it represents the "mainstream majority."

"It's a woman's personal decision on what kind of birth control to use," said Cat Barr, campaign director for UltraViolet. "Hobby Lobby is out of touch with mainstream Americans. It's not their role to be dictating medical decisions."

The petitions accuse Hobby Lobby's owners of using their Christian faith as an excuse to obstruct health care reform and deny women access to birth control. Petitioners vow to not shop at Hobby Lobby until the lawsuit, filed on Sept. 12 in U.S. District Court in Oklahoma City, is dismissed.

Duncan denied accusations that the company is attempting to block women's access to birth control.

"It's not true," Duncan said. "Hobby Lobby covers the vast majority of contraceptives, will continue to do so.

"The only people's rights that are being trampled on here are the Green family and the companies they operate," he said.

Duncan said Hobby Lobby provides generous health care benefits to its employees, including birth control. But the government is trying to force the company cover two specific drugs that the company's owners believe can cause early abortions.

"This is illegal and unconstitutional," he said.

The company claims that failure to provide the drugs in the company's health insurance plan could lead to fines of up to $1.3 million a day.

Duncan said the federal government's birth control guide states that drugs like the morning-after pill and the week-after pill can prevent implantation of a fertilized egg in the womb.

"Millions of Americans would consider that an early abortion," he said. "What the petitioners need to hear immediately is that the government cannot use healthcare reform as an excuse for trampling on religious rights."

Load-Date: September 28, 2012

Evangelical Christian business owner sues over HHS mandate

Catholic Standard

September 13, 2012

Section: NEWS

Length: 463 words

Byline: CATHOLIC NEWS SERVICE

Body

Hobby Lobby Stores and the evangelical Christian family that owns it has filed suit in federal court against the Department of Health and Human Services' mandate that it provide certain drugs that can cause abortions to its employees free of charge.

The suit filed Sept. 12 in U.S. District Court for the Western District of Oklahoma asks for an emergency injunction against enforcement of the HHS mandate, saying that it would violate the religious beliefs on which the company was founded and has operated since 1970.

Based in Oklahoma City, Hobby Lobby has more than 500 retail stores in 41 states. Its practices include remaining closed on Sundays and hiring company chaplains to minister to employees.

"We have always operated our company in a manner consistent with biblical principles, including integrity and service to others," said David Green, an evangelical Christian who is founder and CEO of Hobby Lobby. "We simply cannot abandon our religious beliefs to comply with this mandate."

Hobby Lobby is the largest company to file suit against the HHS mandate and the only one not owned by a Catholic. In all, 28 lawsuits involving 88 plaintiffs are working their way through the federal court system.

Green noted in a conference call announcing the lawsuit that his family had no objections, religious or otherwise, to contraceptives that do not induce abortion and that the company has been covering those for its 22,500 employees through its health insurance and would continue to do so.

But he said the "morning-after" and "week-after" pills, marketed as Plan B One-Step, Next Choice or ella, "go against our faith, and our family is now being forced to choose between following the laws of the land that we love or maintaining the religious beliefs that have made our business successful and have supported our family and thousands of our employees and their families."

Kyle Duncan, general counsel for the Becket Fund for Religious Liberty, which is representing Hobby Lobby in the lawsuit, said the nationwide litigation "is a fight for religious freedom for all Americans," not just an issue for Catholics.

Duncan said the Green family had been reluctant to file suit. "No one wants to go to court. No one wants to sue their own government," he said. "We have respect for government. So it is with a heavy heart that anyone has to go to court to sue their own government."

Jennifer Bandy

But, he said, Hobby Lobby was compelled to ask the federal court "to protect their right to run their business as they always have, in conformity with their faith."

Duncan said Hobby Lobby could be subject to a fine of $1.3 million a day if it fails to provide the abortion-inducing drugs to employees who request them after Jan. 1, the beginning of the next plan year for its health insurance.

Load-Date: October 29, 2012

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Hobby Lobby sues over morning-after pill coverage

The Associated Press State & Local Wire

September 12, 2012 Wednesday 9:24 PM GMT

Section: BUSINESS NEWS

Length: 752 words

Byline: By TIM TALLEY, Associated Press

Dateline: OKLAHOMA CITY

Body

Christian-oriented Hobby Lobby Stores Inc. filed a federal lawsuit Wednesday challenging a mandate in the nation's health care overhaul law that requires employers to provide coverage for the morning-after pill and similar drugs.

The lawsuit by the Oklahoma City-based chain claims the government mandate is forcing the company's owners "to violate their deeply held religious beliefs under threat of heavy fines, penalties and lawsuits." Failure to provide the drugs in the company's health insurance plan could lead to fines of up to $1.3 million a day, the company said.

"By being required to make a choice between sacrificing our faith or paying millions of dollars in fines, we essentially must choose which poison pill to swallow," David Green, Hobby Lobby CEO and founder, said in a statement. "We simply cannot abandon our religious beliefs to comply with this mandate."

The lawsuit, filed in U.S. District Court in Oklahoma City, alleges the Health and Human Services mandate is unconstitutional and requests an injunction to prohibit it from being enforced. Hobby Lobby is self-insured and will be required to comply with the mandate by Jan. 1, the start of its health insurance plan year.

"We are confident that the court will act quickly," said Kyle Duncan, general counsel for the Becket Fund for Religious Liberty in Washington, which represents Hobby Lobby. Duncan said 27 other lawsuits have been filed nationwide over the mandate, mostly by nonprofit groups.

"This mandate violates the religious liberty of millions of Americans," Duncan said. "The government has turned a deaf ear to the rights of business owners."

Duncan said the lawsuit does not challenge rules regarding a variety of other birth-control measures.

Charles Miller, spokesman for the civil division of the Department of Justice, said the agency had no comment on the lawsuit.

Jane Scherdt, who was shopping in a store in Edmond, Okla., said she agreed with the business' decision to challenge the federal mandate.

"I think the government has overstepped its bounds for sure in requiring that," Scherdt said as she exited the store Wednesday. "It's part of a core belief in human dignity, the sancity of human life."

Hobby Lobby calls itself a "biblically founded business" and is closed on Sundays. Founded in 1972, the company now operates more than 500 stores in 41 states and employs more than 13,000 full-time employees who are eligible for health insurance coverage.

The lawsuit also was filed on behalf of another of the Green family's businesses, Mardel, Inc., a bookstore and education company also based in Oklahoma City that sells a variety of Christian-themed materials. The company operates 35 stores in seven states and has 372 full-time employees.

Hobby Lobby is the largest and only non-Catholic-owned business to file a lawsuit against the Health and Human Services mandate that forces all companies, regardless of religious conviction, to provide coverage of drugs the lawsuit alleges are abortion-inducing, including the morning-after pill and week-after pill.

"The Green family's religious beliefs forbid them from participating in, providing access to, paying for, training others to engage in, or otherwise supporting abortion-causing drugs and devices," the lawsuit states.

The lawsuit says the family also has "a sincere religious objection" to providing coverage for certain kinds of intrauterine devices and alleges they can cause the death of an embryo by preventing it from implanting in the wall of a woman's uterus.

The morning-after pill works by preventing ovulation or fertilization. In medical terms, pregnancy begins when a fertilized egg attaches itself to the wall of the uterus. If taken within 72 hours of unprotected sex, it can reduce a woman's chances of pregnancy by as much as 89 percent.

But critics of the contraceptive say it is the equivalent of an abortion pill because it can prevent a fertilized egg from attaching to the uterus.

In his statement, Green said the federal government is challenging his faith by forcing his company to offer the morning-after and week-after pills in its insurance plan.

"These abortion-causing drugs go against our faith, and our family is now being forced to choose between following the laws of the land that we love or maintaining the religious beliefs that have made our business successful and have supported our family and thousands of our employees and their families," Green said. "We simply cannot abandon our religious beliefs to comply with this mandate."

Load-Date: September 13, 2012

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WASHINGT**ON, DC** – Today, **Hobby Lobby Stores, Inc.**, a privately held retail chain with more than 500 arts and crafts stores in 41 states, filed a lawsuit in the US District Court for the Western District of Oklahoma, opposing the Health and Human Services mandate, which forces the Christian-owned-and-operated business to provide, without co-pay, the "morning after pill" and "week after pill" in their health insurance plan, or face crippling fines up to 1.3 million dollars per day.

"By being required to make a choice between sacrificing our faith or paying millions of dollars in fines, we essentially must choose which poison pill to swallow," said **David Green, Hobby Lobby CEO and** founder . "We simply cannot abandon our religious beliefs to comply with this mandate."

Hobby Lobby is the largest and only non-Catholic-owned business to file a lawsuit against the HHS mandate, focusing sharp criticism on the administration's regulation that forces all companies, regardless of religious conviction, to cover abortion-inducing drugs (the "morning after pill" and "week after pill").

"Washington politicians cannot force families to abandon their faith just to earn a living," said Lori W**indham, Senior Counsel, Becket Law**. "Every American, including family business owners like the Greens, should be free to live and do business according to their religious beliefs."

Founded in an Oklahoma City garage in 1972, the Green family has grown Hobby Lobby from one 300-square-foot retail space into more than 500 stores in 41 states.

"It is by God's grace and provision that Hobby Lobby has endured," **said Green.** "Therefore we seek to honor God by operating the company in a manner consistent with Biblical principles. The conflict for me is that our family is being forced to choose between following the laws of the country that we love or maintaining the religious beliefs that have made our business successful and have supported our family and thousands of our employees and their families."

The business's lawsuit acts to preserve its right to carry out its mission free from government coercion.

There are now 28 separate lawsuits challenging the HHS mandate, which is a regulation under the Affordable Care Act (aka "Obamacare"). These HHS challenges were not affected by the Supreme Court's June 28th ruling on the constitutionality of the "individual mandate."

Becket led the charge against the unconstitutional HHS mandate, and along with Hobby Lobby represents: Wheaton College, Belmont Abbey College, Colorado Christian University, the Eternal Word Television Network, and Ave Maria University.

(UPDA*TE: September 19, 2012, 6:18pm)*

The Green family has no moral objection to the use of preventive contraceptives and will continue its longstanding practice of covering these preventive contraceptives for its employees. However, the Green family cannot provide or pay for two specific abortion-inducing drugs. These drugs are Plan B and Ella, the so-called morning-after pill and the week-after pill. Covering these drugs, as the government is forcing them to do under the threat of $1.3 million penalty per day, would violate their most deeply held religious belief that life begins at conception, when an egg is fertilized. The FDA-approved government birth control guide clearly states that these two drugs, the morning-after pill and the week-after pill, may prevent fertilized eggs from implanting in the womb, thus aborting the fertilized egg.

The Green family respects the religious convictions of all Americans, including those who do not agree with them. All they are asking is for the government to give them the same respect by not forcing them to violate their religious beliefs.

Duncan Attach 0753

Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 18 years its attorneys are recognized as experts in the field of church-state law, and they recently won a 9-0 victory in Hosanna-Tabor v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half century."

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Duncan Attach 0754

Not-So-Safe Harbor

AA

by NR INTERVIEW

September 6, 2012 4:00 AM

Wheaton vs. President Obama's HHS.

Buried in the August news was yet another regulatory rewrite from the Obama administration pertaining to the Department of Health and Human Services mandate. As the Democratic Convention has been celebrating its version of freedom in Charlotte — one where mandating coverage of contraception, sterilization, and abortion-inducing drugs trumps religious liberty — an Evangelical college was back in court, in a suit against the federal government. On Monday, Wheaton College filed an appeal in federal court after a D.C. district court in late August dismissed the college's lawsuit challenging the HHS mandate. The court held that the latest version of the administration's "safe-harbor" rule — which gives some faith-based entities, including Wheaton, one year to comply with the mandate — made the college's suit premature. Kyle Duncan, general counsel at the Becket Fund for Religious Liberty, explains what this means for Wheaton and for religious liberty in an interview with

s Kathryn Jean Lopez.

KATHR***YN JEAN LOPEZ***: How does the latest rewrite of the HHS mandate's "safe-harbor" rule affect the religious liberty of schools such as Wheaton College?

KYLE DUNCAN: It leaves them somewhat better off, for the time being. In response to Wheaton's lawsuit, the government expanded the one-year safe harbor to include religious organizations that discovered objectionable drugs in their health plans, acted to remove them, but were unable to complete the exclusion process before the cutoff date. As originally written, the safe harbor plainly didn't include such organizations. Now it does. This means those organizations have the additional safe-harbor year before the government fines them for not providing insurance that violates their religious beliefs.

LOPEZ: What is the "safe harbor"?

DUNCAN: The “safe harbor” is essentially the federal government’s promise that — for one additional year after the mandate’s effective date of August 1, 2012 — it will not enforce the mandate against certain religious organizations. It’s not the same as being “exempt” from the mandate, which would mean the mandate doesn’t apply to you at all. The government has chosen to “exempt” only organizations that narrowly qualify as houses of worship under the Internal Revenue Code. By contrast, the “safe harbor” is merely the government’s promise not to enforce a law that actually does apply to the organization. It’s as if the government said, “This law binds you, but we are not going to enforce the law’s penalties against you for the time being.”

LOPEZ: Was the court’s August 24 ruling a victory for Wheaton and religious liberty, even though their case was dismissed?

DUNCAN: It is a victory — but a temporary and partial one. Wheaton and presumably many other religious groups in a similar position have been promised they will not face the threat of heavy government fines until sometime after August 2013 (depending on when their insurance year starts). It should be obvious why a victory on those terms is limited, however. The threat to religious liberty is still out there; it’s merely been postponed. The government seems to be saying, “Trust us, we’ll fix the mandate down the road.”

But that is not how rights work. Our government cannot put religious believers in a position where practicing their faith has been deemed illegal but they are granted a temporary reprieve. And the safe harbor itself isn't entirely "safe," anyway. During the safe-harbor period, religious organizations can still be sued by any covered employees or their family members who think the organization should be providing the mandated drugs.

LOPEZ: How is Wheaton about to be in violation of federal law, despite the rewrite, and despite the court's apparent lack of concern or recognition of this?

DUNCAN: The government has merely promised not to enforce the mandate for an additional year. During that time, however, the mandate continues to apply. So, each and every day of the safe harbor, an organization is — in a very real sense — in violation of federal law. During that time, the clock continues to tick toward the date when the government will begin enforcing the mandate. An organization in that position can only wait to see if the government comes through with some kind of "fix" for the mandate. But as of right now, the government has only made a nonbinding promise to come out with some new, unspecified mandate by August 2013. And, as I said above, during that period an organization is still legally exposed to private lawsuits by any employee unhappy with the organization's stance on the mandate. It would be understandable if a religious

organization felt its rights deserved more robust protection. The courts are the ones who should provide that protection.

LOPEZ: How can the federal government keep playing with a rule like it has with this one? And what does this mean for the rule of law?

DUNCAN: It's important to remember that the HHS mandate itself is not a product of legislation, but of regulation. Congress didn't pass it; an executive agency issued it through a rulemaking process. Administrative agencies have a great deal of flexibility with the rules they promulgate, although that flexibility cannot be unlimited. Furthermore, the safe harbor isn't even a regulation. Rather, it's the agency's "guidance" position advising how it will enforce the rule. What does all this mean? That, as it stands now, the government has created a kind of tiered system for organizations with religious objections to the mandate. Some are completely exempt (churches, for the most part); some are granted a temporary reprieve (religious colleges, hospitals, charities, etc.); others have no protection whatsoever (religious business owners). I will leave it to the philosophers to say what this means for the "rule of law." To me, it seems like there are much better ways of running a railroad.

LOPEZ: Everyone will be talking about politics during

these next weeks. How can your work inform the political conversation?

DUNCAN: The HHS litigation is not about whether it's socially or morally desirable for government to promote free contraception. That's an important argument our society should be having, but it's one for the political process. The litigation can help inform the political process, however, by drawing attention to where the government's contraceptive project infringes on basic liberties — here, it's religious freedom. So, the litigation is saying, "The people, through their representatives, can determine whether to promote free contraception. But they cannot do so by forcing religious objectors to provide it against their consciences." That's what the government has done through the HHS mandate. It can't do that.

— Kathryn Jean Lopez is editor-at-large of

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W**ashington, DC –Wheaton College** has appealed a federal judge's decision to dismiss its lawsuit against the HHS mandate. The mandate forces Wheaton to cover the "morning-after pill" and "week-after pill" against its deeply held religious beliefs, or face crippling fines of $1.4 million dollars each year.

In response to Wheaton's lawsuit, the federal government rewrote the mandate guidelines to give Wheaton until August 2013 to comply. Because Wheaton's medical policies are renewed each calendar year, this means implementation would be effective January 1, 2014. The judge therefore ruled Wheaton's present lawsuit was premature.

"Wheaton will keep fighting for its religious freedom," **says Kyle Duncan, General Counsel at Becket Law**. "The government has granted Wheaton a temporary reprieve—but has not addressed its core concerns."

Wheaton's religious convictions prevent it from providing its employees with access to abortion-causing drugs as mandated by the federal government. The College's lawsuit seeks to preserve its right to offer health insurance to employees that aligns with its beliefs.

"We're appealing because we continue to believe that our case should be considered on its merits," **says Wheaton College President Philip Ryken**. "While we are pleased that our lawsuit has compelled the government to delay enforcement, waiting another year will not change the fact that the mandate violates our religious liberty and puts our ability to offer our employees health insurance at risk."

There are now 26 separate lawsuits challenging the HHS mandate, which is a regulation under the Affordable Care Act.

More information regarding the College's lawsuit is available via its July 18 news release, and its updated Frequently Asked Questions. A Case Summary, Frequently Asked Questions about legal challenges to the HHS mandate, and a Media Information Sheet are available on the Becket Law website.

Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 18 years its attorneys are recognized as experts in the field of church-state law, and they recently won a 9-0 victory in Hosanna-Tabor v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half century."

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Duncan Attach 0761

WASHINGT**ON, DC** – In direct response to a lawsuit challenging the HHS mandate brought by **Becket Law** on behalf of **Wheaton College**, the federal government has rewritten its one-year "safe harbor" to include Wheaton, giving the prominent evangelical institution until August, 2013, before being forced to comply with the mandate or face crippling fines. As a result of the government's concession, last Friday, a federal judge for the U.S. District Court for the District of Columbia dismissed Wheaton College's lawsuit as premature.

The government claims that it will create a new "insurer" mandate during that safe-harbor period which would purportedly solve the religious liberty problem, but religious organizations like Wheaton remain unconvinced.

"The government has now re-written the 'safe harbor' guidelines three times in seven months, and is evidently in no hurry to defend the HHS mandate in open court," said **Kyle Duncan, General Counsel for Becket Law**. "By moving the goalposts yet again, the government managed to get Wheaton's lawsuit dismissed on purely technical grounds. This leaves unresolved the question of religious liberty at the heart of the lawsuit."

Still, the new "safe harbor" guidelines are a victory for Wheaton. Before the lawsuit, the government could have enforced the HHS mandate against Wheaton regardless of its religious objections to providing coverage for abortion-inducing drugs. As a direct result of Wheaton's lawsuit, the college now has some protection for its faith and its employees' health insurance–albeit only for one year and only against government enforcement of the mandate.

"Millions of religious employers are relying on the safe harbor guidance from HHS about who is subject to the mandate and who isn't," **said Duncan.** "It should be more clear than a series of confusing ad hoc changes to the safe harbor."

Unfortunately, the court's dismissal of the lawsuit fails to acknowledge the government coercion Wheaton still faces. Despite qualifying for the "safe harbor," not complying with the mandate during that safe harbor period technically places the college in violation of federal law, and thus exposed to lawsuits authorized by the Affordable Care Act to enforce the HHS mandate. Wheaton therefore is carefully considering an appeal to the U.S. Court of Appeals for the D.C. Circuit.

The government has already lost the religious liberty argument over the mandate once—when a federal court in Colorado issued an injunction against the mandate in favor of a Catholic business owner—and the government appears to be in no hurry to defend the mandate in open court again.

Becket led the charge against the unconstitutional HHS mandate, and along with Wheaton represents: Belmont Abbey College, Colorado Christian University, the Eternal Word Television Network, and Ave Maria University. There are now 26 separate lawsuits challenging the HHS mandate.

Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 18 years its attorneys are recognized as experts in the field of church-state law, and they recently won a 9-0 victory in Hosanna-Tabor v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half century."

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Duncan Attach 0762

Wheaton College Asks for Emergency Help from Court on Mandate

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by KATHRYN JEAN LOPEZ

August 1, 2012 1:00 PM

@KATHRYNLOPEZ

Wheaton College joined a suit in July filed by the Catholic University of America in D.C. federal court to protect themselves from the HHS mandate that goes into effect today, August 1. Today the Becket Fund for Religious Liberty, which is representing Wheaton, filed for a preliminary injunction on the Evangelical college's behalf.

We saw the first injunction granted by a Carter-appointed federal judge on Friday for the Newland family, who own a HVAC company in Denver. The Newlands are Catholic and have never covered and can't in good conscience cover abortion-inducing drugs, contraception, and sterilization for their employees. The Newlands needed the injunction quickly because their health-insurance plan-year begins in November. Wheaton, likewise, is asking today for a decision by September 30, a month before open enrollment starts for its 2013 insurance plans.

I interviewed the president of Wheaton College about the lawsuit the school filed here.

"Remember August 1, 2012. Today begins a violation of American conscience like we have never seen before in our country, and Wheaton College personifies it," Kyle Duncan, general counsel for the Becket Fund, says in a statement about the injunction filing. "Everyone knows Wheaton is a school that lives out its faith. But today our government is telling Wheaton it is not 'religious enough' to have a conscience, and so can be forced to participate in abortions or face heavy fines. Wheaton's only recourse is to ask the federal courts for emergency relief."

Duncan adds: "Wheaton has always provided generous employee benefits, but now the government is forcing it to choose between caring for its employees and honoring its faith. The government should never be able to put anyone in that position."

WASHINGT**ON, DC** – Today, as the Health and Human Services (HHS) mandate takes effect, **Becket Law** asked a D.C. federal court to issue a preliminary injunction on behalf of Wheaton **College,** the leading evangelical liberal arts institution. Wheaton now faces the decision whether to obey the HHS mandate—which would force it to cover abortion-inducing drugs—or obey its faith.

"Remember August 1, 2012. Today begins a violation of American conscience like we have never seen before in our country, and Wheaton College personifies it," said **Kyle Duncan, General Counsel for Becket Law.** "Everyone knows Wheaton is a school that lives out its faith. But today our government is telling Wheaton it is not 'religious enough' to have a conscience, and so can be forced to participate in abortions or face heavy fines. Wheaton's only recourse is to ask the federal courts for emergency relief."

Wheaton does not qualify for the one-year "safe harbor," which the government offered to certain religious organizations as a temporary reprieve from the HHS mandate. So, in a few short months, Wheaton faces the prospect of over a million dollars per year in fines and other penalties—unless it agrees to violate its core religious beliefs by providing insurance coverage for "emergency contraceptives" that they believe cause abortion.

"Wheaton's employees are standing with the school, but they are afraid," said Duncan . "Many employees have said that, if Wheaton is forced to terminate insurance coverage, they will not be able to afford health care for their families. Wheaton has always provided generous employee benefits, but now the government is forcing it to choose between caring for its employees and honoring its faith. The government should never be able to put anyone in that position." *(See declarations of employees* below)

To avoid making dramatic changes to its employee health insurance, Wheaton is asking the court for a decision by September 30—which is a month before Wheaton's open enrollment starts for its 2013 health insurance plans.

Becket led the charge against the unconstitutional HHS mandate, and along with Wheaton represents Belmont Abbey College, Colorado Christian University, the Eternal Word Television Network, and Ave Maria University. There are now 24 separate lawsuits challenging the HHS mandate.

Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 18 years its attorneys are recognized as experts in the field of church-state law, and they recently won a 9-0 victory in Hosanna-Tabor v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half century."

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Duncan Attach 0765

WASHINGT**ON, DC** – Today, Wheaton College (Ill.), a leading evangelical liberal arts institution, filed a lawsuit alongside The Catholic University of America in the D.C. District Court opposing the Health and Human Services "Preventative Services" mandate, which forces both institutions to violate their deeply held religious beliefs or pay severe fines.

This alliance marks the first-ever partnership between Catholic and evangelical institutions to oppose the same regulation in the same court.

"This mandate is not just a Catholic issue—it threatens people of all faiths," **says Kyle Duncan, General Counsel, Becket Law**. "Wheaton's historic decision to join the fight alongside a Catholic institution shows the broad consensus that the mandate endangers everyone's religious liberty."

Wheaton's religious convictions prevent it from providing its employees with access to abortion-causing drugs. The college's lawsuit acts to preserve its religious liberty and the right to carry out its mission free from government coercion.

"Wheaton College and other distinctively Christian institutions are faced with a clear and present threat to our religious liberty," says **Wheaton College President Dr. Philip Ryken**. "Our first president, the abolitionist Jonathan Blanchard, believed it was imperative to act in defense of freedom. In bringing this suit, we act in defense of freedom again."

"As the president of the national university of the Catholic Church, I am happy to express solidarity with our evangelical brothers and sisters from Wheaton College as they challenge the HHS mandate. Wheaton's lawsuit is another sign of how troubling many people of faith find the government's efforts to chip away at our first freedom," added **Catholic University President John Garvey**.

There are now 24 separate lawsuits challenging the HHS mandate, which is a regulation under the Affordable Care Act (aka "Obamacare"). Catholic University filed suit on May 21, 2012. These HHS challenges were not affected by the Supreme Court's June 28th ruling on the constitutionality of the "individual mandate."

Becket led the charge against the unconstitutional HHS mandate, and along with Wheaton represents Belmont Abbey College, Colorado Christian University, the Eternal Word Television Network, and Ave Maria University.

Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions—from Anglicans to Zoroastrians. For 18 years its attorneys are recognized as experts in the field of church-state law, and they recently won a 9-0 victory in Hosanna-Tabor *v. EEOC, which The Wall Street Journal called one of "the most important religious liberty cases in a half* century."

For more information, or to arrange an interview with one of the attorneys, please contact Melinda Skea at media@becketlaw.org or call 202.349.7224.

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Duncan Attach 0766

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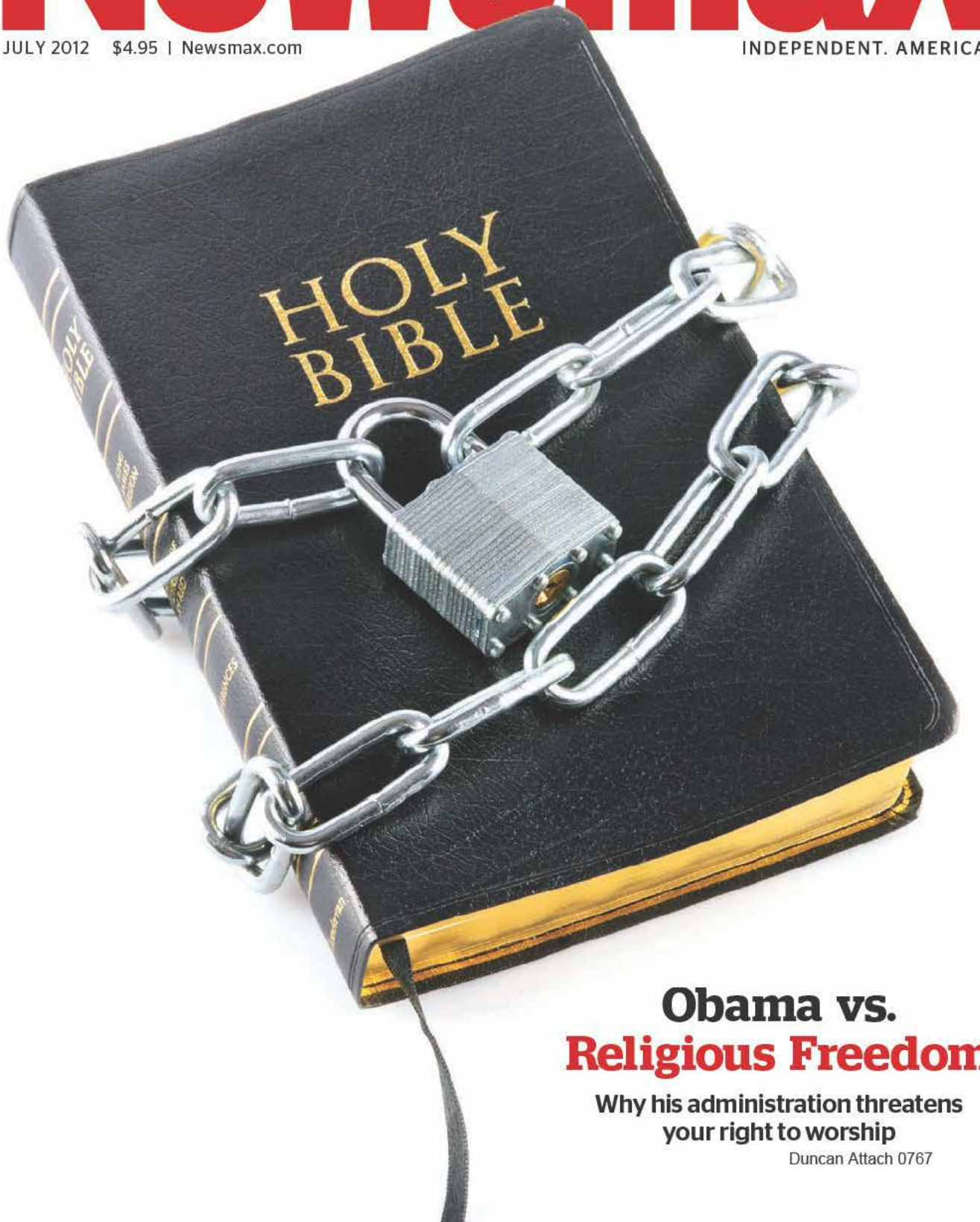


Obama vs. Religious Freedom

Why his administration threatens your right to worship

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

— First Amendment to the Constitution of the United States

Obama vs. Religious Freedom

BY DAVID A. PATTEN

The first salvo in the war on religion was fired long before the official declaration of hostilities.

It came in an angry phone call to small-town attorney Deano Ware. When Ware picked up the phone in his office in the tiny Detroit suburb of Redford, Mich., population 48,362, he had no idea that it would ultimately entangle him in what *The Wall Street Journal* would term one of "the most important religious liberty cases in a half century."

Ware was stunned to get an earful from another attorney who was threatening to use the full might of the federal government to close down Ware's little church, Hosanna-Tabor Lutheran Church.

The lawyer at the other end of the line represented a woman who had been a minister at Hosanna-Tabor several years past. Her job only rarely entailed leading prayer services at the school; her primary function was to teach children. The church referred to her as a "called teacher" and a minister.

She had left her job at the church in 2004 due to a mysterious health problem. Hosanna-Tabor's policy held that any employee would be terminated after missing several months of work. With a new school year looming, the church hired a replacement.

Nonetheless, the former employee showed up, insisting she be rehired. She said she had been diagnosed with narcolepsy, a chronic sleep disorder that causes victims to fall asleep at inappropriate times. And she was claiming she had been terminated in violation of the Americans with Disabilities Act.

The Equal Employment Opportunity Commission (EEOC), which was first established in the historic Civil Rights Act of 1964, announced it was taking up the woman's cause. She refused to settle for less than $200,000. Ware knew that would bankrupt his little church, which only had about 120 active members.

That Ware didn't immediately give up and advise the church to file for bankruptcy probably had a lot to do with his gritty, inner-city background. When he was 7, Ware says, his parents dropped him off at his grandparents. Without parental guidance from that point forward, Ware grew up in one of those rough neighborhoods where kids are more likely to be sent to prison than to college. Yet he harbored an improbable dream — to be a lawyer.

His escape came courtesy of the U.S. Army. Ware enlisted, and his high test scores landed him a slot in the Judge Advocate General's legal office in Heidelberg, Germany.

After leaving the Army, Ware earned a bachelor's degree from Michigan State. With a family to support, he began working as a manager at a restaurant. But he never forgot his dream of becoming a lawyer.

A devout Christian, Ware began praying for providential guidance. And like so many believers, after praying long and hard he began to sense he was receiving an answer.

"The Lord kept telling me . . . 'I need you to do something. You're going to do something for me," Ware tells Newsmax. "You're going to take something to the highest court in the land.'"

With that assurance, Ware began attending law school at night and earned his law degree.

He eventually passed the bar, opened up a small practice, and

Norman Rockwell's *Freedom of Worship*: "Each According to the Dictates of His Own Conscience"
Rockwell's 1943 illustration captures the constitutional right to religious freedom and was used as part of President Franklin Roosevelt's "Four Freedoms" campaign during World War II.

joined the church. When Ware got the call from the other attorney, he wasn't even Hosanna-Tabor's legal counsel. The church was too poor to afford one. But he began researching the law anyway, and decided the church's best chance for survival was a little-known legal provision called "ministerial exception."

The ministerial exception simply meant the government could not force churches to retain any minister. Gender, disability, and sexual-orientation cases did not merit special protection if those employees were ministers. In other words, the government's social-justice imperative did not trump the foundational First Amendment right to practice one's religion.

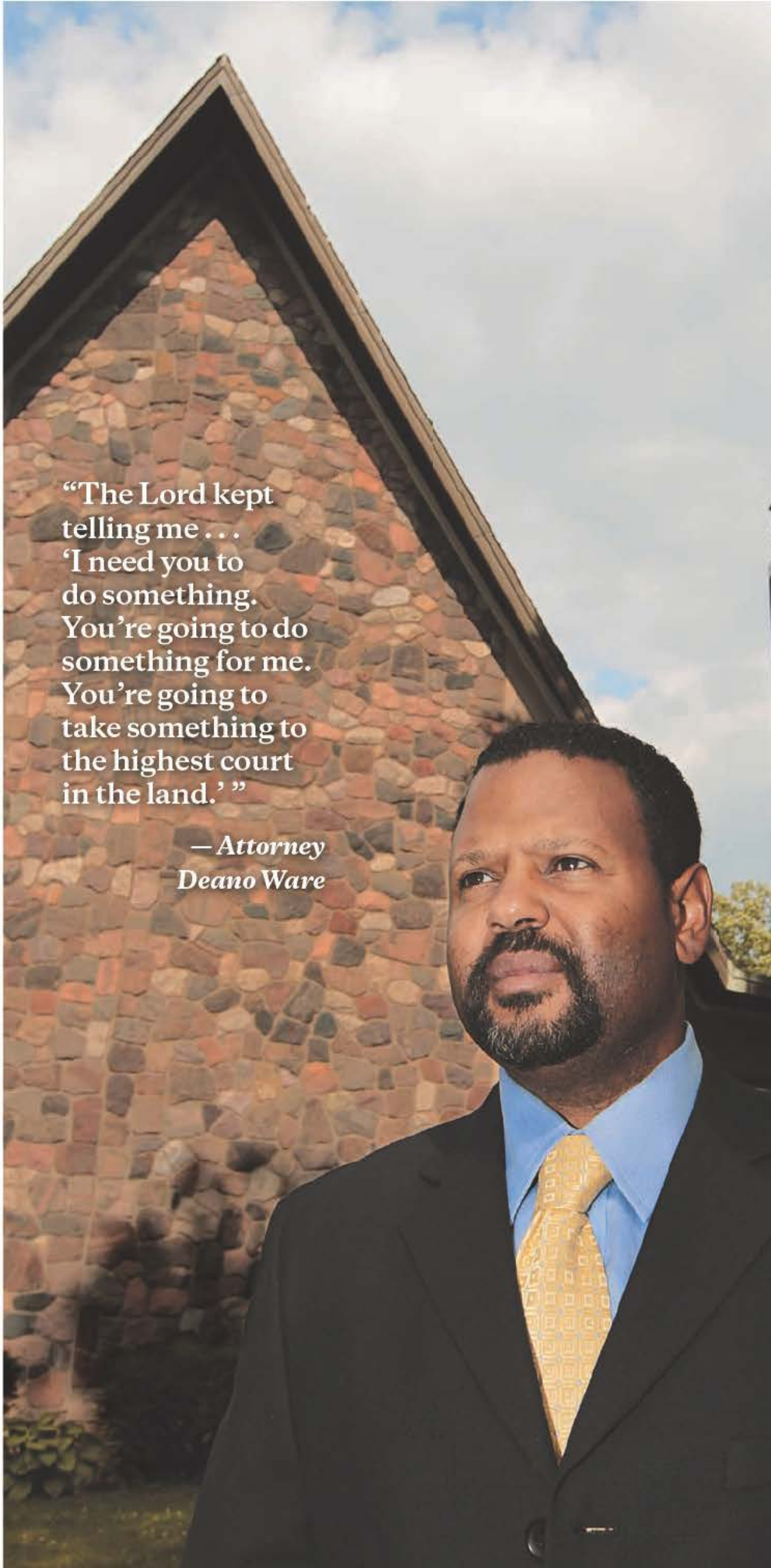
After all, what good was the First Amendment if the government could tell a church which pastor to retain?

It was on precisely this ground that the church won a summary judgment at the trial level. But the Obama-era EEOC wouldn't take no for an answer.

In October 2009, the EEOC appealed to the Sixth Circuit Court of Appeals in Cincinnati, arguing that the teacher who had been terminated was not actually a minister, and therefore was not protected by the ministerial exception.

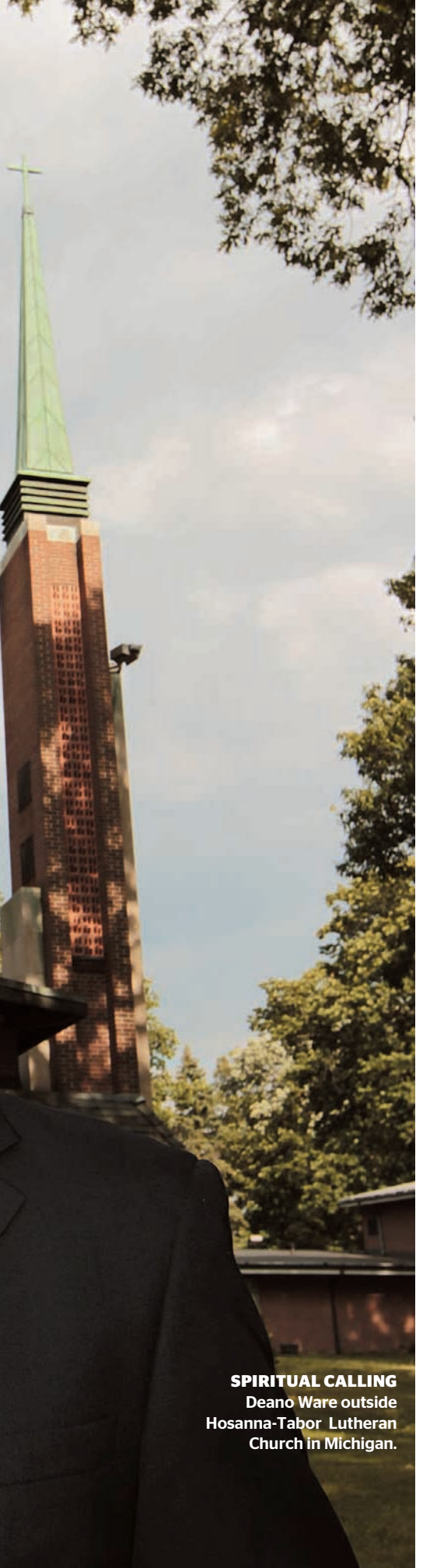
The Sixth Circuit has 25 judges. Of the three who heard the EEOC's Hosanna-Tabor case, one was a Reagan appointee, one was a Clinton appointee, and one was nominated first by Clinton, and then later re-nominated by George W. Bush in an effort to loosen a logjam of appointments that were being blocked by Democrats.

The three judges noted that the fired worker only spent about 45 minutes per day on religious duties. Because she spent most of her time teaching rather than preaching, the appeals court reversed the lower court's decision. It ordered the case to be tried without reference to the religious status of the parties involved.



"The Lord kept telling me . . . 'I need you to do something. You're going to do something for me. You're going to take something to the highest court in the land.' "

— Attorney Deano Ware



SPIRITUAL CALLING
Deano Ware outside Hosanna-Tabor Lutheran Church in Michigan.

"The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."

— Founding Father James Madison, speech to Congress, June 8, 1789

Ware thought that missed the point, however. If the government could dictate who was or was not a minister, a rabbi, a pastor, or priest, what religious liberty was left? "That to me was the core constitutional issue," he tells Newsmax, "that a court is going to tell a church now who is and who is not their minister. Somebody we've ordained or commissioned, and trained, and now the court is going to tell us she's not a minister."

The Sixth Circuit's verdict in March 2010 was a devastating setback, and Ware advised his church elders to prepare for possible bankruptcy. The little church in a Detroit suburb was on the verge of being snuffed out by the federal bureaucracy. But the Sixth Circuit ruling also proved to be a blessing in disguise. The case drew national publicity.

Not long after that court rejected Ware's claim of ministerial exception, he received a call from The Becket Fund for Religious Liberty.

The Washington, D.C.-based, nonprofit religious liberty organization offered to help him appeal the Sixth Circuit's ruling to the Supreme Court, which had never ruled on the ministerial exception. It agreed to hear the case. Once and for all, the court would decide whether the federal government could use equal-employment laws to tell churches whom to retain as ministers.

In October, Ware bought a train ticket, booked a hotel room, and arrived in Washington, D.C., to hear the oral arguments. He arrived with less than $50 to his name. His church had been unable to pay his legal bills. He'd poured his last dollar into defending Hosanna-Tabor.

By trying to save his church from bankruptcy, he'd nearly bankrupted himself. But Ware hadn't made it out of Detroit's inner-city by giving up without a fight. For religious-liberty advocates, the stakes could hardly have been higher.

If Ware and The Becket Fund lost, it would set back the cause of religious liberty for a generation. Leaders of churches, synagogues, and mosques around the country would have to operate knowing the EEOC, or any other part of the federal bureaucracy for that matter, could step in at any time to veto their decisions.

If, on the other hand, the little church could prevail against the government's battalion of attorneys, the "ministerial exception" would finally enjoy the ultimate imprimatur. Winning Hosanna-Tabor might put the brakes on an administration that had boldly asserted its power to sue churches and to reduce the tax incentives for contributions to charities.

After the oral arguments, Ware took the train back to Detroit to return to a struggling law practice and a marriage that was breaking up because he couldn't pay his bills.

In January, the Supreme Court rendered its decision. Ware says: "I'd already told the Lord, 'If we win, wherever I'm at, I'm going to drop to my knees immediately and thank you.' And that's exactly what I did. Luckily, I was in my office."

The court's opinion blasted the administration's case as "extreme" and "untenable," and granted the

Duncan Attach 0771

TOUGH PILL Sebelius and Obama announce the mandate for "preventive services," causing an uproar over religious freedom.

First Amendment protection for a ministerial exception. What "blew all of us away," Ware says, was the vote tally. The unanimous 9-0 decision was hailed by legal scholars as perhaps the most important religious-liberty case in a generation. "The exception ensures that the authority to select and control who will minister to the faithful is the church's alone," declared Chief Justice John Roberts.

Even President Obama's own judicial appointees to the Supreme Court, Justices Elena Kagan and Sonia Sotomayor, had rejected the administration's attempt to deny the ministerial exception under the First Amendment.

The Wall Street Journal described the verdict as "a crushing rebuke to the Obama administration." GOP presidential hopeful Mitt Romney praised the decision, saying: "We are very fortunate [to have people] who are willing to stand up for religious tolerance and religious liberty and the First Amendment of this Constitution in this country."

The unanimous ruling sent a clear message: The judicial branch wasn't waging the war on religion. That was coming from the executive.

But if Hosanna-Tabor represented the first firefight, the administration's official declaration of hostility toward religion came on Jan. 20 with what appeared to be a routine exercise in bureaucratic rulemaking by Health and Human Services Secretary Kathleen Sebelius. On that date, she announced the final rules that employers would have to follow under the Patient Protection and Affordable Care Act, aka Obamacare, in the healthcare coverage they offered their employees.

The new rules required that all employers, including faith-based service ministries and charities, offer insurance to their employees that would cover "preventive services" free of charge. These services included contraception, the morning-after pill, and sterilizations.

Only organizations that met the HHS's narrow definition of a "religious employer" — churches, synagogues, and mosques — would be able to avoid the requirement by qualifying for an exemption.

Sebelius announced: "This decision was made after very careful consideration, including the important concerns some have raised about religious liberty. I believe this proposal strikes the appropriate balance between respecting religious freedom and increasing access to important preventive services."

Catholic and Protestant leaders saw the regulations quite differently, as nothing less than an effort to limit the expression of religion in America. They had tried for months to get the administration to adopt Obamacare regulations that would not force charitable outreach ministries to offer their employees services that violated essential church principles. But Sebelius's announcement signaled that effort had clearly failed.

The Catholic Church perceived the regulations as an assault on its conscientious-

Are Swing-State Catholics Losing Their Faith in Obama?

The great unknown of the 2012 presidential race is whether voters will decide to re-elect President Obama despite his provocative stand on religious-liberty issues.

The answer may depend on swing-state Catholics. In 2008, exit polls showed that Catholics broke for Obama by 54 to 45 percent. But since then, many Catholics have expressed "buyer's remorse" over their choice.

If the faith of swing-state Catholics in Obama wavers, his campaign is in big trouble. Ten swing states control 130 of the 270 delegates needed to win the presidency — and all of them have substantial Catholic-voter populations. □

Swing State	% Catholic Population	Available Delegates
Colorado	19%	9
Florida	26%	29
Iowa	25%	6
Nevada	27%	6
New Hampshire	29%	4
North Carolina	9%	15
Ohio	21%	18
Pennsylvania	29%	20
Virginia	14%	13
Wisconsin	29%	10

SOURCES: Pewforum.org, U.S. Religious Landscape Survey; 270ToWin.com

PGS. 52 & 53: JEFF KOWALSKI / PG.54 AP IMAGES

10 Top Threats to America's Religious Freedoms

Religious liberty has been in the headlines ever since the Department of Health and Human Services sought to redefine which types of faith-based organizations would be fully protected by the First Amendment. But many other crusades are under way against religion. Here is Newsmax's list of the top 10 other threats to religious freedom in America:

1. "All-Comers" Rules on College Campuses
Colleges are so worried Christian groups expect their leaders and members to actually be, well, Christians that they have adopted "all-comers" policies. All comers must be allowed to join — or lead — all groups. When Vanderbilt University adopted an "all-comers" policy, state legislators were so alarmed they passed a bill to nix it.

2. Banning Crosses in the Mojave National Preserve That Honor Fallen Heroes
Despite a previous Supreme Court ruling that a cross erected on the Mojave National Preserve to honor World War I Veterans could remain, anti-religious groups are challenging the placement of two 13-foot crosses atop a hill at Camp Pendleton in honor of Marines who died fighting the war on terror. The Thomas More Law Center is among those defending the cross.

3. Editing "God" Out of "God Bless the USA"
In Bellingham, Mass., fourth graders were rehearsing a popular Lee Greenwood song. But politically correct elementary-school officials changed the lyrics to "We love the USA." Parents complained, and school officials canceled the concert. The superintendent of schools later announced students would be allowed to sing the song unabridged.

4. Requiring Pharmacists to Stock "Morning After" Pills — Despite Their Moral Objections
The Becket Fund challenged a directive from Washington state ordering all pharmacists, regardless of their religious convictions, to stock morning-after pills, and won. But the verdict is under appeal to the Ninth Circuit Court of Appeals. The American Center for Law and Justice has challenged a similar law in Illinois.

5. Revoking Christian Foster-Care Programs
Who could possibly oppose faith-based adoption and foster care? The answer: Boston, San Francisco, the District of Columbia, and Illinois. The U.S. Conference of Catholic Bishops says these jurisdictions have revoked charities' licenses and contracts "because those charities refused to place children with same-sex couples or unmarried opposite-sex couples who cohabitate."

6. Air Force Takes Aim at the Bible
The American Family Association accuses Air Force leaders of anti-religious bias, and are sponsoring a letter-writing campaign." The Air Force has stopped providing Bibles at its lodging facilities, removed the word "God" from the logo of its Rapid Capabilities office, and backed off its support for the Operation Christmas Child charity at the Air Force Academy.

7. Blacklisting the 10 Commandments
The ACLU sued the Giles County School Board in Roanoke, Va., because it allowed the 10 Commandments to be displayed along with the Magna Carta, the Mayflower Compact, and the Declaration of Independence. It was part of a display on the foundations of American law and government. Matthew D. Staver's Liberty Counsel came to the school board's defense, and has argued the case before the U.S. District Court for the Western District of Virginia.

8. Obstructing Small-Church Meetings
New York City has banned religious groups from renting the same public-school auditoriums that are available to a host of secular groups. The Alliance Defense Fund represented one group, the Bronx Household of Faith, in a lawsuit against the city. Sixty other ministries were also affected. After an initial injunction, the courts upheld the city's right to deny renting to church groups.

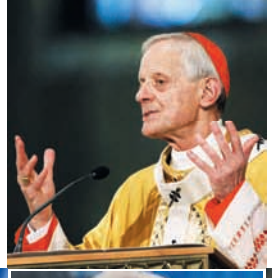
9. Secularizing Easter
Religious-liberty pioneer Kevin J. "Seamus" Hasson reports the school system in Lansing, Mich., considered the Easter Bunny too sectarian. So it hosted a "Breakfast with the Special Bunny" event instead. The public library in Arlington, Va., re-named its annual Easter egg hunt "Spring Egg Roll." It relented when its decision became a laughingstock, Hasson says.

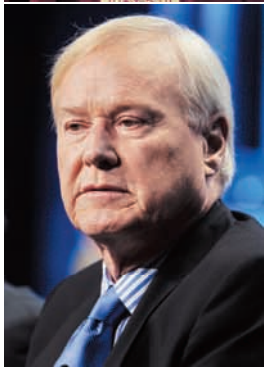
10. Stoking the War on Christmas
New assaults on Christmas occur every year now. In 2011, three Christmas carolers dressed in Victorian garb were tossed out of a post office in Silver Spring, Md., for the offense of singing Christmas tunes on government property.

— David A. Patten

TEN COMMANDMENTS, CROSS, BIBLE, EGG/ISTOCKPHOTO / CAROLEB5/FPG/ARCHIVE PHOTOS/GETTY IMAGES

Duncan Attach 0773





CHRISTIANS OF ALL STRIPES Across: Paul Ryan, E.J. Dionne, Tony Perkins. Vertical: Cardinal Donald Wuerl, Cardinal Timothy Dolan, MSNBC host Chris Matthews.

objector status in the realm of reproductive services — the church will not provide abortion or birth-control services to patients, or its employees.

The Archdiocese of Washington, D.C., led by Cardinal Donald Wuerl, blasted the rules as "an unprecedented attack by the federal government on one of America's most cherished freedoms."

Requiring faith-based organizations to offer sterilizations and abortion-inducing drugs delighted Planned Parenthood and the secular left. But it brought on several unintended consequences.

It united socially-conservative Catholics and evangelicals in a way a thousand ecumenical conferences could never do.

Tony Perkins' Family Research Council issued a letter signed by 2,500 pastors and evangelical leaders vowing solidarity with Catholics. Conservatives in Congress reacted as well.

"This is much, much bigger than about contraception," said GOP Rep. Paul Ryan of Wisconsin. "This is about religious freedom, First Amendment rights, and how this progressive philosophy of fungible rights of a living breathing Constitution really clashes and collides with these core rights that we built our society and country around."

Craftily, they believed their stance requiring Catholic and other religious institutions to provide birth control would be viewed purely as an issue involving contraception and women's reproductive freedom, which enjoyed broad support from women and independent voters according to various polls.

At first, that appeared to be the public's perception — until the Catholic Church fired back.

In May, Catholic leaders launched what could be the largest religious-liberty legal action ever. A dozen lawsuits were filed on behalf of 43 organizations nationwide.

The lawsuit filed in U.S. District Court in the Eastern District of New York, on behalf of the Archdiocese of New York that is led by Cardinal Dolan, charged: "In order to safeguard their religious freedoms, religious organizations must plead with the government for a determination that they are sufficiently 'religious.'"

With that broadside, the issue suddenly risked alienating mainstream Catholics generally. The obvious question: Why would the administration go out of its way to pick a fight with people of faith, just months before the November elections?

George J. Marlin, the conservative columnist and best-selling author of *Narcissist Nation: Reflections of a Blue-State Conservative*, thinks he knows the answer.

"Obama's assault on religious liberty is by design," he tells Newsmax. "Secular ideologists like Obama want people to look to the state or themselves for guidance, not to organized religion. In effect, they want to substitute religious values with the enlightened, utilitarian values of the managerial elite."

Discouraging Catholic institutions, he says, could induce them to hand over to government the keys of their soup kitchens, adoption agencies, homeless shelters, and hospitals.

For months leading up to the Sebelius announcement, Cardinal Dolan of New York and other Catholic leaders tried to work out a compromise with the White House. And Dolan thought he had.

In March, the Cardinal told *The Wall Street Journal* that Obama promised during an Oval Office meeting that HHS regulations would respect "the rights of conscience."

"So you can imagine the chagrin," Dolan told the *Journal*'s James Taranto, "when [President Obama] called me at the end of January to say that the mandates remain in place and that there would be no substantive change." The nation's No. 1 Catholic leader was charging the president with breaking his word.

After reneging on the promise to respect churches' "rights of conscience," the administration offered them a one-year transition period before the mandate would take effect. Dolan said this amounted to giving Catholics "a year to figure out how to violate [their] consciences."

The administration did offer an exemption to "religious employers" to avoid offering services they found morally unacceptable. At the same

time, it established three tough conditions to meet in order to qualify.

The first required an organization to be devoted to the "inculcation of religious values." Organizations that expressed their religious beliefs by acting on them in public, perhaps by helping poor children purchase school supplies, for example, would not qualify for the exemption as their activities transcended "inculcation."

The inculcation rule meant Christians could preach to the homeless shivering on the streets of Boston. But if they opened a shelter to help them, they would lose their religious exemption.

Kyle Duncan, general counsel for the Becket Fund, observed, "The government seems to be saying, You can go worship in a church, but when it comes to being out there in civil society and doing something for people, you are going to have to get in line with everybody else."

The church decried the rules as an "unprecedented attack" on religious freedom.

The second condition for the exemption that also had to be met: A majority of an organization's employees would have to share its values. It seemed likely any faith-based charity seeking a religious exemption would find itself squeezed between equal-employment laws on the one hand, and the religious-exemption requirements on the other.

The third and most troublesome hurdle to religious autonomy: A majority of those served by an organization must share its religious values. For Catholics, the notion of imposing a religious litmus test for someone in dire need, which was what the government seemed to be suggesting, was repugnant.

As Marlin speculates, it was almost as if the rules were designed to encourage faith-based organizations to stop serving the community. Catholics see service to life's disadvantaged

RELIGIOUS LIBERTY PIONEER:

Time to Remind Caesar He Isn't God

The Founding Fathers wrote the First Amendment to bequeath religious liberty to future generations. Yet it was people like Kevin Hasson who ensured the inheritance was actually delivered.

Hasson is the founder and driving force behind The Becket Fund for Religious Liberty.

The Becket Fund was a key player in the Supreme Court's extraordinary 9-0 verdict earlier this year in the *Hosanna-Tabor Lutheran Church v. EEOC* case, which recognized for the first time the constitutional right of religious organizations to choose their own ministers free from government interference.

Hasson was a Catholic altar boy. He later earned a master's degree in theology from Notre Dame, and later become one of the nation's leading guardians of religious liberty. "Faith answers the deepest longing of the human heart," Hasson says. "It is a quintessentially human act. And that is a point that even the most devout atheist should be able to grant."

Hasson made his name in Washington circles at the powerhouse Williams & Connolly law firm focusing on religious liberty.

In 1994, he left the firm to found The Becket Fund, a non-profit defender of religious liberty.

Newsmax asked Hasson why the enemies of religion attack public expressions of faith. His perspective: The secularists believe the West is free, and relatively peaceful, only because it is "untainted by fanatical devotion to absolute truths."

They therefore seek to marginalize religion as much as possible and foment a "synthetic, one-size-fits-all culture."

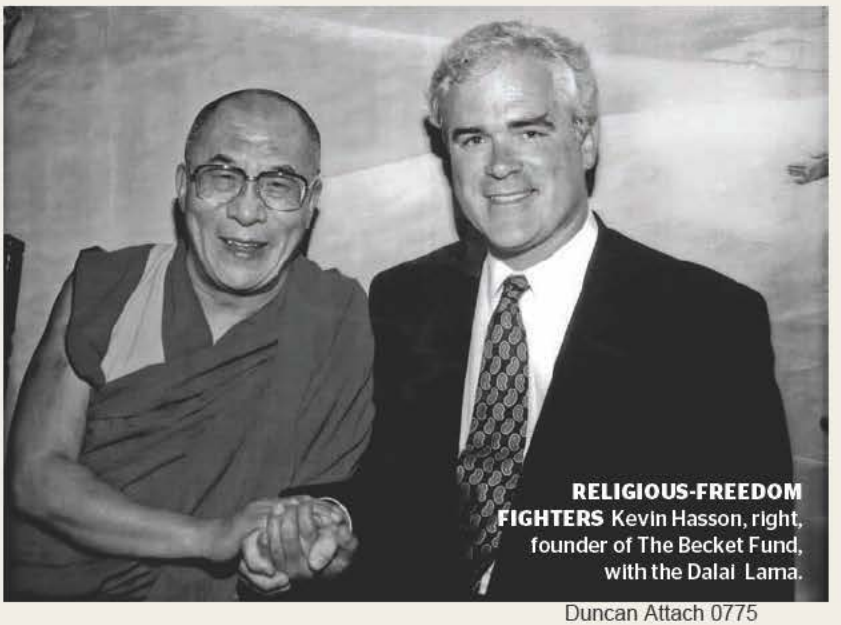
He tells Newsmax: "As we'll see, that's literally inhuman. It's also self-defeating. It doesn't resolve the culture war."

Hasson sees an even greater danger to American religious life, however: a culture that appears increasingly indifferent to religious pursuits. "Faith is seen as nothing more than a private pursuit roughly akin to golf or sailing."

The cure, Hasson believes, is for religious expression to once again be welcomed in public life.

"And for that to happen," he adds, "people of all faiths must constantly remind Caesar that he is, after all, only Caesar. He may not demand what belongs to God."

— Dave Eberhart



RELIGIOUS-FREEDOM FIGHTERS Kevin Hasson, right, founder of The Becket Fund, with the Dalai Lama.

COURTESY OF BECKET FUND FOR RELIGIOUS LIBERTY

Duncan Attach 0775

as a core element of their faith. "By a stroke of the pen and a definition," said Jane Belford, chancellor of the Archdiocese of Washington, D.C., "they have defined away our religious freedom, to make it only 'freedom to worship.'"

Under the federal guidelines, Mother Theresa would not have qualified for a religious exemption, Belford said.

The regulations also raised the issue of how the exemption would be enforced. Would government inspectors review and verify churches' exemption claims? Would Big Brother conduct surveys to ascertain whether the beliefs of employees and clients matched those of the church?

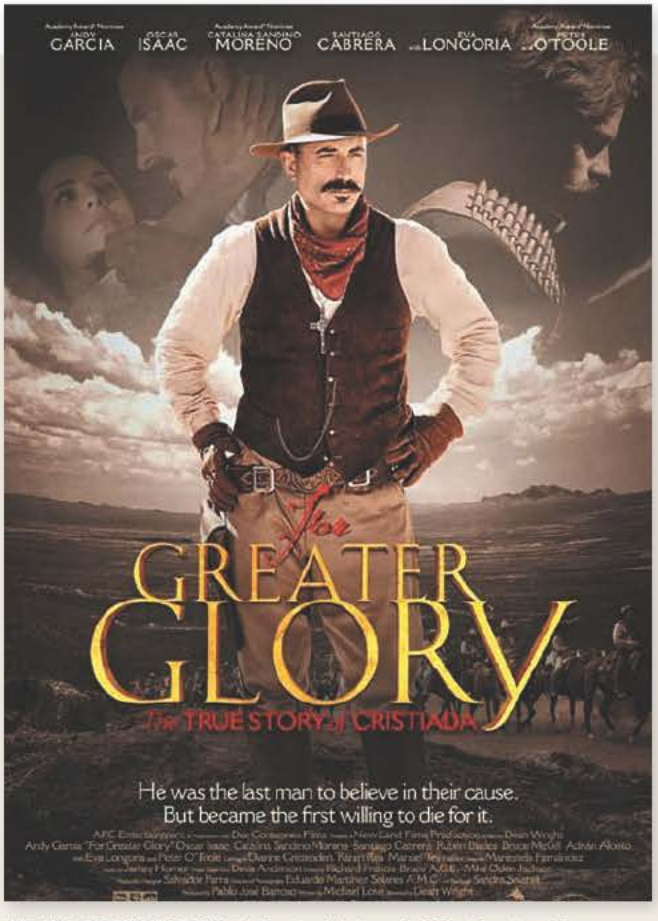
The backlash was fast and furious. Cardinals Dolan and Wuerl protested the new policy. Even liberal Catholics, including *Washington Post* columnist E.J. Dionne and MSNBC host Chris Matthews, criticized the rules.

Facing a potential split within his own party, President Obama reframed the debate in remarks made in February that were carefully calibrated to give progressive Catholics the fig leaf they needed to return to the Democratic fold.

He promised a vague accommodation of Catholics' moral concerns by shifting the responsibility for free reproductive services onto the insurance companies rather than the institutions themselves; and secondly, he characterized any further opposition as an attack on a woman's right to control her own body. "Religious liberty will be protected," Obama promised, "and a law that requires free preventive care will not discriminate against women."

But Catholic leaders, who went to great lengths to state they were not proposing a prohibition on contraception, felt requiring the insurance carriers to foot the bill was disingenuous. Many Catholic charities and institutions are self-insured. If outside insurance carriers were used, they would simply jack up their premiums.

Obama's speech left Democrats believing that they were winning the battle for women's votes in swing states. But there were growing signs the battle for religious liberty was just beginning, culminating in a May 21 announcement of a massive legal counter-attack by the Catholic



MEXICO'S STRUGGLE Andy Garcia stars in *The Greater Glory*, which depicts Mexican citizens in their fight for religious freedom.

'FOR GREATER GLORY'

'It's About Your

Renowned actor Andy Garcia tells Newsmax that the right to practice religion — free from government intrusion — is sacrosanct.

BY PAUL SCICCHITANO AND KATHLEEN WALTER

CUBAN-BORN ACTOR ANDY GARCIA TELLS NEWSMAX.TV in an exclusive interview that he sees parallels between his new movie chronicling the fight for religious freedom in 1920s Mexico and the current struggle of America's Catholics against the Obama administration's attack on their religious beliefs.

"Where is that line drawn . . . the concept of religious freedom — or even a greater concept which is absolute freedom," declares Garcia. "How deeply does the government get involved in your personal decisions as an individual? In this case — dealing with a movie — it's about your right to practice your faith. And so this is been something unfortunately that's been going on that repeats itself in history." Garcia's new movie, "For Greater Glory," opened in nearly 800 theaters on June 1.

Church in defense of religious liberty.

The church filed a dozen lawsuits simultaneously on behalf of 43 Catholic organizations, including the Archdiocese of New York and the Archdiocese of Washington, D.C. The plaintiffs included the University of Notre Dame, which in 2009 presented Obama with an honorary degree despite his support for abortion rights.

The issues raised by the Hosanna-Tabor case bear an uncanny similarity to the HHS effort to define what constitutes a "religious employer." Both cases reflected an effort to elevate an issue of social justice above other rights vouchsafed by the First Amendment.

They also sought to constrain religion by defining it. The government, in other words, did not attack the First Amendment directly. Rather, it said certain employees or organizations did not fall under the First Amendment's protection because they were not, in the government's view, quintessentially religious.

Despite the 9-0 Hosanna-Tabor ruling, it is by no means clear whether defenders of religious liberty will defeat the attempt to impose the contraception mandate. A 1990 Supreme Court decision, *Employment Division v. Smith*, held that organizations cannot shield themselves behind religion in order to evade generally applicable laws. So the plaintiffs know a host of legal land mines await them.

REP. FORTENBERRY

All of which raises a deeper issue: Why is the administration so determined to limit the rights of charities, which provide desperately needed social services? "This is wrong. It is unfair," declared GOP Rep. Jeff Fortenberry of Nebraska. "Why would the federal government seek to undermine these extraordinary institutions of care?"

In the nation's capital alone, Catholic-affiliated entities provide services to over 100,000 people per year. It is not clear how local governments would cope. That concern is not theoretical. According to the United States Conference of Catholic Bishops, Catholic adoption and foster care

AP IMAGES

Right to Practice Your Faith'

Garcia sees similarities to his family's own struggle for freedom from the communist government they fled when he was only 5 years old. "In the case of Cuba, it wasn't only religious freedom, obviously there was all aspects of human rights curtailed — and still are for that matter," acknowledged Garcia. "The church has finally come in a little bit, but it's only a little bit."

Garcia plays Gen. Gorostieta, a retired military man who at first thinks he has nothing personal at stake as he and his wife (Golden Globe nominee Eva Longoria) watch Mexico fall into a violent civil war that centered on the vicious persecution of Roman Catholics and strict enforcement of anti-religious laws.

The Cristero War, also known as the *Cristiada*, took place between 1926 and 1929, pitting Mexican forces with support from the Mexican government against the Catholic Church.

ARCHBISHOP LORI

"Certainly what's being protested today by the Catholic Church is not to the degree of what went down in Mexico in the '20s. But the essence of it — there is an argument there," observes Garcia, whose character commands the freedom-fighters in the face of an oppressive Mexican president, while struggling with his own faith. "Does anyone feel that any government could cross the boundary of what your personal right is as a human being?"

The movie picked up an unexpected endorsement from Archbishop William E. Lori of Baltimore, who chairs the U.S. Catholic Conference of Bishops Ad Hoc Committee for Religious Liberty. Lori described it as an "excellent film" that tells an all-but-forgotten story. "The sacrifices and hardships endured by those who would not renounce Christ helped preserve the religious liberty of millions," he wrote. In addition to Garcia and Longoria, the cast is also headlined by acting legend Peter O'Toole, who plays Father Christopher. □

ministries have been forced out of business in Boston, San Francisco, the District of Columbia, and Illinois for refusing to place children with same-sex couples or unmarried heterosexual couples.

Author Marlin believes technocratic elites know that turmoil would follow any mass shutdown of Catholic social services. But he says they would gladly accept that price in return for a long-term monopoly on the entitlement state. "These big government guys are what they are, and they'll put up with chaos for a while in order to get their way," he says.

Ware agrees that larger forces are at play: "You have an anti-religious, liberal government in place now. They have as an agenda to basically eviscerate . . . religion in our society."

As for the political debate, Democrats believe they'll win as long as the president keeps the media focused on a woman's right to contraception.

Marlin, however, believes the administration may have miscalculated the reaction of swing-state Catholics. "Older Catholics who stayed home four years ago may well come out this year," he says. "For the 1 to 4 percent of the Catholic voters in those states who come out again to vote along social lines, that can tip things over."

Ware does not pretend to know what the political outcome will be. But based on his Hosanna-Tabor experience, he believes he can predict the legal outcome.

"What the court ruled unanimously in our case was that the principle of freedom of religion is larger than any exception that Congress can write into a law. It exists separate and apart from not only the exceptions, but the law itself," he says.

"It's part of our Constitution and the fabric of this nation. So they're gonna lose that. I can almost tell you that more confidently than I could have told you about the outcome in Hosanna-Tabor." □

TARGETING COULTER
Protesters gather in Alberta. In Ottawa, Coulter was threatened with criminal prosecution.

SPEECH UNDER SIEGE

Battle for Religious Liberty Overseas

The assault on religious liberty is not limited to the United States. Just ask conservative author and columnist Ann Coulter.

The University of Ottawa's Campus Conservatives organization invited Coulter to address the group in March 2010. But even before she could speak, Francois Houle, the university's academic vice president and provost, threatened that Coulter could be criminally prosecuted for what she was going to say.

COULTER

"Promoting hatred against any identifiable group would not only be considered inappropriate, but could in fact lead to criminal charges," Houle warned her.

The next day, a rock- and stick-wielding mob forced authorities to cancel Coulter's event.

Hate-crime laws have been used repeatedly against Christian activists in Canada who support the right to life and traditional marriage.

In January, the British Columbia Supreme Court refused an appeal by two activists arrested for violating the province's "bubble zone" around abortion clinics. Their crime: Displaying a cross and carrying a sign that quoted the biblical commandment "Thou shalt not kill."

The Canadian Conference of Catholic Bishops has taken up the cause of religious liberty.

It wrote a 12-page pastoral letter in May, defending the right of Christians to publicly voice their views on policy issues.

The United Kingdom, meanwhile, is struggling with its own religious-liberty issues.

In April 2010, authorities arrested a Christian preacher for stating that homosexual conduct was a sin. Authorities later dropped that case. A month later Britain's Welsh government notified Catholic schools that by teaching opposition to gay marriage they were breaking the law.

More recently, Britain's gay police minister, Nick Herbert, proclaimed that voicing opposition to gay marriage is "not acceptable."

He told the *London Evening Standard* in May that gay marriage is "nothing more or less than a fundamental issue of equality."

— Andrew Henry

Duncan Attach 0778

JACK CUSANO/REUTERS

Sister Carol Keehan, president and CEO of the Catholic Health Association of the United States, talks about health care as Vice President Joseph Biden listens at the Eisenhower Executive Office Building of the White House July 8, 2009, in Washington. (Alex Wong/Getty Images)

| JUN. 18, 2012

Course Correction: Sister Carol Keehan Now Opposes Obama 'Accommodation' for HHS Mandate

The Catholic Health Association's president calls for a broader religious exemption.

JOAN FRAWLEY DESMOND

WASHINGTON — In a striking reversal with unpredictable political consequences, President Barack Obama's most powerful ally in his fight with the U.S. bishops over the contraception mandate has reversed herself.

In a five-page letter to the U.S. Department of Health and Human Services, dated June 15, Sister Carol Keehan, the president and CEO of the Catholic Health Association (CHA), registered her opposition to the federal law requiring co-pay-free contraception, abortion drugs and sterilization for all private employer health plans.

Trending

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"The more we learn, the more it appears that the ... approaches for both insured and self-insured plans would be unduly cumbersome and would be unlikely to adequately meet the religious-liberty concerns of all of our members and other Church ministries," stated the letter, which was signed by Sister Carol and two other CHA board members.

"t is imperative for the administration to abandon the narrow definition of 'religious employer' and instead use an expanded definition to exempt from the contraceptive mandate not only churches, but also Catholic hospitals, health-care organizations and other ministries of the Church."

The Obama administration had no immediate comment, but a Washington Post article on the late-breaking story underscored the significance of Sister Carol's unexpected reversal:

"As the largest private health-care provider in the nation, overseeing a network of hundreds of hospitals and medical facilities, the CHA is a critical player in health-care issues. Many accused Keehan of showing the White House more deference than she did the hierarchy."

The Becket Fund for Religious Liberty, a public interest group representing a number of plaintiffs challenging the federal law, welcomed Sister Carol's policy reversal.

"We at the Becket Fund had no doubt that once people examined the administration's faux 'accommodation,' they would quickly realize it had no plans to lift the burden on conscience caused by its illegal and unconstitutional mandate. We therefore welcome recent statements made by organizations like the Catholic Health Association that the accommodation is unworkable, impractical and woefully inadequate to safeguard religious freedom," Kyle Duncan, general counsel of The Becket Fund for Religious Liberty, told the Register.

"The Becket Fund will continue to fight the mandate in court, along with many other organizations. As of today, 23 separate lawsuits have been filed on behalf of 56 individual plaintiffs, representing hospitals, universities, businesses, schools and individuals, all speaking with one voice to affirm the freedom of religion guaranteed by the Constitution," said Duncan.

The Becket Fund represents the Eternal Word Television Network in its legal challenge against the mandate. The Register is a service of EWTN.

Critical Time

Sister Carol's action comes just days before the launch of the U.S. bishops' Fortnight for Freedom, a two-week period of prayer and activities affirming the importance of securing the "first freedom" for future generations of Americans.

By the end of June, the Supreme Court is also expected to hand down its decision on the new health bill, which gives HHS the authority to mandate the controversial provisions in the federal rule. Constitutional scholars say it is unlikely that the high court will overturn the entire health bill.

The CHA letter asked HHS administrators to "find a way to provide and pay for these services directly without requiring any direct or indirect involvement of 'religious employers,' as broadly defined."

Otherwise, the letter advised, the federal government should act to include any objecting entity within a broader exemption if it "shares common religious bonds and convictions with a church."

After the Obama administration approved the mandate on Jan. 20, Sister Carol, a member of the Daughters of Charity of St. Vincent de Paul, expressed strong reservations about its narrow religious

Series Alleges Cover-Up

7. As God Showe Catherine of S Mercy Melts 'H Sin'

8. Shockingly Su Collegiate Gua Makes It Big W York Knicks

9. Pope Francis (Consistory to New Cardinals

10. 3 Ways Many Catholics Are Receiving the Eucharist Wro Rights vs. Tru More Great Li

exemption.

But when Obama proposed an "accommodation" on Feb. 10, passing on costs for co-pay-free contraception, abortion drugs and sterilization to insurance companies, she expressed satisfaction with the new plan. Her stance was widely cited by Democrats and commentators supporting the president to validate his policy.

At the time, media reports suggested that Sister Carol had received special treatment from the White House. A Feb. 10 New York Times story stated that the president's "accommodation" was designed specifically to address Sister Carol's concerns, not those of the bishops.

"The fight was for Sister Carol Keehan — head of an influential Catholic hospital group, who had supported President Obama's health-care law — and Catholic allies of the White House seen as the religious left," reported the Times.

But Richard Doerflinger, the chief lobbyist for the bishops' conference on pro-life issues, told the Register back then that the U.S. Conference of Catholic Bishops' lawyers quickly determined that nothing of substance had changed.

"The only thing that has force of law is that same final rule. It's still in place. The rest is something that might happen," said Doerflinger at the time. The administration told the USCCB, he said, that "some time in the coming months we will issue new rulemaking for organizations that are not exempt from the mandate."

Thus, the bishops opposed the "accommodation," expressing "serious moral concerns" in a statement that noted the large number of Catholic institutions that self-insured and thus would be directly responsible for covering the services. But bishops also noted that insurance companies were likely to pass on the costs of providing co-pay-free services to employers.

The USCCB maintained that position after the administration spelled out its proposal for passing on costs for the services in an "Advanced Notice of Proposed Rulemaking (ANPRM)" issued on March 21.

More Robust Language

Sister Carol's backing of the "accommodation" raised the bar for the bishops as they continued their campaign to maintain pressure on the administration to withdraw the entire mandate or broaden the religious exemption and offer strong individual conscience protections.

When then-Bishop William Lori of Bridgeport, Conn., chairman of the bishops' Ad Hoc Committee for Religious Freedom, who is now the archbishop of Baltimore, testified in several House hearings on the issue, Democratic legislators noted that the CHA backed the accommodation. The perceived divisions within the Church led the mandate's supporters to raise questions about the credibility of the bishops' position.

In the months following the accommodation, however, visitors to the CHA website were greeted with an announcement that offered few assurances, and the CHA told members it was seeking clarification of the proposed accommodation, which had not been formally incorporated into the federal rule and thus had no binding force.

As legal challenges against the mandate were filed by a growing number of plaintiffs throughout the country, the Obama administration, in turn, filed papers in court promising to resolve the issue and requesting that the cases be dismissed.

Over the past four months, religious leaders have consistently expressed strong concern that the religious exemption in the mandate's language is too narrow and only shields houses of worship, not church-affiliated social-service agencies, universities and hospitals.

In Atlanta, during the bishops' meeting last week, Archbishop Lori and other speakers stressed the larger framework for this emerging threat to the free exercise of Catholic institutions. They said the effort to limit the exemption to houses of worship reflected a broader push by secular forces to redefine religious freedom to exclude public expressions of faith, such as Catholic health-care services.

In CHA's letter to the Department of Health and Human Services, Sister Carol asked the federal agency to adopt a more robust definition of protected religious entities that would shield church-affiliated institutions. "An organization is associated with a church if it shares common religious bonds and convictions with the church," read her proposed language.

This language, she said, "would align the policy under the women's preventive-care regulation with existing federal law on conscience protection. The exemption in the final rule is narrower than any conscience clause ever enacted in federal law and reflects an unacceptable change in federal policy regarding religious beliefs."

Adoption of this language, the letter asserted, "could help address the serious constitutional questions created by the department's current approach, in which the government essentially parses a bona fide religious organization into secular and religious components solely to impose burdens on the secular portion."

While the leaders of a number of objecting religious institutions have highlighted the increasingly common effort to reserve constitutional protections solely for religious worship, Sister Carol now joins the chorus of high-profile Catholics opposing this trend in constitutional scholarship and judicial rulings.

"To make this distinction is to create a false dichotomy between the Catholic Church and the ministries through which the Church lives out the teachings of Jesus Christ. Catholic health-care providers are participants in the healing ministry of Jesus Christ," read the letter.

"Our mission and our ethical standards in health care are rooted in and inseparable from the Catholic Church and its teachings about the dignity of the human person and the sanctity of human life from conception to natural death."

The CHA letter was clearly focused on resolving its membership's problems with the mandate and did not attempt to provide solutions for individual employers that object to the federal rule on moral or religious grounds but are not formally affiliated with a church. Last week, at the bishops' meeting in Atlanta, Archbishop Lori made it clear that Catholic leaders were fighting to defend the free exercise of Catholic institutions, but also other objecting religious entities and individual employers.

"The right to religious freedom requires that all people of faith, not just organizations that are structurally bonded to a church, be exempt from ObamaCare's violations of conscience," stated Matt Bowman, legal counsel for the Alliance Defense Fund, a public interest group, outlining concerns about Sister Carol's proposed language.

Sister Carol was not scheduling followup interviews, and the CHA letter did not explain precisely why she delayed her decision to reverse course more than four months after the bishops ruled the accommodation "unacceptable."

Some groups opposing the mandate expressed skepticism about whether she might still seek to bolster the administration's agenda. Three years earlier, the CHA leader played a critical role in the bruising fight to pass the health bill — over the objections of the U.S. bishops — and received a pen from President Obama when he signed the bill.

But Sister Carol's letter hinted at one possible explanation for the delay: She and top hospital administrators had spent the intervening months struggling to figure out how they could make the president's "accommodation" work, and they failed to do so.

Meanwhile, Kathleen Sebelius, the secretary of Health and Human Services, who approved the federal rule in January, acknowledged during a hearing of the House Education and Workforce Committee this April that she did not seek a full constitutional review of the mandate.

Sebelius had initially promised an accommodation that "strikes an appropriate balance between respecting religious freedom and increasing access to important preventive services." But under questioning from a skeptical legislator about how she squared First Amendment concerns with the controversial measure, she admitted that she had not sought a legal memo clarifying the issues at stake and said she was untutored in the "nuances of the constitutional balancing tests."

Joan Frawley Desmond is the Register's senior editor.

View Comments

Duncan Attach 0782

NATIONAL CATHOLIC REGISTER

Duncan Attach 0783

Washington, D.C. – Today, major Catholic dioceses and charitable organizations across the country —including the University of Notre Dame—filed twelve separate lawsuits against the Obama administration's abortion-drug mandate and dramatically widened the battle front against this unprecedented assault on religious freedom. Becket Law, who has led this fight by filing the first four lawsuits against the mandate, praised the courage of these Catholic entities.

"The alarm bells are ringing all over our nation," said Kyle Duncan, General Counsel for Becket. "With so many voices now joined in chorus against it, the federal government cannot continue to ignore the widespread violations of religious liberty caused by its flagrantly unconstitutional mandate."

This sweeping new lawsuit joins a growing list of challenges to the HHS mandate that employers must include contraception, sterilization, and abortion-inducing drugs in their employee health insurance, or risk hundreds of thousands of dollars in fines.

Becket Law played a path-breaking role in this litigation. It filed the first three lawsuits against the mandate, on behalf of Belmont Abbey College, a Catholic liberal arts school; Colorado Christian University, an evangelical school in Denver; and the Eternal Word Television Network, a worldwide Catholic broadcasting network based in Alabama. It then filed the fifth lawsuit on behalf of Ave Maria University, a Catholic university in Florida.

Please visit Becket's website for the most up-to-date information and resources about the growing number of challenges to the HHS mandate: www.becketlaw.org.

*Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions. Becket has a 17-year history of defending religious liberty for people of all faiths. Its attorneys are recognized as experts in the field of church-state law, and they recently won a 9-0 victory against the federal government at the U.S. Supreme Court in Hosanna-Tabor v. EEOC. Becket Law is the first and leading law firm to legally challenge the Adm*inistration'*s HHS* mandate.

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For more information, or to arrange an interview with one of the attorneys, please contact Melinda Skea at media@becketlaw.org *or call 202.349.7224.*

Duncan Attach 0784

WASHINGT**ON, DC** – Today, Becket Law filed an amicus brief in *Douglas County School District v.* Larue, which will decide the legality of Colorado's Choice Scholarship Program. The program lets low-income families send their children to private schools of their choice and avoid failing public schools. The district court struck down the program, ruling that a 19th-century anti-Catholic provision in the Colorado Constitution known as a "Blaine Amendment" barred using scholarships at "sectarian" schools.

"Blaine Amendments are relics of an ugly past when many laws openly made Catholics second-class citizens," said **Kyle Duncan, General Counsel for Becket Law**. "They have no more place in today's legal system than old laws that discriminate against someone on the basis of race or sex."

Blaine Amendments are provisions in dozens of state constitutions that prohibit the use of state funds at "sectarian" schools. They have an ugly history. Beginning in the mid-nineteenth century, our nation endured a rash of anti-Catholic and anti-immigrant bigotry. This "Know-Nothing" movement—decried at the time by Abraham Lincoln and in modern times by the U.S. Supreme Court—unleashed a spasm of religious discrimination at war with our traditions of religious liberty. Its legacy persists to this day in the form of "Blaine Amendments," provisions adopted in numerous state constitutions in the late 1800s and early 1900s that were designed to suppress Catholic schools in favor of Protestant-dominated public schools.

"Not only are Blaine Amendments outdated, they are unfair," said Duncan . "Children who attend religious schools should be able to apply for state scholarships on the same terms as everyone else."

For more information or to arrange an interview with a Becket Fund attorney, please contact Melinda Skea at mskea@becketlaw.org *or 202.349.7224.*

Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions. For over 20 years, it has defended clients of all faiths, including Buddhists, ***Christians, Jews, Hindus, Muslims, Native Americans, Sikhs, and Zoroastrians.*** *Its recent cases include three major Supreme Court victories: the landmark ruling in Burwell v. Hobby Lobby, and the 9-0 rulings in Holt v. Hobbs and* Hosanna-T*abor v. EEOC, the latter of which The Wall Street Journal called one of "the most important religious liberty cases in a half century*." '

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Duncan Attach 0785

W**ashington, DC** – Today, Alabama Attorney General Luther Strange moved to join Becket's lawsuit on behalf of the Eternal Word Television Network (EWTN), against the Obama Administration's unconstitutional mandate that forces religious employers to provide health coverage for contraceptives, sterilization, and abortion drugs in violation of their faith.

"We welcome Alabama as a crucial ally in this fight, " said Kyle Duncan, Becket's General Counsel and lead attorney for EWTN. "Their participation reveals another glaring problem with the mandate: not only does the mandate threaten religious freedom, but it also impairs Alabama's ability to protect its own citizens' rights."

Attorney General Strange filed a motion to intervene in the lawsuit on the grounds that the mandate forces Alabama to regulate its health insurance market in a way that violates both the U.S. Constitution and the Alabama Constitution. "Alabama law does not allow anyone to be forced to offer a product that is against his or her religious beliefs or conscience" said Strange.

"We are grateful to Alabama Attorney General Luther Strange for taking such a strong stand on this issue," said EWTN President and Chief Executive Officer Michael P. Warsaw. "The state could simply have chosen to file a brief advising the court of the impact of the case on its citizens. Instead, it is intervening in the suit as a co-plaintiff with EWTN. The Attorney General is saying, in effect, that this unjust, unconstitutional mandate hurts not only EWTN, but the entire community."

The intervention arises in the fourth legal challenge brought by the Becket Fund against the Obama administration's abortion drug mandate. The Becket Fund also represents Belmont Abbey College (a Catholic Benedictine college in North Carolina), Colorado Christian University (a nondenominational Christian University in Colorado), and Ave Maria University (a Catholic College in Florida) in similar lawsuits. To date, the government has only sought to postpone hearing Becket's claims.

Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has a 17-year history of defending religious liberty for people of all faiths. Its attorneys are recognized as experts in the field of church-state law, and they recently won a 9-0 victory against the federal government at the U.S. Supreme Court in Hosanna-Tabor v. EEOC.

For more information, or to arrange an interview with one of the attorneys, please contact Melinda Skea at media@becketlaw.org or call 202.349.7224.

A press conference call with Attorney General, Luther Strange, EWTN*'s General Counsel, John B. Manos, and Becket's General Counsel, Kyle Duncan, will take place Thursday, March 22, 2012, 1*1:30 *am eastern /10:30 central. All press welcome to participate. Call 800.704.9804, code 743216#.*

Duncan Attach 0786

Washington, DC – Today, Florida's Ave Maria University joined the rising tide of Becket lawsuits against the Obama Administration's attempt to force contraception, sterilization, and abortion drugs into virtually every health insurance policy in America. Jim Towey, Ave Maria's President and former head of the Bush Administration's Office of Faith-Based & Community Initiatives is determined to stop the Administration's assault on religious freedom.

"It is a sad day when an American citizen or organization has no choice but to sue its own government in order to exercise religious liberty rights guaranteed by our nation's Constitution," President Towey states. "Allowing a U.S. president of any political party or religious affiliation to force conformance to his or her religious or secular orthodoxy through executive action, is a perilous precedent."

Ave Maria University is seeking relief from a federal court in Florida because the U.S. Department of Health and Human Services demands the University offer health plan services that undermine its firmly-held religious convictions.

"The federal mandate puts Ave Maria in a terrible bind," said Kyle Duncan, General Counsel for Becket Law, which filed suit this morning on behalf of the University. "Either it betrays its faith and covers the drugs, or else it ends employee health benefits and pays hundreds of thousands in annual fines."

Ave Maria is a Catholic University dedicated to transmitting authentic Catholic values to students, who can then carry those values to the world. The Obama Administration's contraceptive and abortion mandate threatens the very faith that animates Ave Maria's mission.

Ave Maria University's case is the fourth lawsuit brought by Becket challenging the Obama administration's abortion drug mandate. Becket also represents Belmont Abbey College (a Catholic college in North Carolina), Colorado Christian University (a nondenominational Christian University outside Denver), and the Eternal Word Television Network.

Becket Law is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions. Becket has a 17-year history of defending religious liberty for people of all faiths. Its attorneys are recognized as experts in the field of church-state law, and they recently won a 9-0 victory against the federal government at the U.S. Supreme Court in Hosanna-T*abor v. EEOC*.

For more information, or to arrange an interview with one of the attorneys, please contact Melinda Skea at media@becketlaw.org or call 202.349.7224.

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Duncan Attach 0787

EWTN Sues U.S. Government to Stop Contraception Mandate

Christian Newswire

February 9, 2012 Thursday 10:00 AM GMT

Length: 807 words

Byline: By EWTN Global Catholic Network

Body

Network Asks Court to Stop Order to Pay for Immoral Services

EWTN Global Catholic Network, 205-795-5769

IRONDALE, Ala., Feb. 9, 2012 / *Christian Newswire*/ -- EWTN Global Catholic Network filed a lawsuit February 9 in U.S. District Court in Birmingham, Alabama against the Department of Health & Human Services, HHS Secretary Kathleen Sebelius, and other government agencies seeking to stop the imposition of the contraception mandate as well as asking the court for a declaratory judgment that the mandate is unconstitutional. EWTN is the first Catholic organization to file suit since the final HHS rules were published by the Obama administration on January 20, 2012.

"We had no other option but to take this to the courts," says EWTN President and CEO Michael P. Warsaw. "Under the HHS mandate, EWTN is being forced by the government to make a choice: either we provide employees coverage for contraception, sterilization and abortion-inducing drugs and violate our conscience or offer our employees and their families no health insurance coverage at all. Neither of those choices is acceptable."

The lawsuit was filed on EWTN's behalf by Mark Rienzi, Kyle Duncan, and Erik Kniffin from the Becket Fund for Religious Liberty.

"We are taking this action to defend not only ourselves but also to protect other institutions -- Catholic and non-Catholic, religious and secular -- from having this mandate imposed upon them," Warsaw continued. "The government is forcing EWTN, first, to inform its employees about how to get contraception, sterilization and abortifacient drugs, a concept known as forced speech. To make the matter worse, the government then will force EWTN to use its donors' funds to pay for these same morally objectionable procedures or to pay for the huge fines it will levy against us if we fail to provide health care insurance. There is no question that this mandate violates our First Amendment rights. This is a moment when EWTN, as a Catholic organization, has to step up and say that enough is enough. Our hope is that our lawsuit does just that."

The Becket Fund previously filed similar lawsuits on behalf of Belmont Abbey College, a small Catholic liberal arts college in Belmont, N.C., and Colorado Christian University, an interdenominational Christian liberal arts university near Denver, which demonstrates that this is not just a Catholic issue. Both suits were filed prior to the HHS rules being finalized in January.

"When the government recently mandated that all private group health plans cover certain abortion drugs (namely, Plan B and ella), as well as related education and counseling, [our clients] knew that they could not obey both the government's mandate and their own religious convictions," said Rienzi, who focuses his practice at the Becket Fund on violations of the Fourteenth Amendment, free speech, and the free exercise of religion. "The mandate has been sharply criticized from across the political spectrum, and from religious leaders of a variety of faiths."

Duncan, a former Louisiana Solicitor General and General Counsel of the Becket Fund, said that without a change in the rules, EWTN could be forced to pay more than $600,000 for the "privilege" of not underwriting these services. "This mandate is particularly hard on Catholics because Catholic organizations, such as hospitals, schools, social service agencies, media outlets and others, serve people regardless of their religious beliefs," Warsaw said. "We serve others not because they are Catholic, but because we are Catholic."

EWTN Global Catholic Network, in its 30th year, is available in over 200 million television households in more than 140 countries and territories. With its direct broadcast satellite television and radio services, AM & FM radio networks, worldwide short-wave radio station, Internet website *www.ewtn.com*, electronic and print news services, and publishing arm, EWTN is the largest religious media network in the world.
The Becket Fund for Religious Liberty is a non-profit, public-interest law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has a 17-year history of defending religious liberty for people of all faiths. Its attorneys are recognized as experts in the field of church-state law, and they recently won a 9-0 victory against the federal government at the U.S. Supreme Court in Hosanna-Tabor v. EEOC.

Editors: To schedule an interview with EWTN President Michael P. Warsaw, please contact EWTN Communications Director Michelle Johnson at the numbers above. For more information about EWTN, and for continuous updates, please go to *www.ewtn.com/media*. To arrange an interview with one of the attorneys, please contact Emily Hardman, Becket Fund Communications Director, at *ehardman@becketfund.org* or call 202.349.7224.

CONTACT: Michelle Johnson,

Load-Date: February 9, 2012

End of Document

Obama contraception rule challenged

Politico.com

February 7, 2012 Tuesday 10:06 AM EST

Length: 787 words

Byline: J. Lester Feder

Body

The courts will be the next battleground for the fight over whether the Obama administration can require religious organizations to cover birth control as part of their insurance plans.

Two federal suits have already been filed by religious universities - one in D.C., the other in Colorado - contending that the rule violates their religious liberties. The general counsel of the U.S. Conference of Catholic Bishops also recently vowed more litigation is to come.

The issue has become highly politicized in an election year, and some polls have shown eroding support for President Barack Obama among Catholic voters. Catholic leaders are blasting Obama for the decision, and Mitt Romney Monday night in Colorado lashed out at the administration for seeking to curtail religious freedom.

The rule's supporters are confident it will withstand such challenges. Defending the controversial requirement, the administration has often pointed out that 28 states have similar requirements. And those state rules have withstood legal challenges from groups that contend they violate the religious liberties of faith-based employers that object to contraception.

Opponents say a crucial difference between the federal and state mandates could make it easier to get struck down: An employer who doesn't agree with the state rules can opt out of offering coverage. That won't be possible under the national health care law, at least not for large employers.

"You don't have an option on whether or not to provide health insurance coverage," said James Bopp, general counsel to the National Right to Life Committee. "Under Obamacare, you have to. In these states, you could just decline to provide the coverage."

In designing the rule and the waivers, HHS followed the lead of states like California and New York, which exempt houses of worship but not other religiously affiliated employers such as hospitals or charities. Eight states do not even make allowances for churches - all employers must comply with the mandate.

Sebelius cited states with these carve-outs when defending the HHS policy in an USA Today op-ed Monday.

"By carving out an exemption for religious organizations based on policies already in place, we are working to strike the right balance between respecting religious beliefs and increasing women's access to critical preventive health services," she wrote.

HHS also created a one-year waiver for other religious employers to come into compliance with the rule in response to a firestorm of protest that greeted the original proposal last August. However, this did little to address the critics' concerns.

No court has struck down any of these mandates, according to legal experts on both sides. And in upholding the California and New York laws, the courts solidly rejected arguments that they violate the constitution or other religious liberty protections in federal law.

"The court [has been] incredibly clear" in these cases, said Laura MacCleery, government relations director for the Center for Reproductive Rights. In her view, the new rule will not be found to "violate either the constitution [or] the law."

The American Civil Liberties Union's Sarah Lipton-Lubet explained that the ruling upholding the California statute made two key findings: First, the contraceptive requirement is "generally applicable" to all employers, and charities or other religious employers are not entitled to a carve-out when they are providing services to the public just as a secular employer does.

Second, there is a "compelling state interest" providing access to contraception because it is part of "eliminating gender discrimination." The court cited evidence that without contraceptive coverage, women would be forced to spend as much as 68 percent more on out-of-pocket health care costs during their reproductive years.

The court wrote, "Any broader exemption increases the number of women affected by discrimination in the provision of health care benefits."

Kyle Duncan, senior counsel at the Becket Fund for Religious Liberty, which is representing the two religious schools that have already filed suit, said he would tackle this justification when his cases got to trial.

He argued that requiring employers to cover birth control is not a compelling interest because "contraception is already widely available ... [through] Title X," which provides federal funding for reproductive health services through providers including Planned Parenthood.

But he was confident that the court would reject the federal mandate as more extreme than any state law because there's no avoiding the insurance requirement.

"There's no way to get around it," he said.

This article first appeared on POLITICO Pro at 5:31 a.m. on February 7, 2012.

Load-Date: February 8, 2012

NATIONAL CATHOLIC REGISTER

BLOGS

Register Radio: HHS Mandate and March for Life

Becket Fund's Kyle Duncan and Register editor Tom Wehner

By Tim Drake – Posted 2/3/12 at 2:00 AM

You shouldn't miss this week's "Register Radio."

In the first half, the Becket Fund for Religious Liberty's senior counsel, Kyle Duncan outlined the recent Health and Human Service's mandate that will force religious organizations to not only provide contraception, abortifacients, and sterilization, but also counseling for such services. Duncan explained how the mandate will impact Christian hospitals, charities, and universities. In a recent article for the National Catholic Register, Duncan described the mandate as an "inversion of the Good Samaritan." The only exception, Duncan described, would be for those organizations that hire and serve only people of their own faith, and organizations that serve only a religious purpose, not a humanitarian one. Quoting Washington Post writer Michael Gerson, he said the decision 'is the most transparently anti-Catholic maneuver by the federal government since the Blaine Amendment was proposed in 1875 — a measure designed to diminish public tolerance of Romanism, then regarded as foreign, authoritarian and illiberal.'

To learn more about the decision and what Christians can do to oppose it, listen to the show.

In our second half, National Catholic Register editor Tom Wehner and Register Radio co-host Thom Price discussed secular media coverage, or the lack thereof, of the March for Life as well as the start-to-finish coverage provided by EWTN and the National Catholic Register. In addition to the lack of coverage, they also addressed the media's clearly biased coverage in reporting on and picturing the small number of pro-abortion supporters on the sidelines, while disregarding the between 400,000-500,000 pro-life demonstrators participating in the March. One admission of failure in coverage that was discussed was by the Washington Post's ombudsman Patrick Pexton.

You can hear Register Radio live on any of EWTN's affiliates at 2:00 p.m. EASTERN on Friday, or the re-broadcasts on Saturday at 7:00 a.m. EASTERN or Sunday at 11:00 a.m. EASTERN, or

you can listen to it at the Register Radio web page, or EWTN's podcast of the show.

NewsRoom

8/30/11 AP Alert - LA 21:54:54

AP Alert - Louisiana

August 30, 2011

Appeals court weighs prison ban on newspaper

MICHAEL KUNZELMAN

Associated Press

NEW ORLEANS Louisiana state prisons should be allowed to ban inmates from receiving copies of a newspaper published by the Nation of Islam because its contents pose a security risk, a lawyer for the state argued Tuesday before a federal appeals court.

The state wants the 5th U.S. Circuit Court of Appeals to overturn a federal judge's ruling that the David Wade Correctional Center must deliver copies of The Final Call newspaper to Henry Leonard, a convicted murderer who claimed the Homer prison violated his right to free exercise of religion.

Kyle Duncan, appellate chief for Attorney General James "Buddy" Caldwell's office, said the newspaper contains racist rhetoric that could provoke an outbreak of violence.

The American Civil Liberties Union of Louisiana, which sued on Leonard's behalf in 2007, says banning The Final Call from prisons is unconstitutional and has no connection to preventing violence.

Duncan couldn't point to any violence that could be linked to The Final Call, but he said prison officials have broad discretion to block access to material that may create a disruption.

"You have to anticipate problems before they occur," Duncan said.

ACLU attorney Justin Harrison said the state hasn't produced a shred of evidence that The Fall Call poses a threat.

"Any deference to prison officials has to be justified with some sort of evidence," he said.

Harrison said the Nation of Islam can be a positive force in the lives of inmates, promoting discipline and discouraging the use of alcohol, drugs or weapons.

"It encourages the sort of lifestyle that one would think inmates should adopt," Harrison said. "It's quite the opposite of something that would create the risk of prison violence."

Prison officials implemented a statewide ban on The Final Call in 2005. The state claims the language of "The Muslim Program," a statement of beliefs that is reprinted on the back cover of each issue, is racially inflammatory.

5th Circuit Judge James Graves Jr. pressed Duncan to explain how the material poses a risk.

"The words themselves," Duncan said. "This is an explicit demand for racial separation."

In March 2010, U.S. District Judge Donald Walter in Shreveport ruled the prison can't censor or restrict Leonard's access to The Final Call. Walter expressed concern that completely banning the newspaper was an exaggerated response to security concerns.

Leonard is a former Baton Rouge police officer who was convicted of murdering his estranged wife's boyfriend and is serving a life sentence.

The ACLU filed a similar case in February 2009 on behalf of an inmate at the state prison in Angola, La., who also says he has been denied access to The Final Call. The case is pending in the federal court based in Baton Rouge.

"However this case is determined will dictate the fate of the other one," Harrison said after Tuesday's hearing.

---- Index References ----

News Subject: (Murder & Manslaughter (1MU48); Criminal Law (1CR79); Intellectual Freedoms & Civil Liberties (1IN08); Violent Crime (1VI27); Legal (1LE33); Civil Rights Law (1CI34); Judicial (1JU36); Crime (1CR87); Social Issues (1SO05); Prisons (1PR87))

Region: (USA (1US73); U.S. Southeast Region (1SO88); North America (1NO39); Louisiana (1LO72); Americas (1AM92))

Language: EN

Other Indexing: (Donald Walter; Henry Leonard; James Graves Jr.; James Caldwell; Kyle Duncan; Justin Harrison) (United States; USA; North America) (StateDistribution)

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Word Count: 469

End of Document

Litigation roils health-care law

The Advocate (Baton Rouge, Louisiana)

August 21, 2011 Sunday, Main Edition

Section: B; Pg. 07

Length: 666 words

Byline: GERARD SHIELDS

WASHINGTON BUREAU

Body

Louisiana will join 25 states in a likely conga line to the U.S. Supreme Court after an appeals court ruling earlier this month in Atlanta that Congress overstepped its bounds by forcing U.S. citizens to purchase health insurance by 2014.

The Supreme Court appearance is likely because the recent ruling conflicts with a June appeals court decision in Ohio that the health-care law promoted by President Barack Obama is constitutional.

The law requires that the majority of Americans must purchase health insurance by 2014 or face a penalty from the federal government. The recent appeals court found that Congress cannot force the insurance requirement because the mandate cannot meet the legislative branch power to tax, since the enforcement tool is a penalty.

At issue is the commerce clause of the Constitution, which gives Congress the power "to regulate commerce with foreign nations and among several states, and with the Indian tribes."

The states are arguing that the health-care law is an overreach of congressional power.

The safe money on the Supreme Court verdict is that the nine-member panel splits, leaving the matter in the hands of swing U.S. Supreme Court Justice Anthony Kennedy.

Kyle Duncan likes that scenario. Duncan is the appellate chief in the office of Louisiana Attorney General Buddy Caldwell, who was one of the original challengers to the law.

Kennedy has become the expert on the court when it comes to issues of federalism, Duncan said.

"The states are confident," Duncan said. "We have a very good chance. It's going to be a close one."

Carl Tobias disagrees. The law professor with a perch a few hours from Washington at the University of Richmond School of Law sees some of the justices crossing ideological lines, even staunch conservatives like Justice Antonin Scalia and Chief Justice John Roberts.

"They'll uphold the constitutionality," Tobias said. "I don't think it's going to be close, six to three."

The Supreme Court has given Congress wider latitude on the clause since the panel struck down six of eight laws ranging from minimum wage to agriculture relief passed during Franklin Delano Roosevelt's presidency, Tobias said.

The ruling earlier this month from the appeals court, however, struck down the commerce clause argument by the government. The divided three-member panel contends Congress can only regulate "activity" while the law penalizes citizens for "inactivity."

That makes the case more unique than any other involving the commerce clause, said Roger McEowen at Iowa State University's Center for Agricultural Law and Taxation.

"We've never had a commerce clause case about regulating inactivity," said McEowen, who predicts a split majority ruling that the law is unconstitutional.

The appeals judges also determined that the Supreme Court has never ruled in a way to "allow Congress to dictate the financial decisions of Americans through economic mandate."

In April, the Supreme Court rejected a call for an expedited appeal of a Virginia lawsuit against the health-care law. When the Supreme Court may take up the case is unknown, but the delay could cause states like Louisiana headaches, said Deborah Juneau, of the Baton Rouge law firm of Kean Miller LLP.

Juneau focuses on health-care law and said deadlines to meet some of the laws' provisions are already approaching.

"What it's going to do is leave everyone in a state of what do we do?" Juneau said. "It's not like we can wait around for a Supreme Court ruling. There are deadlines coming."

And the question remains over whether the court will rule on just parts of the law. The recent ruling just struck down the provision requiring citizens to buy insurance, not the whole law.

That provision is key, however, because it pays for the implementation of the remainder of the law.

"The problem is that it is such a juggling act on how all the moving parts work together," Juneau said.

Gerard Shields is chief of The Advocate's Washington bureau. His email address is *GerardShields@theadvocate.com*

Load-Date: August 22, 2011

Mother waits for retrial decision

The Advocate (Baton Rouge, Louisiana)

July 24, 2011 Sunday, Main Edition

Section: B; Pg. 01

Length: 749 words

Byline: KORAN ADDO

WESTSIDE BUREAU

Dateline: BAYOU SORREL

Body

BAYOU SORREL - A grieving mother who is convinced that her son was murdered 13 years ago in an arson attack is waiting on the courts to decide whether the accused killer will stand trial again.

"I've been waiting so long, and it just keeps dragging and dragging on," Adrina Moses said.

Her son, Leander "Lee-Lee" Johnson, 29, died in May 1998 when his Bayou Sorrel trailer caught fire.

Moses believes Johnson's former friend, Clint Martinez, also of Bayou Sorrel, set the trailer ablaze and killed Johnson in what prosecutors have described as a "love triangle killing."

The trouble started in the late 1990s when Johnson began dating Martinez's estranged wife, Moses said.

Martinez, 44, threatened to kill Johnson several times after finding out about the affair, Moses said.

"My son was scared," Moses said. "Clint said he was going to burn down his trailer and kill him, and that's what he did."

On May 30, 1998, Johnson attended a crawfish boil with his lover, prosecutors said. Later that night, his trailer went up in flames. Investigators determined that Johnson died of asphyxiation caused by flash fire.

Prosecutors allege that an enraged Martinez, humiliated by his wife's public appearance with her lover, went to Johnson's mobile home, cut the telephone wire, subdued the victim, doused him with an accelerant and then ignited the fire.

Defense attorneys argued that Martinez was asleep at his father's home when the fire started.

They further claimed that impatient investigators failed to follow the evidence, and instead, jumped to conclusions in ruling the fire an arson.

Nevertheless, a parish grand jury charged Martinez with one count of second-degree murder in 2000.

The subsequent murder trial in 2002 was moved from Iberville Parish to Pointe Coupee Parish because of its high-profile nature, attorneys said.

But the case ended in a mistrial after the jury deliberated for three hours, summoned state District Judge James Best and told him the members were deadlocked at 9-3 with nine jurors voting to acquit Martinez and three jurors voting to convict him, court records show.

When Best declared the mistrial, the decision set off a flurry of legal motions as the case jumped from a state appeal court to federal court and finally to a federal appeal court where it stands now.

Defense attorneys claimed that Best improperly declined to tell them the jury was one vote away from acquitting Martinez.

Charles "Chip" Marionneaux, one of the defense attorneys involved, said Friday that he would have objected to the judge's decision to declare a mistrial had he been informed which way the jury was leaning.

When defense attorneys learned that the 18th Judicial District Attorney's Office was planning to retry Martinez for murder, they moved to quash a second indictment, Marionneaux said.

Marionneaux argued that a second trial would subject Martinez to double jeopardy - the clause in the U.S. Constitution which protects a defendant from being tried twice for the same offense.

In considering the double jeopardy motion, state ad hoc Judge Jerome Winsberg ruled that the state couldn't retry Martinez, court records show.

Winsberg concluded that Best, the trial judge, inadvertently influenced the defense to go along with the mistrial.

The state appealed that decision to the Louisiana 1st Circuit Court of Appeal, which then overturned Winsberg, records show.

The 1st Circuit ruling opened the door for the state to retry Martinez by ruling that Judge Best did not intend to provoke a mistrial when he withheld knowledge of the 9-3 jury vote from the defense.

But Martinez's attorneys persisted, taking their double jeopardy argument to federal court in Baton Rouge, where U.S. District Judge James J. Brady ruled in March 2010 in their favor and barred the state from retrying Martinez, records show.

The state Attorney General's Office appealed Brady's decision to the 5th U.S. Circuit Court of Appeals in New Orleans, where a three-judge panel ruled June 15 that the state could proceed in retrying Martinez, said Kyle Duncan, an attorney with the state Attorney General's Office.

"At this point, the defense has lost," Duncan said Thursday.

But Martinez's lawyers have petitioned the 5th Circuit to reconsider its decision, which is where the case currently stands.

Meanwhile, Moses, Johnson's mother, said the legal sparring has taken its toll on her.

"My son was a good-hearted person. He never had a mean bone in him," Moses said. "I've been waiting way too long to get justice for my son."

Graphic

Color photo: Mug of Leander "Lee-Lee" Johnson

Mother waits for retrial decision

Load-Date: July 25, 2011

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US Supreme Court to consider Calif prison crowding

Associated Press Online

November 29, 2010 Monday 6:29 PM GMT

Section: DOMESTIC NEWS

Length: 1210 words

Byline: By DON THOMPSON, Associated Press

Dateline: SACRAMENTO Calif.

Body

In a case pitting states rights against the power of the federal judiciary, the U.S. Supreme Court will hear arguments about a federal court order requiring California to release inmates from its overcrowded prisons.

At issue during Tuesday's hearing is the medical and mental health care delivered to inmates in the nation's largest state prison system.

Eighteen other states have joined Gov. Arnold Schwarzenegger's administration in urging the justices to reject the order as overreaching and arguing that it poses a threat to public safety. Attorneys general elsewhere fear they could face similar legal challenges if the decision survives.

A 2005 ruling by a federal judge in San Francisco found that an average of one inmate per week was dying in California prisons as a result of medical neglect or malfeasance. The prison health care system has been judged so poor that the federal courts have found it violates the constitutional rights of inmates.

Last year, a three-judge panel of the 9th Circuit Court of Appeals ruled that reducing the inmate population by about 40,000 inmates is the only way to improve medical and mental health care.

California has been fighting lawsuits over its treatment of inmates for two decades, but this is the first time the battle has reached the nation's high court. It is also the first time the justices will consider a prisoner release order in any state under a 1996 federal law that governs judges' actions in inmates rights cases.

The Supreme Court agreed to hear the state's argument that the three judges overstepped their authority. Specifically, the judicial panel gave California two years to trim the population of the state's 33 adult prisons to about 110,000 inmates. More than 144,000 inmates are now in the prisons, which were designed to hold about 80,000.

The judges' order "represents the highest level of federal court interference with state prison management and fails to take into account the adverse effects it will have on public safety," Andrea Hoch, Schwarzenegger's legal affairs secretary, said in a statement this week. "This appeal is important to preserve the state's rights to operate its criminal justice system."

The administration says conditions have improved as it gradually reduces crowding and improves care.

California has been lowering the prisons' population through changes in parole and sentencing policies that free some ex-convicts from supervision and by sending about 10,000 inmates to private prisons in other states. Another 5,000 have been authorized for transfer out of state.

Separately, the state has clashed with a federal judge who appointed a receiver in 2006 to oversee all aspects of California's prison health care system.

The receiver has more than doubled the prisons' annual medical budget from $707 million to $1.5 billion, hired more medical staff and increased salaries. The receiver reported 46 inmate deaths last year that might have been prevented or delayed with better medical care. That was an improvement from 66 preventable deaths in 2008 and 2006, and 68 in 2007.

Attorney General Jerry Brown, who will become governor in January, has said the receiver's demands constitute a threat to state sovereignty and that California should be protected from a federal court raid of the state's budget.

Attorneys representing inmates counter that conditions remain in a crisis state despite the steps taken by the state and the court-appointed health care receiver.

"It's an enormously important case," said Erwin Chemerinsky, dean of the University of California, Irvine School of Law, who is not representing any party in the ongoing court battles. "The reality is that the California prisons are desperately overcrowded, and as a result prisoners receive grossly inadequate medical care. The question then is, what can the federal courts do about it?"

He said the Supreme Court's ruling may hinge on whether the judges successfully followed a complex federal law that lets courts order the early release of inmates only if a special judicial panel decides all other options have been exhausted.

The state said in its written argument to the court that the creation of the three-judge panel and its order violate the 1996 Prison Litigation Reform Act.

The state contests the judges' ruling that overcrowding was the primary cause of the health care deficiencies, or that reducing the number of inmates would solve the problems.

The state's lawyers say the judges could have helped mentally and physically ill inmates without such a sweeping order. Releasing inmates will jeopardize the public unless the state invests in rehabilitation programs it cannot afford as it faces a $25 billion budget gap over the next 18 months, the state contends.

Inmates' rights attorneys say the three judges had no choice after the state ignored or violated more than 70 court orders since a lawsuit challenging prisons' medical care was filed in 1990.

Most of the evidence favors the inmates, but conservative justices will be reluctant to intervene in state decisions, said Frank Zimring, a University of California, Berkeley law professor who has studied California prisons for nearly 30 years.

The pending Supreme Court decision will help determine how the 1996 federal law is applied nationwide when judges see constitutional violations, although no other state appears to have prison problems as severe as California, said Amy Fettig, a lawyer with the American Civil Liberties Union's National Prison Project.

Louisiana Attorney General Buddy Caldwell filed a friend of the court brief supporting California on behalf of the other 18 states, including Colorado, Illinois, Pennsylvania and Texas. Other states have a substantial interest because they also could face lawsuits seeking to force large-scale prisoner releases, Caldwell said in the brief.

"States like Louisiana must make difficult decisions about their correctional systems every day, and they must be given flexibility by the federal courts in the face of tight budgets and growing prison populations," Caldwell's appellate chief, Kyle Duncan, said in a statement.

Even as the administration appeals the order, Schwarzenegger has long recognized the dangers of crowding and taken steps to create space, said Don Specter, who as director of the nonprofit Berkeley-based Prison Law Office will argue the case on behalf of inmates.

"I'm not sure why the state is taking the position it is and fighting it so hard when there is consensus this is the main barrier that has to be resolved before things can get better," Specter said.

If the ruling is upheld, the state will have two years to act once the final order takes effect.

The administration has said meeting the judges' deadline would require California to keep criminals convicted of drug possession, receiving stolen property, theft and check fraud in county jails instead of state prisons. Some lower-risk inmates would serve the last 12 months of their sentences under house arrest enforced by satellite-linked ankle bracelets tracking their movements.

Several of the changes would require modifications in state laws and would burden counties already dealing with crowded jails and dwindling budgets, the administration said.

The case is Schwarzenegger v. Plata, 09-1233.

Load-Date: November 30, 2010

End of Document

Prosecuting offices' immunity tested; Supreme Court set to hear a case that considers whether prosecutors' employers can be held accountable for not preventing misconduct

USA TODAY

October 6, 2010 Wednesday, FINAL EDITION

Section: NEWS; Pg. 13A

Length: 1910 words

Byline: Brad Heath and Kevin McCoy

Body

WASHINGTON

Americans can sue almost anyone for almost anything. But they can't sue prosecutors.

Not when prosecutors hide evidence that could prove someone's innocence. Not when they violate basic rules designed to make sure trials are fair. Not even when those abuses put innocent people in prison.

Nearly 35 years ago, the U.S. Supreme Court ruled that prosecutors cannot face civil lawsuits over how they handle criminal cases in court, no matter how serious or obvious the abuses. Since then, courts have further limited the circumstances under which prosecutors -- or their bosses -- can be sued for civil rights violations.

Today, in a case involving a New Orleans man who came within a month of being executed for a murder he didn't commit, the Supreme Court is scheduled to consider another aspect of prosecutorial immunity: whether people who were wrongly convicted can take local prosecutors' offices to court. The court's answer could determine the extent to which prosecutors' employers are also shielded if they fail to make sure attorneys comply with their constitutional responsibilities.

"Prosecutorial misconduct is a serious problem, and nothing is being done to adequately address it," said Kathleen Ridolfi, director of the Northern California Innocence Project, which released a study Monday that found hundreds of instances of misconduct by state and federal attorneys. "Prosecutors know . . . they can commit misconduct with impunity."

A USA TODAY investigation documented 201 cases since 1997 in which judges determined that federal prosecutors had violated laws or ethics rules. Although those cases represent a small fraction of the tens of thousands that are filed in the nation's federal courts every year, judges found that the violations were so serious that they overturned convictions or rebuked the prosecutors for misconduct. Some of the abuses put innocent people in jail.

Not one resulted in a successful lawsuit against a prosecutor.

The latest test of the extent of prosecutors' immunity began with a December 1984 murder and a separate carjacking three weeks later in New Orleans. John Thompson was convicted of both crimes and sentenced to die

for the murder. A month before his execution date, his lawyers discovered that prosecutors had deliberately covered up a police lab report that showed he could not have committed the carjacking. Then they uncovered still more evidence that undermined his murder conviction.

Thompson was freed in 2003. He sued New Orleans District Attorney Harry Connick Sr. and his office for failing to train the prosecutors who covered up that evidence. Four years after Thompson got out of prison, a jury awarded him $14 million; now the Supreme Court must decide whether he can keep it.

"The importance of (Thompson's) case is prosecutorial accountability -- whether or not violations of constitutional rights make a difference, or whether the prosecutors can just walk away without any accountability, any liability, any punishment for breaking the law," said Pace University law professor Bennett Gershman, an expert on misconduct by prosecutors.

In 1976, the Supreme Court decided, in a case called Imbler v. Pachtman, that prosecutors have absolute immunity from civil rights lawsuits for their work in the courtroom. The court acknowledged that its ruling "does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty," but said the alternative was worse: leaving prosecutors to fear a lawsuit, or even bankruptcy, every time they lose a trial.

Without immunity, prosecutors "would be gun-shy" about taking on difficult cases, former U.S. attorney general John Ashcroft said.

The Supreme Court has said that, instead of being sued, prosecutors who break the rules could be kicked out of the legal profession or even charged with a crime. Those outcomes are rare. Although USA TODAY's investigation documented misconduct in 201 cases, it did not find a single federal prosecutor who was disbarred. Only one, Richard Convertino, was prosecuted. He was acquitted.

"Short of pointing a gun at a prisoner and pulling the trigger, the prosecutor can get away with just about anything," said Patrick Regan, an attorney for two Washington, D.C., men who spent decades in prison before a court overturned their convictions because prosecutors never turned over evidence that pointed to other suspects. The men sued, but a court ruled the prosecutors had immunity and threw out their case.

John Thompson was a 22-year-old high school dropout and self-described "small-time weed dealer" when he was arrested in 1985 for the slaying of a New Orleans businessman. Days later, prosecutors also charged that he was responsible for an armed carjacking of three teenagers outside the Superdome.

Thompson went on trial twice. Prosecutors tried Thompson for the carjacking first, and a jury convicted him. That set the stage for his murder trial several weeks later: Thompson decided not to testify because doing so would have opened the door for prosecutors to tell the jury that he had just been convicted of the carjacking. The jury found him guilty. When it was time to decide his punishment, jurors did hear about the carjacking, his first felony conviction, which enabled prosecutors to seek the death penalty. Jurors sentenced him to death.

Authorities scheduled Thompson's execution for the day before his son was to graduate from high school in 1999. Two Philadelphia corporate attorneys, Michael Banks and Gordon Cooney, had by then taken on his case.

A month before his execution, an investigator working for them found a copy of a police lab report that upended the case. The report, based on blood found on the clothing of one of the carjacking victims, showed conclusively that Thompson had not committed that crime; the sample was blood type B, and Thompson's blood was type O .

That was enough for a court to throw out Thompson's carjacking conviction, and to overturn his death sentence. And it led to a series of discoveries -- including inconsistent witness statements -- that ultimately undermined Thompson's murder conviction as well. The district attorney's office in New Orleans had all that evidence when Thompson went on trial but never disclosed it to his lawyers, as the law requires.

He was retried in the murder case and acquitted. In 2003 -- after 18 years in prison, 14 of them on death row -- Thompson walked out of Louisiana's Angola penitentiary a free man.

Conduct 'grossly illegal'

Almost no one defends the way New Orleans prosecutors handled his case. Graymond Martin, now second in command of the district attorney's office, said the prosecutor who hid the lab report, Gerald Deegan, "violated every moral, ethical and legal obligation that he had" and said the violation was "grossly illegal." Deegan, who died before the defense attorneys learned of the lab report, had admitted to another lawyer what he'd done.

Kyle Duncan, the chief of appeals for Louisiana's attorney general, said it's "unquestionable that the prosecutors on his case did do wrong."

It's also unquestionable that Thompson can never sue the individual prosecutors for what they did during his trial. Two prosecutors who worked on his case still practice law but are immune from lawsuits.

Instead, Thompson sued the district attorney's office itself. His lawyers alleged that the office -- which was run at the time of his trial by Connick, father of singer Harry Connick Jr. -- didn't train its attorneys about their legal obligation to turn over evidence that could help defendants prove their innocence. As a result, Thompson's lawyers argued, prosecutors didn't know what evidence they had to share, and, in Thompson's case, kept it secret. A federal jury agreed.

That's when the real battle began. Prosecutors in Louisiana insist that unless the Supreme Court throws out the jury's verdict, prosecutors' offices will have to worry about civil lawsuits every time one of their attorneys makes a mistake, a prospect that could leave them reluctant to bring tough cases.

In a series of rulings, the Supreme Court has said that prosecutors -- unlike police officers and most other government employees -- can face civil rights lawsuits only under narrow circumstances. They can be sued when misconduct happens during an investigation but not in court proceedings. And the justices have suggested that prosecutors' offices -- like other local government agencies -- can be liable for not training their employees.

"We can't sue the prosecutor, but we can sue the FBI agent. That's absurd," said Ben Gonek, an attorney for Kamil Koubriti, one of the men Convertino prosecuted in the nation's first major terrorism case after September 11. The Justice Department dismissed the terrorism charges when it concluded that Convertino had concealed evidence. Nonetheless, courts ruled that Koubriti could not sue Convertino; the Supreme Court on Monday declined to hear the case.

The Supreme Court is scheduled to hear arguments in Thompson's case this morning; a decision is expected before the court adjourns next June.

After he was freed, Thompson opened a non-profit group in New Orleans to help others who were wrongly convicted readjust to society. Some of the men who have come through his door spent decades in prison. He helps them find housing and work.

In 2005, Louisiana set aside a pool of money for people who were wrongly convicted. The payments are capped at $150,000. Thompson's attorney Banks said Louisiana officials fought Thompson's claim for four years before finally sending him a check in September.

Questions of training

For years, some judges have faulted the Justice Department for doing too little to train and supervise its prosecutors. Last year, for example, the chief federal judge in Massachusetts became so frustrated with continuing violations of defendants' rights that he set up a training program for prosecutors and defense attorneys there.

The move by U.S. District Judge Mark Wolf came after prosecutors failed to turn over evidence that defense lawyers could have used to challenge a police officer's testimony in a routine gun possession case. Wolf berated officials from the U.S. attorney's office in Boston for "a dismal history of violations" that have a "powerful impact on individuals entitled to due process and a cancerous effect on the administration of justice."

The Justice Department has recently overhauled its own training program, in response to the collapse of its corruption case against former Alaska senator Ted Stevens; prosecutors had wrongly concealed evidence about the government's star witness. As a result, every federal prosecutor must now get regular training about his or her duty to turn over evidence to defendants.

The Justice Department has not taken a position on Thompson's case. The federal government cannot be sued for failing to train its employees the way local governments can be.

Still, a group of former Justice Department officials has urged the Supreme Court to uphold the jury's $14 million verdict. In a brief by former solicitor general Paul Clement, they noted that "prosecutors face no threat of legal consequences for depriving criminal defendants of their rights" in cases where they have concealed evidence.

Unless their offices face some form of liability, Clement said, "the question really does become whether there's any deterrent for a violation."

Graphic

PHOTO, Color, Jennifer S. Altman for USA TODAY

PHOTO, B/W, File photo by Ted Jackson

PHOTO, B/W, 1995 photo by Burt Steel

PHOTO, B/W, Rhyne Piggott, USA TODAY

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Raising Its Game; Video game industry lobbies state AGs in high court case.; WASHINGTON

The National Law Journal

August 30, 2010 Monday

THE NATIONAL LAW JOURNAL

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Length: 1604 words

Byline: TONY MAURO AND CARRIE LEVINE

Body

A campaign is under way to win the hearts and minds of state attorneys general in the runup to a major Supreme Court case testing the constitutionality of limits on the sale of violent video games.

Representatives of the video game industry, with $10 billion in annual sales nationwide, have been in contact with state AGs to persuade them to support the industry by filing a brief in the case, set for argument on Nov. 2. At issue: whether California's 2005 law banning sale or rental of violent video games to minors violated the First Amendment.

"It's our understanding that there's a pretty intense lobbying effort" against the law, said California Supervising Deputy Attorney General Zackery Morazzini, who will argue in defense of California's law before the high court in the case, titled *Schwarzenegger v. Entertainment Merchants Association and EntertainmentSoftware Association*.

One sign that the industry is making inroads is that only 11 states signed onto an amicus curiae or friend-of-the-court brief supporting the California law filed on July 19, an unusually low number in a case involving a law aimed at protecting children. In a typical state-law enforcement case, 40 states or more may join briefs supporting their counterparts before the Supreme Court. The justices often cite state amicus briefs, so having states on the industry's side could be an important tactic in countering California's defense of the law.

"Would we have liked to get more states on our side? Sure," said S. Kyle Duncan, appellate chief of the Louisiana Department of Justice, who wrote the brief for states supporting California. "Would the fact that we didn't be the result of activity by the industry? I can't say." Duncan acknowledged that he was aware of "intense lobbying" of states by the game industry in connection with the case.

"We wouldn't be surprised if the number [of states siding with the industry] was equal or exceeded the number" backing California, said George Rose, executive vice president and chief public policy officer of Activision Blizzard, whose games include Guitar Hero. Rose said his company, which isn't a member of the Entertainment Software Association (ESA) but is coordinating with the rest of the industry on the case, plans to file its own amicus brief against the California law.

Rose asserted that the attorneys general siding with the industry should not be viewed as responding to industry pressure. "Similarly to our opponents, we have discussed the merits of the case with attorneys general of different states in this country," Rose said. "We don't want their opinions to be uninformed."

UTAH'S CALL?

The California law was passed after legislators cited studies linking violent video games with aggressive behavior, and evidence that minors had easy access to games rated "mature." Video games like *Grand Theft Auto: Vice City*, *Postal 2* and *Duke Nukem 3D* were criticized for glorifying death, mayhem and dismemberment. In *Postal 2*, players can direct an animated character to urinate on a dead body, triggering the comment, "Now the flowers will grow." The ESA challenged the law on its face on First Amendment grounds. It was struck down at the district and appeals court levels.

According to both Morazzini and Duncan, among others, Utah Attorney General Mark Shurtleff is taking the lead in drafting a brief supporting the industry and discussing it with AGs of other states. A spokesman for Rhode Island Attorney General Patrick Lynch confirmed he is also considering joining a brief.

Shurtleff declined to be interviewed about his position on the case, but his spokesman Paul Murphy said in an e-mail that Shurtleff is still making up his mind and that his reservations about the California law have to do with the First Amendment and "the concern from law enforcement that the courts will recognize a defense for criminals that 'the video game made me do it.'"

Murphy said Shurtleff, a Republican, is also concerned about government intervention when parents should be monitoring their children's video game use and preventing them from playing games with sex and violence. "The issue weighs two competing interests: protecting our children and individual liberties," Murphy said. "Mr. Shurtleff will be consulting with other attorneys general before making a decision."

The ESA donated $3,000 to Shurtleff's Utah campaign in 2008, state campaignfinance records show. And people affiliated with the ESA contributed about $2,500 to Lynch's campaigns for Rhode Island attorney general and for the 2010 Democratic gubernatorial nomination.

Mike Healey, a spokesman for Lynch, said Lynch, a Democrat, has not yet decided whether he will sign onto the industry-side brief, which would be due at the Court by Sept. 17. Healey would not say to whom Lynch had spoken while considering the issue.

"Whatever decision he makes on this sign-on letter will be based on the merits of the issue," Healey said in an e-mail message, calling the contributions from the video game industry "a very tiny fraction of the approximately $2 million that AG Lynch raised in the 2006 and 2010 election cycles."

As mentioned by Shurtleff's spokesman, the state arguments against the California law would likely focus on the First Amendment, but not just in the lofty free speech sense. Every law similar to California'sat least eight so far has been struck down by courts on First Amendment grounds, and states could argue that defending laws like it are a waste of scarce resources.

The concern about creating a Twinkielike defense"the video game made me do it"for those accused of crimes is also likely to surface, as Murphy indicated.

But California's brief in the case states explicitly that the justices need not embrace a causal relationship between video games and harm to minors to uphold California's laweven though the brief asserts there is such a link.

James Steyer, a former prosecutor and current CEO of Common Sense Media, which rates video games and other media for families, said a "video game defense" would be "rather disingenuous." He added, "I can't believe any defendant would use such a defense and, if they did, that any juror would listen to it."

GAMER FIREPOWER

Steyer, whose group filed a brief in support of California's law, wrote public letters to both Shurtleff and Lynch urging them not to support the industry.

Shurtleff "has claimed to be such a great advocate for children and families in Utah," said Steyer. "We find it very surprising that he would consider filing amicus briefs on behalf of the video game industry." In a pointed letter to Lynch, Steyer also noted that Lynch himself is a parent of young children, so he should not be considering support of the video game industry.

Steyer offered another indicator of the influence of the video game industry. When he sought a law firm to write the amicus brief for Common Sense Media, he went to a half-dozen major law firms, only to find that "they all had a conflict because they represented the entertainment industry." Columbia Law School professor Theodore Shaw wrote the brief.

Jenner & Block appellate chair Paul Smith will be arguing the case for the industry associations. He referred questions to the ESA. Among other firms filing briefs on the side of the industry is Williams & Connolly, representing the Motion Picture Association of America.

Dan Hewitt, a spokesman for the ESA, declined to discuss any contacts with state AGs but said, "a number of organizations, associations, elected officials and others are considering participating in this case by filing amicus briefs. We're encouraged by the broad range of support already shown from individuals and groups across the political and ideological spectrum."

Sean Bersell, vice president of the Entertainment Merchants Association, said, "We're not involved with lobbying any state attorney generals," but added, "If you're looking for what our position is on the law and why it's unconstitutional and a violation of the First Amendment and really the effort by the state of California to...create an exception to the First Amendment that I think would be incredibly dangerous and a real loophole, you'll find it in our response to the state brief, which is going to be filed by Sept. 10."

The ESA, which represents publishers of video and computer games, has been active at the state and federal level for years, spending $2.4 million so far this year for lobbying in both arenas. It won a victory in Utah last year when then-Gov. Jon Hunstman vetoed a bill that would have fined retailers who failed to enforce a game rating system for minors.

Video game advocates are viewing the Supreme Court case in apocalyptic terms, fearing that an adverse decision will give the medium diminished First Amendment protection forever, compared to other forms of expression, new and old.

The fact that the high court granted review of California's appeal even though its petition acknowledged there was no split among the circuits has free speech advocates worried that the Court may carve out a new, vague exception to First Amendment protections to permit restrictions on violent content for children.

The Entertainment Consumers Association, a gamers' rights and advocacy group, is gathering gamers' signatures on a petition that it will include in a friend-of-the-court brief it is filing on the industry's side.

The Court confrontation, it states on its Web site, "represents the single most important moment for gamers, and the [most] pivotal issue for gaming, in the sector's history."

Tony Mauro can be contacted at *tmauro@alm.com* Carrie Levine can be contacted at *clevine@alm.com*

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State to appeal adoption ruling ; Gay couple allowed names on certificate

Times-Picayune (New Orleans)

February 22, 2010 Monday

Section: METRO; Pg. B 01

Length: 717 words

Byline: Bill Barrow Staff writer

Body

A top state lawyer has confirmed that Attorney General Buddy Caldwell almost certainly will appeal a federal appeals court order requiring that Louisiana issue an amended birth certificate listing as parents two out-of-state men who, through a New York court, adopted a child born in Shreveport.

Kyle Duncan, a Caldwell deputy and lead state attorney in the case, said the state will most likely ask the full U.S. 5th Circuit Court of Appeals to reverse Thursday's unanimous ruling from a three-judge panel of the circuit. The state also has the option of appealing directly to the U.S. Supreme Court.

Sitting squarely at the intersection of gay rights and federalism, the case poses questions about what lengths one state must go to enforce judgments from another state's court system. And for its obvious political undertones, the matter has the attention of gay-rights advocates and social conservatives.

Oren Adar and Mickey Ray Smith originally sued in federal district court after Louisiana Registrar Darlene Smith declined to give the two men a birth certificate reflecting their joint adoption, certified in New York, of an infant born in Louisiana.

Armed with a Louisiana attorney general's opinion, she noted that Louisiana law limits adoption to married couples and single individuals, but not an unmarried couple. So, she said, she could not produce a Louisiana public record reflecting an adoption that would be illegal in the state.

Adar and Smith said the refusal violates the full faith and credit clause and the equal protection clause of the U.S. Constitution, which, generally speaking, requires that every state honor judgments handed down by other states' courts. Because the trial court and the appeals court declared that principle enough to decide for the plaintiffs, they sidestepped the equal-protection claim, meaning from a legal perspective the case is less of a pure civil rights issue, despite the political backdrop.

Duncan speculated that the full 5th Circuit could be interested in the case for several reasons: It is an issue of "first impression," meaning neither the local appeals court nor the U.S. Supreme Court has ruled on such a set of facts; the panel's decision could be interpreted as overturning Texas law on adoption records, though Texas isn't a party to the case; and, the state alleges, the relevant Louisiana laws are ambiguous and should be settled by the Louisiana Supreme Court rather than by the federal bench.

To gain a hearing from the full panel, Duncan will have to overcome a 36-page decision in which Judge Jacques Wiener, an appointee of President George H.W. Bush, exhaustively rejected each of the many prongs in the state's case.

Judges Grady Jolly, an appointee of President Ronald Reagan, and Thomas Morrow Reavly, an appointee of President Jimmy Carter, joined the opinion.

Duncan said the panel applied the full faith and credit clause too broadly, effectively applying New York adoption policy in Louisiana. While noting that states do not have to honor each other's statutes, Wiener dismissed the idea that a New York adoption decree -- which is not a statute -- amounts to out-of-state control over Louisiana adoptions.

The issue of interpreting Louisiana law, in particular, drew Duncan's ire. He maintains that there is an unsettled conflict between the law dictating Smith's responsibility to issue amended birth certificates and separate passages requiring that those documents conform to all Louisiana laws. Duncan wanted the federal court to punt that question to the state's highest court for clarification before any federal ruling on federal constitutional issues.

Wiener declined, saying there isn't a conflict. He cited a Louisiana Supreme Court holding that while topical statutes can be construed together, one that is clear on its own cannot be rendered "ambiguous" by a separate provision.

So, Wiener said, the Louisiana registrar has no real choice in issuing a birth certificate once she receives a legitimate adoption decree.

Caldwell's office thus far has handled the case without hiring outside firms. Should the state lose all appeals, federal rules would compel Louisiana taxpayers to pay attorneys fees for Adar and Smith.

. . . . . .

Bill Barrow can be reached at *bbarrow@timespicayune.com* or by calling 504.826.3452.

Load-Date: June 25, 2012

NewsRoom

2/19/10 AP Alert - MiS 00:25:17

AP Alert - Mississippi

February 19, 2010

Court: La. must put 2 adoptive fathers on document

JANET McCONNAUGHEY

Associated Press Writer

NEW ORLEANS Louisiana must put both fathers' names on the birth certificate of a boy adopted by a same-sex couple, the 5th U.S. Circuit Court of Appeals ruled Thursday.

A three-judge panel unanimously upheld a district judge's ruling, ordering the state registrar to quickly issue a new certificate for the boy identified as "Infant J," and "J.C. A.-S."

"Even our opponents have said this is landmark case and we're pleased the court agrees that it's wrong to punish children just because the registrar doesn't like their parents," said Kenneth Upton, the attorney for Lambda Legal who represented the couple, Oren Adar and Mickey Ray Smith of San Diego.

Upton said he called Adar with news of the ruling and was told, "Can you imagine the coincidence? Right now I'm enrolling the child in school and they just asked me for a birth certificate."

"You talk about great timing," Upton said. "They were just delighted."

Kyle Duncan, the assistant state attorney general who argued the case, said the 36-page opinion written by Judge Jaques L. Wiener, Jr. "is a thorough rejection of the state's position."

He said he would ask the full court to rehear the case and to stop the order for a new birth certificate until it does. Duncan said he also planned to call the Texas Solicitor General's Office, where he used to work, because he thinks it probably will affect cases there. Texas and Mississippi, where a similar ruling in a local court was not appealed, also are in the 5th Circuit.

Texas' out-of-state birth certificate law is much more specific than Louisiana's about the gender of adoptive parents, Duncan said. "Louisiana's is strictly generic. It just says parents, and doesn't define it."

The child was born in Shreveport in late 2005. His mother gave Adar and Smith custody of the baby shortly after birth, and they adopted him on April 27, 2006, in New York state.

The 5th Circuit upheld a district judge's ruling that Louisiana must give "full faith and credit" to New York's laws.

Attorneys for the state contended that because Louisiana law lets only married couples and single individuals adopt children, the certificate could carry only one man's name.

U.S. District Judge Jay Zainey found that the law was so clear that no trial was needed. Louisiana's law requires the state to list adoptive parents' names. Because New York law allows adoption by unmarried couples, Louisiana had to follow that law in writing the new certificate, he wrote.

The 5th Circuit is the second federal appeal court to consider the question. The 10th Circuit made a similar ruling in 2007, and Oklahoma did not appeal or ask for a rehearing in that case.

Adoptive parents also have won a similar case in Virginia which, like Mississippi, did not appeal.

On the Net:

Lambda Legal: http://www.lambdalegal.org/

Louisiana Attorney General's Office: http://www.ag.state.la.us/

Court opinion: http://www.ca5.uscourts.gov/opinions%5Cpub%5C09/09-30036-CV0.wpd pdf

---- Index References ----

News Subject: (Legal (1LE33); Judicial (1JU36))

Region: (Texas (1TE14); North America (1NO39); Louisiana (1LO72); New York (1NE72); Americas (1AM92); Mississippi (1MI74); USA (1US73))

Language: EN

Other Indexing: (LAMBDA LEGAL) (Adar; Circuit; Circuit Court; Court; Duncan; Jaques L. Wiener, Jr.; Jay Zainey; Kenneth Upton; Kyle Duncan; Mickey Ray Smith; Oren Adar; Smith; Texas; Upton) (United States; USA; North America) (StateDistribution)

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Judge rules no hearing for triggerman

The Advocate (Baton Rouge, Louisiana)

October 1, 2009 Thursday, Main Edition

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Byline: JOE GYAN JR.

Advocate staff writer

Body

The convicted triggerman in the fatal 1992 carjacking of an LSU freshman is not entitled to an evidentiary hearing because he can do no better than the life sentence he is serving, a judge ruled Wednesday.

State District Judge Bonnie Jackson denied Dale Dwayne Craig's application for post-conviction relief, saying "the outcome would still be the same" even if the allegations contained in the application for the hearing were proven.

"He has received every relief he could possibly receive," Jackson said, referring to the fact that the U.S. Supreme Court turned Craig's death sentence into a life term when it banned the execution of juveniles in 2005.

Craig, now 35, was a week shy of his 18th birthday when he abducted 18-year-old Kipp Earl Gullett at gunpoint from the Kirby Smith Hall parking lot on the LSU campus on Sept. 15, 1992.

Gullett, of Pineville, was taken to an isolated construction site on South Kenilworth Parkway, where he was fatally shot.

Kyle Duncan, the appellate chief for the state Attorney General's Office, was in court for Jackson's ruling and said afterward the judge made the right call.

"The judge correctly dismissed all of his claims because they're frivolous," Duncan said.

Craig's current attorney, John Landis, told Jackson he believes Craig is entitled to an evidentiary hearing - an indication that Landis likely will ask the state 1st Circuit Court of Appeal to review the judge's ruling.

Jackson allowed Landis to meet with Craig after court. Landis could not be reached afterward. He has said previously he plans to take Craig's case to the U.S. Supreme Court if necessary.

Craig's post-conviction claims include alleged drug use the day of the crime, that the state's witnesses perjured themselves, and that his former trial attorney provided ineffective assistance.

Jackson said Craig is guilty of no less than second-degree murder, which carries a mandatory sentence of life in prison. The judge said Craig has never claimed, "I wasn't there, I wasn't a participant."

Craig was one of four men convicted in Gullett's slaying. The four ranged in age from 16 to 19 at the time of the killing.

Judge rules no hearing for triggerman

Craig was found guilty of first-degree murder in 1994. Prosecutors said he wanted Gullett's Ford Bronco.

James Conrad Lavigne was convicted of second-degree murder in 1995 and received a life sentence. R

oy Maurer and Zebbie Berthelot pleaded guilty to manslaughter that same year and were sentenced to 20 years in prison. Maurer and Berthelot testified against Craig.

Gullett was beaten, pistol-whipped and shot after begging for his life, according to trial testimony.

Load-Date: October 1, 2009

End of Document

NewsRoom

7/15/09 US Fed. News (Pg. Unavail. Online)
2009 WLNR 13491475

US Federal News

July 15, 2009

U.S. SUPREME COURT ISSUES OPINION THAT IS A VICTORY FOR LOUISIANA

BATON ROUGE, La., May 26 -- The Louisiana attorney general issued the following news release:

The United States Supreme Court agreed with the State of Louisiana and today overruled a case that will change how criminal investigations are conducted throughout the United States.

The Louisiana Attorney General's Office, jointly with the St. Tammany Parish District Attorney's Office, recently filed a brief with the United States Supreme Court in the matter of Montejo v. Louisiana to overrule the case Michigan v. Jackson, which effectively insulated a criminal defendant from police questioning even if the defendant wanted to talk to the police. The opinion issued today will make it easier for the police to get voluntary confessions from criminal defendants. Those defendants will still be able to refuse to speak to police without their lawyers present. However, there will no longer exist an artificial presumption that a defendant has been bullied into speaking with the police, when there is no evidence that actually happened.

The case was orally argued by the St. Tammany Parish District Attorney's Office in Washington, D.C. in January, 2009. "This opinion is a huge victory, not just for Louisiana, but for law enforcement in every state in the country," stated Kyle Duncan, Appellate Chief for Attorney General Buddy Caldwell. "The United States Supreme Court has used a Louisiana case to improve the administration of criminal justice in this country and that is why it's a great victory for all states, with Louisiana being immediately impacted."

Attorney General Caldwell observed, "Our office helped get many other states to join this brief through their Attorneys General to demonstrate how important it was to overrule the Jackson case which now helps law enforcement. I especially want to thank District Attorney Walter Reed, his Appellate Counsel Kathryn Landry, and the rest of his staff for allowing Kyle Duncan and my staff to assist him in this landmark, successful effort to overturn this very troublesome and bad law."For more information please contact: Sarabjit Jagirdar, Email:- htsyndication@hindustantimes.com.

---- Index References ----

Company: VICTORY

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Word Count: 427

NewsRoom

7/8/09 Baton Rouge Advoc. A8
2009 WLNR 13012785

Baton Rouge Advocate

July 8, 2009

Section: A

ACLU hits birth certificate law

BILL LODGE

Advocate staff writer

The American Civil Liberties Union went to court Tuesday to oppose Louisianas refusal to place the names of unmarried couples on the birth certificates of their adopted children.

ACLU attorneys asked the 5th U.S. Circuit Court of Appeals in New Orleans to uphold a December decision by a federal judge in that city.

That decision would require Louisiana to issue a new birth certificate for a Shreveport boy adopted by two gay men in New York.

Both mens names would appear as parents on that certificate.

The U.S. Supreme Court has made it perfectly clear that government actions that are intended solely to disadvantage one group of people wont pass constitutional muster, Marjorie Esman, executive director of the ACLU of Louisiana, said in a written statement.

Louisiana officials denied that any disadvantage was intended.

State Registrar Darlene W. Smith did not discriminate against the two gay men and their adopted son by complying with state law, said S. Kyle Duncan, executive counsel and appellate chief for the Louisiana Attorney Generals Office.

Duncan said the law permits only the names of married parents or a single parent on a birth certificate.

Two unmarried parents cannot be listed on the certificate, he added.

This case would be precisely the same in Louisiana if it involved an unmarried heterosexual couple, Duncan added.

The gay couple in the case Oren Adar and Mickey Smith adopted their infant son in New York in 2006.

They have since moved to San Diego.

In their court filings, the adoptive parents said lack of a birth certificate listing their names made it difficult for them to obtain group health insurance for their son.

Because the 3-year-old child and his adoptive parents are different races, they have been denied access to passenger airplanes until they produced adoption papers.

The parents contend a birth certificate bearing their names would avert such inconveniences.

The parents might have the backing of the ACLU, but state officials are backed by the Louisiana Conference of Catholic Bishops.

In papers filed with the 5th Circuit in May, the bishops said: In Louisiana, the laws as expressed by the state Legislature allow for a married man and woman or a single person to adopt a child, but do not allow same-sex couples to do so.

This is in accord with church teaching based on natural moral law that marriage is not just any relationship between any two human beings, but solely between a man and a woman, the bishops added.

In December, U.S. District Judge Jay C. Zainey ruled in New Orleans that Louisiana must accept the New York adoption as valid and amend the childs birth certificate to include the names of his adoptive parents.

But Attorney General Buddy Caldwell took the case to the 5th Circuit, arguing that federal law cannot force Louisianas public records to recognize the New York adoption of a child that would have been illegal within her borders.

Duncan, Caldwells appellate chief, predicted Tuesday that the 5th Circuit will hear oral arguments in the case later this year.

ACLU attorneys Katie M. Schwartzmann, of New Orleans, and Kenneth Y. Choe and James D. Esseks, of New York, asked the 5th Circuit to uphold Zaineys decision.

Because denying complete and accurate birth certificates to children adopted by unmarried couples serves only to express disapproval of gay (or unmarried) couples, it does not further any legitimate interest, the ACLU attorneys argued.

---- Index References ----

Company: AMERICAN CIVIL LIBERTIES UNION

News Subject: (Family Social Issues (1FA81); Social Issues (1SO05); Legal (1LE33); Intellectual Freedoms & Civil Liberties (1IN08); Civil Rights Law (1CI34); Judicial (1JU36))

Region: (North America (1NO39); Louisiana (1LO72); New York (1NE72); Americas (1AM92); USA (1US73))

Language: EN

Other Indexing: (5TH CIRCUIT; ACLU; ACLU OF LOUISIANA; AMERICAN CIVIL LIBERTIES UNION; LOUISIANA; LOUISIANA ATTORNEY GENERALS OFFICE; LOUISIANA CONFERENCE OF CATHOLIC; US CIRCUIT COURT OF APPEALS; US SUPREME COURT) (Buddy Caldwell; Darlene W. Smith; Duncan; James

D. Esseks; Jay C. Zainey; Katie M. Schwartzmann; Kenneth Y. Choe; Marjorie Esman; Mickey Smith; Oren Adar; S. Kyle Duncan; Zaineys)

Edition: Main

Word Count: 683

End of Document

NewsRoom

Birth certificates bill moves to Senate; Unmarried couples would not be listed

Times-Picayune (New Orleans)

June 4, 2009 Thursday

Section: NATIONAL; Pg. 2

Length: 492 words

Byline: By Bill Barrow, Capital Bureau

Body

BATON ROUGE -- Gay rights advocates fell one vote short Wednesday of derailing a bill designed to affirm that the state will not issue birth certificates listing the names of two unmarried parents who adopt a Louisiana-born child in another state.

The Senate Health & Welfare Committee's action moves House Bill 60 to the full Senate floor, one step away from final passage. Gov. Bobby Jindal supports the measure, as does the Louisiana Family Forum, a conservative Christian organization, and the state's council of Catholic bishops.

Sponsored by Rep. Jonathan Perry, R-Abbeville, and carried in the Senate by Sen. A.G. Crowe, R-Slidell, the bill comes during an ongoing federal court case concerning a Louisiana birth certificate.

U.S. District Judge Jay Zainey in December sided with two California men who sought a revised birth certificate listing both of them as the father of a Shreveport-born toddler they adopted in New York in 2006. The case awaits action by the 5th U.S. Circuit Court of Appeals, which has stayed Zainey's order for a new birth certificate.

Perry's bill would clarify that any birth certificate revisions would recognize only parents who would qualify to adopt under Louisiana law. That includes single adults and married couples, but not unmarried couples, regardless of sexual orientation.

Kyle Duncan of the Louisiana attorney general's office said the case and the bill are about federalism. The U.S. Constitution, which generally requires that states recognize the decrees of courts in other states, should not force Louisiana to alter its records practice, Duncan said.

"This is not a case about discrimination," he said.

Several witnesses disagreed, saying the bill unnecessarily denies some adopted children an accurate birth certificate. Parents who are not listed on the birth certificate could struggle registering their adoptive child for school or providing the child with health and life insurance benefits, they said, with those issues magnifying should the listed parent die.

Thomas Robichaux, another adoptive parent, said an unlisted parent could be denied the right to visit or make health decisions about a hospitalized child.

"What kind of hate do you have to have in your heart to keep a parent from their child?" he said.

Jennifer Bandy

Crowe steered clear of the constitutional issues.

"This is still a family values country, and it has continually been attacked," he said. "And I'm not going to sit by and let it happen."

Sens. Yvonne Dorsey, D-Baton Rouge; Cheryl Gray Evans, D-New Orleans; and David Heitmeier, D-Algiers, voted to defer the bill. Sens. Sherry Smith Cheek, R-Keithville; Dale Erdey, R-Livingston; and Ben Nevers, D-Bogalusa, voted against that measure. Committee Chairman Willie Mount, D-Lake Charles, broke the tie. On the final vote, Heitmeier joined the supporters to move the bill on, relieving Mount from casting a vote.

. . . . . .

Bill Barrow can be reached at *bbarrow@timespicayune.com* or 225.342.5590.

Load-Date: June 4, 2009

Sen. panel takes sides on birth certificate issue

The Associated Press State & Local Wire

June 3, 2009 Wednesday 11:26 PM GMT

Section: STATE AND REGIONAL

Length: 269 words

Dateline: BATON ROUGE La.

Body

A Senate panel approved a bill taking sides in a pending federal court case, voting that Louisiana should not be forced to provide a birth certificate listing a same-sex couple from another state as a child's parents.

The bill by Rep. Jonathan Perry, R-Abbeville, seeks to expand an existing law that allows only a single person or a married couple to adopt a child. That law triggered a lawsuit from two gay men who won approval to adopt a child in a New York court. The Louisiana Office of Vital Records refused to issue a birth certificate listing the two men's names as parents of the Louisiana-born child.

A federal district judge has ruled that Louisiana must put the men's names on the boy's birth certificate. The state Attorney General's office is appealing.

Passage of Perry's bill would not affect the federal suit, but it drew opposition from gay rights groups who consider it discriminatory.

"It's really just not cool anymore in this country to be discriminatory against gay people," said John Hill, a consultant for the New Orleans-based Forum for Equality.

Kyle Duncan, the state Justice Department lawyer handling the federal appeal, sought to downplay the dispute and presented the matter as a question of federalism: the right of states to have laws that might conflict with another state's.

"Louisiana has its policies, and good reasons for those policies," Duncan said. "If people want to change them, they are free to."

The Senate's health committee approved the bill with a 4-2 vote. It moves to the Senate floor for further debate.

On the Net:

House Bill 60 can be viewed at http://legis.state.la.us/

Load-Date: June 4, 2009

End of Document

User Name: Jennifer Bandy
Date and Time: Thursday, May 11, 2017 8:54:00 AM EDT
Job Number: 47568652

Document (1)

1. *Full trial asked in 2 dads birth certificate order*

Client/Matter: -None-
Search Terms: "Kyle Duncan"
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
News	-None-

Full trial asked in 2 dads birth certificate order

The Associated Press State & Local Wire

January 15, 2009 Thursday 9:41 PM GMT

Section: STATE AND REGIONAL

Length: 434 words

Byline: By JANET McCONNAUGHEY, Associated Press Writer

Dateline: NEW ORLEANS

Body

The state attorney general has asked a federal judge to reconsider his ruling that both fathers' names must be added to the birth certificate of a boy born in Shreveport and adopted by a gay couple from out-of-state.

Court papers filed Wednesday in New Orleans ask U.S. District Judge Jay Zainey either to hold a full trial or to ask the state Supreme Court to interpret the state law at the heart of the matter.

Zainey ruled without a trial in December, saying the facts were so clear that none was needed. He ordered the state Office of Vital Records to put the names of both Oren Adar and Mickey Ray Smith on the amended birth certificate that is standard for adoptions.

The mother gave them custody of the boy, identified in court papers as "J.C. A.-S." and "Infant J," shortly after his birth in late 2005. The adoption became formal in April 2006 in New York, where officials decided earlier this month that same-sex couples could list both their names on their children's birth certificates.

Under Louisiana law, a single person or a married couple may adopt a child, but two single people may not. However, Zainey ruled that because the adoption became formal in New York, the Office of Vital Records must recognize that state's adoption law on this matter.

Smith and Adar said that because they didn't have a birth certificate for their son, they had problems getting him insured through Smith's health insurance and were detained at an airport because a security guard thought they had kidnapped the boy he is black; Smith and Adar are white.

Both matters were resolved, and worries that they might recur "are conjectural, hypothetical and non-imminent," said S. Kyle Duncan, a lawyer with the attorney general's office.

The brief also contends that Adar and Smith don't have any legal right to sue, because they could get a birth certificate with either Adar's or Smith's name on it. Problems they say have been caused by lack of a birth certificate wouldn't exist if they accepted the certificate offered, the state contends.

"That is just offensive. I can't believe the state actually made that argument," said Kenneth D. Upton Jr. of Dallas, the Lambda Legal Defense and Education Fund, Inc. attorney representing Adar and Smith.

He compared it to defending restrictions overturned decades ago on African-Americans by saying, "You don't have a transportation problem you just sit in the back of the bus."

If Zainey doesn't call for a full trial, Duncan argued, he should ask the Louisiana Supreme Court to decide whether a birth certificate listing an unmarried couple as parents would violate state law.

Load-Date: January 16, 2009

End of Document

Miss. Supreme Court losses to change court?

The Associated Press State & Local Wire

November 5, 2008 Wednesday 8:34 PM GMT

Section: STATE AND REGIONAL

Length: 558 words

Byline: By JACK ELLIOTT JR., Associated Press Writer

Dateline: JACKSON Miss.

Body

The Mississippi Supreme Court will lose one of its independent voices when Oliver Diaz Jr. makes his exit in January, says a law professor.

Diaz was one of three justices Chief Justice Jim Smith and Justice Chuck Easley losing re-election bids Tuesday.

However, Matt Steffey, a professor at the Mississippi College School of Law, said Wednesday that the judge who defeated Diaz will bring to the high court valuable chancery court experience that "is a big part of the judicial experience for many Mississippians."

Chancery Judge Randy "Bubba" Pierce defeated Diaz with 58 percent of the vote according to complete but unofficial returns.

Diaz, 48, was acquitted in two federal trials one on bribery charges in 2005 and another in a tax-evasion case in 2006. A former Court of Appeals judge, Diaz was appointed to the Supreme Court in 2000. He won election in November 2000 in a bitter, expensive campaign in which he was targeted by the U.S. Chamber of Commerce.

In the closing weeks of the campaign, Diaz was stung by third-party ads that attacked his record on the court. The ads were condemned as misleading by a watchdog group.

Pierce, 43, is a former lawmaker who was appointed to the chancery court in 2005. He said his chancery court work immersed him in the needs of families in crisis and the impact on children. He said that perspective is missing on the Supreme Court.

Steffey said Diaz must have felt "like a game animal for the past few years ... being stalked and relentlessly hunted by a better armed opponent," said Steffey, referring to Diaz' trials over the past eight years.

"He was the subject of baseless criminal charges and beat them. He was the target of the first million dollar election in 2000 and beat it. I think he just ran out of lives," Steffey said.

In the other elections, longtime trial attorney Jim Kitchens defeated Smith in what many had thought would be a close contest. Kitchens got 54 percent of the vote. Former Chancery Judge Ceola James of Vicksburg ran a distant third.

Court of Appeals Judge David Anthony Chandler got 67 percent of the vote to defeat Easley in one of two north Mississippi elections. In the other, Justice Ann H. Lamar defeated Okolona attorney Gene Barton with almost 62 percent of the vote.

Steffey said Chandler will bring an important perspective to the Supreme Court.

"The bulk of the appellate work is done by the Court of Appeals and having former judges from the Court of Appeals on the Supreme Court is a good thing," he said.

Despite the losses of three sitting justices, Kyle Duncan, an assistant law professor at the University of Mississippi, said he doesn't see any drastic changes ahead for the Supreme Court.

Duncan, who tracked the Supreme Court's decisions from 2004-2008 in research for the Federalist Society, said he expects the court to avoid activism and continue a path of restraint that he calls "just interpreting the plain letter of the law."

"From my point of view that is a desirable thing.

"Although Easley just hasn't written much for the court, he was often in dissent with Diaz, who has written quite a bit and was often in dissent. Diaz was often trying to reach out and decide issues that in my view really weren't before the court. More likely than not the judge who is replacing him will be for lack of a better word more conservative than Diaz was," Duncan said.

Load-Date: November 6, 2008

End of Document

Some Mississippi Supreme Court candidates claim bias

Mississippi Business Journal (Jackson, MS)

October 20, 2008

Section: NEWS

Length: 1353 words

Byline: Becky Gillette

Body

Each of the nine candidates for the Mississippi Supreme Court will tell you that it is vitally important that the state's highest court be fair and impartial. But some of the candidates claim the present Supreme Court has a bias towards big business.

"Any lawyer who reads the Supreme Court opinions knows what is going on in this state," said incumbent Supreme Court Justice Chuck Easley, whose is running against David Chandler for District Three, Place One, which is in the northern part of the state. "If you want a fair Supreme Court, go to another state. This court is bought and paid for. My opponent is bought and paid for. Just look at his financing from special interest groups. Special interest groups are running ads for him. He is going to spend $1 million in soft money. "

Easley called the tort reform group Mississippians for Economic Progress (MFEP) "as sleazy as they come. " On its website, MFEP is described as a coalition of associations, businesses, and individuals who share the same common interest in civil justice reform in Mississippi.

"Through hard work and dedication, we are making changes and Mississippi is now open for business," MFEP says.

"Special interest groups feel like the Supreme Court of Mississippi is for sale," Easley said. "It is a shame. But I'm not for sale. The voters know that. "

Easley's negative comments about the Supreme Court have drawn criticism from University of Mississippi law professor Kyle Duncan. Duncan said he was disturbed by Easley's comment that "the working man and woman doesn't have a chance" and that "the court stinks. "

Duncan said such remarks are degrading.

"Notice that Justice Easley does not refer to a single decision or principle of law to support his view," Duncan said. "Instead, he frames the issue in the purely political terms of class warfare. "

Duncan said Supreme Court judges are not "pro-business" or "pro-plaintiff. " They do not represent special interest groups.

"In fact, they represent no one," Duncan said. "Their sole task is to impartially apply laws written by a separate branch of government, the Legislature, a branch that actually represents the people of Mississippi. "

Duncan recently completed a report for The Federalist Society in which he reviewed the court's work for the past four years and beyond. His opinion is that the Supreme Court has been quite restrained in how it interprets Mississippi's laws and Constitution. He said that does not mean the Court is either "conservative" or "liberal," but it does mean that the Court has been more and more unwilling to substitute its own policy views for those enacted by the people of Mississippi through their legislators.

"I take it with a huge grain of salt when people start talking about the court as pro-big business," Duncan said. "When I hear people make accusations that a federal or state court is in the pockets of big business, or in the pockets of trial lawyers, to me red flags go up because they are talking about the court as if it is a Legislature where you send people to court to represent the big business lobby or the plaintiff's lobby. But we send people to the courts, and especially the Supreme Court, to impartially apply the law. "

In years past, business groups have claimed that Mississippi was a hot spot in the country for "jackpot justice. " Tort reform proponents said the state's business climate was being hurt because it was a destination for large, class action lawsuits that sometimes resulted in huge jury awards. The state passed tort reform legislation in 2004 designed to tighten up the tort system, limiting how claims are brought and putting a cap on non-economic damages.

Duncan said when the Supreme Court interprets the new laws in a fair way, that doesn't make the court pro big business.

"The Court is applying a law that the people of Mississippi wrote through their Legislature," Duncan said. "If people don't like way tort reform works out, they can change it. What we are talking about here is the role of the court in interpreting the law. "

Another candidate for Supreme Court, Gene Barton, who is running against Ann Lamar for the Central Mississippi position (District Three, Place One), says the Supreme Court should be fair and just. But large contributions from special interest groups can create the impression that the Supreme Court is a vehicle to promote businesses.

Barton expressed concerns about the large amounts of campaign contributions Lamar is receiving from medical community. He saw a letter from a medical association urging every doctor in the state to donate $1,000 to Lamar's campaign.

Barton said he doesn't like being portrayed as "a vicious trial lawyer" when he is not against business.

"But the court system is not for economic development," he said. "It is for justice. "

Interestingly enough, a retired attorney who primarily represented corporations during his career, Alex A. Alston Jr. of Jackson has done a study of the Supreme Court rulings in the past 4.5 years and found that an "astonishing" 88% of all jury verdicts in favor of wronged victims have been overturned. Alston, a former president of the Mississippi Bar, said over the same 4.5-year period, the success rate for plaintiffs in reversing a jury verdict is zero.

"The defendant corporation, hospital, or insurance company prevailed in 100% of these cases," Alston said in an op ed opinion piece in the Clarion Ledger. "It is difficult to imagine victims of negligence and fraud losing 100 percent of the time, but that is the way it is in the state Supreme Court in a plaintiff's appeal.

"The U.S. Chamber of Commerce and insurance companies should be ecstatic over this state of affairs. Think of the money it saves the insurance companies not to pay a claim, knowing they are safe with the state Supreme Court. "

Alston said to expect the U.S. Chamber of Commerce, a lobbying arm of big business, to pour millions into the current Supreme Court races "to close any chance of victory for a poor maimed victim who has successfully worked his way through the judicial system to the Supreme Court. It is only then that these powerful entities will have a complete victory over anyone bold enough to think he has a claim for negligence or fraud. "

Duncan response is that the Supreme Court's role is to determine if the lower court ruling followed the law. If, for example, a tort claim fell outside of the time limit, then the court has no choice but to rule against the plaintiff.

"Perhaps more than any other public official, judges are tempted to extend their power, in order to solve, directly and creatively, the pressing matters of justice in the cases before them," Duncan said. "If improperly exercised, the judicial power distorts the balance of governmental authority in favor of our least-accountable officials. "

Duncan said that under the guise of technical rules of statutes, activist courts may subtly rewrite laws to further the judges' own policy preferences. But his review of the court's statutory interpretation decisions over the past four years shows that the Mississippi Supreme Court has taken a more restrained approach.

"It is particularly evident with respect to a statute such as the Mississippi Tort Claims Act, a law that makes hard choices in painful cases - just those cases in which activist judges are tempted to do 'justice' in disregard of the law's terms and the judges' own legitimate power," Duncan wrote in his paper published by the Federalist Society at *www.fed-soc.org*. "For example, University of Mississippi Medical Center v. Easterling presented the wrenching case where, after an infant died following a laparotomy, the mother's claim was dismissed because she failed to comply with the 90-day notice provision of the Mississippi Tort Claims Act. Overruling the circuit court's softening of the notice provision, the Mississippi Supreme Court ruled that "strict compliance [with the 90-day rule] was required. " The court overruled a prior decision allowing 'substantial compliance with the rule'. "

Duncan said the court resisted the temptation to bend the law in the face of tragic facts.

Load-Date: April 14, 2010

End of Document

NewsRoom

12/14/06 Clarion-Ledger (Jackson, Miss.) A1
2006 WLNR 25364647

Clarion-Ledger, The (Jackson, MS)

December 14, 2006

Section: Main

Judge interfering in pastor's work, colleagues say

December 14, 2006

•Court wrongly blocked contact, critics say; official says nothing improper done

By Jean Gordon

jmgordon@clarionledger.com

jmgordon@clarionledger.com

Several area ministers are accusing a Pearl Youth Court judge of interfering with a Jackson pastor's relationship with his congregation by reportedly barring him from counseling a family with a case in his court.

But Judge John Shirley said he has "never prohibited a child or an adult from going to church."

"I have encouraged churches to take an active role with our youth; I have asked many churches to mentor children going through our Youth Court; and I have never prohibited an adult from communicating with another adult," Shirley said in parts of a statement e-mailed to The Clarion-Ledger Wednesday.

More than two dozen ministers and lay people held a peaceful protest outside the Rankin County Juvenile Justice Center on Tuesday morning after they said Shirley issued an order preventing the Rev. Hosea Hines, pastor of College Hill Baptist Church, from counseling the family, which attends Hines' church.

Court administrator Paul Bowen said state law prohibits him from discussing the case because it is a Youth Court matter. "It is confidential," he said.

Hines also said he could not comment about the case.

But according to Hines' colleague, Bishop Ronnie Crudup of New Horizon Church in Jackson, the matter started when Hines accompanied the family to Youth Court. A teen in the family had made an abuse claim against his stepfather, said Crudup, who was not present.

When Hines advised the stepfather to get a lawyer because of the complexity of the case, Crudup said the judge then forbade the family from having contact with Hines.

"We felt like the pastor/parishioner relationship was infringed upon," Crudup said. "Pastor Hines was counseling one of his own parishioners, and because of that he actually was called to task by the judge."

Youth Court matters are not public record to protect the identity of minors, said Christine Carlberg of the Children's Advocacy Center in Jackson. She said abuse allegations are first reported to the state Department of Human Services and law enforcement. If the agencies find evidence of abuse, the child's case is sent to Youth Court to be heard.

University of Mississippi law professor Kyle Duncan, who specializes in church/state issues, said the case seems to "present some possible tension" with the pastor's and family's religious freedom rights, but it's still difficult to determine the court's intention.

"It's not clear to me which side of the dispute this implicates," he said. "Is it the government saying we don't like the advice a pastor is giving, and don't go to his church; or is the court saying the pastor is doing something illegal or unethical that could violate civil law, and we're going to file an injunction?"

Hines' supporters include members of 100 Concerned Clergy of Greater Jackson, an organization for which Hines serves as president, and the interfaith group the Amos Network.

Crudup said the groups don't have further plans to protest.

"We've made our statement by our presence," he said.

Shirley's order forbidding Hines from counseling a teen and family also will not keep them from doing their jobs, several local clergy said.

"I will still do what I've always done," said the Rev. John Cameron, pastor of Greater Mount Calvary Baptist Church in Jackson. "Iwill always advise my parishioners when they have issues and seek my help."

•

Staff writer Andy Kanengiser contributed to this report.

---- Index References ----

Company: CLARION CO LTD

News Subject: (Judicial Cases & Rulings (1JU36); Religion (1RE60); Social Issues (1SO05); Protestantism (1PR28); Legal (1LE33); Catholic Church (1CA30); Christianity (1CH94))

Region: (Americas (1AM92); North America (1NO39); Mississippi (1MI74); USA (1US73); U.S. Southeast Region (1SO88))

Language: EN

Other Indexing: (Christine Carlberg; Kyle Duncan; John Shirley; John Cameron; Court; Paul Bowen; Andy Kanengiser; Ronnie Crudup)

Edition: Metro

Word Count: 583

End of Document

Supreme Court nominee gains ground

University Wire

July 22, 2005 Friday

Length: 531 words

Byline: By Bryan Doyle, Daily Mississippian; SOURCE: U. Mississippi

Dateline: OXFORD, Miss.

Body

President George Bush and Supreme Court nominee John Roberts have begun their campaign to win the approval of the Senate through Roberts' confirmation hearing later this summer.

Bush's nomination of John Roberts as U.S. Supreme Court justice has opened speculation among political figures, various media outlets and advocacy groups over the political policy of the hopeful federal judge.

Many have labeled him a moderate or a moderate conservative, while others contend he is an extremist and an ideologue. Though many law faculty specializing in Supreme Court law are out of town, The Daily Mississippian was able to speak with one expert of the subject.

To Kyle Duncan, assistant law professor who teaches constitutional law, terms like "extremist," "moderate," and "ideologue" mean nothing.

It is qualifications that truly matter, he said. Impartiality, not political motivation, is what a judge is charged to answer, he said.

Roberts has argued 39 cases to the Supreme Court, served as the managing editor of the Harvard Law Review and has experience with different facets of the federal government.

He also served as a clerk for current Supreme Court Justice William Rehnquist.

"Given his record as an advocate and record in government, he strikes me as someone who will faithfully and intelligently interpret the constitution and the law," he said.

Duncan said Roberts will likely face some kind of opposition from the far left as many have gone on record against him.

He said anyone complaining that Roberts will lead the charge to overthrow Roe v. Wade, the landmark 1973 high court case that legalized abortion, is giving in to misinformation.

There is precedent to a woman's right to privacy in the constitution, he said.

There are six judges on the court that currently support Roe, and Roberts voting against it would only make the vote 5-4, and that's assuming that Roberts votes against it, he said.

What Roberts could help determine, however, is future rulings concerning partial-birth abortions.

Jennifer Bandy

Duncan said that generally, one's opinions of the constitutionality of Roe v. Wade are completely irrelevant to his qualifications as a judge.

"It's wrong to even ask that question," he said.

To a certain extent appointing and getting a judge confirmed is a political process.

He said judges, however, are not and were never meant to be political figures.

Judges do have judicial styles, a system by which they interpret the constitution.

If by conservative a person means that the judge should adopt a laundry list of political positions, then their thinking is misguided, he said.

In this view, Duncan said he understands he is a minority.

Roberts is qualified, not because of his political background or because of how he might rule, but because he has the experience, Duncan said.

"From what I garner, this is precisely the kind of person one ought to nominate. This would be completely true if he were a liberal.

When someone is nominated, it should be understood that he will want to judge fairly, not politically," Duncan said.

He said it is misleading for anyone to press for a confirmation based on the assumption that a judge will rule a certain way.

Load-Date: July 22, 2005

End of Document

United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 16(e)

STUART KYLE DUNCAN
Nominee to be United States Circuit Judge
for the Fifth Circuit

2015 WL 5562186 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Henry MONTGOMERY, Petitioner,
v.
STATE OF LOUISIANA, Respondent.

No. 14-280.
August 24, 2015.

On Writ of Certiorari to the Louisiana Supreme Court

Brief of Respondent State of Louisiana

James D. "Buddy" Caldwell, Louisiana Attorney General, Trey Phillips, First Assistant, Attorney General, Colin A. Clark, Assistant Attorney General, Louisiana Department of Justice, 1885 N. Third Street, Baton Rouge, LA 70802.

Hillar C. Moore, III, District Attorney, Dylan C. Alge, Assistant District Attorney, East Baton Rouge, District Attorney's Office, 222 St. Louis Street, Baton Rouge, LA 70802.

S. Kyle Duncan, Duncan PLLC, 1629 K St. NW, Ste. 300, Washington, DC 20006, Tel: 202.714.9492, kduncan@duncanpllc.com, for respondent.

*i QUESTIONS PRESENTED

1. Does this Court have jurisdiction to decide whether the Louisiana Supreme Court correctly refused to give retroactive effect to the decision in *Miller v. Alabama,* 567 U.S. (2012)?

2. Did *Miller* announce a new substantive rule that applies retroactively to cases on collateral review under the analysis in *Teague v. Lane,* 489 U.S. 288 (1989)?

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*iv TABLE OF AUTHORITIES

CASES

Joe Gyan, Jr., *High Court to Reconsider Juvenile Life Terms,* The Advocate, March 25, 2015, http://theadvocate.com/news/11929154-123/us- supreme-court-to-consider 1

***1** INTRODUCTION

Over fifty years ago petitioner Henry Montgomery shot deputy Charles Hurt to death, leaving Hurt's wife and three young children to spend the rest of their lives without a husband or a father. Montgomery, who was seventeen when he killed Hurt, was automatically sentenced to life-without-parole for his crime. If he committed the same crime today, he could receive precisely the same sentence. The question in this case is whether the new procedure announced in *Miller v. Alabama,* 132 S. Ct. 2455 (2012) - requiring a judge or jury to consider a juvenile murderer's youth before sentencing him to life-without-parole - should retroactively invalidate Montgomery's punishment and require the State to afford him a new sentencing hearing.

Under a straightforward application of the framework in *Teague v. Lane,* 489 U.S. 288 (1989), the answer is no. *Teague* requires retroactive application of new rules that deny government the power to criminalize primary conduct or the power to impose a category of punishment. The rule in *Miller* does neither. *Miller* explicitly recognizes that a life-without-parole sentence is still a constitutionally valid category of punishment, and that, today, a judge or jury must "only … follow a certain process" before imposing that punishment on a juvenile murderer. 132 S. Ct. at 2471. As the court below correctly ruled, those are the hallmarks of a procedural rule that is non-retroactive ***2** under *Teague.* The Court should affirm that decision and leave in place Montgomery's life-without-parole sentence, which is just as constitutional today as when it was imposed in 1969.

STATEMENT OF THE CASE

A. Factual Background

On November 13, 1963, Montgomery murdered Charles Hurt, an East Baton Rouge Parish sheriff's deputy. *State v. Montgomery,* 181 So.2d 756, 757, 759 (La. 1966). Montgomery was seventeen when he killed Hurt. *Id.* at 757. He was convicted and sentenced to death. La. Rev. Stat. Ann. § 14:30 (1942) ("Whoever commits the crime of murder shall be punished by death."). The Louisiana Supreme Court, however, reversed Montgomery's conviction, finding that adverse publicity had compromised his trial. *Montgomery,* 181 So.2d at 762. Following a brief escape from the parish jail, Montgomery was retried and again convicted of murder. *State v. Montgomery,* 242 So.2d 818, 818-20 (La. 1970).

This time the jury returned a verdict of guilty without capital punishment, which carried a mandatory sentence of life without possibility of parole. *Id.* at 818; *see* La. Code Crim. Proc. art. 817 (1969) (capital jury "may qualify" guilty verdict as " 'without capital punishment,' in which case the punishment shall be imprisonment at hard labor for life"); La. Rev. Stat. Ann. § 15:574.4(B)(1) (1969) (providing "[n]o prisoner serving a life sentence shall be eligible for parole consideration until his life sentence has been commuted to a fixed term of years"). The Louisiana Supreme Court affirmed Montgomery's conviction and ***3** sentence on November 9, 1970, and denied rehearing on December 14, 1970. *Montgomery,* 242 So.2d at 818, 821. Montgomery did not seek certiorari from this Court.

B. Procedural History

Forty-one years later, this Court decided in *Miller* that a judge or jury must have the opportunity to consider youth as a mitigating circumstance before sentencing a juvenile murderer to life-without-parole. *Miller,* 132 S. Ct. at 2475. Relying on *Miller,* Montgomery moved to correct his sentence in July 2012. JA 8-37. The state district court denied his motion

on January 8, 2013, ruling that *Miller* did not apply retroactively. Pet. App. 1. Montgomery's application for review of that decision was properly transferred to the Louisiana Supreme Court. JA 132.

On June 20, 2014, the Louisiana Supreme Court affirmed, concluding that *Miller* was non-retroactive. The court relied on its decision in *State v. Tate,* 2012-2763, p. 13 (La. 11/05/13); 130 So.3d 829, 838, which had concluded *Miller* was non-retroactive under the analysis in *Teague v. Lane.* Pet. App. 3.

On September 5, 2014, Montgomery timely sought certiorari, which this Court granted on March 23, 2015.

SUMMARY OF ARGUMENT

1. This Court has jurisdiction to review the judgment below because it is interwoven with federal law. In finding *Miller* non-retroactive, the Louisiana Supreme Court followed the framework established by this Court in *Teague v. Lane:* the court relied exclusively on *Teague,* cited only *Teague* precedents, ***4** and cited no state-law retroactivity principles. For purposes of jurisdiction, therefore, the decision below is " 'interwoven with federal law.' " *Coleman v. Thompson,* 501 U.S. 722, 733 (1991) (quoting *Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983)).

Contrary to the court-appointed *amicus*, this Court does not risk issuing an "advisory" opinion merely because the court below hypothetically could have applied a standard broader than *Teague.* What matters for jurisdictional purposes is that the Louisiana Supreme Court applied *Teague,* as it has for over twenty years. The risk of an advisory opinion arises where the decision below was based on a state ground that would justify it regardless of what this Court says about federal law. That is plainly not the case here. It is undisputed that the Louisiana Supreme Court's decision relied on *Teague* and *Teague* alone.

2. Under a straightforward application *of Teague,* the rule announced in *Miller* is non-retroactive.

Teague bars retroactive application of most new criminal rules, with a narrow exception for new "substantive" rules. In over a quarter-century of *Teague* jurisprudence, this Court has taught that a rule is substantive if it denies the government the power to criminalize primary conduct or to impose a particular category of punishment. Thus, this Court has found substantive under *Teague* (1) new rules that narrow a federal criminal statute to de-criminalize formerly illegal conduct; (2) new rules that interpret the Constitution to deny the government power to criminalize certain primary conduct; and (3) new rules that interpret the Constitution to deny the government power to impose a category of punishment on a class of ***5** defendants or for a type of crime. *See generally Schriro v. Summerlin,* 542 U.S. 348, 351-52 (2004). The rule announced in *Miller* does none of these things and is therefore not substantive under *Teague.*

Miller decided that the Eighth Amendment requires a sentencer to consider youth as a mitigating factor before sentencing a juvenile murderer to life-without-parole. The Court candidly explained, however, that *Miller* "does not categorically bar" a life-without-parole sentence and mandates only that a judge or jury "follow a certain process" before imposing that sentence on a juvenile murderer. *Miller,* 132 S. Ct. at 2471. Because *Miller* only requires a sentencing procedure and does not deny the government power to impose a category of punishment, *Miller* does not qualify as a substantive rule under *Teague*'s exception.

Recognizing this, the United States invites the Court to extend *Teague*'s exception to include procedural rules, like *Miller,* that "expand[] the range of possible sentencing outcomes." Br. 8. The Court should decline. Re-defining *Teague*'s exception to include "outcome-expanding" rules would contradict the reasons that justified the exception to begin with. It would require overturning final sentences despite the fact that defendants are facing a constitutionally valid punishment. And it would require burdensome relitigation of facts buried in the past or irretrievably lost. *Teague* originally recognized its substantive exception because retroactively applying such categorical rules would *not* undermine finality and drain government resources. The United States' proposed expansion of *Teague* would do both and should therefore be rejected.

***6** This case vividly illustrates why *Miller*'s new procedure should not apply retroactively. Montgomery received an automatic life-without-parole sentence for murdering Deputy Hurt over fifty years ago. Applying *Miller* would annul that sentence, despite the fact that Montgomery could receive the same sentence today for the same conduct. Moreover, re-sentencing Montgomery today under *Miller*'s new procedure would pose severe difficulties. The sentencer would have to determine whether Montgomery's youth *should* have impacted the sentence he received for a crime he committed a half-century ago. This would occur in a case where, as far as counsel can tell, virtually everyone involved in Montgomery's 1969 trial is dead. If those conceptual and practical obstacles were not enough, one must also consider the effect of the resentencing process on Deputy Hurt's surviving children, who would be forced to publicly relive the anguish of having been deprived of a father for the better part of their lives.

ARGUMENT

I. The Court has jurisdiction to review the judgment of the Louisiana Supreme Court.

The Court has asked whether it has jurisdiction to review the Louisiana Supreme Court's judgment. Finding no jurisdiction would be to Louisiana's advantage, given that Louisiana prevailed below and would also prevail in any federal habeas proceeding. *Craig v. Cain,* 2013 WL 69128 (5th Cir. Jan. 4, 2013) (unpublished) (finding *Miller* non-retroactive under *Teague*). Nonetheless, Louisiana concedes this Court has jurisdiction, because the state supreme court's ***7** decision was based solely on the federal *Teague* framework.

1. Louisiana agrees with the United States that the decision below is interwoven with federal law and that the Court thus has jurisdiction to review it. *See* US Br. 25-26.

It is undisputed that the Louisiana Supreme Court relied exclusively on *Teague* and applied no independent state-law retroactivity standard. *See* Pet. App. 3 (relying solely on *Tate* decision); *Tate,* 130 So.3d at 834 (explaining "our analysis is directed by the *Teague* inquiry"); *id.* at 834-41 (applying only *Teague* cases); *see also* US Br. 27 (observing that the Louisiana Supreme Court "relied solely on federal precedents[,] applied solely federal reasoning," and "did not apply an independent state standard of retroactivity"). Plainly, the state court's retroactivity analysis was "interwoven with federal law," *Coleman,* 501 U.S. at 733 (quotations omitted), and therefore its judgment "rest[s] upon federal grounds sufficient to support this Court's jurisdiction." *Fitzgerald v. Racing Ass'n of Central Iowa,* 539 U.S. 103, 106 (2003) (citation omitted).

By tethering state retroactivity to *Teague,* the Louisiana Supreme Court "treat[s] state and federal law as interchangeable and interwoven," *Florida v. Powell,* 559 U.S. 50,57 (2010). This Court therefore has jurisdiction to review the decision in this case on the same grounds that it has reviewed state decisions that interpret state constitutional provisions or statutes in lockstep with federal standards. *See, e.g., Delaware v. Prouse,* 440 U.S. 648, 652-53 (1979) (finding no independent state ground where Delaware Constitution was "automatically … interpreted at least ***8** as broadly as the Fourth Amendment"); *Oregon v. Guzek,* 546 U.S. 517, 520-21 (2006) (concluding state decision "rest[ed] on federal law" because Oregon statute incorporated Eighth Amendment standards). In those cases, like this one, the state court's "interpretation of state law has been influenced by an accompanying interpretation of federal law," and this Court therefore has jurisdiction to review it. *Three Affiliated Tribes of Fort Berthold Reseru'n v. Wold Eng'ing, P.C.,* 467 U.S. 138, 152 (1984).

2. Louisiana also agrees with the United States that this Court has jurisdiction notwithstanding the fact that the Louisiana Supreme Court could have adopted a retroactivity standard broader than *Teague. See* US Br. 26-32; *see also Danforth v. Minnesota,* 552 U.S. 264, 279 (2008) (explaining that *Teague* "does not in any way limit the authority of a state court … to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*"). What matters for jurisdictional purposes is not what retroactivity standard the state court *could* have applied, but what standard it actually *did* apply. It is undisputed that the Louisiana Supreme Court has long applied the *Teague* framework and did so here. The *amicus*

is therefore mistaken to claim that an opinion from this Court respecting *Teague* would be "advisory" under *Michigan v. Long,* 463 U.S. 1032. *See* Court-Appointed *Amicus* Br. 9-16. [2]

***9** The *amicus* reads *Long* too narrowly. *Long* teaches that a state law issue is "interwoven" with federal law where state and federal law are governed by identical standards. *See Long,* 463 U.S. at 1040-41 (explaining Court may review state issue "interwoven with" federal law); *id.* at 1044 n.10 (finding jurisdiction to review decision applying state constitutional provision that was "governed by a standard identical to that imposed by the Fourth Amendment"). Thus, the Court had jurisdiction to review a Michigan Supreme Court decision that relied "exclusively" on federal precedent in interpreting a state constitutional provision in lockstep with the Fourth Amendment. *Id.* at 1043. In this case, there is no question that the Louisiana Supreme Court has similarly adopted a federal standard to govern state law and exclusively relies on federal precedent to apply it.

To be sure, *Long* cautioned against rendering an "advisory opinion" in cases where the decision below was grounded on "adequate and *independent* state grounds." *Id.* at 1041 (emphasis added). The Court explained, however, that a state-law decision is not "independent" of federal law where state law is tethered to federal standards and where the state decision "relie[s] *exclusively* on its understanding of … federal cases." *Id.* at 1043 (emphasis in original). The Court has applied this principle from *Long* in numerous cases involving state constitutional provisions or statutes that incorporate federal ***10** standards. [3] In none of those cases did the Court suggest its opinion risked being "advisory" merely because state courts might elect on remand to interpret state law more broadly than its federal counterpart.

As the United States points out, this case is somewhat different from *Michigan v. Long* and its progeny because here the federal retroactivity standards do not apply "of their own force" in state collateral proceedings. US Br. 28. That distinction is immaterial for purposes of this Court's jurisdiction, however. The United States correctly explains that, in several cases, this Court has exercised jurisdiction "to review certain embedded federal-law issues in state cases because those cases raise federal questions." *Id.* at 28-31 (citing *Standard Oil Co. v. Johnson,* 316 U.S. 481 (1942); *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 478 U.S. 804 (1986); ***11** *Three Affiliated Tribes,* 467 U.S. 138; *Ohio v. Reiner,* 532 U.S. 17). The discrete federal law component in those cases was sufficient to support this Court's jurisdiction. *See, e.g., Three Affiliated Tribes,* 467 U.S. at 151-52 (explaining this Court "retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law").

That principle applies here. It is undisputed that the Louisiana Supreme Court relied solely on the *Teague* framework in determining that *Miller* is non-retroactive on collateral review. The state court's application of *Teague* thus raises a discrete issue of federal law sufficient to support this Court's jurisdiction. *See, e.g., Danforth,* 552 U.S. at 291 (explaining that the availability of a state remedy for violation of a federal constitutional right " 'is a mixed question of state and federal law' ") (quoting *American Trucking Assns., Inc. v. Smith,* 496 U.S. 167, 205 (1990) (Stevens, J., dissenting)).

II. *Miller* is a procedural rule that does not apply retroactively under *Teague*'s first exception.

As discussed above, Montgomery received a mandatory life-without-parole sentence for a 1963 murder he committed when he was seventeen years old. *See supra* LA. His conviction and sentence became final on March 15, 1971, when the time elapsed for seeking certiorari from this Court on direct review. *See Montgomery,* 242 So.2d at 818 (denying rehearing December 14, 1970). Forty-one years later this Court decided *Miller v. Alabama.* This case asks whether *Miller* applies retroactively to invalidate Montgomery's life-without-parole sentence.

***12** 1. *Miller*'s retroactivity is governed by the analysis in *Teague v. Lane,* 489 U.S. 288 (1989). *Teague* discarded the previous retroactivity analysis in *Linkletter v. Walker,* 381 U.S. 618 (1965), because *Linkletter* "ha[d] not led to consistent results." *Teague,* 489 U.S. at 302 (plurality op.). In its place, *Teague* adopted Justice Harlan's analysis from his separate opinion in *Mackey v. United States,* 401 U.S. 667, 675-702 (1971) (Harlan, J., concurring in the judgments in part and

dissenting in part).[4] *See Teague,* 489 U.S. at 310 ("[W]e now adopt Justice Harlan's view of retroactivity for cases on collateral review.") (plurality op.); *Penry v. Lynaugh,* 492 U.S. 302, 314, 329 (1989) (applying "Justice Harlan's approach to retroactivity" as adopted by *Teague* plurality). *Teague* promised to bring consistency to what Justice Harlan had called "the Court's ambulatory retroactivity doctrine." *Mackey,* 401 U.S. at 681.

Teague teaches that new rules[5] of criminal law generally do not apply retroactively to cases on collateral review. *Teague,* 489 U.S. at 310; *see also Mackey,* 401 U.S. at 689 (arguing "it is sounder, in adjudicating habeas petitions, generally to apply the ***13** law prevailing at the time a conviction became final").[6] *Teague*'s presumption against retroactivity furthers society's compelling interest in the finality of convictions. *See Teague,* 489 U.S. at 309 (retroactive application of constitutional rules "seriously undermines the principle of finality which is essential to the operation of our criminal justice system"). Applying new rules to final cases "may be more intrusive than the enjoining of criminal prosecutions," *id.* at 310 (citation omitted), because it "subvert[s] the criminal process itself" and forces States "to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed." *Mackey,* 401 U.S. at 691.

Teague also adopted two "narrow" exceptions from Harlan's *Mackey* opinion. *See Teague,* 489 U.S. at 307 (observing "Justice Harlan identified only two exceptions to his general rule of nonretroactivity for cases on collateral review"); *Saffle v. Parks,* 494 U.S. 484, 486 (1990) (*Teague* has "two narrow exceptions"). The first exception is for a new rule that "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' " *Id.* (quoting *Mackey,* 401 U.S. at 692). The second exception is for a new rule that "requires the observance of those procedures that… are implicit in the concept of ordered liberty." *Id.* (quoting *Mackey,* 401 U.S. at 693) (internal quotes omitted). The Court has characterized the first exception as distinguishing between "substantive" rules that apply retroactively, ***14** and "procedural" rules that do not.[7] *See Summerlin,* 542 U.S. at 351-52. The Court has characterized *Teague*'s second exception as limited to "watershed" procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle,* 494 U.S. at 495.

2. The issue in this case is whether the Court's decision in *Miller v. Alabama,* 132 S. Ct. 2455, announced a procedural or substantive rule under *Teague*'s first exception.[8] The answer will determine whether *Miller* applies retroactively to cases on collateral review.

Miller held that the Eighth Amendment forbids the mandatory imposition of life-without-parole sentences on juveniles who commit murder. To reach this result, *Miller* wove together two strands of precedent. First, it drew on cases holding that the Eighth Amendment "categorically" forbids certain punishments for a class of offenders or type of crime. *Miller,* 132 S. Ct. at 2463-66; *see, e.g., Graham v. Florida,* 130 S. Ct. 2011 (2010) ***15** (barring life-without-parole for juveniles who commit non-homicide crimes); *Roper v. Simmons,* 543 U.S. 551 (2005) (barring death penalty for juveniles). Second, it drew on cases requiring "individualized sentencing" before someone receives the death penalty. *Id.* at 2466-68; *see, e.g., Woodson v. North Carolina,* 428 U.S. 280, 304 (1976) (plurality opinion) (jury must consider "the character and record of the individual offender and the circumstances of the particular offense"). The "confluence of these two lines of precedent" led the Court to conclude that a juvenile murderer may be sentenced to life-without-parole only if the sentencer first has "the opportunity to consider [the] mitigating circumstances" of the offender's youth. *Miller,* 132 S. Ct. at 2464, 2475.

Miller candidly described what it did and did not do. While drawing on cases like *Graham* and *Roper, Miller* explained that - unlike those decisions - it did not categorically ban life-without-parole sentences for juvenile murderers: "Our decision does not categorically bar a penalty for a class of offenders or type of crime - as, for example, we did in *Roper* or *Graham.*" *Id.* at 2471. Furthermore, *Miller* explained that it "mandates only that a sentencer follow a certain process - considering an offender's youth and attendant characteristics - before imposing a particular penalty." *Id.* Provided a sentencing judge or jury follows that "process," *Miller* confirmed that imposing a life-without-parole sentence on a

juvenile murderer is permitted by the Eighth Amendment. *See id.* at 2469 (explaining "we do not foreclose a sentencer's ability to make that judgment in homicide cases").

***16 A. *Miller* is not "substantive," because it only prescribes a sentencing process and does not categorically bar life-without-parole sentences.**

1. With respect to the first *Teague* exception, the Court has identified three kinds of decisions that announce substantive rules applicable retroactively to cases on collateral review. First, a rule is substantive if it narrows a criminal statute, making conduct lawful that was formerly thought unlawful. *See Summerlin,* 542 U.S. at 351 (a substantive rule "narrow[s] the scope of a criminal statute by interpreting its terms") (citing *Bousley v. United States,* 523 U.S. 614, 620-21 (1998)). Second, a rule is substantive if it "places a class of private conduct beyond the power of the State to proscribe," *Saffle,* 494 U.S. at 494 - for instance, when a decision announces the government cannot criminalize flag burning or using contraceptives. *See Texas v. Johnson,* 491 U.S. 397 (1989); *Griswold v. Connecticut,* 381 U.S. 479 (1965). Third, a rule is substantive if it "prohibit [s] a certain category of punishment for a class of defendants because of their status or offense," *Penry,* 492 U.S. at 330 - for instance, when a decision categorically prohibits the death penalty for juveniles, rapists, or vicarious felony murderers. *See Roper,* 543 U.S. at 578; *Kennedy v. Louisiana,* 554 U.S. 407, 413 (2008); *Enmund v. Florida,* 458 U.S. 782, 801 (1982); *Coker v. Georgia,* 433 U.S. 584, 592 (1977) (plurality op.).

2. *Miller* obviously does not fall into the first two categories, and Montgomery does not argue otherwise. *Miller* did not interpret a federal criminal statute and narrow its terms; it interpreted the Eighth ***17** Amendment. *Cf. Bousley,* 523 U.S. at 617 (discussing decision that narrowed part of a federal criminal statute). Nor did *Miller* place any "private conduct beyond the power of the State to proscribe." *Saffle,* 494 U.S. at 494. *Miller* prescribed a process for sentencing juvenile murderers; it did not bar the government from criminalizing the underlying homicide.

3. Montgomery does claim, however, that *Miller* is substantive under the third category. Specifically, he argues that *Miller* "prohibits a 'category of punishment' (mandatory life without parole) for a 'class of defendants' (juveniles)." Br. 16. Montgomery misunderstands *Miller.*

a. "*Mandatory* life without parole" refers, not to a category of punishment, but to a particular manner of imposing a punishment. That is why *Miller* expressly said it does *not* categorically bar a life-without-parole "penalty," but only requires the sentencer to "follow a certain process" before imposing it. 132 S. Ct. at 2471. *Miller* thus makes plain that the relevant punishment category is simply "life without parole." *That* category, *Miller* confirmed, remains valid for juvenile murderers - unlike the categories banned in *Roper* (juvenile death penalty) and *Graham* (life-without-parole for juvenile non-homicide offenders). *See Miller,* 132 S. Ct. at 2469 (explaining "we do not foreclose a sentencer's ability to make [a life-without-parole] judgment in homicide cases"). Many courts have noted *Miller*'s distinction between the mandatory imposition of a life-without-parole punishment and the punishment itself. *See, e.g., People v. Carp,* 852 N.W.2d 801,825 & n.13 (Mich. 2014) (explaining "[t]he *category* of punishment implicated by *Miller* is a sentence of 'life ***18** without parole,' " not " 'mandatory' life without parole"), *petitions for cert. filed* U.S.L.W. (U.S. Jan. 13 & 23, 2015) (Nos. 14-824, 14-8106). [9]

To be sure, the *Miller* petitioners *asked* the Court to bar the life-without-parole punishment for certain juveniles. *Miller,* 132 S. Ct. at 2469 (noting "[petitioners'] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger"). If the Court had accepted that suggestion, then it would be accurate to say *Miller* prohibited a category of punishment. *Miller,* however, did nothing of the sort. *See id.* at 2469 (explaining that "we do not consider" petitioners' alternative argument). [0]

***19** b. The Eighth, Fourth, Eleventh, and Fifth Circuits - the only federal circuits to have addressed *Miller*'s retroactivity - all agree that *Miller* did not prohibit a category of punishment but only prescribed a process a sentencer must follow

before imposing life-without-parole. Based on that straightforward reasoning, those circuits have correctly concluded that *Miller* is non-retroactive under *Teague*. *See Martin v. Symmes,* 782 F.3d 939, 942 (8th Cir. 2015) (reasoning that "*Miller* does not prohibit a category of punishment … for a class of defendants"); *Johnson v. Ponton,* 780 F.3d 219, 225 (4th Cir. 2015) (observing "*Miller* expressly does not" prohibit a "certain category of punishment"), *petition for cert. filed sub nom. Johnson v. Manis* U.S.L.W. (U.S. June 29, 2015) (No. 15-1) (quotes omitted); *In re Morgan,* 713 F.3d 1365, 1367-68 (11th Cir. 2013) (finding *Miller* procedural because it "did not prohibit the imposition of a [life-without-parole] sentence" on juvenile murderers, but only "changed the procedure by which a sentencer may impose [that sentence]"); *Craig v. Cain,* 2013 WL 69128, at *2 (5th Cir. Jan. 4, 2013) (unpublished) (*Miller* "does not categorically bar" life-without-parole ***20** sentences for juveniles and is therefore procedural under *Teague*).

4. Montgomery also claims that *Miller* should apply retroactively because it establishes a "*substantive* right to individualized sentencing." Br. 19 (emphasis added). This begs the question. No one disputes that *Miller* established a new right. The question is whether that right is procedural or substantive under *Teague*. *Miller* explicitly described the difference between mandatory and discretionary life-without-parole sentencing schemes in terms of *process*, not substance. As *Miller* explained, its new rule "mandate[s] only that a sentencer follow a certain *process*" before imposing a ***21** life-without-parole sentence, which remains a valid penalty for juvenile murderers. 132 S. Ct. at 2471 (emphasis added). *Miller*'s own description of its new procedural right places it outside of *Teague*'s exception for substantive rules. *See, e.g., Carp,* 852 N.W.2d at 827 (noting "*Miller,* in describing the nature and scope of its rule, repeatedly employs language typically associated with nonretroactive procedural rules").

Furthermore, Montgomery is incorrect to claim that the *Woodson* line of capital-sentencing cases "differentiates" between a "substantive" right to individualized sentencing and "procedures" for implementing that right. Br. 20. *Woodson* itself referred to individualized sentencing as "part of the *process* of inflicting the [death] penalty." 428 U.S. at 304 (emphasis added). And *Lockett* - on which Montgomery places particular weight (Br. 20) - calls a jury's consideration of mitigating factors part of the "*procedure* for deciding in which cases governmental authority should be used to impose death." *Lockett v. Ohio,* 438 U.S. 586, 605 (1978). [2] Moreover, Montgomery ignores decisions from this Court subsequent to *Woodson* and *Lockett* finding that new rules requiring capital juries to consider specific ***22** mitigating evidence are procedural under *Teague*. *See infra* II.B (discussing capital sentencing cases). [3]

5. Montgomery also argues that *Miller* is substantive because it requires the sentencer to consider "specific factors" (such as age, background, and the circumstances of the crime) before sentencing a juvenile to life-without-parole. Br. 22-23. Montgomery is again mistaken.

Montgomery's argument relies solely on *Summerlin,* but he misreads that decision. *Summerlin* does not suggest that a decision is substantive merely because it requires a sentencer to consider specific factors before imposing a sentence. Rather, in *Summerlin* the Court explained that a decision is substantive if it "modifies the elements of an offense" by, for instance, "alter[ing] the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa." 542 U.S. at 354 (citation omitted). In that case, a decision would be substantive because it would "mak[e] … certain fact[s] essential" to imposing a particular penalty. *Id.*

***23** *Miller* does nothing of the kind. It requires only that a judge or jury consider the potentially mitigating circumstances of youth before imposing a life-without-parole sentence. *Miller,* 132 S. Ct. at 2471 (requiring consideration of "youth and attendant characteristics … before imposing a particular penalty"). *Miller* does not modify the elements of the underlying crime, whether by "alter[ing] the range" of punishable conduct or by doing anything else. *Summerlin,* 542 U.S. at 354. Moreover, *Miller* teaches that an offender's youth is to be considered in *mitigation* of a potential life-without-parole sentence. *See Miller,* 132 S. Ct. at 2475 (holding "a judge or jury must have the opportunity to consider mitigating circumstances"). As this Court has long recognized, facts that may mitigate punishment (as opposed to facts that may *aggravate* it) do not constitute "elements" of an offense. *See Apprendi,* 530 U.S. at 490 n.16 (noting "the distinction

the Court has often recognized … between facts in aggravation of punishment and facts in mitigation") (citing *Martin v. Ohio,* 480 U.S. 228 (1987)). Several lower courts have correctly rejected the argument that *Miller* introduces new "elements" and is therefore substantive. *See, e.g., Chambers,* 831 N.W.2d at 329 (concluding that "the *Miller* rule does not announce a new 'element,' " because it "does not mandate that a certain aggravating factor be proven before the State imposes the sentence in question"). [4]

***24 B. The Court's *Teague* precedents strongly support finding *Miller* to be procedural.**

Finding *Miller* to be non-retroactive is also strongly supported by this Court's *Teague* precedents, which have found non-retroactive other sentencing rules closely resembling the new rule adopted in *Miller.*

Miller requires a judge or jury to consider certain kinds of mitigating evidence before imposing a life-without-parole sentence on a juvenile murderer. *See Miller,* 132 S. Ct. at 2475 (stating "judge or jury must have the opportunity to consider mitigating circumstances"); *id.* at 2471 (sentencer must "consider[] an offender's youth and attendant characteristics"). This Court has considered the retroactivity of similar rules in the capital sentencing context - rules that require the jury to consider specific mitigating evidence before imposing the death penalty. These cases have particular relevance in assessing *Miller*'s retroactivity, since *Miller* drew its sentencing rule, in part, from these individualized capital sentencing cases. *See id.* at 2466 (drawing on precedents "demanding individualized sentencing when imposing the death penalty"). In each of these cases, the Court has found a new sentencing rule non-retroactive under *Teague.* It should reach the same result with respect to *Miller.*

***25** For example, in *O'Dell v. Netherland* the Court considered the rule providing that, if the prosecutor argues that a defendant's future dangerousness supports the death penalty, the defendant must be allowed to inform the jury he is ineligible for parole. *O'Dell v. Netherland,* 521 U.S. 151, 155 (1997) (considering rule *of Simmons v. South Carolina,* 512 U.S. 154 (1994)). The Court found that new sentencing rule non-retroactive under *Teague. O'Dell,* 521 U.S. at 153, 156-67. In *Beard v. Banks* the Court considered the rule that forbids instructing a jury to disregard mitigating factors on which it fails to reach unanimity. *Beard v. Banks,* 542 U.S. 406, 408 (2004) (considering rule of *Mills v. Maryland,* 486 U.S. 367 (1988); *McCoy v. North Carolina,* 494 U.S. 433 (1990)). The theory behind the *Mills* rule was that, by requiring unanimity, the State had effectively barred the jury from "giv[ing] mitigating evidence any effect whatsoever." *Mills,* 486 U.S. at 375. Nonetheless, the Court found that new sentencing rule non-retroactive under *Teague. Beard,* 542 U.S. at 420 ("We hold that *Mills* announced a new rule of constitutional criminal procedure that falls within neither *Teague* exception."). Similarly, the Court has found non-retroactive (1) a new sentencing rule that forbids a jury from recommending a death sentence based on invalid aggravating factors (*Lambrix v. Singletary,* 520 U.S. 518, 539 (1997) (considering rule of *Espinosa v. Florida,* 505 U.S. 1079 (1992)); and (2) a new sentencing rule that forbids suggesting to a capital jury that it is not ultimately responsible for a death sentence (*Sawyer v. Smith,* 497 U.S. 227, 229 (1990) (considering rule of *Caldwell v. Mississippi,* 472 U.S. 320 (1985)).

***26** The Court has also declined to consider certain proposed capital sentencing rules because - even if such rules were constitutionally required - they would not apply retroactively under *Teague.* Thus, in *Graham v. Collins,* the Court refused to consider whether the Eighth Amendment requires a special jury instruction - going beyond the instructions already provided in Texas - "concerning [the defendant's] mitigating evidence of youth, family background, and positive character traits." *Graham v. Collins,* 506 U.S. 461, 478 (1993). The Court reasoned that the proposed sentencing rule would "plainly" not fall within *Teague*'s first exception and thus would not apply retroactively. *Id.* at 477. Similarly, in *Saffle v. Parks* the habeas petitioner argued that the Eighth Amendment forbids instructing a jury to avoid "sympathy" in deciding whether to impose the death penalty. *Saffle,* 494 U.S. at 486. The Court declined to reach that question because such a rule would not apply retroactively under *Teague. Id.* at 495.

These capital sentencing precedents strongly support finding the new sentencing rule in *Miller* to be non-retroactive. In each case, the new sentencing rule required the jury to consider mitigating evidence that could have significantly

influenced its decision to impose the death penalty. Yet the Court concluded that each rule was procedural and therefore non-retroactive under *Teague*. *See, e.g., Craig,* 2013 WL 69128, at *2 (relying on these cases in finding *Miller* non-retroactive). The same result should obtain here. As in the capital sentencing cases, the rule in *Miller* is a procedural rule requiring the sentencer to consider particular mitigating evidence (youth) before imposing a particular sentence (life-without-parole). The Court's ***27** capital sentencing cases teach that such a sentencing rule is procedural, not substantive, and therefore does not apply retroactively under *Teague.*

Montgomery does not address these capital sentencing cases, nor does he acknowledge that the Court has consistently held the rules at issue in those cases to be non-retroactive. He does, however, suggest that the Court's *Woodson* line of cases - requiring individualized capital sentencing - has been applied retroactively. Pet. Br. 26-27 (discussing *Woodson,* 428 U.S. at 280; *Lockett,* 438 U.S. at 608; *Eddings v. Oklahoma,* 455 U.S. 104, 117 (1982)). Montgomery is mistaken. He relies principally on pre-*Teague* lower court decisions that by definition could not have addressed whether *Woodson* was substantive under *Teague. See* Pet. Br. at 27 n.12. The one post-*Teague* decision he cites does not address *Woodson*'s retroactivity. *See Thigpen v. Thigpen,* 926 F.2d 1003, 1005 (11th Cir. 1991) (addressing "only one issue" - whether admission of evidence deprived petitioner of due process); *see also Carp,* 852 N.W.2d at 827-29 & nn. 17-19 (rejecting argument that this Court, "or even any federal court of appeals, has declared any of the individualized sentencing capital-punishment cases retroactive under *Teague*"). Unlike Montgomery, the United States acknowledges that this Court has never held that *Woodson* applies retroactively under *Teague.* Br. 24. [5]

***28 C. The Court should decline the United States' invitation to create a new category of substantive *Teague* rules.**

The United States concedes, as it must, that *Miller* allows life-without-parole sentences for juvenile murderers under the Eighth Amendment. *See* Br. 21 (*Miller* "did not preclude a life-without-parole sentence for a juvenile homicide defendant"). Nonetheless, the United States argues that *Miller* is a substantive rule under *Teague*'s first exception because it is "outcome-expanding" (*id.* at 16), meaning that the decision affords juvenile murderers the possibility of receiving a lesser sentence. [6]

The United States' complex argument unfolds in several steps: (1) under *Teague*'s first exception a substantive rule "alter[s] the range of permissible outcomes," whereas a procedural rule "alter[s] only the manner of determining" guilt or sentence (*id.* at 13-15); (2) *Miller* falls on the substantive side because, instead of altering how a sentence is determined, it "expands the range of permissible sentencing outcomes" (***29** *id.* at 14-15); (3) *Miller* has a "procedural component" but is not "entirely" procedural; rather, *Miller* has "necessary implications for the substantive criminal law" because it allows juvenile murderers to obtain "different and more favorable outcomes" (*id.* at 18-19); and (4) finding *Miller* substantive "accords with *Teague*'s objectives" because *Miller*'s potential effects are "sufficiently profound" to justify upsetting final sentences (*id.* at 21).

The United States' argument is mistaken. Under a straightforward application of *Teague*'s first exception, *Miller* is a procedural rule. *See supra* II.A. The United States does not ask the Court to apply *Teague*'s exception for substantive rules, but to expand it - adding a new category of substantive rules to *Teague* for the first time since *Teague* was decided a quarter-century ago. This unwieldy addition would upend *Teague*'s settled distinction between substantive and procedural rules and frustrate the policy reasons for which the Court adopted the *Teague* exception to begin with. The Court should decline the United States' invitation to expand and complicate *Teague.*

1. The United States concededly asks the Court to extend the first* Teague *exception.

The United States acknowledges that the first *Teague* exception, as this Court has described it for the past 25 years, does not encompass the rule adopted in *Miller.* Br. 16 (admitting that "*Miller* differs from previous decisions in which this Court has announced substantive rules"). Furthermore, none of this Court's cases has ever adopted, or even discussed,

the United States' proposed formulation that punishment rules are ***30** substantive if they are "outcome-expanding." *Id.* To the contrary, the law has always been that punishment rules are substantive only if they *categorically* forbid the government from imposing a particular penalty because of an offender's status or offense. The same year as *Teague,* the Court explained in *Penry* that "the first exception set forth in *Teague* should be understood to cover … rules *prohibiting a certain category of punishment* for a class of defendants because of their status or offense." *Penry,* 492 U.S. at 330 (emphasis added). The Court has never deviated from *Penry*'s categorical formulation. *See, e.g., Beard,* 542 U.S. at 416 (*Teague*'s bar "does not apply to … rules prohibiting a certain category of punishment") (quoting *Penry,* 492 U.S. at 330); *O'Dell,* 521 U.S. at 157 (*Teague*'s "first, limited exception is for new rules … 'prohibiting a certain category of punishment for a class of defendants because of their status or offense' ") (quoting *Penry,* 492 U.S. at 330).

Penry could not have made the categorical nature of *Teague*'s first exception any clearer. It explained that categorical punishment rules are retroactive because "the Constitution itself deprives the State of the power to impose a certain penalty." 492 U.S. at 330. It analogized such rules to rules "placing certain conduct beyond the State's power to punish at all." *Id.* And it drew its holding from Justice Harlan's formulation finding retroactive rules that place " 'certain kinds of primary, private conduct beyond the power of the criminal lawmaking authority to proscribe.' " *Teague,* 489 U.S. at 307 (quoting *Mackey,* 401 U.S. at 692).

The United States suggests that this Court's *Summerlin* decision supports its "outcome-expanding" ***31** formulation, *see* US Br. 13, 15, but *Summerlin* does not. To the contrary, *Summerlin* hews to *Penry*'s original formulation that a substantive rule is one that "prohibit[s] the imposition of … punishment on a particular class of persons," 542 U.S. at 353 (quoting *Saffle,* 494 U.S. at 495). In the same vein, *Summerlin* explains that a substantive rule applies retroactively because otherwise a defendant would have "face[d] a punishment *that the law cannot impose on him." Summerlin,* 542 U.S. at 352 (citation omitted) (emphasis added). Nowhere does *Summerlin* hint that a substantive rule *also* includes rules expanding an offender's "range of outcomes." When *Summerlin* speaks of "ranges," it refers not to a range of *outcomes,* but instead to rules that alter the "range of *conduct*" the law punishes *Id.* at 353 (emphasis added). That phrase, however, refers to the entirely different situation where a decision recognizes as lawful previously unlawful conduct. *See id.* (citing *Bousley,* 523 U.S. at 620-21). Such a rule, unlike the United States' newly-minted "outcome-expanding" rule, falls easily within *Teague*'s exception for rules that decriminalize primary conduct.

Thus, when *Teague*'s first exception - as often described by this Court - is properly stated, *Miller* falls squarely on the procedural side of the line. Unlike a substantive rule that "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense," *Penry,* 492 U.S. at 330, *Miller* "does not categorically bar a penalty for a class of offenders or type of crime." *Miller,* 132 S. Ct. at 2471. A state court could constitutionally impose a life-without-parole sentence upon Montgomery before *Miller;* it can constitutionally impose a life-without-parole sentence ***32** upon Montgomery after *Miller.* Unlike a rule that affords a "substantive constitutional guarantee[ ] … regardless of the procedures followed," *Penry,* 492 U.S. at 329, Miller "mandates *only* that the sentencer follow a certain *process*" before imposing a life-without-parole sentence that the decision concededly "do[es] not foreclose." *Miller,* 132 S. Ct. at 2471, 2469 (emphasis added).

The upshot is that the United States is asking the Court, not to apply *Teague*' s first exception as it has long been understood, but to expand it. The United States admits that no *Teague* case recognizes a distinct category of "outcome-expanding" rules. *See* Br. at 16 (admitting *Miller* "differs" from previous *Teague* cases because they "narrowed, rather than expanded" permissible outcomes); *id.* (admitting "the Court has not considered" retroactivity of rules that "expanded possible sentencing outcomes"). The United States says only that *Teague* jurisprudence has "not precluded" recognizing this new substantive category, and that doing so would accord with "the expansion over time of what constitutes a substantive rule." *Id.* The Court should reject the United States' invitation to extend *Teague.*

2. Neither precedent nor policy supports the United States' proposed extension of the first* Teague *exception.

As an initial matter, the United States is wrong in contending (Br. 14) that this Court has regularly expanded the scope of *Teague*'s first exception. The parameters of that exception have been settled since *Teague* was decided: substantive rules either categorically de-criminalize primary conduct or ***33** categorically preclude a particular punishment. *See Summerlin,* 542 U.S. at 351-52; *Penry,* 492 U.S. at 329-330. The United States relies on *Penry* (Br. 14), but *Penry* does not "expand" *Teague.* To the contrary, *Penry* - decided the same year as *Teague* - merely applies to punishment what *Teague* said about conduct. *Penry* explained that a rule categorically precluding a punishment is substantive for the same reason as a rule forbidding punishment of primary conduct: "In both cases, the Constitution itself deprives the State of the power to impose a certain penalty." *Penry,* 492 U.S. at 330.

Nor did *Bousely* "expand" *Teague.* Br. 14 (citing *Bousely,* 523 U.S. at 620-21). *Bousely* merely held that *Teague*'s first exception applies to a decision that decriminalizes conduct by narrowing a federal criminal statute. *See, e.g., Summerlin,* 542 U.S. at 351-52 (explaining *Bousley* "narrowed the scope of a criminal statute by interpreting its terms"). The United States is thus wrong that *Penry,* or any other decision, has ever "expanded" what *Teague* recognized as a substantive rule. The Court should hesitate before expanding *Teague* for the first time in a quarter-century to recognize a new category of purported substantive rules.

On a more basic level, the United States' proposed extension of *Teague*'s exception contradicts *Teague* itself. The United States essentially argues as follows: If a new rule is substantive because it *precludes* a punishment, then so is a new rule that "*expands* the range of permissible sentencing outcomes." Br. 15 (emphasis added). That argument ignores, however, the profound difference between those two kinds of ***34** rules and the reason why *Teague* recognized its narrow substantive exception to begin with.

a. *Teague* announced a sweeping principle that new rules of criminal procedure do not apply retroactively on collateral review. It relied on two propositions from Justice Harlan's *Mackey* opinion. First, non-retroactivity protects society's interest in the finality of convictions. *See Mackey,* 401 U.S. at 690 ("It is … a matter of fundamental import that there be a visible end to the litigable aspect of the criminal process."). As Justice Harlan memorably wrote: "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his incarceration shall be subject to fresh litigation on issues already resolved." *Id.* at 691. Second, non-retroactivity avoids the "adverse collateral consequences" of upsetting final convictions. *Teague,* 489 U.S. at 302-10; *Mackey,* 401 U.S. at 693. Those adverse consequences are the disruptions to the criminal justice system caused by having to re-litigate facts "buried in the remote past." *Mackey,* 401 U.S. at 691.

At the same time, *Teague* also adopted Justice Harlan's exception allowing retroactive application of new substantive rules. *Teague,* 489 U.S. at 307. As Harlan explained, new rules prohibiting the government from "utiliz[ing] certain *techniques or processes* in enforcing concededly valid societal proscriptions on individual behavior" are not to be applied retroactively. *Mackey,* 401 U.S. at 692 (emphasis added). By contrast, rules that place "certain kinds of primary, private individual conduct beyond the ***35** power of criminal law-making authority to proscribe must … be placed on a different footing." *Id.* Unlike procedural rules, these substantive rules apply retroactively because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Id.* at 693. Moreover, retroactive application of such rules "entails none of the adverse collateral consequences of retrial" that justified the general non-retroactivity principle. *Id.*

In *Penry,* the Court confirmed that this reasoning applies to new rules that categorically ban particular punishments. 492 U.S. at 330 (explaining *Teague*'s exception "should cover … rules prohibiting a certain category of punishment"). In contrast to a procedural rule, *Penry* explained that a rule banning a particular punishment is a "substantive categorical guarantee [ ]" that applies "regardless of the procedures followed." *Id.* at 329. *Penry* also emphasized that, regarding such invalid punishments, society lacks an " 'interest in permitting the criminal process to rest at a point where it ought properly never to repose.' " *Id.* at 330 (quoting *Mackey,* 401 U.S. at 693).

b. This reasoning does not apply to a rule like the one recognized in *Miller,* where the State is required only to adopt a new procedure before imposing a concededly valid punishment. It is immaterial that this new procedure would "alter[ ] the range of permissible outcomes." US Br. 13.

In such a case, the State's finality interests should not yield because the punishment imposed remains constitutional. In Montgomery's case, for example, the "criminal process" is *not* "rest[ing] at a point where it ***36** ought properly never to repose." *Mackey,* 401 U.S. at 693. For instance, it has not sentenced a juvenile to death, as in *Roper.* The criminal process *may* rest with Montgomery serving a life-without-parole sentence, so long as certain procedures are followed. *See Miller,* 132 S. Ct. at 2471 ("Our decision … mandates only that a sentencer follow a certain process … before imposing a [life-without-parole sentence]"). The same, of course, cannot be said of a defendant like Terrance Graham, the beneficiary of the categorical prohibition on life-without-parole sentences for non-homicide crimes adopted in *Graham.*

Furthermore, applying *Miller* retroactively creates precisely the same "adverse collateral consequences" that *Teague* sought to avoid. When, for example, a state criminal law is invalidated for violating the First Amendment, prisoners convicted under the invalid statute cannot be retried. "[F]acts buried in the remote past" will not have to be unearthed. *Mackey,* 401 U.S. at 691. By contrast, the *Miller* rule will require a new hearing at which "a judge or jury must have the opportunity to consider mitigating circumstances." 132 S. Ct. at 2475. To determine whether those mitigating circumstances justify a reduced sentence, the court will also need to revisit *aggravating* circumstances, including the facts of the crime and the impact on the victims. And so - in contrast to new *categorical* prohibitions - retroactive application of *Miller* will force the criminal justice system to endure hearings burdened by the "[p]assage of time, erosion of memory, and dispersion of witnesses." *Engle v. Isaac,* 456 U.S. 107, 128 (1982).

***37** c. At bottom, therefore, the rule announced in *Miller* is no different for *Teague* purposes than new rules requiring that capital juries be given a full opportunity to consider various forms of mitigating evidence. *See supra* II.B.2 (discussing new rules in *O'Dell, Beard, Lambrix,* and *Sawyer*). In each of those cases, the Court held that the new rule did not apply retroactively - even though, if applied to already final cases, it would have afforded prisoners "the opportunity to obtain different and more favorable outcomes." US Br. 19.

Take, for instance, a defendant whose death sentence became final prior to *Simmons,* where (contrary to *Simmons*) his prosecutor urged the defendant's future dangerousness without the jury being informed he would never leave prison. *See Simmons,* 512 U.S. at 171 (plurality op.) (where capital defendant's future dangerousness was at issue, "he was entitled to inform the jury of his parole ineligibility"). In holding *Simmons* non-retroactive under *Teague,* this Court never suggested that *Simmons* was anything other than a "procedural" rule - even though it is plausible that some juries would have imposed a lesser sentence had they been informed of the defendant's parole ineligibility. *See O'Dell,* 521 U.S. at 167 (concluding *Simmons* did not apply retroactively under *Teague*); *id.* at 172-73 (Stevens, J., dissenting) (urging that *Simmons* should apply retroactively because it results in a significant "decline in the number of death sentences" and enhances "the accuracy and fairness of a capital sentencing hearing").

The only difference between those cases and this one is that the lesser sentence a person might receive ***38** under *Miller* had not been on the books prior to *Miller.* The United States never explains, however, why that difference makes the *Miller* rule equivalent to a categorical prohibition for purposes of the first *Teague* exception. In the end, if a rule affording a defendant a better opportunity to convince a judge or jury to impose life instead of death is procedural, so too is a rule affording the defendant the opportunity to convince a judge or jury to impose life-with-parole instead of life-without-parole. And that is no less true merely because life-with-parole had not previously been a sentencing option for the particular crime.

On this point, the United States emphasizes that the federal government and some states (like Louisiana) have amended their sentencing laws in response to *Miller.* Br. 18; *see also* Pet. Br. 18 n.9 (noting amendments). This does not prove *Miller* is substantive, however. Many new rules that are nonretroactive under *Teague* have triggered enactment of new

sentencing laws. For instance, following *Apprendi* the New Jersey Legislature deleted its unconstitutional aggravating provision and enacted a new crime of bias intimidation. See *Apprendi,* 530 U.S. at 468-69 (discussing N.J. Stat. Ann. § 2C:44-3(e) (West. Supp. 1999-2000)); 2001 N.J. Sess. Law. Serv. Ch. 443 (West) (deleting § 2C:44-3(e) and enacting N.J. Stat. Ann. § 2C:16-1). Following *Blakely v. Washington,* 542 U.S. 296 (2004), the Washington Legislature "responded … by amending the [Sentencing Reform Act]" to require juries to find aggravating factors. *State v. Kinneman,* 119 P.3d 350, 353 n.8 (Wash. 2005). Following *Ring,* the Arizona Governor "called a special legislative session" to enact "several revisions intended to conform Arizona law to [this Court's] … mandate." ***39** *State v. Ring,* 65 P.3d 915,926 (Ariz. 2003). Just as those states did, Louisiana revised its sentencing laws to conform to *Miller.* [7] The fact that a new rule prompts alteration of sentencing laws simply begs the question of whether the underlying decision announcing that rule is substantive or procedural under *Teague.*

d. The United States also tries to dilute the first *Teague* exception by suggesting (Br. 21) it should apply when the "effects" of a new rule "on the fairness of a defendant's conviction or sentence are sufficiently profound to justify upsetting settled expectations." But none of this Court's decisions has ever suggested that the first *Teague* exception is an amorphous collection of whatever new rules are deemed to have "sufficiently profound" effects on a conviction or sentence. To the contrary, the Court has carefully limited the exception to conduct the State may not criminalize and punishment the State may not impose. Thus, the Court has explained that a punishment rule applies retroactively in order to prevent a defendant from "fac[ing] a punishment *that the law cannot impose on him."* *Summerlin,* 542 U.S. at 352 (emphasis added). In other words, *Teague* did not adopt a distinction between substantive and procedural rules that turns on the *degree* to which a new rule affects a sentence, but one that turns on whether a new rule categorically bars the government from imposing the sentence at all. *See, e.g., Penry,* 492 U.S. at 330 (explaining that, "if we ***40** held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons … regardless of the procedures followed, such a rule would fall under [*Teague*'s] first exception").

In the place of this straightforward test, the United States proposes an opaque inquiry requiring the Court to speculate whether a new rule's effects on a sentence are "sufficiently profound." Br. 21. The United States does not say which effects are "profound" enough to tip the scales from the procedural into the substantive realm - no doubt because such a thing cannot possibly be determined *ex ante.* There is no place in the *Teague* analysis for such guesswork. Under a straightforward application of *Teague*'s first exception, *Miller* is procedural. Given that *Miller* did not disturb the government's power to sentence a juvenile murderer to life-without-parole, it is impossible to maintain that a juvenile murderer now serving that sentence "faces a punishment that the law cannot impose on him." *Summerlin,* 542 U.S. at 352. Plainly he does not: both before and after *Miller,* the Eighth Amendment "do [es] not foreclose" a life-without-parole sentence. *Miller,* 132 S. Ct. at 2469. That is the end of the analysis under *Teague.*

e. Finally, the United States suggests that *Miller* is akin to a categorical prohibition because, as a supposed practical matter, "life without parole would be an 'uncommon' sentence." Br. 22 (quoting *Miller,* 132 S. Ct. at 2469). Again, however, the United States would distort the nature of the first *Teague* exception, which has never turned on the frequency with which a new rule might lead to different outcomes. In prior ***41** cases, the Court could have easily predicted that any number of new capital sentencing rules would lower the number of death sentences. *See, e.g., Simmons,* 512 U. S. at 171 (plurality op.) (Eighth Amendment requires capital defendant be allowed to inform jury he is ineligible for parole if prosecutor argues future dangerousness); *Mills,* 486 U.S. at 384 (Eighth Amendment forbids instructing jury to disregard non-unanimous mitigating factors); *Caldwell,* 472 U.S. at 328-29 (Eighth Amendment forbids suggesting a capital jury is not ultimately responsible for death sentence). In all of those cases, however, the Court recognized that the new rules would not apply retroactively to prisoners who had been sentenced to death without the new rule's benefit. *See O'Dell,* 521 U.S. at 153 (recognizing *Simmons* rule non-retroactive); *Beard,* 542 U.S. at 408 (recognizing *Mills* rule non-retroactive); *Sawyer,* 497 U.S. at 229 (recognizing *Caldwell* rule non-retroactive); *see also supra* II.B (discussing these cases). The same result should obtain here.

After *Miller,* life-without-parole sentences for juvenile murderers remain a valid punishment, but their frequency will be a function of how the considerations sketched out in *Miller* interact with concrete cases. *Miller,* 132 S. Ct. at 2468. It is not something that can be gauged prospectively, and *Miller* did not purport to do so. How "common" or "uncommon" life-without-parole sentences turn out to be will depend, in the final calculation, on how a judge or jury weighs "an offender's youth and attendant circumstances," *id.* at 2471, against the human life he has irrevocably taken.

***42 D. While *Miller* is not a watershed procedural rule, the Court should not reach the issue.**

Montgomery also claims *Miller* is a "watershed" rule under *Teague*'s second exception. Br. 28-30. The Court should not consider this issue - which Montgomery did not raise below (*see* JA 89-98) - because it is not fairly included within the questions on which the Court granted certiorari. *Cf.* Pet. for Cert, in No. 14-280 at i (asking "whether *Miller* adopts a new substantive rule that applies retroactively on collateral review"); *see e.g., Snyder v. Phelps,* 562 U.S. 443, 449 n.1 (2011) (declining to reach issue not asserted in petition, even though issue was discussed in lower courts). Whether *Miller* is a watershed procedural rule is distinct from whether it is a substantive *Teague* rule. *See Yee v. City of Escondido, Cal.,* 503 U.S. 519, 535-37 (1992) (generally considering issues "fairly included" within question presented, but not "related" or "complementary" issues); Sup. Ct. R. 14.1(a).

If the Court decides to reach this issue, Louisiana agrees with the United States that *Miller* did not announce a watershed rule. *See* US Br. 19 n.8. To satisfy the watershed exception the rule must both relate to the accuracy of the conviction and "alter our understanding of the 'bedrock procedural elements' essential to the fundamental fairness of a proceeding." *Sawyer v. Smith,* 497 U.S. 227, 242 (1990) (citing *Teague,* 489 U.S. at 311). This Court has never found a rule retroactive under the watershed exception and has identified only *Gideon v. Wainright,* 372 U.S. 335 (1963), as an example of such a rule. As the Court has explained, the paucity of watershed rules should be "no surprise" given that the exception applies "only to a ***43** small core" of procedures "implicit in the concept of ordered liberty." *Beard,* 542 U.S. at 417 (internal citations and quotations omitted). It is therefore "unlikely that many such components of basic due process have yet to emerge." *Id.*

Even assuming the watershed exception could ever apply to a rule that concerns only a sentencing procedure, the rule announced in *Miller* does not qualify as a watershed rule. As the United States observes, *Miller* does not work the "profound and sweeping change" on our justice system that *Gideon* produced and does not "fundamentally 'alter our understanding of the bedrock' procedures necessary for a fair trial." US Br. 19, n.8 (quoting *Whorton v. Bockting,* 549 U.S. 406, 418 (2007)); *see also* LaFave § 28.6(e) (observing that rules which are less sweeping than *Gideon* are not watershed rules even if they relate to the accuracy and fairness of the proceeding).

CONCLUSION

The judgment of the Louisiana Supreme Court should be affirmed.

Footnotes

1 *See* Joe Gyan, Jr., *High Court to Reconsider Juvenile Life Terms,* The Advocate, March 25, 2015, http://theadvocate.com/news/ 11929154 123/us supreme court to consider.

2 Because the jurisdictional issue may be resolved on this narrower ground, Louisiana agrees that the Court should not address "whether the Constitution compels retroactivity in state collateral review when an exception to *Teague* applies. US Br. 33. Resolving that issue should await a case where the Court's jurisdiction turns on it, unlike this one.

3 *See, e.g., Powell,* 559 U.S. at 57 (reliance on state constitution did not defeat jurisdiction to review *Miranda* issue where state court "treated state and federal law as interchangeable and interwoven, and "at no point expressly asserted that state law sources gave respondent] rights distinct from, or broader than, those delineated in *Miranda*); *Guzek,* 546 U.S. at 521 (finding jurisdiction where state evidentiary statute incorporated Eighth Amendment standards and therefore "rest ed] upon federal

law); *Ohio v. Reiner,* 532 U.S. 17, 20 (2001) (finding jurisdiction to review state court's interpretation of state immunity statute where outcome rested on whether witness had a valid Fifth Amendment privilege); *South Dakota v. Neville,* 459 U.S. 553, 556 67 n.5 (1983) (state court's interpretation of state constitution was not "independent of federal law because state provision was interpreted co extensively with Fifth Amendment); *Prouse,* 440 U.S. at 653 (reliance on state constitutional provision did not defeat jurisdiction because state court's holding "depended upon its] view of the reach of the Fourth and Fourteenth Amendments).

4 All citations to *Mackey* are to Justice Harlan's separate opinion.

5 Both parties, as well as the United States, agree that *Miller* is a new rule. *See* Pet. Br. 16 n.8; Resp. Br. in Opp. 10 11; US Br. 10 13; *see also Chaidez v. United States,* 133 S. Ct. 1103, 1107 (2013) (a new rule is one not " '*dictated* by precedent existing at the time the defendant's conviction became final) (quoting *Teague,* 489 U.S. at 301).

6 Prior to *Teague,* the Court adopted Justice Harlan's view that new criminal rules apply retroactively to cases still on *direct* review. *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987).

7 The "substantive and "procedural terminology arose because Justice Harlan referred to non retroactive rules as "procedural due process rules and retroactive rules as "substantive due process rules. *See Mackey,* 401 U.S. at 692 & nn. 6 7. The provenance of this terminology is relevant because " t]he meaning of 'substance and 'procedure in a particular context is 'largely determined by the purposes for which the dichotomy is drawn. *Jinks v. Richland County, S.C.,* 538 U.S. 456, 465 (2003) (citation omitted).

8 Montgomery also claims *Miller* is a "watershed rule under *Teague*'s second exception. Pet. Br. 28 30. The Court should not consider this issue because it is not fairly included within the questions on which the Court granted certiorari. *See infra* II.D. In any event, the claim lacks merit. *Id.; see also* US Br. 19 n.8.

9 *See also Beach v. State,* 348 P.3d 629, 640 (Mont. 2015) (plurality op.) (*Miller* only " 'dictated what process must take place before a life without parole sentence could be imposed) (quoting 7 W. Lafave, J. Israel, N. King, & O. Kerr, *Criminal Procedure* §28.6(e) (3rd ed. 2007, 2014 15 suppl.) ("LaFave)); *Ex parte Williams,* So.3d , 2015 WL 1388138, at *9 (Ala. 2015) (distinguishing "the mandatory … imposition of a life without parole] sentence from "the actual sentence of life without parole]); *In re Morgan,* 717 F.3d 1186, 1192 (11th Cir. 2013) (Pryor, J., concurring in denial of reh'g en banc) (*Miller* "did not prohibit any category of punishment for juveniles … but only the mandatory procedure by which a life without parole] punishment had been imposed); *Tate,* 130 So.3d at 837 (*Miller* "d id] not categorically bar a penalty but "simply altered the range of *permissible methods* for determining whether a juvenile could be sentenced to life without parole) (quotes omitted); *Craig,* 2013 WL 69128, at *2 (*Miller* "does not categorically bar all life without parole] sentences, … but] only those sentences made mandatory by a sentencing scheme).

10 Contrary to Montgomery's argument (Br. 17), *Alleyne v. United States,* 133 S. Ct. 2151 (2013), has no bearing on whether mandatory and discretionary life without parole schemes are substantively different under *Teague. Alleyne* addressed the entirely different issue of whether the Sixth Amendment requires a jury, rather than a judge, to find facts that increase a mandatory minimum sentence. *See Alleyne,* 133 S. Ct. at 2160 (applying rule of *Apprendi v. New Jersey,* 530 U.S. 466 (2000), to "facts increasing the mandatory minimum).

11 Eight state supreme courts have also correctly found *Miller* procedural under *Teague*: Alabama (*Williams,* 2015 WL1388138, at *8 9); Colorado (*People v. Tate,* P.3d , 2015 WL 3452609, at *10 11 (Colo. 2015)); Connecticut (*Casiano v. Comm r of Correction,* 115 A.3d 1031, 1040 41 (2015)); Louisiana (*Tate,* 130 So.3d at 836); Michigan (*Carp,* 852 N.W.2d at 823); Minnesota (*Chambers v. State,* 831 N.W.2d 311, 327 (Minn. 2013)); Montana (*Beach,* 348 P.3d at 639 40); and Pennsylvania (*Commonwealth v. Cunningham,* 81 A.3d 1 (Pa. 2013)). The Connecticut Supreme Court, however, found *Miller* to be a "watershed procedural rule. *Casiano,* 115 A.3d at 1040 41. By contrast, nine state supreme courts have incorrectly found *Miller* to be substantive under *Teague*: Illinois (*Illinois v. Davis,* 6 N.E.3d 709 (Ill. 2014)); Iowa (*State v. Ragland,* 836 N.W.2d 107 (Iowa 2013)); Massachusetts (*Diatchenko v. Dist. Att y for Suffolk Dist.,* 1 N.E.3d 270 (Mass. 2013)); Mississippi (*Jones v. State,* 122 So.3d 698 (Miss. 2013)); Nebraska (*State v. Mantich,* 842 N.W.2d 716 (Ne. 2014)); New Hampshire (*Petition of State,* 103 A.3d 227 (N.H. 2014), *petition for cert. filed sub nom. New Hampshire v. Soto,* U.S.L.W. (U.S. Nov. 26, 2014) (No. 14 639)); Texas (*Ex parte Maxwell,* 424 S.W.3d 66 (Tex. 2014)); South Carolina (*Aiken v. Byars,* 765 S.E.2d 572 (S.C. 2014)); Wyoming (*State v. Mares,* 335 P.3d 487 (Wyo. 2014)).

12 *See also, e.g., Eddings v. Oklahoma,* 455 U.S. 104, 116 (1982) (characterizing individualized capital sentencing as "the *manner* of the imposition of the ultimate penalty); *Sumner v. Shuman,* 483 U.S. 66, 83 (1987) (comparing " a] mandatory capital sentencing *procedure* with "a guided discretion sentencing *procedure*); *Roberts (Stanislaus) v. Louisiana,* 428 U.S. 325, 334 (1976) (explaining *Furman* requires that "standardless jury discretion be replaced by *procedures* to guide juries in the "imposition of death sentences) (citing *Furman v. Georgia,* 408 U.S. 238 (1972)) (emphases added).

13 In a footnote, Montgomery suggests that *Miller* should apply retroactively because the Court applied it in *Jackson v. Hobbs,* 132 S. Ct. 2455 (2015), a companion case on state collateral review. Br. 15 n.7. Montgomery is mistaken. *Teague* was not raised in *Jackson* and the Court therefore did not address *Miller*'s retroactivity. *See Caspari v. Bohlen,* 510 U.S. 383, 389 (1994) (federal courts "may … decline to apply *Teague* if the State does not raise it); US Br. 8 n.2 (noting that *Miller*'s retroactivity "was not before the Court in *Jackson*).

14 *See also Beach,* 348 P.3d at 640 (rejecting argument that *Miller* creates new "elements because "it does not make the finding of 'certain fact s] essential to a life without parole sentence) (citing *Alleyne,* 133 S. Ct. at 2155; *Summerlin,* 542 U.S. at 354); *Williams,* 2015 WL 1388138, at *9 ("*Miller* did not make a certain fact essential to the imposition of the sentence.); *Tate,* 130 So.3d at 837 (*Miller* "did not alter the elements necessary for a homicide conviction); *and see Carp,* 852 N.W.2d at 829 n.20 (suggesting in *dicta* that *Miller* did not add elements because of its "repeated statements that individualized sentencing hearings could occur because a '*judge* or jury) (quoting *Miller,* 132 S. Ct. at 2460)).

15 Nor did this Court apply *Woodson* retroactively in *Sumner v. Shuman,* 483 U.S. 66, when it invalidated a "mandatory capital sentencing procedure for inmates who commit murder while serving a life sentence. *Id.* at 83, 85. The prisoner's murder conviction in *Sumner* became final on direct review nearly two years after *Woodson* was decided. *See Carp,* 852 N.W.2d at 828 (concluding *Woodson* was not applied retroactively in *Sumner*). In any event, *Sumner* predated *Teague* and so could not stand for the proposition that *Woodson* announced a substantive rule. *Id.* at 828 n. 18.

16 Montgomery makes a more abbreviated form of the same argument. *See* Br. 16 (arguing *Miller* "alters the range of available sentencing options). Montgomery's version, however, depends on his assertion that *Miller* prohibits "a 'category of punishment for juvenile murderers. *Id.* As already explained, Montgomery is plainly wrong. *See supra* II.A.3.

17 *See Tate,* 130 So.3d at 841 44 (finding that Louisiana's "new procedure for determining whether juvenile life sentences will be served with or without parole applies "prospectively only); *see also* La. Code Crim. Proc. art. 878.1(A); La. Rev. Stat. Ann. § 15:574.4(E) (added by 2013 La. Acts 239, § 2).

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IN THE SUPREME COURT OF THE UNITED STATES

- x

HENRY MONTGOMERY, :

Petitioner : No. 14-280

v. :

LOUISIANA. :

- x

Washington, D.C.

Tuesday, October 13, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

RICHARD D. BERNSTEIN, ESQ., Washington, D.C.; on behalf of Court-appointed amicus curiae.

MARK D. PLAISANCE, ESQ., Thibodaux, La.; on behalf of Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of United States, as amicus curiae, supporting Petitioner.

S. KYLE DUNCAN, ESQ., Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 14-280, Montgomery v. Louisiana.

Mr. Bernstein.

ORAL ARGUMENT OF RICHARD D. BERNSTEIN

ON BEHALF OF THE COURT-APPOINTED AMICUS CURIAE

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

The issue is whether to decide the question of Miller's retroactivity in this case or in a Federal habeas case such as Johnson v. Manis, No. 15-1 on this Court's docket.

In today's case there is no jurisdiction over that question because the point of Section 1257 is to enforce the Supremacy Clause. And the Supremacy Clause States that when, quote, "the laws of the United States," unquote, apply, quote, "the judges" -- and this is -- these are the key words -- "in every State shall be bound thereby."

There is no such thing as supreme Federal law that depends on whether a particular State voluntarily makes Federal precedence binding. When a State does that, when a State voluntarily adopts

nonbinding Federal precedence, that creates no right under Federal law, which is what 1257 requires, and Michigan v. Long does not apply.

JUSTICE GINSBURG: So how would you describe the adequate and independent State ground on which the -- this decision rested?

MR. BERNSTEIN: I would say that the lack of a binding Federal law question is an antecedent requirement, to borrow the terminology of the S.G.'s brief, before you get to the adequate and independent State ground analysis.

JUSTICE SOTOMAYOR: So why don't we have jurisdiction to answer that question?

MR. BERNSTEIN: You certainly have jurisdiction to answer the question whether Teague is constitutionally required in State collateral review courts.

The second part of our brief said why it is not constitutionally required in State collateral review courts, and that's basically this Court's precedence from Danforth back to the beginning in Desist and in Kaufman, have said that the Teague -- what have become the Teague exceptions are matters of equitable discretion and not matters of the Constitution, and the Federal habeas statute on its face only applies in

Federal court.

So the Federal habeas court can grant relief if relief is warranted under the Teague exception.

JUSTICE KENNEDY: If a State says, we acknowledge that we are holding a prisoner in contravention of Federal law but we choose to do nothing about it, then the answer is Federal habeas corpus; there is not a second answer that the State can be required under the Supremacy Clause, under its own procedures, to enforce the Federal law?

And if -- if I'm -- and if I were to take -- to argue that second position, I'm not quite sure what case I would have to support me. It wouldn't --

MR. BERNSTEIN: Well, I think that Your Honor's opinion for the Court in Martinez v. Ryan --

JUSTICE KENNEDY: Yes.

MR. BERNSTEIN: -- 132 Supreme Court at 1319 to 1320 suggested that there are advantages to citing the Federal habeas right in the Federal habeas statute rather than what the Court called a freestanding constitutional claim. A major advantage here is if you say that the State courts are bound by the Teague exceptions by the Constitution, then when it goes to Federal habeas, there will be very deferential AEDPA review.

If you say that the redress question, as the rationale of Danforth indicated, in State court is a matter of State law, then when the issue goes to Federal habeas, AEDPA will not apply because the State court will not have decided the Federal issue. And that is a -- it is a major difference. You would actually be weakening the Federal habeas statute to recognize jurisdiction in this case.

And this Court will benefit from having de novo percolation in the lower Federal courts, the lower habeas courts, all of which will be out the window if there's jurisdiction in this case, because the lower Federal habeas courts will only be able, and the courts reviewing them on appeal, to apply the highly deferential AEDPA review.

JUSTICE KENNEDY: In effect, are you -- we saying that the Supremacy Clause binds the States only in direct criminal proceedings?

MR. BERNSTEIN: No.

JUSTICE KENNEDY: I mean, is that another way of phrasing your argument?

MR. BERNSTEIN: It would be that the Supremacy Clause only binds the States in direct proceedings and in collateral proceedings where it's an old rule, because that's the equivalent of a direct

proceeding. But if you are talking about the retroactivity of a new rule, then the -- that's where the Teague -- the two Teague exceptions apply. They apply to new rules. They apply to collateral review. And those are based in statutory equitable discretion rather than the Constitution. But the Court has already held that both direct review and the application of old rules present Federal questions.

JUSTICE SOTOMAYOR: How do you differentiate this case from Standard Oil?

MR. BERNSTEIN: Because in Standard Oil, the issue was the underlying status of the Federal government arm, and the Court said that question is controlled by Federal law. Standard Oil is like Miller itself, where the issue was: What does the Eighth Amendment require? That's a Federal constitutional issue it applied.

In Standard Oil, as a combination of statute regulations and Federal common law, Federal law controlled the question. Here the statute doesn't apply in State court, as Danforth and numerous other cases have held, like the Federal Rules of Evidence don't apply in State court, even though many courts follow similar provisions and certainly follow Federal precedence in interpreting those similar rules.

JUSTICE SOTOMAYOR: But we did say that that State could define the exemption any which way it wanted.

MR. BERNSTEIN: Correct.

JUSTICE SOTOMAYOR: And so it could -- it's almost identical here; we would announce what the Federal law is, send it back. The State has already said it's going to follow Teague, but I guess it might or might not be free to change its mind about doing that.

MR. BERNSTEIN: I think the difference and what makes this case special is that this Court has held since Murdock v. City of Memphis, almost 150 years ago, 87 U.S. at 326 to 327, that the 1267 jurisdiction is question by question. It is not like 1331, case by case. It is question by question.

And I do not believe the Court has jurisdiction to skip over the question of whether Federal law applies and then answer the hypothetical if Federal law applied, what would it be. I think the question of whether Federal law applies is a jurisdiction question.

JUSTICE BREYER: How -- how -- suppose -- let's think of the first Teague exception. Suppose -- substantive matters. Suppose that many States had

sedition laws that make certain conduct unlawful so there are a thousand people in prison. This Court in a new rule holds you cannot criminalize that behavior. All right. What is the law that would make that retroactive to people in prison? It sounds to me that it isn't like some kind of statutory discretion. Rather, there are human beings who are in prison, who are there without having violated any valid law, because it was always protected by the First Amendment.

And if that's right, then it's the Constitution, the Due Process Clause, that says they are being held -- even though they committed the crime 22 years ago, they are now being held in confinement without due process of law because you cannot criminalize their behavior.

MR. BERNSTEIN: Well --

JUSTICE BREYER: Do you see where I'm going?

MR. BERNSTEIN: Yes.

JUSTICE BREYER: That being so, it's a Federal Constitution rule, the exceptions of Teague, Teague drops out of the case. The only question is whether they satisfy the two exceptions.

MR. BERNSTEIN: Well, in your hypothetical, respectfully, I don't think that would be a new rule. It would be an old rule --

JUSTICE BREYER: I've made it a new rule.
MR. BERNSTEIN: If it were --
JUSTICE BREYER: For purposes of my hypothetical, I'm making it a new rule.
MR. BERNSTEIN: If it were a genuinely new rule --
JUSTICE BREYER: Yes.
MR. BERNSTEIN: -- then under Danforth and going all the way back, the -- Justice Harlan's opinion in Mackey said, we're not creating the substantive exception because the Constitution requires that --
JUSTICE BREYER: Danforth was the case saying that the States could be more generous. It wasn't a case -- this is a case that -- the opposite of being generous: Can they be more stingy? And I cannot find anything in -- in Harlan -- maybe I'll read it again, but I can't find anything there, nor can I find anything in Danforth that answers the question.
So I thought it is a new question. Hence, that question I posed to you, because I want to get your response. I don't think you can answer it by means of precedent. I think you have to try to figure it out without the help of precedent.
MR. BERNSTEIN: Well, if it is a new rule, the Court has held -- and sorry to cite a precedent --

JUSTICE BREYER: That's all right.

(Laughter.)

MR. BERNSTEIN: Linkletter has held that retroactivity on collateral review is not constitutional. That aspect --

JUSTICE BREYER: That's true. But then we have Teague, and Teague is saying we don't like Linkletter -- and -- and --

MR. BERNSTEIN: But Teague said, we don't like Linkletter.

JUSTICE BREYER: All right. But you're saying that we have -- then maybe that's wrong.

MR. BERNSTEIN: Because --

JUSTICE BREYER: I mean, why doesn't it violate the Constitution to hold a person in prison for 20 years for conduct which the Constitution forbids making criminal?

MR. BERNSTEIN: Well, it does violate the Constitution.

JUSTICE SCALIA: Well, it wasn't criminal at the time. I mean, it wasn't prohibited by the Constitution at the time he was convicted, right?

MR. BERNSTEIN: Fair enough.

JUSTICE BREYER: That would be the reason.

MR. BERNSTEIN: Fair enough. But the -- the

Constitution, according to the cases, is satisfied by the Federal habeas remedy. I think this is where Schweiker v. --

JUSTICE BREYER: Is there anything else you can say? Because I can make -- you know, I can say, which witch is being a witch? There were some people in Salem who were imprisoned for being a witch. And lo and behold in 1820, it was held by this Court that that violated the Constitution.

Now, you see, I just make a more outrageous example of the same thing.

MR. BERNSTEIN: Well --

JUSTICE BREYER: And -- and what I want you to say, okay, I got your point. It didn't violate the Constitution at the time. I've also got the point you have some authority.

Anything else?

MR. BERNSTEIN: This Court has been reluctant, even when there is a violation of the Due Process Clause, to create a judicial remedy, an implied judicial remedy on top of the Federal statutory remedy. That's Schweiker v. Chilicky, cited in our briefs. And I think you should be especially reluctant --

JUSTICE KAGAN: But that's -- that's not what is happening here, Mr. Bernstein -- I mean, if you

assume the premise of Justice Breyer's question, which is that there is a Constitutional violation in keeping somebody in prison for some conduct that can't be criminalized.

The State has set up a collateral review mechanism. We're not asking it to set up a new mechanism that it hasn't had before. It has a collateral review mechanism, and the only question is whether it's going to comply with Federal constitutional law in that collateral review mechanism.

MR. BERNSTEIN: And the other question is whether that issue of retroactivity is itself a Federal constitutional issue. If it is, obviously there's jurisdiction. If it is not, I would submit there is not jurisdiction, and that the proper remedy is Federal habeas.

If I may reserve the remainder of my time. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Plaisance.

ORAL ARGUMENT OF MARK D. PLAISANCE

ON BEHALF OF THE PETITIONER

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

Miller v. Alabama established a new

substantive rule prohibiting mandatory life without parole for juveniles, which should be applied retroactively.

This Court has jurisdiction to hear Henry Montgomery's claim because the Louisiana Supreme Court relied exclusively on Federal jurisprudence.

In Miller, this Court held that mandatory life in prison was unconstitutional. It also held that life in prison would be an uncommon, rare sentence, even today.

JUSTICE GINSBURG: Isn't it just like a State saying: We have a Fourth Amendment, and the Federal Constitution has a Fourth Amendment; we are going to apply our own Constitution, but in applying it, we will follow the Federal precedent?

I think we would say, in that case, the case has been decided on the State constitutional ground, even though the State court, in interpreting that ground, is looking to Federal decisions.

MR. PLAISANCE: In this case, Your Honor, the Louisiana Supreme Court did not state that it was exercising any independent grounds at all. Under Michigan v. Long --

JUSTICE SCALIA: I thought that the -- the case it cited said that.

MR. PLAISANCE: Well --

JUSTICE SCALIA: I thought it cited an earlier Louisiana Supreme Court case which made it very clear that it was following the Federal rule as a matter of discretion and not because -- not because it had to, and it could in a later opinion decide not to follow Federal law.

MR. PLAISANCE: It is my interpretation of that earlier case that the Louisiana Supreme Court said, we have a choice, and they made the choice to apply Teague. In fact, they said in that opinion, we are dictated by the Teague analysis. And that's what was done in this case.

Under Michigan v. --

JUSTICE ALITO: Did they not say in Taylor that they were not bound to follow Teague? Didn't they say, we're going to follow Teague but we -- we want to make it clear we're not bound to do that?

MR. PLAISANCE: They did say that.

JUSTICE ALITO: They've never -- they've never retracted that, have they?

MR. PLAISANCE: Correct, but the choice itself is not necessarily a matter of State law. While the Supreme Court had the authority to make that decision, it said, we believe -- by choosing Teague, we

believe that is the better law, and therefore, we will follow the Federal guidelines from Teague, the Federal jurisprudence, in doing so.

And I believe that under Michigan v. Long, unless they state a clear and independent ground, this Court can conclusively presume that they applied Federal law as they believed this Court would apply --

JUSTICE SCALIA: Well, I thought -- I thought it's unless they clearly state otherwise, we will assume that they're applying Federal law. And here they did clearly state otherwise. They said, we don't have to follow Federal law, but we're going to model our State law on Federal law. It seems to me that satisfies the -- the exception requirement of -- of Michigan.

MR. PLAISANCE: It is my opinion that Michigan v. Long indicates the reverse, Your Honor, that the State must say, we are following State law in making this decision. We're applying State law rather than Federal law.

JUSTICE SCALIA: Well, they did say that here. They said that. This is a matter of State law; we don't have to follow Teague, but we choose to as a matter of State law. I thought that's what they said.

MR. PLAISANCE: And I believe that that's sufficient to indicate to this Court that it is applying

Federal law; it is not applying State law.

JUSTICE KAGAN: But Mr. Plaisance, I think what people are saying to you is that this is different from your standard Michigan v. law question -- Long question. It's a different question. It's a State that says, we're not bound to follow Teague, we know we can do something different, but we want to follow Teague. That's what we want to do.

And then in -- in all its particulars. All right? And then the question is: If the State commits to following Teague, it's not -- it doesn't think anybody else has committed it. It self-commits to following Teague and to following Federal law. Then what happens? Is there enough of a Federal question to decide this case?

Now, that's not a Michigan v. Long question. It's more like a Merrell Dow question or something like that, where Federal law is -- the State has chosen it, but it's just part and parcel of the claim, because the State is so committed to following Federal law in all its particulars.

MR. PLAISANCE: I agree with Your Honor. And even in Danforth, this Court said that the question of retroactivity is a pure question of Federal law.

CHIEF JUSTICE ROBERTS: But what's --

MR. PLAISANCE: That --

CHIEF JUSTICE ROBERTS: I'm sorry. Why don't you finish?

MR. PLAISANCE: That's the answer to -- to your -- to your explanation or hypothetical, that you -- you said if the State decided that they were choosing Federal law, then what -- what's the next step? And in the next step the question is retroactivity, which both the majority and the dissent in Danforth said the question of retroactivity is a pure question of Federal law.

CHIEF JUSTICE ROBERTS: Federal statutory law, right? I thought that was the point of Danforth, that the reason the States can go beyond what the Federal interpretation is is because we're talking about the Federal habeas statute. Right?

MR. PLAISANCE: That's correct, Your Honor, but even in Yates, this Court said that on State habeas, if the State considers the merits of the Federal claim. And the merits of this claim are: Is Mr. Montgomery serving an unconstitutional sentence? Is Miller retroactive to address the fact that he's serving an unconstitutional sentence?

JUSTICE GINSBURG: How do you deal with Mr. Bernstein's point that your client would be worse

off if -- if you are correct? That is, if the question comes up on Federal habeas, then the Federal court decide -- decides it without any AEDPA problem. But if the State court goes first, then the Federal review is truncated.

MR. PLAISANCE: That would be my understanding, Your Honor, that while Mr. -- while Henry -- while jurisdiction in this Court does not depend on what has occurred so far, it depends upon what this Court does decide. But again, whether he can go to Federal court or this Court doesn't affect this jurisdiction that this Court, I believe, has today. And the question is: If --

JUSTICE GINSBURG: But in -- in -- how do you answer the argument: All right, suppose you're right, but your victory is going to leave your client in a worse position because when he gets to the Federal court, he will be saddled with AEDPA?

MR. PLAISANCE: Well, not if this Court rules it has jurisdiction and makes Miller retroactive. Then obviously, at that point, he would not be going to Federal court.

And the question is: Is Mr. Montgomery being held unconstitutionally? This Court in Miller said that a mandatory life-in-prison sentence is

unconstitutional because it fails to address the fact of the matter that this Court believed kids are different.

JUSTICE SCALIA: Mr. Plaisance, on the jurisdictional point, let me see if I understand what you're arguing. A lot of State rules of procedure are modeled after Federal Rules of Procedure, and a lot of State courts simply follow the Federal Rules. But they follow it as a matter of choice and not because they think they're bound by the Federal rules.

So let's say that there is a -- a disagreement in Federal court about what Federal Rule of Evidence 403 means. The State court says, well, you know, we're going to follow the -- the Federal rule, and we think that the right course as between these two divergent Federal courts of appeals is the Second Circuit. So we're going to follow the Second Circuit's interpretation of Federal Rule 403. What -- would we have jurisdiction to -- to review that decision as -- as a decision on a question of Federal law?

MR. PLAISANCE: If it was clear to this Court that the State court made a conscious choice and sent enough of a signal to this Court that it was adopting Federal law to use as State law. But in this case, there is no indication that the State of -- Supreme Court of Louisiana was making that decision.

They said that we are -- our analysis is dictated by Teague, and in doing so, they found that Mr. -- they would not apply Miller retroactively. That's the real issue of this case.

JUSTICE ALITO: Suppose we hold that we can review the -- the -- we have jurisdiction because the State court said it was going to follow Teague. And then we go on and we say that under Teague, Miller can be applied on collateral review. And then the case goes back to the Louisiana Supreme Court, and they say, well, we said previously in Taylor that we were going to follow Teague, but that was based on our understanding of Teague at that time. But now that we see what it's been interpreted to mean by the U.S. Supreme Court, we're not going to follow Teague. Then what would happen?

MR. PLAISANCE: I think Louisiana would be bound to follow this Court's ruling as you set forth. It's --

JUSTICE ALITO: It would be? Why? Because it said that we would voluntarily follow it in Taylor? That bound them?

MR. PLAISANCE: I think they made the conscious choice to follow this Court's laws, this Court's jurisprudence. In doing so, it must follow this

Court's jurisprudence, as I've said before.

JUSTICE SCALIA: They changed their mind. They have now chosen the course not to follow our jurisprudence. What forces them to stay where they were? It's a matter of State law. They've decided, we're going to change State law.

MR. PLAISANCE: But they didn't do that in this case, Your Honor. They did not --

JUSTICE SCALIA: Well, not yet, but if we -- if we agree with you and then we send it back and they look at it and they say, oh, if that's what Teague means, we're not going to follow Teague, what stops them from doing that? And doesn't that make us look foolish?

MR. PLAISANCE: No, it doesn't, Your Honor.

JUSTICE SCALIA: That we render decisions that can be overruled by somebody else?

MR. PLAISANCE: If a State considers the merits of a Federal claim, it must grant the relief the Federal court --

JUSTICE SOTOMAYOR: You're not asking --

JUSTICE KENNEDY: But the question is: What's a Federal claim?

MR. PLAISANCE: The Federal claim --

JUSTICE KENNEDY: Why didn't you cite Standard Oil v. Johnson in your response to the

questions from Justice Scalia and Justice Alito?

MR. PLAISANCE: I believe my friend the Solicitor General --

JUSTICE KENNEDY: Do I have --

MR. PLAISANCE: -- perhaps --

JUSTICE KENNEDY: -- the name of the case right? Yes, Standard Oil v. Johnson.

MR. PLAISANCE: That was a case cited by the Solicitor General. I believe my friend from the Solicitor General's office can probably answer that question a little bit better.

The point I'd like to make --

JUSTICE SOTOMAYOR: Are you asking us to decide the question left -- left open in Danforth?

Danforth said that it was a minimum -- the -- there could be a constitutional minimum, but it wasn't answering that question.

Are you asking us to answer that question?

MR. PLAISANCE: I'm saying, Your Honor, I don't believe you need to get to that question because --

JUSTICE SOTOMAYOR: But let's assume we -- all right.

MR. PLAISANCE: Under Michigan v. Long, this Court has jurisdiction.

I'll reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. PLAISANCE: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING PETITIONER

MR. DREEBEN: Thank you, Mr. Chief Justice, and may it please the Court:

This Court does have jurisdiction to decide the question of Miller's retroactivity, because Louisiana has voluntarily incorporated into its law a wholly Federal standard.

And in this Court's decisions in Standard Oil, Merrell Dow, Three Affiliated Tribes, and most recently, Ohio v. Reiner, the Court has recognized that when a State chooses to adopt Federal law to guide its decisions and binds itself to Federal law, there is a Federal question.

CHIEF JUSTICE ROBERTS: Do you think they can change --

MR. DREEBEN: The United States --

CHIEF JUSTICE ROBERTS: They can change their mind, right? You said "voluntarily chose to follow it."

MR. DREEBEN: That's right.

CHIEF JUSTICE ROBERTS: And they can voluntarily choose they're not going to follow it anymore.

MR. DREEBEN: That's right.

And the same is true in any Michigan v. Long case. What Michigan v. Long said is that this Court has jurisdiction under Section 1257 to resolve State court resolutions of Federal law, and it will presume that a State constitutional decision of a mirror image, say, of the Fourth Amendment, will be binding, but recognized that the only circumstance in which the Court will not treat Federal law as governing both questions is when the State makes clear that it would reach the same result under State constitutional law as it did under Federal law.

It did not preclude the option of the State going back and reaching a different decision once enlightened by this Court as to the content of Federal law.

Standard Oil is completely clear on this. It says the State chose to use Federal law to determine whether a Federal post exchange was a Federal instrumentality. And we're going to correct its understanding of Federal law.

But on remand, the State can now, freed from its misapprehensions of Federal law, decide what it thinks State law requires. And if it does that, then there may be a Federal constitutional question.

JUSTICE BREYER: How -- how -- how does it work? It -- it should be pretty elementary, but -- I mean, I looked at the Indian case, and that seems a little far out.

The -- the -- the -- though it definitely gives you support on your statement here, suppose you took Justice Scalia's example: We have Iowa State Rule 56. We interpret Iowa State Rule 56 the same way as the Federal Rules of Civil Procedure. That's our rule. And now this is what it means in that case. And they say, but we're doing it under Iowa State rule.

Now, you say we can review that because they said that Iowa State rule is the same as the Federal.

MR. DREEBEN: So I -- I --

JUSTICE BREYER: Is that right?

MR. DREEBEN: I --

JUSTICE BREYER: Now, I just -- how do you fit that in the words in 1257?

MR. DREEBEN: Well, I doubt -- I doubt that that would satisfy the Court.

There's a theoretical answer, and then

there's a practical answer. Let me give the practical answer first.

The States that copy the Federal Rules of Evidence and the Federal Rules of Civil --

JUSTICE BREYER: Yes.

MR. DREEBEN: -- Procedure pretty uniformly say, we will treat Federal precedent as guidance in our decisions as -- for its persuasive value. They recognize that there are State rules of procedure and State rules of evidence that will belong to the State.

JUSTICE BREYER: Well, they say in a particular case, it's guidance. It's great guidance. We agree. Our interpretation is the Federal interpretation.

MR. DREEBEN: Well, I -- I think that --

JUSTICE BREYER: Now, can we review that -- because, in fact, it wasn't the Federal interpretation? But can we review it?

MR. DREEBEN: I -- I --

JUSTICE BREYER: Yes or no?

MR. DREEBEN: There -- there is a distinction between this case and that that may suggest that this case, the Court has jurisdiction over, and that one, the Court does not.

JUSTICE BREYER: So you say the Court does

not in the example of the Federal Rules of Civil Procedure that Justice Scalia gave?

MR. DREEBEN: I think this is a stronger case.

JUSTICE BREYER: Okay. It's a thought.

MR. DREEBEN: I'm doubtful that the Court would have jurisdiction or choose to exercise it, because -- I accept, for premises of the argument, Your Honor's hypothetical. But in the real world, it doesn't happen.

JUSTICE ALITO: Well, but when you say that that's a doubtful case, I think you are implicitly acknowledging that, if we adopt your argument, we are going to get that case and lots of similar cases, and we're going to have to parse the words that were -- were -- the words that were used by the State Supreme Court: Well, we're following -- we're going to be guided by it. We're going to be strongly guided by it. We're going to adopt it. We're going to get all of those cases.

Why should we go down that road --

MR. DREEBEN: Well, I think the Court --

JUSTICE ALITO: -- when there's a perfectly available and possibly superior remedy available to the Petitioner by filing a Federal habeas petition?

MR. DREEBEN: So there are several reasons, Justice Alito.

First of all, I don't think that it is that -- going to come up in that way to this Court, because that's not the way States treat their own rules of procedure. I don't think it will be very difficult.

There is a principle in the Court's cases that when Federal law has been adopted as Federal law, the Court will review it even if the State could have chosen a different path.

So --

JUSTICE SOTOMAYOR: Mr. Dreeben, what's the problem --

JUSTICE KENNEDY: Pardon me.

Did you misspeak? When -- when Federal law is adopted as State law, the Federal courts can review it. Isn't that what you meant to say? Or -- or -- I mean, you're very -- you're very careful, and you don't make mistakes, but I --

MR. DREEBEN: Well, I -- I think, Justice Kennedy --

JUSTICE KENNEDY: You -- you said --

MR. DREEBEN: This is -- this is what I'm trying to --

JUSTICE KENNEDY: -- when -- when State law

adopts Federal law as Federal law, then there's review. Okay.

MR. DREEBEN: The State has adopted Teague for a reason that does not exist in any of these civil procedure cases, and that is that the State knows that that Federal law will be applied to the very case in a habeas case. So the State has decided consciously to synchronize its law with the law that it knows will be applied.

And this actually serves a very important Federalism purpose. The State says, if we have to rectify in -- a -- a constitutional error in our case that's become final, we would like the opportunity to do it. And if the Federal habeas court is going to treat this decision as retroactive, we would like the first crack at it.

California --

JUSTICE SCALIA: You're -- you're -- you're saying "hooray" that -- that the Federal habeas court will thereafter be bound by it --

MR. DREEBEN: No, because --

JUSTICE SCALIA: -- because the State got there first.

MR. DREEBEN: No. There's an elementary reason why that's not so, Justice Scalia, and this

answers Justice Ginsburg's question earlier.

2254(d) applies to State determinations on the merits. That's the only time that the deference provision kicks in. And a determination under Teague is a threshold determination that comes before the decision on the merits. This Court has said that in any number of cases. It's not a merits resolution of the case. So deference to a State determination on retroactivity would never occur.

What I --

JUSTICE SOTOMAYOR: Could you --

CHIEF JUSTICE ROBERTS: I was just going to suggest maybe we hear a little bit more on the merits.

MR. DREEBEN: Certainly, Mr. Chief Justice.

The -- the rule in Miller v. Alabama, in our view, is a substantive rule, because it goes far beyond merely regulating the procedure by which youths are sentenced for homicide crimes. It compelled the State to adopt new substantive sentencing options, an option that is less severe than life without parole.

The only other time that this Court has ever invalidated a mandatory sentencing provision was Woodson v. North Carolina in 1976. So we went something like 36 years before we had another decision that concluded that the law must change to accommodate the

compelling interests in having the characteristics of youth that mitigate culpability considered in the sentencing process.

CHIEF JUSTICE ROBERTS: Would it be enough -- is -- is it enough if the States simply say, okay, with respect to people who have been mandatorily sentenced to life without parole, we're going to provide parole?

MR. DREEBEN: Yes. I believe that it would be. That would be the same remedy that the Court ordered in a Graham v. Florida case for -- which is the case that held that youths who do not commit homicide but are convicted of other crimes cannot be sentenced to life without parole at all.

And the Court's remedy for that problem could either be a sentence of term of years, but it could also be simply converting the life-without-parole sentence to a life-with-parole sentence.

So that would be --

JUSTICE SOTOMAYOR: Mr. Dreeben, how do you explain how your articulation of your test wouldn't apply to the guideline changes in Booker that we made?

MR. DREEBEN: So I -- I think, Justice Sotomayor, the key difference is that, with respect to the guidelines, there was always a -- a minimum and a

maximum set by statute. And the guidelines, even when they were mandatory, did not preclude judges from sentencing outside the guidelines, depending upon the presence of aggravating or mitigating factors that weren't taken into account.

And as Justice Alito's opinion for the Court in United States v. Rodriguez recognized, even the top of a mandatory guidelines range was not truly mandatory. So even under the mandatory guidelines, which for Sixth Amendment purposes were treated as if they established elements of the offense, for the purposes that we're looking at here, they are not mandatory in the same way, so that Booker brought about a procedural change.

JUSTICE SOTOMAYOR: What is the substantive difference -- if you pardon the use of that word -- between your formulation and Petitioner's formulation?

He says this is substantive because it did away with mandatory life imprisonment. You're articulating it slightly different. Tell me what you see as the difference and why your articulation is --

MR. DREEBEN: Justice Sotomayor, I don't think there is any substantive, to use the word, daylight between Petitioner's position and ours. The description of the crime at issue as punishable by mandatory life imprisonment and treating that as a

category, I think, sums up the reality of what is happening.

We broke it out into its component parts because I think it facilitates the analysis of it to understand that Miller does have a procedural component. Sentencing courts must now consider the mitigating characteristics of age, but it also, and more fundamentally in our view, contains a substantive component that required a change in the law.

Now, the change here was expanding the range of outcomes. Previously when this Court has analyzed substantive changes in the law, there have been changes that restricted the form of outcome; say, for example, in Justice Breyer's hypothetical, forbidding punishment at all.

But I think that if you trace back the origins of the substantive category to Justice Harlan's opinion in Mackey, this is still faithful to what Justice Harlan had in mind. Justice Harlan said the clearest case of an injustice in not applying a rule retroactively is when it puts off-limits altogether criminal punishment. He did not say that it was the only case.

And I think that if you consider what is going on in Miller and the reasons for the rule, the

Court made very clear that it believed that of the 2,000 people that were in prison and under mandatory life for juvenile homicide, the Court believed that that penalty was frequently disproportionate, that it would be uncommonly imposed in the future, and that it was not a sentence that was consistent in most cases with the mitigating characteristics of youth that have been recognized in Roper and in Graham and then in Miller.

JUSTICE ALITO: Would it be accurate to say that a rule is substantive if it makes a particular outcome less likely or much less likely or much, much less likely than was previously the case?

MR. DREEBEN: Probably the last, Justice Alito. When -- when the Court characterized substantive rules, most recently in the Summerlin opinion --

JUSTICE ALITO: What's the difference between much less likely and much, much less likely?

MR. DREEBEN: Well, I would put it in the words that the Court has used previously. The Court has said that a substantive rule creates a significant risk that the person is serving a sentence that's not appropriate for that person, maybe not even legally available for that purpose. It did not say absolutely conclusively proves it. It said significant risk.

And in contrast, when the Court has talked

about procedural rules, rules that govern the manner in which a case is adjudicated, it has said that the likelihood or potential for a different outcome is speculative.

And I think if you put this case on the speculative-significant risk axis, this case falls in the significant risk domain precisely because of the reasons why the Court said it was deciding Miller.

The reasons why the Court decided Miller had to do with the reduced culpability of youth and the capacity of youth to mature, change, and achieve a degree of rehabilitation that is consistent with something less than the most harsh sentence available for youths who commit murder -- a terrible crime, but still the harshest sentence, the Court thought, would be reserved for the worst of the worst, which is, in fact, what Louisiana said when it amended its statutes substantively to conform them to Miller. It said life without parole should be reserved for the worst offenders who commit the worst crimes.

And so when you combine the fact that this is not a rule that -- that only governs procedure -- it doesn't just govern evidence; it also mandates changes in outcomes as an available option -- with the very genesis of the Miller rule in a conclusion that, for the

people in this class, the appropriateness of the punishment of the harshest degree, life without parole, will be relatively uncommon, it seems clear that the Miller rule falls on the substantive side of the axis rather than on the procedural side of the axis.

JUSTICE GINSBURG: Have any States treated Miller as retroactive --

MR. DREEBEN: Yes.

JUSTICE GINSBURG: -- on State habeas?

MR. DREEBEN: Yes. The majority of States -- it's a close call. I think it's maybe about ten to seven or ten to eight. But the majority of States that have reviewed this have concluded that Miller is retroactive. Most of them have done it as a matter of substantive law. There are a couple of opinions that talk about the watershed exception, which is not the way that we think that this case should be analyzed.

But not only the -- the States have done that, but the United States has taken that position with respect to the juveniles that were sentenced before Miller to life without parole as a mandatory sentence. And in the resentencings of those that have taken place so far -- it's only been about ten, but those -- those defendants have almost uniformly received sentences that

are terms of years significantly shorter than life.

JUSTICE GINSBURG: So what is the population we're dealing with if most States do apply Miller retroactively? I think that there was a figure of 2,000 people with life without parole.

MR. DREEBEN: I haven't broken it down -- may I answer, Mr. Chief Justice?

CHIEF JUSTICE ROBERTS: Sure.

MR. DREEBEN: I have not broken it down numerically, Justice Ginsburg, but Michigan has not applied it retroactively, and it has a very large population of juveniles who are in the Miller class. And I don't think that Pennsylvania has resolved it, certainly not favorably yet for the defendants.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. DREEBEN: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Duncan.

ORAL ARGUMENT OF MR. S. KYLE DUNCAN

ON BEHALF OF THE RESPONDENT

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

I was going to begin by saying I would proceed directly to the merits, but I gather from the drift of the argument that the Court has serious questions about jurisdiction, and so I'd like to briefly

begin there.

We're in an odd position with respect to jurisdiction because we won below and we'd win in the Fifth Circuit on Federal habeas, which has found that Miller is not retroactive. Why then do we not contest jurisdiction?

We believe and still believe that this is a straightforward case. Not -- and Justice Kagan, it's not a standard Michigan v. Long case, but it's an interwoven case, meaning that the -- the State court took Teague lock, stock, and barrel.

Now, there is no doubt, Justice Scalia, that in the -- in the Taylor -- in the previous Louisiana Supreme Court opinions, that the State said we are voluntarily adopting Teague. There is no doubt about that. So we think the question is whether that raises the possibility of an advisory opinion from this Court. And why do we say it doesn't?

Well, because in cases like Coleman v. Thompson and Eddings v. Oklahoma, the Court said where the Federal law holding is integral to the State court's disposition of the matter, there is no risk of an advisory opinion. And later, in Coleman, the Court said only if resolution of the Federal issue in court could not affect the judgment is it at risk of an advisory

opinion.

So here we don't think there is a risk of an advisory opinion. Of course, it is within the realm of possibility. We doubt that it's going to happen, but it could happen that on remand the Louisiana Supreme Court could say, well, we've seen what you think about Teague and we're going to adopt our own retroactivity standards, as some States have done. They could do that. The question is: Does that make this Court's opinion advisory? And we think not.

The Solicitor General -- the Assistant Solicitor General has talked about cases like Standard Oil v. Johnson, where the -- the State was under no obligation to tether its State law to Federal standards, and --

JUSTICE SCALIA: It didn't say so, though. In -- in -- in Standard Oil, the -- this is a quote from the opinion: "The relationship between Post Exchanges; and the government of the United States is controlled by Federal law."

MR. DUNCAN: Right. That's right. My point, Justice Scalia, is that the -- the tax -- that was embedded in a tax-exemption statute. The tax exemption made certain taxes exempt from the statute, and -- and the exemption --

JUSTICE SCALIA: Well, that would have been true no matter what the State did, right?

MR. DUNCAN: Well, no, the State --

JUSTICE SCALIA: We're deciding a question of Federal law that -- that would have applied on its own.

MR. DUNCAN: Well -- well, no -- well, with respect to Standard Oil, I think the -- my point is, is that the State didn't have to make its tax-exemption status turn on a Federal question. It did, and so the Court had jurisdiction to resolve it. That's all.

JUSTICE ALITO: Well, don't you think that the State made its tax-exemption law turn on Federal law because there are Federal constitutional requirements in that area? Could the -- could the State have taxed -- I mean, there was the question of whether or not the -- the Supremacy Clause would permit the State to tax sales to the Post Exchanges.

MR. DUNCAN: I think that's possible, but this Court didn't make its jurisdiction dependent on that. And so take a case like Ohio v. Reiner --

JUSTICE SCALIA: Well, it did. In the provision I just quoted, it said that the relationship between Post Exchanges and the government of the United States is controlled by Federal law. That's what our

opinion says.

MR. DUNCAN: Well, so take the -- the Assistant Solicitor General brought up the case of Ohio v. Reiner, where a State made its transactional immunity statute turn on the validity of a Fifth Amendment privilege. This Court -- this Court addressed that embedded and discrete Federal issue with --

JUSTICE KAGAN: And Mr. Duncan, isn't it quite similar when Justice Scalia used this "controlled" language? The Louisiana Supreme Court has used similar language. It's dictated by Teague. Now, it's only dictated by Teague because they've chosen to make it dictated by Teague, but once that choice has been made, all outcomes are dictated by Teague. It's the same issue.

MR. DUNCAN: Well, we think -- we agree with that. We think it's binding -- quote/unquote, "binding" within the meaning of binding Federal law, because the State has chosen to do it and it's never shown that it wouldn't do it. You know, so -- we -- we think that. Look, if the Court disagrees with us on that, we don't take a position --

JUSTICE ALITO: Well, in Ohio v. Reiner, which you just cited, was there any other way in which the State could have obtained review of the State

supreme court's erroneous determination that the witness in question there did not have a Fifth Amendment privilege because she said that she didn't commit the crime?

MR. DUNCAN: Well, I don't think so, because this --

JUSTICE ALITO: And do you think that's not a distinction between that case and this case?

MR. DUNCAN: Well, if -- if -- if the Teague -- if the Teague standard is a discrete Federal standard that the State has made -- has -- has incorporated, then the only way -- well, the Louisiana Supreme Court could -- the defendant could go to Federal habeas, sure, and you could get an interpretation that way.

But it doesn't seem to us that the difference between Federal habeas and review of the State supreme court decision makes any difference with respect to this Court's jurisdiction. It might mean that this Court would wait, you know, for a -- for -- I don't know, a more robust split to develop and take a Federal case that way.

But in this case -- and this -- this goes to the second reason why we haven't strongly contested jurisdiction at all -- because there is a robust split

on this direct -- on this specific issue that extends to something like 21 State and Federal courts, they're all deciding the same Federal issue, so it seems to us that as a practical matter, this Court ought to weigh in. It's going to weigh in sooner or later. It's going to weigh in either on a Federal habeas case or from a State court.

JUSTICE SCALIA: Well, we weigh in when we have jurisdiction. You don't think that matters at all?

MR. DUNCAN: No, of course jurisdiction matters, Justice Scalia. We just -- of course it does.

JUSTICE SCALIA: Well, so what you said doesn't make much sense.

MR. DUNCAN: Well, I think it makes sense.

JUSTICE SCALIA: Let's get in there quickly, whether we have jurisdiction or not. You're not saying that, are you?

MR. DUNCAN: Well, no, we're not saying that. We're not saying that. We're saying if the Federal issue is genuinely interwoven with State law and there's no independent State grounds, then this Court has jurisdiction to decide the question. Otherwise, it's going to have to wait for a Federal habeas case.

Proceeding to the merits: In Miller, this Court was invited --

JUSTICE BREYER: We clearly have jurisdiction, don't we? Why -- I'm just trying to figure this out in my mind.

We have jurisdiction where there is a person -- that's the defendant -- and the defendant says the court's decision -- that's your court's decision -- is contrary to the Constitution or statute of the United States. That's just what they say.

MR. DUNCAN: That answers the question --

JUSTICE BREYER: So we have jurisdiction to answer the question.

Now, the question is: How do we dispose of the case --

MR. DUNCAN: Exactly.

JUSTICE BREYER: -- in which we have jurisdiction? And in three instances, I guess, the Court has done, in disposing of such a case, what the Solicitor General says; namely, they have said, we are -- we are not going to say whether he's right in saying it's contrary to the Constitution. That's because there might be an adequate State ground; there might not be. Their adequate State ground was one that was -- was elucidated or explained as being -- flowing from a certain interpretation of Federal law.

MR. DUNCAN: Well, that's --

JUSTICE BREYER: We will say their interpretation of Federal law was wrong, and now we'll send it back to see what they do.

MR. DUNCAN: Yes. The cases that we all --

JUSTICE BREYER: Is that right? Have I got it right?

MR. DUNCAN: That's our position. And by the way --

JUSTICE SCALIA: What is -- what is the Federal law you're talking about?

MR. DUNCAN: The application of Teague to Miller.

JUSTICE SCALIA: Yes. That's not a Federal law, it's -- the Federal habeas statue is a Federal law, right?

MR. DUNCAN: Well, the interpretation --

JUSTICE SCALIA: And Teague is an interpretation of that Federal law.

MR. DUNCAN: Well --

JUSTICE SCALIA: Was that Federal law at issue in this case?

MR. DUNCAN: The Teague -- the Teague standard --

JUSTICE SCALIA: Of course it wasn't.

JUSTICE BREYER: But the Teague standard --

the Teague exceptions could well be constitutionally required. The Teague exception --

JUSTICE SCALIA: Have we -- have we ever said that?

JUSTICE BREYER: -- means Teague doesn't apply.

MR. DUNCAN: You have not. That's why we don't take a position on it. That's particularly --

JUSTICE SCALIA: You want us to hold that in this case?

MR. DUNCAN: We do not want you to hold that in this case, Your Honor.

CHIEF JUSTICE ROBERTS: Did we say the opposite in Danforth, or did the majority say the opposite in Danforth?

MR. DUNCAN: You left the question open in Danforth, Your Honor.

JUSTICE SOTOMAYOR: Could you tell me why you would think that something like Atkins would not be retroactive to States? As a compulsion, meaning not as by election of Teague retroactivity.

MR. DUNCAN: That is a difficult question that we don't take a position on.

But to answer your question, Justice Sotomayor, the -- the -- the argument goes that Danforth

made clear that Teague is an -- is an equitable interpretation to Federal habeas statute, it's not constitutionally binding on the States, and the Court left open whether the exceptions are binding, but the exceptions were part and parcel of Justice Harlan's Mackey understanding of -- of how he thought Federal habeas ought to apply.

And so whereas -- whereas Atkins -- I mean, Atkins creates a binding constitutional right. The question of remedy, though. The question is: Is the State constitutionally bound to offer that remedy? And this Court has recognized, in cases like Pennsylvania v. Finley, for example, that States have wide discretion in structuring their post-conviction.

And the -- the next point, though, has to do with finality.

JUSTICE SOTOMAYOR: It has to do something different, because as Justice Breyer pointed out, you have wide discretion to structure it as you want, but if you structured it in a way that you're going to say, I'm offering due process, isn't there a check, a substantive check by due process --

MR. DUNCAN: Well --

JUSTICE SOTOMAYOR: -- that you have to offer the minimum?

MR. DUNCAN: Well, I mean, that is -- that is the question. So this Court has found that there's a substantive check on due process in Griffith, where we're talking about direct review.

When we're talking about collateral review -- I mean, our view, although we haven't taken a position on it, collateral review is a different animal for purposes of --

JUSTICE SOTOMAYOR: But we have any number of cases where States have viewed the exceptions as controlling the fact that they have to offer the constitutional minimum.

MR. DUNCAN: But this Court has never held that.

JUSTICE SOTOMAYOR: Hasn't yet.

MR. DUNCAN: Unless --

JUSTICE SOTOMAYOR: And why shouldn't we?

MR. DUNCAN: I understand.

JUSTICE SOTOMAYOR: That's really the serious question.

MR. DUNCAN: It -- it -- it is a serious question. We -- we -- and, again, we have not taken a position on that question because we feel that this case is interwoven with Federal law as a matter of State retroactivity.

In Miller, this -- on to the merits: In Miller, this Court was invited to categorically bar the penalty of life without parole for juveniles who commit murder, but it decided not to do so.

Now, that decision leads directly to the conclusion, in our view, that Miller is not a substantive rule under Teague's first exception. Consideration of the Teague framework, Teague policies, and Teague precedent points instead to the conclusion that Miller is a procedural and not a substantive rule.

So we think Summerlin most helpfully sets out the framework that ought to govern this question.

JUSTICE KAGAN: Mr. Duncan --

MR. DUNCAN: Yes.

JUSTICE KAGAN: -- can I give you just a hypothetical? I mean --

MR. DUNCAN: Sure.

JUSTICE KAGAN: -- suppose that there is a State and it has a -- a mandatory minimum for a theft. It says the mandatory minimum for theft is 20 years.

And suppose a court looks at that and says, you know what? That's incredibly disproportionate to a lot of theft, and so strikes the mandatory minimum. Says, you just can't have a mandatory minimum like that; make it lower.

Would that be a substantive ruling?

MR. DUNCAN: We don't think so, Justice Kagan, because the mandatory aspect of it goes to the manner of imposing a penalty.

JUSTICE KAGAN: It does not go to the manner of imposing. It says nothing about the manner of imposing.

What it does is it just increases the range of sentencing possibilities. It actually leaves it to the -- to the courts. It says absolutely nothing about what factors ought to be taken into account. Nothing about that at all.

All it says is, you can't have a mandatory minimum of 20 years for theft; make it lower.

MR. DUNCAN: Well, so in -- in -- if in that hypothetical that doesn't go to the manner of imposing the penalty, then it's different than Miller, because Miller made very clear that the mandatory aspect of the penalty goes to the manner of imposing the penalty --

JUSTICE KAGAN: But I think --

MR. DUNCAN: -- not something substantive.

JUSTICE KAGAN: So if you're saying, no, that's different because there was something else in Miller -- there is something else in Miller. There is a bunch. There -- there is -- there is a process

component of Miller, no question about it, where the Court says what courts are supposed to look at is -- are the characteristics of youth and are supposed to try to figure out whether these terrible crimes are functions, in part, of immaturity or -- or -- or not, whether you -- you really are looking at an incorrigible defendant.

So there is that process component. But that process component does not take away the fact that there is a completely separate, self-sufficient component as to what the range of punishment has to be. That's completely on all fours with the hypothetical that I gave you.

MR. DUNCAN: Well, your -- Justice Kagan, the -- the relevant difference in terms of the Teague analysis is that this Court in Miller did not take the punishment of life without parole, the distinct category of punishment of life without parole, off the table. This Court has never held that a noncategorical rule is substantive under Teague.

And it's done that for good reasons: Because that would fly in the face of the policies that inform the Teague analysis.

JUSTICE KAGAN: No, you're exactly right. It did not take the LWOP punishment off the table. But

similarly, in my hypothetical, a 20-year sentence for theft has not been taken off the table.

What the Court has done is to say, there have to be other options. There has to be an option of ten years or five years or two years, whatever it is.

So they've expanded the range of possibilities. They've just made the sentence different, because a sentence is defined both by its upper end and by its lower end.

MR. DUNCAN: I --

JUSTICE KAGAN: And so they've made the sentence different.

MR. DUNCAN: I understand that. But making the sentence different doesn't necessarily mean make it substantive under the Teague framework.

Here's another way of looking at it. The defendant in a -- a juvenile murderer who committed -- who committed murder and is serving a life-without-parole sentence today, pre-Miller, is not facing a punishment that the law cannot impose on him. And we know that from Miller because Miller said the Court's decision does not preclude that punishment.

And so that goes to finality. The finality interests underlying convictions do not yield where the State still has the power to impose that punishment.

Finality interests yield -- Justice Harlan explained in Mackey and this Court adopted in Teague, finality interests yield only where the State lacks the power. That's where the finality interests crumble, so to speak, because the State no longer can impose that category of penalty.

So that would go for Roper. It would go for Graham. It would go for Justice Breyer's sedition or witch crimes. If -- if -- if somebody's in jail because they were accused of being a witch, then the State has no finality interest in keeping that person in jail. But by the same token, if -- if -- if the punishment is death for a juvenile, the State has no finality interest in doing that.

So leaving the punishment on the table is crucial. If he doesn't take it off, it's not substantive.

The second policy reason for Teague is avoiding the adverse consequences of retrial. And we think Miller is even more clearly not substantive under that standard, because categorical rules apply retroactively, Justice Harlan explained, because they don't carry the adverse consequences of retrial. They don't make you go back and redo the trial and unearth old facts and -- and drain State resources and come up

with distorted -- distorted retrials.

Miller, by its nature, envisions a fact-intensive hearing that considers multiple characteristics at the time of the crime.

JUSTICE KENNEDY: But you don't have a distorted new trial if you just grant a parole hearing.

MR. DUNCAN: That's right. That -- that's right. But that's, of course, not what Miller would require. That's what Graham would require, Justice Kennedy, because Graham is obviously a categorical rule that says you can no longer impose that punishment, so you have to give them a parole hearing or some meaningful way of release.

Miller is about the step before whether to give a parole hearing, whether the person can be eligible for parole at the outset. That's the inquiry that we're talking about in Miller, and that's quite different from a parole hearing.

The fact of the matter is, though, is that applying Miller retroactively inevitably turns the Miller -- the retroactive Miller hearing into a parole hearing, which -- which shows that it doesn't quite work in terms of adverse --

JUSTICE BREYER: You were going to say -- at some point you started -- suppose you look at the

watershed procedural change. My -- my impression from the case you cited, Summerlin, is that deciding whether that's retroactive has two parts. I think we were unanimous on this point.

The two parts were: Is it implicit in the concept of ordered liberty? And here it would seem to be, because it's applicable to the States. And the second is: Is it central to an accurate determination that life without parole is a legally appropriate punishment? And the -- the -- the rule that a mandatory can't exist is central to making that -- that was the whole point of the Miller opinion.

So if that's the correct analysis for watershed rule, procedural rule that's retroactive -- if I'm right about that, why doesn't it fit within that category?

MR. DUNCAN: Well, let's take the first one, the point.

It's not just implicit in the concept of ordered liberty. The way that the -- the watershed rule has been stated, the first -- the first prong of it is it has to alter our understanding of bedrock procedural elements necessary to fundamental fairness. And this would be a strange case to find that in, because Miller itself doesn't represent a bedrock revolution in

sentencing practices. It takes a sentencing practice from another area and puts it in this new area. So it's an incremental change in that sense. It's not a wholesale discovery of a new bedrock procedural element, the way we had in -- in a case like Gideon v. Wainwright.

So -- and -- and I think this Court explained in Whorton v. Bockting that it's not enough that the rule be fundamental in some -- in some abstract sense -- right? -- but it has to itself represent a change in bedrock procedural understandings. And we don't think Miller does that.

We also don't think it's necessary to an accurate determination of a sentence. It would enhance the accuracy of the sentence, but it's not necessary.

And the other point there is this Court has never hold that a -- held that a pure sentencing rule can qualify under watershed, because, after all, this Court has on many occasions said that a watershed rule is necessary to the accurate determination of guilt or innocence, and here we're talking about a sentence.

So we -- we agree with the United States that watershed procedural analysis is not the way to go here, but it does raise an interesting question.

In Summerlin -- because, after all, we do --

we do part company quite strongly from the United States when -- when the United States says we need an outcome-expanding alteration to the definition of substantive rules under Teague. We say that's -- that's not just a slight tweak to Teague. What that is is a change in the understanding of what a substantive rule is.

Substantive rules under Teague analysis have never depended on the frequency with which new outcomes might -- might come about under the new procedures. In fact, in Summerlin -- and this goes back to my original point about the framework. Summerlin explained that a criminal defendant under a procedural rule does have the opportunity of getting a more lenient outcome under the new procedures. So -- and nonetheless, Summerlin said that such procedural rules are not applied retroactively.

And so, as -- Justice Alito, as you were saying, the difference between a substantive and a procedural rule under Teague is not whether it's very likely or very, very likely to result in a new outcome. It's about whether the new rule categorically removes the power of the State to impose a category of punishment. That's what a -- that's what a categorical rule does. That is not what Miller does, right?

Miller may express an expectation about the way that Miller hearings will come out. And that may or may not come -- come to pass in the future. Who knows, right? We can point to cases where criminal defendants have had Miller hearings and have still received life without parole, and I can point to several in particular from the State of Louisiana under its new Miller procedures, but the point being is that the idea of changing outcomes, which is what the United States' entire argument depends on, is built into the procedural side of Teague and not the substantive side.

The substantive side is about --

JUSTICE KAGAN: Mr. Duncan, I -- I -- I think not. I think by your own definition this fits on the substantive side.

You said you -- you categorically remove a certain outcome. And -- and -- and that's exactly what Miller does. If you -- as long as you understand a sentence, which I think you agreed with, as defined both by its upper end and by its lower end, effectively what the Court said in Miller was that that sentence, which was the mandatory LWOP sentence, cannot control for juveniles.

MR. DUNCAN: And --

JUSTICE KAGAN: There has to be a different

sentence, one that includes other punishments.

MR. DUNCAN: Well, there's no doubt --

JUSTICE KAGAN: That -- that increases the range.

MR. DUNCAN: Right.

Miller -- Miller quite clearly said, as you know, Justice Kagan, that it does not categorically bar a penalty, but -- and -- and so -- and what did it mean by that penalty? It's --

JUSTICE KAGAN: It allows something within the range, but it has -- it has completely changed the range that's -- that is -- that is given for any juvenile defendant.

MR. DUNCAN: Well, we think that's --

JUSTICE KAGAN: The range is important. It's not just the top end. This is what we said in Alleyne, that you can't think about a sentence without thinking about both parts of the sentence, both the maximum and the minimum. And when you decide whether a substantive change in that sentence has been made, you look at both the maximum and the minimum.

MR. DUNCAN: Well, I -- look, I -- I -- I hope this is responsive. I mean, I think after Miller we would see two categories of punishment on the table. We would see a life-without-parole category and a

life-with-parole, for example.

But my point is, is that Miller doesn't ban the first category, and that is determinative for whether something is a substantive rule or not.

JUSTICE SCALIA: I'm -- I would -- I would not describe changing the range of sentences available as changing the sentence.

MR. DUNCAN: It -- it puts an element on the table, I think, is the most you could say.

JUSTICE SCALIA: It doesn't change the sentence --

MR. DUNCAN: Yes.

JUSTICE SCALIA: -- necessarily.

MR. DUNCAN: Right.

JUSTICE KAGAN: But this is what we --

JUSTICE SCALIA: You still get the same sentence.

MR. DUNCAN: You could still -- absolutely still -- and what -- what did you --

JUSTICE KAGAN: Which is what we said last year. We said, it's impossible to disassociate the floor of a sentencing range from the penalty affixed to the crime. And similarly, we said criminal statutes have long specified both the floor and ceiling of sentencing ranges, which is evidence that both define

the legally prescribed penalty.

MR. DUNCAN: Well --

JUSTICE KAGAN: That is the penalty --

MR. DUNCAN: Right.

JUSTICE KAGAN: -- is the range.

MR. DUNCAN: It -- it -- life without parole has the same floor and ceiling, of course. It's -- it's -- it's got the same floor and ceiling. What Miller does is create the -- the -- the procedural circumstances for finding -- for putting a new penalty on the table, which is the -- the -- that's the point of the United States' argument: There is a new possibility.

And our point is to say that putting a new possibility on the table doesn't take away the State's power to impose the old category of punishment.

JUSTICE SOTOMAYOR: Mr. Winsor -- Mr. Winsor --

MR. DUNCAN: Duncan. I'm sorry.

JUSTICE SOTOMAYOR: I know that we didn't ever look at this issue.

I'm sorry. Reading the wrong one. I apologize.

But do you really think that we -- that any State would have not applied Woodson retroactively?

MR. DUNCAN: That -- that --

JUSTICE SOTOMAYOR: They all did.

MR. DUNCAN: Probably -- probably not, Your Honor. But the -- the question -- that -- that, of course, is a pre-Teague case. It raises the question: Is Woodson substantive or procedural under Teague? And our argument is it's a procedural rule.

JUSTICE SOTOMAYOR: Why?

MR. DUNCAN: It's a procedural rule --

JUSTICE SOTOMAYOR: It just said you couldn't have mandatory death penalties, just like here: You can't have mandatory life without parole.

MR. DUNCAN: But it required an individualized sentencing --

JUSTICE SOTOMAYOR: The sentence -- exactly --

MR. DUNCAN: -- process, which we say is a procedure.

JUSTICE SOTOMAYOR: And to give sentences less than --

MR. DUNCAN: It -- it would put new --

JUSTICE SOTOMAYOR: -- mandatory death. But they could have still given death.

MR. DUNCAN: They certainly could have, so the question is whether it's substantive or procedural

under the Teague rubric, which, of course, it was a pre-Teague case. And I think the most we can say about it is it's not substantive under Teague for the reasons that we've said.

Now, raise the question: Is it a watershed procedural rule? Perhaps that's --

JUSTICE BREYER: All right. But that's the language -- "bedrock" is -- I don't think is the right language, because that was the language he referred to in a sentence in Mackey, correct? I've just been looking it up.

And -- and -- but then in Teague itself, Justice O'Connor tries to get the right words, and -- what she ends up with here is that the procedural is the first test, the first part, is -- can be addressed by limiting the scope of the second exception -- that's the watershed rule -- to those new procedures without which the likelihood of an accurate conviction is seriously diminished. Okay.

MR. DUNCAN: That's the first one.

JUSTICE BREYER: And that's joined by the Chief Justice, Justice Scalia, and the fourth I can't remember.

But -- so is it seriously diminished? Now, we read through Miller. It's pretty hard to say -- I

mean, my goodness, Miller is just filled with paragraph after paragraph about how a mandatory requirement for life without parole fails to take account of all the characteristics or many characteristics adherent in youth.

And it's pretty hard to come away from that without thinking, gee, accuracy under a mandatory life without parole does seriously diminish the accuracy of imposing life without parole when you apply the mandatory to a youth.

MR. DUNCAN: But in -- every Eighth Amendment sentencing rule goes to accuracy in some significant --

JUSTICE BREYER: No, no. But you have to say the accuracy is seriously diminished. And she says, then I don't think there will be too many such cases.

MR. DUNCAN: Well, again, take a -- we haven't talked about the capital sentencing cases, but take a case like O'Dell, where the capital jury was not informed of the defendant's parole and eligibility while considering his future dangerousness. I mean, one could easily say that the accuracy of the resulting death sentence under the old rule was seriously diminished, and yet this Court said in O'Dell that that is not a watershed procedural rule. And you can go down the line

with all those cases, the Beard case and the Sawyer case. Those are cases in which the defendant could have said, well, seriously -- seriously diminished accuracy. And yet the Court found no watershed rule. And, of course, the bedrock is what the word that this Court has used in referring to that exception, particularly in Whorton v. Bockting.

JUSTICE GINSBURG: Is there any watershed procedural rule other than Gideon?

MR. DUNCAN: Well, this Court has said it's -- it's doubtful that any will emerge. And so we think this case is an implausible case for a new watershed rule to emerge, since this rule -- and back to the bedrock point -- is not a creating a -- it's not -- it's not a revolution in bedrock understanding of procedure. It's -- it's an incremental step in sentencing juveniles. So if a case -- if a case like Crawford is not a watershed procedural rule, then it's difficult to understand how this one would be.

JUSTICE GINSBURG: We have one brief that tells us that this Court has never barred punishment as cruel and unusual under the Eighth Amendment, but refused to make the decision retroactive.

MR. DUNCAN: Well, we --

JUSTICE GINSBURG: Is that --

MR. DUNCAN: -- disagree with that. There are cases -- take the -- take the case that refused to make retroactive the rule in Caldwell v. Mississippi. That's an Eighth Amendment case that goes to the accuracy of a capital jury sentence in determination of death. And this Court didn't make that rule retroactive, and found that it was procedural and non-watershed at the same time. So we take issue with that.

Just a few more words about the United States' proposed expansion of Teague. It would -- it would shift the whole focus of what a substantive rule is from the categorical nature of the rule to the effects of the rule. And so that -- if -- any defendant in these capital sentencing cases we've just been talking about, O'Dell and Sawyer and Beard, would now have the argument handed to them by the United States new rule that says, well, that new rule gave me the opportunity for a better outcome. I might have not gotten the death penalty if my jury had been properly instructed.

We don't understand how the United States' new rule in this case can be cabined only to where a mandatory sentence is taken off the table.

JUSTICE KAGAN: Well, but I think that you

yourself cabined it when you said that the difference is one -- there is some category of cases which do refer to process, to how a decisionmaker makes a particular result, and another category of cases which refer to what we've called substance, which is: What results are on the table? What category of punishment is on the table? And that's the difference between this and all the other kinds of things that you're mentioning.

MR. DUNCAN: Well, I --

JUSTICE KAGAN: This is not about the how -- or it's partly about the how, but there's also about what punishments are on the table.

MR. DUNCAN: Well, I just have to -- just have to push back on the premise a little bit, where -- our -- our position is not that a substantive rule is about what punishments are on the table. A substantive rule is about whether a State categorically no longer has the power to impose a category of punishment.

Here, it's clear from the Miller opinion and from the Grayer -- from the Graham opinion that the relevant category is life without parole. The State still has the ability to impose that punishment. And that's what -- that's a sharp distinction from what a procedural rule is. And the United States' new conception of what a substantive rule is would blur

that. It would blur that, and it would call into question all of the capital sentencing cases.

And I heard a question -- I don't remember which Justice asked it -- about Booker. And my reaction to that is -- but Booker as a matter of the Sixth Amendment made a sentencing guideline non-mandatory, and it surely opened up new sentencing outcomes.

And so by -- by what reason could a -- could a Federal habeas petitioner now not say under the United States' new test Booker is now retroactive, or Alleyne, for that matter? Alleyne overturned the mandatory minimum under the Sixth Amendment, opening up new sentencing outcomes. Why couldn't a Federal defendant on Federal habeas say, now I ought to get the benefit of that rule retroactively?

Our position is those cases -- Booker, Alleyne, Apprendi -- are clearly procedural, as this Court explained in -- in Summerlin -- Schriro v. Summerlin. They're clearly procedural under the Teague rubric. And what the United States would do is blur those categories.

If there are no further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Bernstein, you have three minutes remaining.

REBUTTAL ARGUMENT OF RICHARD D. BERNSTEIN
ON BEHALF OF THE COURT-APPOINTED AMICUS CURIAE

MR. BERNSTEIN: What this fantastic discussion has shown is why the Court, as it always has in the past, should keep the Teague exceptions a matter of equitable discretion, rather than constitutional requirement.

The Court has much more freedom, generally speaking, on the matter of equitable discretion than it does on constitutional requirements. There is no way to look at the prior precedents of the Court in Teague in any of those courts to say, oh, here's what our equitable discretion is. The only time you get retroactivity is when the Constitution requires it. That would have been a really short opinion. And that was not that.

Now, to turn quickly to the cases that have been cited: The critical difference between this case on the one hand and Merrell Dow and Three Affiliated Tribes on the other hand is that jurisdiction under this statute is question by question under Murdock.

In Merrell Dow, the question of whether the defendant's conduct had violated the Federal drug labeling laws was a Federal question. The Court never would have gone on to say, and we're also going to

Federalize the remedy. We're going to decide whether it's lost profits or out-of-pocket costs.

Similarly, in Three Affiliated Tribes, there was no question that there was a Federal statute that limited State court jurisdiction. The only issue was the scope of that statute.

Here we have the opposite. There is no question that the Federal statute does not apply to the State court, and yet people say you should decide the scope question, even though the underlying issue may be one of State law.

And then, finally, to the Solicitor General's new cake-and-eat-it-too argument that there is going to be review in this Court and de novo review on habeas: The statutory language in 2254(d) is pretty broad. Quote: "Any claim that was adjudicated on the merits in State court proceeding."

The only claim in this case is remedy. This case was filed after Miller was decided. The only issue in this case is redress. And it would be a very wonderful turn if you could say on the one hand that 2254(d) doesn't apply, but on the other hand, 1257 applies when it -- when it requires a, quote, "right claimed under Federal law," which gets to your question, Justice Kagan.

Is it enough that a State court says, we voluntarily want to be bound? And the best answer to that is not only in the cases I would recommend -- Moore, which is cited in Merrell Dow, which goes out of its way to show how Federal law is binding on the intrastate commerce conduct in that case before saying the Court could review it -- but it's also plain in the language of the Supremacy Clause. Binding Federal law means binding in all 50 States, and that's why the statute also says "right under Federal law."

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

And, Mr. Plaisance, you have three minutes remaining.

MR. PLAISANCE: Your Honors, I'd like to make two quick points.

First of all, in jurisdiction: Resolving this case under Teague avoids the serious constitutional question of whether due process requires retroactivity for Miller.

A second point on the merits: Miller said that juvenile homicide offenders should not have to die in prison with no chance for rehabilitation and no consideration of youth. That important rule changed the substantive outcomes available. Indeed, this Court said

that life without prison should be uncommon.

The individuals sentenced before Miller -- that remains about 1,500 -- deserve a chance at redemption.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Bernstein, the Court appointed you as an amicus curiae to brief and argue this case against this Court's jurisdiction. You have ably discharged that responsibility, for which the Court is grateful.

The case is submitted.

(Whereupon, at 11:18 a.m., the case in the above-entitled matter was submitted.)

D

2009 WL 3776259 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Harry F. CONNICK, in his official capacity as District Attorney; Eric Dubelier, in his official capacity as Assistant District Attorney; James Williams, in his official capacity as Assistant District Attorney; Leon Cannizzaro, Jr., in his official capacity as District Attorney; Orleans Parish District Attorney's Office, Petitioners,
v.
John Thompson, Respondent.

No. 09-571.
November 6, 2009.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petition for Writ of Certiorari

James D. "Buddy" Caldwell, Louisiana Attorney General, S. Kyle Duncan, Appellate Chief, Robert Abendroth, Assistant Attorney General, Louisiana Department of Justice, P.O. Box 94005, Baton Rouge, LA 70804, (225) 326-6008.

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Leon A. Cannizzaro, Jr., Orleans Parish District, Attorney, Graymond F. Martin, First Assistant District, Attorney, Donna R. Andrieu, Counsel of Record, Chief of Appeals, Orleans Parish District, Attorney's Office, 619 South White Street, New Orleans, LA 70119, (504) 822-2414, Counsel for Petitioners.

***i** Questions Presented

Prosecutors in the Orleans Parish District Attorney's Office hid exculpatory evidence, violating John Thompson's rights under *Brady v. Maryland,* 373 U.S. 83 (1963). Despite no history of similar violations, the office was found liable under § 1983 for failing to train prosecutors. Inadequate training may give rise to municipal liability if it shows "deliberate indifference" and actually causes a violation. *See City of Canton v. Harris,* 489 U.S. 658, 389-91 (1978); *Bd. of County Comm'rs of Bryan County v. Brown,* 520 U.S. 397, 403-07 (1997). A pattern of violations is usually necessary to show culpability and causation, but in rare cases one violation may suffice. *Bryan County,* 520 U.S., at 409. The Court has hypothesized only one example justifying single-incident liability: a failure to train police officers on using deadly force. *See Canton,* 489 U.S., at 390 n.10.

1.

Does imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravene the rigorous culpability and causation standards of *Canton* and *Bryan County?*

2.

Does imposing failure-to-train liability on a district attorney's office for a single *Brady* violation undermine prosecutors' absolute immunity recognized in *Van de Kamp v. Goldstein,* 129 S. Ct. 855 (2009)?

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***iv** TABLE OF AUTHORITIES

Federal Cases

***1** Petitioners seek a writ of certiorari to review the judgment of the *en banc* United States Court of Appeals for the Fifth Circuit in this case.

Opinions Below

The *en banc* decision in *Thompson v. Connick* (App. 1a-50a) is reported at 578 F.3d 293 (5th Cir. 2009). The panel opinion is reported at 553 F.3d 836 (5th Cir. 2008) (App. 51a-113a). The district court's order denying summary judgment (App. 114a-144a) is not reported but is available at 2005 WL 3541035 (E.D. La. Nov. 15, 2005).

Jurisdiction

The *en banc* Fifth Circuit entered judgment on August 10, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutory Provision Involved

Title 42, section 1983, of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

***2 Statement of the Case**

A. Factual Background

On December 6, 1984, Raymond T. Liuzza Jr. ("Liuzza") was robbed, shot, and killed outside of his home in New Orleans. Approximately three weeks later, siblings Jay, Marie, and Michael LaGarde were the victims of an attempted armed robbery while in their car in New Orleans. Jay LaGarde fought off the perpetrator, and, in the struggle, some of the robber's blood stained the cuff of Jay's pants. As part of the police investigation, crime scene technicians took a swatch of the pants with the robber's blood on it. App. 53a.

In January 1985, John Thompson ("Thompson") and Kevin Freeman ("Freeman") were arrested for the Liuzza murder. The LaGardes saw Thompson's picture in the newspaper and believed it was Thompson who had attempted to rob them. They contacted the Orleans Parish District Attorney's Office ("District Attorney's Office") and identified Thompson. App. 53a-54a.

At that time, the Orleans Parish District Attorney was Harry Connick ("Connick"). During Connick's twenty-nine year tenure from 1974 to 2003, between thirty and ninety assistant district attorneys worked in the office, screening between 12,000 and 17,000 charges per year, and prosecuting about half of those. App. 54a, 131a.

The LaGardes' armed robbery case was screened for institution of prosecution by assistant district attorney Bruce Whittaker ("Whittaker"), who received the police report, approved the case for prosecution, and filled out a Screening Action Form ***3** indicating that armed robbery charges should be brought. After noting that a technician had taken a bloody swatch of Jay LaGarde's pants, Whittaker wrote on the form that the state "[m]ay wish to do blood test." He also recommended that the case be handled by Eric Dubelier ("Dubelier") as a special prosecutor because it involved the same defendant (Thompson) as the Liuzza murder case, which Dubelier was already handling. App. 54a-55a.

In March 1985, assistant district attorney James Williams ("Williams") handled a suppression hearing in Thompson's armed robbery case. Noting the reference to a blood test on the Screening Action Form, Williams stated in open court that "it's the state's intention to file a motion to take a blood sample from the defendant, and we will file that motion - have a criminalist here on the 27th." The record does not reflect that Thompson's blood was ever tested by the District Attorney's Office. About one week before the armed robbery trial, however, the bloody pants swatch was sent for testing. Two days before trial, Whittaker received a crime lab report showing that the armed robber's blood was type B. The report was never turned over to Thompson's attorneys. App. 55a.

Several days before trial, Dubelier had asked Williams to act as lead prosecutor. Accordingly, the armed robbery case was tried by Williams and assistant district attorney Gerry Deegan ("Deegan") on April 11 and 12, 1985. The Fifth Circuit panel ***4** described what happened as Thompson's armed robbery trial began:

> On the first day of trial, Deegan checked all of the evidence out of the police property room, including the bloody swatch from Jay LaGarde's pants. Deegan then checked the evidence into the court property room, but never checked in the pants swatch.

App. 56a. Williams did not mention the blood evidence at trial and relied primarily on eyewitness testimony. The jury found Thompson guilty of attempted armed robbery, and he was sentenced to forty-nine and one-half years in prison. App. 56a.

From May 6 to 8, 1985, Dubelier and Williams tried Thompson for the first-degree murder of Liuzza. The state sought the death penalty. At trial, Freeman testified that Thompson shot Liuzza. An acquaintance of Thompson testified that Thompson made incriminating statements about the Liuzza murder and that he had sold Thompson's gun for him. App. 56a-57a.

Thompson did not testify on his own behalf. Had he testified, the prosecution would have used his attempted armed robbery conviction to impeach him. The jury convicted Thompson of first-degree murder. During sentencing, Marie LaGarde testified about Thompson's attempt to rob her family and her brother's actions in fighting him off. Dubelier capitalized on this testimony in his closing argument, asserting that there easily could have been three more murders and that a death sentence was necessary to punish Thompson. Thompson was sentenced to death. App. 57a.

***5** In the fourteen years after his murder conviction, Thompson exhausted all of his appeals. His execution was set for May 20, 1999. Then, in late April 1999, an investigator in Thompson's habeas proceedings discovered a microfiche copy of the lab report containing the blood type of the armed robbery perpetrator. Thompson was tested and found to be type O, making it impossible for him to have been the LaGardes' attacker. Thompson's attorneys presented this information to the District Attorney's Office, which then moved to stay Thompson's execution. App. 57a-58a.

The ensuing investigation uncovered that, "in 1994, Deegan [had] confessed to Michael Riehlmann ("Riehlmann"), a former assistant district attorney, that he had intentionally withheld the blood evidence." App. 58a. Deegan, who was suffering from terminal cancer, admitted this shortly after learning he had only months to live. Riehlmann did not tell anyone about Deegan's confession until the blood evidence was discovered in 1999. App. 58a. [2]

In 2001, Thompson applied for state post-conviction relief seeking vacatur of his murder conviction. The state district court resentenced him to life in prison. In 2002, the Louisiana Fourth Circuit Court of Appeal vacated Thompson's murder conviction, holding that the tainted attempted armed robbery conviction had ***6** unconstitutionally deprived him of his right to testify in his own defense at his murder trial. [3] Thompson was retried for Liuzza's murder in 2003, and was found not guilty. App. 59a-60a.

B. Federal Proceedings

After his release, Thompson brought suit in the United States District Court for the Eastern District of Louisiana under 42 U.S.C. § 1983, alleging that the District Attorney's Office [4] violated his rights by failing to train prosecutors on their obligations under *Brady v. Maryland,* 373 U.S. 83 (1963). [5] *See generally Monell v. Department of Social Services,* 436 U.S. 658 (1978). App. 60a-61a, 116a, 132a-142a. [6]

***7** In denying petitioners' motion for summary judgment, App. 138a-142a, the district court reasoned that, even absent a pattern of *Brady* violations, a jury could infer from a single violation that office training showed "deliberate indifference"

to Thompson's rights. App. 138a-139a. [7] The court ruled that the following evidence raised a triable issue on deliberate indifference:

¶ the office "knows that *Brady* issues are complex and ambiguous," and yet lacked formal training and a written policy regarding *Brady* compliance;
¶ there had been *Brady* violations in unrelated cases for which the office could not identify corrective measures taken;

***8** ¶ a judge had written a letter of concern to the office regarding *Brady* obligations;

¶ a later-written policy manual gave little guidance on *Brady* and mistakenly limited *Brady* to exculpatory evidence.

See generally App. 139a-140a (summarizing Plaintiff's summary judgment evidence).

Before trial, the parties stipulated that failure to disclose the lab report violated Thompson's rights under *Brady.* App. 61a n.7, 22a n.41. The jury found that, while the violation was not caused by any official policy, it was "substantially caused by the District Attorney's failure, through deliberate indifference, to establish policies and procedures" to avoid such violations. App. 61a-64a. The jury awarded Thompson $14 million, and the court added just over $1 million in attorneys' fees. App. 64a-65a.

On December 19, 2008, a panel of the United States Court of Appeals for the Fifth Circuit affirmed. App. 71a-113a. On March 11, 2009, the Fifth Circuit granted *en banc* rehearing and vacated the panel decision. [8] On March 18, 2009, the court asked counsel to brief a number of specific issues, including whether a single incident can give ***9** rise to failure-to-train liability, and whether a district attorney's culpability can be premised on a failure by independently-trained prosecutors to follow *Brady.* On August 10, 2009, an equally divided *en banc* court affirmed the verdict and damages. App. 2a. Two separate dissents, however, explained why the judgment should have been reversed. App. 2a-7a, 9a-44a. [9]

Writing for six members of the court, Judge Clement would have held that Thompson's evidence of a single *Brady* violation, accompanied only by "diffuse evidence of *Brady* misunderstanding among several assistant district attorneys," failed to meet the "heightened standards for culpability and causation" for failure-to-train liability. App. 13a-14a, 32a, 39a. Agreeing with Judge Clement, Judge Jones wrote separately to highlight "the troubling tension between this unprecedented multimillion dollar judgment against a major metropolitan District Attorney's office and the policies that underlie the shield of absolute prosecutorial immunity." App. 2a. Judge Jones urged this Court to address whether attaching liability to a district attorney's office undermined the policies that led the Court, last term, unanimously to reaffirm absolute immunity for prosecutors in *Van de Kamp v. Goldstein,* 129 S. Ct. 855 (2009). App. 2a-3a.

Petitioners now seek a writ of certiorari from this Court.

***10 Reasons for Granting the Petition**

In her *en banc* dissent, Judge Edith Brown Clement captured why this case merits review:

> We believe it is imperative to explain why the result in this case should not encourage the extension of single incident municipal liability under *Monell.*

App. 9a. Judge Clement's fears are well founded. This case erases the distinction between municipal and vicarious liability, a distinction on which *Monell* was founded. It also caps a progressive unraveling of the tight limits on municipal

liability for failing to train employees. And it does so with respect to a single instance of deliberate prosecutorial misconduct, thus expanding district attorneys' liability for countless decisions their prosecutors make every day.

The exceedingly high bar for failure-to-train liability is premised on the idea that municipalities are not vicariously liable for employee wrongdoing. *See Monell,* 436 U.S., at 691. Not only must a municipality callously ignore an obvious need for employee training, but its flawed training must directly cause the violation. *Canton,* 489 U.S., at 388-91; *Bryan County,* 520 U.S., at 404. These rigorous standards typically demand a persisting pattern of employee wrongdoing. *Bryan County,* 520 U.S., at 409.

But a single instance of wrongdoing may suffice in rare circumstances. This Court has hypothesized only one: failure to train police officers on using deadly force. *See Canton,* 489 U.S., at 390 n.10. The Court has never expanded ***11** that exception, nor applied it to *prosecutors*, who have historically enjoyed special protections from suit. *See, e.g., Van de Kamp,* 129 S. Ct., at 859-60. Circuit courts have applied the exception to prosecutors' *Brady* obligations, but in two decades they have failed to agree on a consistent approach.

The Fifth Circuit's evenly split *en banc* decision emerges from this persisting confusion. The court has affirmed a jury verdict that inferred from prosecutors' egregious *Brady* violation that the office itself callously ignored *Brady* training. But the evidence showed no history of violations flagging a need for training, nor did it link any training flaw to the deliberate violation in Thompson's case. Moreover, the "uncontradicted and unimpeached" testimony, App. 31a, proved that office policy was to turn over the kind of report at issue, regardless of whether prosecutors thought it fell under *Brady.*

The Fifth Circuit should have heeded the warning that "[a]llowing an inadequate training claim such as this one to go to the jury based upon a single incident would only invite jury nullification of *Monell.*" *Canton,* 489 U.S., at 399 (O'Connor, J., concurring in part and dissenting in part). That is precisely what happened. Once a jury heard Thompson's story - a story being made into a film [0] - the outcome was not surprising. It awarded ***12** Thompson compensation "roughly equal to [the] office's annual operating budget."

The Court should dispel the confusion over how *Canton* applies to district attorney's offices. Reviewing this case will allow the Court to develop its failure-to-train case law - which consists only of *Canton* and *Bryan County* - and to explain *Canton*'s elusive single-incident theory. Unique problems arise when the municipality at issue is a district attorney's office - such as whether an office can culpably fail to train professionally educated criminal attorneys, and whether any training could prevent prosecutors from deliberately violating the law. More generally, the Court should use this case to confirm that a failure-to-train claim based on a single incident is still governed by the rigorous culpability and causation standards of *Canton* and *Bryan County.* Allowing liability here nullifies those safeguards and exposes district attorney's offices to vicarious liability for a wide range of prosecutorial misconduct.

This case dovetails with the attention given to prosecutorial immunity last term in *Van de Kamp* and this term in *Pottawattamie County v. McGhee,* 547 F.3d 922 (8th Cir. 2008), *cert. granted,* 129 S. Ct. 2002 (U.S. Apr. 20, 2009) (No. 08-1065). Indeed, the Court's continuing commitment to ***13** individual prosecutors' absolute immunity highlights another compelling reason for review. Last term in *Van de Kamp,* this Court extended absolute prosecutorial immunity to precisely the kind of failure-to-train claims presented in this case. Allowing those claims against an office on the same theory works the same ill-effects on prosecutors' independence and judgment that *Van de Kamp* and its predecessors sought to avoid.

For both reasons, this Court should grant certiorari to review the judgment of the *en banc* Fifth Circuit.

I. The Court Should Clarify When District Attorney's Offices May Be Liable for Individual Prosecutors' Misconduct.

A. The Court's decisions narrowly limit failure-to-train liability for single incidents.

A municipality is not liable under section 1983 simply because it employs a tortfeasor, but only if a municipal policy or custom directly causes injury. *See, e.g., Bryan County,* 520 U.S., at 403; *Monell,* 436 U.S., at 690-94. When a policy is itself unconstitutional, or a policymaker orders unconstitutional action, proving fault and causation is straightforward. *See Bryan County,* 520 U.S., at 404; *Pembaur v. City of Cincinnati,* 475 U.S. 469, 483-84 (1986). But "much more difficult problems of proof" arise when liability is premised, not on a municipality's action, but on its failure to act. *Bryan County,* 520 U.S., at 406. In such eases, "rigorous standards of culpability and causation must be applied to ensure that the ***14** municipality is not held liable solely for the actions of its employee." *Id.,* at 405 (citing *Canton,* 489 U.S., at 391-92; *Oklahoma City v. Turtle,* 471 U.S. 808, 824 (1985) (plurality opinion)).

Those rigorous standards govern claims alleging a municipality has inadequately trained its employees. It is not enough to show that an employee was poorly trained, that better training would have thwarted his bad act, or that "an otherwise sound program has occasionally been negligently administered." *Canton,* 489 U.S., at 390-91; *see also Bryan County,* 520 U.S., at 408. Rather, inadequate training must demonstrate a municipality's "deliberate indifference" - a callous and conscious disregard for rights. *Canton,* 489 U.S., at 388-89 & n.7; *Bryan County,* 520 U.S., at 407. Additionally, an identified flaw in training must "actually cause" the particular injury. *Canton,* 489 U.S, at 391; *Bryan County,* 520 U.S., at 404. "Where a court fails to adhere to rigorous requirements of causation and culpability, municipal liability collapses into *respondeat superior* liability." *Bryan County,* 520 U.S., at 415.

Failure-to-train liability ordinarily requires an underlying pattern of employee wrongdoing. *See, e.g., Bryan County,* 520 U.S., at 409. Without warning from a history of violations, a municipality's mere failure to adjust its training would not ordinarily show deliberate indifference, nor *directly* cause an employee's wrongdoing. [2] By ***15** contrast, culpability and causation could be proven by a municipality's "continued adherence" to training whose flaws are exposed by repeated wrongdoing. *Id.,* at 407 (citing *Canton*, 489 U.S., at 390 n.10). [3]

In "a narrow range of circumstances," failure-to-train liability may be triggered by an employee's single violation, *Bryan County,* 520 U.S., at 409. The theory emerges from this language in *Canton:*

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officer with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

489 U.S., at 390 n.10 (citation omitted). Even in such a situation, *Canton* did not relax its stringent fault and causation requirements. *Id.,* at 391. Justice O'Connor's concurrence also cautioned against diluting those safeguards:

> ***16** Without some form of notice to the city, and the opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory could completely engulf *Monell*, imposing liability without fault.

Id., at 395 (O'Connor, J., concurring in part and dissenting in part).

Justice O'Connor revisited this subject in *Bryan County. Canton,* she explained, left open the "possibility" that failure-to-train liability might flow from a single violation. *Bryan County,* 520 U.S., at 409 (citing *Canton,* 489 U.S., at 390 &

n.10). In doing so, however, *Canton* "simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." *Bryan County,* 520 U.S., at 409.

The Court, then, has emphasized that plaintiffs suing a municipality for failure to train employees face an exceedingly high bar, especially in those rare situations where liability depends on a single incident. Furthermore, the only concrete example of such a situation is *Canton*'s hypothetical - which the Court has never since clarified - of a police department's failure to train officers about deadly force. As discussed in Parts I.B and I.C, *infra,* circuit courts have struggled to apply that hypothetical to cases like Thompson's.

***17 B. In two decades, circuit courts have not developed a consistent approach to applying single-incident liability to *Brady* violations.**

Federal circuit courts have recognized that single-incident liability is exceptional, and that failure-to-train usually demands a pattern of violations. [4] They confine single-incident liability largely to situations like *Canton*'s deadly force hypothetical. [5] In fact, until *Thompson*, the only time the Fifth Circuit had found single-incident liability was an excessive force case that closely tracked the *Canton* hypothetical. *See Brown v. Bryan County,* 219 F.3d 450 (5th Cir. 2000); App. 16a-18a (discussing *Brown*). But now four circuits, including the Fifth, have confronted single-incident liability based on an alleged failure to train prosecutors or officers on *Brady.* Although these courts have applied the same *Canton* hypothetical, they do not agree on the proper analysis and they reach inconsistent results.

***18** The earliest decision in this area is *Walker v. City of New York,* 974 F.2d 293 (2nd Cir. 1992). [6] Building on *Canton, Walker* developed a three-part test to analyze a failure-to-train claim based on a prosecutor's covering up impeachment evidence. *Id.* at 294-95, 296-97 (discussing *Canton,* 489 U.S., at 390 n.10). [7] Under that test, failure to train prosecutors on *Brady* in 1971 could constitute deliberate indifference, because: (1) a district attorney knows "to a moral certainty that ADAs will acquire *Brady* material"; (2) in 1971, *Brady* obligations were not so obvious as to require no training; and (3) withholding *Brady* material "will virtually always lead to a substantial violation of constitutional rights." *Id.* at 300.

Walker, however, limited itself to the time period and evidence at issue. *Brady* was relatively new in 1971 - the time of the violation in *Walker* - and the Second Circuit took "no view as to whether … a jury finding [on deliberate indifference] would be supportable in other time periods, or with ***19** respect to other kinds of exculpatory evidence." *Id.* Unlike disclosure of impeachment evidence, *Walker* suggested "there might have been no need in 1971 to train ADAs to disclose direct evidence that the accused was elsewhere at the time of the crime." *Id.* The Second Circuit has since re-affirmed *Walker*, while explaining that it is subject to the heightened culpability and causation standards emphasized by this Court in *Bryan County.* [8]

The Eighth Circuit recently confronted the same situation as *Walker* - failure-to-train based on a prosecutor's nondisclosure of impeachment material - but without mentioning *Walker*'s three-part test. *See Reasonover v. St. Louis County,* 447 F.3d 569, 583-84 (8th Cir. 2006). Instead, the court simply applied the stringent culpability and causation requirements from *Canton* and *Bryan County.* Thus, the court emphasized that allegedly inadequate training must not only show deliberate indifference, but also constitute "the moving force behind the constitutional violation." *Id.,* at 583 (quoting *Canton,* 489 U.S. at 388, 389). The evidence - that the prosecutor was aware of *Brady* obligations and that county policy was to disclose *Brady* material - failed to show that the particular violations "were the result of inadequate training or supervision." *Id.,* at 584. The court did not even ***20** hint that a single *Brady* violation could underpin a failure-to-train claim. [9]

By contrast to the Eighth Circuit, the Sixth Circuit has, on two recent occasions, allowed failure-to-train claims based on single-incident *Brady* violations involving police officers. Both decisions implicitly held that a pattern of *Brady* violations was not required to establish failure-to-train liability. In neither case, however, did the court follow the Second Circuit's three-step approach in *Walker.*

For instance, in *Gregory v. City of Louisville,* the Sixth Circuit held that plaintiffs survive summary judgment "by showing that officer training failed to address the handling of exculpatory materials and that such a failure has a 'highly predictable consequence' of" causing *Brady* violations. 444 F.3d 725, 753 (6th Cir. 2006). The officers had received no *Brady* training and the chief of police "believed officers were confused" about *Brady. Id.,* at 753-54. The court reasoned that, because disclosure obligations are "a significant constitutional component of police duties with obvious consequences for criminal defendants," evidence of failure to train on those duties satisfies culpability and causation. *Id.,* at 754. The court recently confirmed *Gregory* in ***21** *Moldowan v. City of Warren,* 578 F.3d 351, 393 (6th Cir. 2009). *Moldowan* reasoned that, because police [20] had a duty to turn over exculpatory evidence, *Canton* "dictates that the City has a corresponding obligation to adequately train its officers in that regard." *Id. Moldowan* said nothing about heightened causation.

In sum, the Second, Eighth, and Sixth Circuits have failed to arrive at a consistent approach to failure-to-train claims involving *Brady* obligations. The Second Circuit's *Walker* analysis, now nearly two decades old, has not been adopted by either the Eighth or the Sixth Circuits. The Sixth Circuit agrees with the Second, however, that single *Brady* violations can support a failure-to-train claim, whereas the Eighth has reached a different conclusion. Furthermore, the Second [2] and the Eighth Circuits subject such failure-to-train claims to the rigorous culpability and causation standards of *Canton* and *Bryan County*, whereas the Sixth Circuit is more lenient. Finally, the Second Circuit's seminal *Walker* test is ambiguous on its own terms: it suggests that obvious or later-occurring *Brady* violations may not support failure-to-train liability against a district attorney's office. None of the other circuits have developed that critical aspect of *Walker.*

***22** This confusion has resulted from lower courts attempting to apply *Canton*'s single-incident hypothetical - involving police training on deadly force - to the very different matter of *Brady* obligations. The divergent approaches reveal not only inconsistency but stagnation: courts have not approached the same situations in a way that will sensibly elucidate, over time, how *Canton* should apply to prosecutors. The Fifth Circuit's approach in *Thompson, infra* Part I.C., adds to the confusion and also emerges from contradictory circuit precedent.

C. The Fifth Circuit's approach in *Thompson* deepens the confusion.

The Fifth Circuit demonstrates the deep confusion plaguing this area of municipal liability. Not only does the court's approach in *Thompson* add another layer of uncertainty to the other circuits, but the Fifth Circuit's own case law now contradicts itself on whether single *Brady* violations can support a failure-to-train claim. Indeed, the area is so murky that, four years before *Thompson*, a Fifth Circuit panel examined the record of the same district attorney's office and found no history of *Brady* violations showing deliberate indifference.

The Fifth Circuit's approach in this area resembles the Second Circuit's, at least superficially. Thompson's jury, for instance, was instructed under the three-part *Walker* test. App. 94a & n.20. The district court denied summary judgment based on the *Walker* analysis, App. 141a-142a, and the panel relied on *Walker* to support the ***23** conclusion that "Thompson did not need to prove a pattern of *Brady* violations to demonstrate that the failure to train was deliberately indifferent." App. 80a (citing *Walker,* 974 F.2d, at 300); *see also generally* App. 72a-80a (discussing whether pattern of violations is necessary).

But there was no attempt to grapple, as *Walker* did, with the nuances of *Brady* - such as how deliberate indifference applies to a violation occurring long after *Brady* or concerning different *Brady* material. Thompson's violation occurred

fourteen years after Walker's, and, since it involved exculpatory as opposed to impeachment evidence, it was an obvious breach. *Cf. Walker,* 974 F.2d at 300. Furthermore, Thompson presented evidence of diffuse disagreement about *Brady* not directly linked to the particular violation, *see infra* Part I.D, evidence that might satisfy Sixth Circuit but fail Eighth Circuit standards. *See supra* Part I.C. Such evidence, moreover, would likely fail in the Second Circuit, given its confirmation that the *Walker* test incorporates heightened culpability and causation. *See Amnesty America,* 361 F.3d at 130 n.10. [22]

***24** The Fifth Circuit's own case law mirrors the inter-circuit confusion. Until *Thompson*, the Fifth Circuit had "consistently rejected application of the single incident exception." *Gabriel v. City of Plano,* 202 F.3d 741, 745 (5th Cir. 2000); App. 16a. [23] Indeed, only four years before Thompson's federal trial, the Fifth Circuit had addressed *Brady* enforcement by Orleans Parish District Attorney Harry Connick - the *same* district attorney over the *same* office during the *same* time period. *See Cousin v. Small,* 325 F.3d 627, 637-38 (5th Cir. 2003). *Cousin* found that Connick's "enforcement of the *[Brady]* policy was not patently inadequate or likely to result in constitutional violations," and observed that:

… Connick's office handled tens of thousands of criminal cases over the relevant time period, and we agree with the [district] court's conclusion that citation to a small number of cases, out of thousands handled over twenty-five years, does not create a triable issue of fact with respect to Connick's ***25** deliberate indifference to violations of *Brady* rights.

Id.

Cousin thus considered - and approved - the same office's record of *Brady* enforcement during the time period covering Thompson's ease. *Id.,* at 630, 637. [24] Furthermore, *Cousin* required a pattern of *Brady* violations: it did not even hint that one violation could suffice. *Id.,* at 637 (explaining that "[t]o satisfy the deliberate indifference prong, a plaintiff usually must demonstrate a pattern of violations"). [25]

In sum, *Thompson* deepens persisting uncertainty, both inside and outside the Fifth Circuit, over when failure-to-train liability may attach to a single *Brady* violation. The issue having stagnated for the past two decades, *Thompson* signals the time is ripe for this Court's intervention. As the next section demonstrates, ***26** *infra* Part I.D, *Thompson* collapses municipal and *respondeat superior* liability for a potentially wide range of prosecutorial misconduct and thus dramatizes the hazards of applying single-incident liability to a district attorney's office.

D. The Fifth Circuit has effectively imposed vicarious liability on a district attorney's office.

The work of district attorney's offices embraces countless judgments by individual prosecutors regarding evidence disclosure. With *Thompson*, the Fifth Circuit has essentially adopted a *per se* rule that offices failing to train adequately on *Brady* could be liable for every violation committed in their offices - regardless of how rarely or under what circumstances they occur. And this rule logically embraces any other violation involving a prosecutor's lapse of discretionary judgment. App. 27a. That rule cannot be right: it dilutes *Canton*'s "rigorous requirements of culpability and causation," *Bryan County,* 520 U.S., at 415, exposing district attorney's offices to vicarious liability. The Court should grant certiorari to temper *Canton*'s application to this fertile source of damaging municipal liability.

(1). Thompson failed to show culpability and causation.

Judge Clement's *en banc* dissent correctly explains that the culpability inquiry must focus on the kind of undisclosed evidence at issue, and whether there was an obvious need to train ***27** prosecutors about it. App. 14a-18a, 22a-24a. [26] Thus, the question was not whether the office culpably failed to train about *Brady* generally, but whether it culpably "fail[ed] to train on how to handle specific types of evidence such as the crime report at issue." App. 24a. [27]

Thompson's evidence failed that standard. Principally, he could rely only on the single violation because he proved no pattern of similar incidents. App. 25a. In tens of thousands of cases handled by Connick's office in the previous decade, "only four convictions were overturned based on *Brady* violations … and there was not a single instance involving the failure to disclose a crime lab report or other scientific evidence." App. 25a. Nor could Thompson identify any reported decision alerting Connick to train on this issue. After all, the Fifth Circuit had already found no pattern of *Brady* violations by his office during the relevant period. App. 26a; *see supra* Part I.C.

Against this, Thompson merely offered "generic generalizations" that "could … support a deliberate indifference finding against any prosecutor's office for nearly any error that leads to a reversal of a conviction." App. 27a-28a. Evidence that *Brady* issues were common, or that prosecutors thought *Brady* had "gray areas," proved nothing. As Judge ***28** Clement explained, such evidence would apply equally to any district attorney's office, and would implicate every discretionary issue prosecutors confront, including "*Brady*, search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, or many more." App. 26a-27a.

Prosecutors, moreover, are not just any municipal employees. They are "licensed attorneys … personally responsible as professionals to know what *Brady* entails and … to understand the 'gray areas.' " App. 29a. This is the last case where diffuse evidence of Brady confusion should show deliberate indifference by a district attorney, who is "entitled to assume that attorneys will abide by the standards of the profession." App. 29a. It would, moreover, be especially inappropriate where - despite theoretical disagreements over *Brady* - "every single witness who was asked stated that they would have disclosed the crime lab report had they known about it." App. 31a.

The evidence also failed heightened causation. As Judge Clement explained, Thompson was required to establish "by substantial evidence" that "unfamiliarity with *Brady* obligations with respect to this lab report was the *actual* cause - the *moving force* - of this constitutional violation." App. 33a (emphasis in original). Thompson did not meet that stringent standard.

Thompson's sole theory of causation was that one or more assistant district attorneys did not disclose the report because they misunderstood their obligation to produce it, and that *Brady* ***29** training would have prevented that. App. 35a-36a. The evidence of what led to nondisclosure was murky, App. 33a, but at most Thompson showed some possible confusion about *Brady*'s application to impeachment evidence, and some disagreement about whether *Brady* reached potentially exculpatory lab reports. App. 37a-38a.

This evidence cannot show that failure to train on *Brady* was "the actual cause and moving force behind the constitutional violation." App. 38a. For instance, any confusion about *Brady*'s coverage of impeachment evidence was irrelevant: the lab report was exculpatory, not impeaching. App. 38a-39a. Furthermore, any disagreement about whether *Brady* reached the report could not overcome the uncontradicted evidence that office policy was to turn over *all* lab reports regardless. App. 31a. The same witness who testified that *Brady* did not reach every lab report also "stated unequivocally that *all* technical or scientific reports, like the lab report, were required to be turned over to a defendant." App. 38a (emphasis in original).

Ultimately, as Judge Clement explained, Thompson's causation argument boiled down to insisting that a jury could have rejected the theory that a "single rogue prosecutor" was solely responsible for hiding the evidence. App. 36a-37a. But regardless of whether one or more of the four prosecutors participated in the nondisclosure, Thompson had to prove a "direct causal link" between the nondisclosure and ***30** *office policy. Bryan County,* 520 U.S., at 404.[28] It was not enough to show that absence of *Brady* training made this violation "more likely," *see id.,* at 410-11, nor "that an injury … could have been avoided if [prosecutors] had had better or more training." *Canton,* 489 U.S., at 391. Rather, *Canton* requires that "the identified deficiency in a … training program must be *closely related* to the ultimate injury," 489 U.S., at 391 (emphasis added). Thompson's proof failed that standard. App. 37a-39a.

(2). Applying "failure-to-train" to this single incident collapses municipal and vicarious liability.

Even as it allowed municipal liability under § 1983, this Court cautioned that "a municipality cannot be held liable *solely* because it employs a tortfeasor - or, in other words, … on a *respondeat superior* theory." *Monell,* 436 U.S., at 691 (emphasis in original). Both *Canton* and *Bryan County* reissued that warning. *See Canton,* 489 U.S., at 391-92; *Bryan County,* 520 U..S., at 415. Justice O'Connor even predicted that allowing certain inadequate training claims "to go to the jury based upon a single incident would only invite jury nullification of *Monell*." *Canton,* 489 U.S., at 399 (O'Connor, J., concurring in part and ***31** dissenting in part). Now *Thompson* has fulfilled Justice O'Connor's prediction. The *en banc* Fifth Circuit has allowed a jury - based solely on the single instance of deliberate prosecutorial misconduct - to impose liability on a district attorney's office, where the evidence failed to establish that the *office* was at fault.

The essence of vicarious liability is to make an employer answerable for an employee's wrongdoing simply by virtue of the employment relationship. That can be the only fair description of the basis for liability in this case. No history of similar violations should have alerted Connick that he needed training targeted to this sort of *Brady* problem. Nothing warned him not to rely on his professional prosecutors' independent training and judgment in obeying *Brady.* And nothing warned him that the existing office policy - to turn over *all* crime lab reports, regardless of whether they fell under *Brady,* App. 31a-32a, 38a - would not resolve exactly the situation presented in Thompson's case. In sum, no evidence showed that Connick or his office had the callous, conscious disregard *Canton* demands.

Nor did any evidence establish a tangible link between the office's lack of *Brady* training and the nondisclosure in Thompson's case. Instead, Thompson merely presented a haze of generalizations. The fact that certain prosecutors expressed doubts after the fact about their *Brady* obligations shed no light on what *actually* caused the violation in Thompson's case. And, again, no evidence overcame the fact that the office's actual policy was to turn over all crime lab reports, ***32** regardless of *Brady.* App. 31a-32a, 38a. The jury, after all, affirmatively found that Thompson's violation was *not* caused by an actual office policy. App. 39a, 64a. The events that led to the deliberate nondisclosure in Thompson's case are now impossible to reconstruct, but one thing is clear: the office's *training policy* did not cause it.

What allowed the Fifth Circuit to dilute culpability and causation is *Canton*'s single-incident theory - *i.e., Canton*'s suggestion that certain duties so obviously cry out for targeted training that a municipality's failure to do so creates liability, even absent a pattern of violations. *See* 489 U.S., at 390 & n.10. But whatever the breadth of single-incident liability, the Court should clarify that it has little application to this case. Absent a warning history of particular violations, there can be no obvious need to train prosecutors who are themselves professionally trained to understand and apply the law. Moreover, a district attorney's office cannot be culpable for, or the moving force behind, a single constitutional injury intentionally committed by prosecutors. No amount of training could prevent such flagrantly unlawful and unethical acts.

The time is long past due for the Court to revisit the subject of single-incident liability in failure-to-train cases. *Canton* embraced it in theory twenty years ago, but the Court has not clarified its scope since. The only guidance remains the single hypothetical in *Canton*'s footnote. But, in over two decades, the circuit courts have not managed to build from that hypothetical a coherent, consistent approach to the subject, particularly in situations ***33** involving prosecutors. The inevitable result is *Thompson* itself: because the Fifth Circuit "fail[ed] to adhere to rigorous requirements of causation and culpability, municipal liability collapse[d] into *respondeat superior* liability." *Bryan County,* 520 U.S., at 415.

II. The Court Should Also Review Whether Holding a District Attorney's Office Liable Under Canton Eviscerates Prosecutors' Absolute Immunity.

The Fifth Circuit's overextension of single-incident liability not only contravenes *Canton*, but also *undermines* the absolute immunity that shields individual prosecutors from failure-to-train claims. Chief Judge Jones' separate *en banc* dissent highlights this distinct and compelling reason for review. App. 2a-7a. Last term, this Court unanimously extended absolute immunity to claims that supervising prosecutors failed to train line prosecutors on their obligations to disclose impeachment evidence. *See Van de Kamp v. Goldstein,* 129 S.Ct. 855, 864-65 (2009). The Court should now decide whether holding the office itself liable on the same theory works the same ill-effects on prosecutors' independence and judgment that *Van de Kamp* and its predecessors sought to avoid.

Absolute immunity has long protected prosecutors from litigation attacking the exercise of their core public functions. *See generally Imbler v. Pachtman,* 424 U.S. 409 (1976). Without this barrier, harassing litigation risks squandering a prosecutor's limited resources and diluting his judgment. *See Van de Kamp,* 129 S.Ct., at 860 ***34** (describing policies underlying absolute immunity as avoiding "a deflection of the prosecutor's energies from his public duties" and "shad[ing] his decisions instead of exercising his independence of judgment required by the public trust"). *Van de Kamp* extended absolute immunity to prosecutors' duties to supervise the management and disclosure of impeachment evidence. *Id.*, at 861-64. Thus, individual prosecutors are immune from suits alleging failure "to adequately train and supervise deputy district attorneys" on disclosure obligations, and "fail[ure] to create any system" for managing impeachment evidence. *Id.,* at 861; *see also generally Giglio v. United States,* 405 U.S. 150 (1972) (establishing duty to disclose impeachment evidence).

Municipalities, of course, cannot claim personal immunities against § 1983 litigation, *see Kentucky v. Graham,* 473 U.S. 159, 167 (1985),[29] yet holding ***35** an office liable on precisely the same claims from which prosecutors are absolutely immune sits uncomfortably with *Van de Kamp.* As Chief Judge Jones noted, "every reason advanced in *Va de Kamp* and *Imbler for* protecting the independence and integrity of prosecutors in trial-related actions and supervision suggests that holding a government entity liable in their stead for the same violations is simply untenable." App. 6a. The "office," after all, does not act: rather, a web of individual prosecutors acts on its behalf. A failure-to-train claim against the office will impose the same judgment-distorting burdens of litigation on the same prosecutors who are nominally protected from them by absolute immunity. *See* App. 4a (explaining that "[a]uthorizing Section 1983 liability against the office creates the same stress on the proper function of the office" as suing the individual prosecutors).

Van de Kamp stressed that the primary aim of absolute immunity was "the interest in protecting the proper functioning of the *office*, rather than the interest in protecting its occupant." 129 S.Ct., at 862 (quoting *Kalina v. Fletcher,* 522 U.S. 118, 125 (1997) (emphasis added)). In light of that rationale, this Court should resolve whether allowing failure-to-train liability against the office devalues the absolute immunity of individual prosecutors and their supervisors. *Van de Kamp*, for instance, held that absolute immunity barred suit against a line ***36** prosecutor for a *Giglio* violation *and also against* his supervisor for failure to train him on *Giglio.* The Court reasoned that "*Imbler*'s basic fear" was implicated in both situations, *i.e.* that "the threat of damages liability would affect the way in which prosecutors carried out their basic court-related tasks." *Van de Kamp,* 129 S.Ct., at 862.

This case starkly illustrates the tension between *Van de Kamp's* extension of absolute immunity to supervisory prosecutors, on the one hand, and holding prosecutorial offices liable for failure to train, on the other. That tension is only heightened by the fact that "the jury was permitted to infer Section 1983 deliberate indifference and causation based on a single incident of withheld *Brady* evidence." App. 5a. Even the prosecutors who intentionally withheld exculpatory evidence would have been shielded by absolute immunity. But - without any evidence of a pattern of similar wrongdoing, and without any evidence that the violation was actually caused by inadequate training - a jury has now been permitted to assess $14 million in damages against the office that employed the prosecutors. This Court should grant certiorari to consider whether that result is compatible with *Van de Kamp* and the absolute prosecutorial immunity it upheld.

***37 Conclusion**

The petition for a writ of certiorari granted.

Footnotes

1 The record does not reveal who ordered the test. App. 55a, 35a.

2 Riehlmann was sanctioned by the Louisiana Supreme Court for his failure to promptly report Deegan's misconduct. *See In Re Riehlmann.* 2004 0680 (La. 1/19/05); 891 So.2d 1239.

3 *See State v. Thompson,* 2002 0361, pp. 8 9 (La. App. 4 Cir. 7/17/02); 825 So.2d 552, 557 58.

4 Thompson also sued, in their individual and official capacities, Connick, Williams, and Dubelier, as well as Eddie Jordan, who held the position of Orleans Parish District Attorney in 2003. App. 60a.

5 Thompson's additional state and federal claims were dismissed at various stages. His state claims were dismissed on summary judgment. His § 1983 claim against Connick individually was dismissed before trial. After Thompson rested, the district court dismissed his § 1985(3) conspiracy claim. At the close of evidence, the court ruled that two of the prosecutors, Dubelier and Williams, were not "policymakers and thus not liable. App. 61a, 142a 143a. The only claim that proceeded to trial was Thompson's § 1983 claim against the office. His official capacity claims against the prosecutors are identical to his claim against the office itself. *See Kentucky v. Graham,* 473 U.S. 159, 165 66 (1985); App. 132a.

6 Thompson also sued the State of Louisiana separately for wrongful conviction. *See* La. Rev. Stat. Ann. § 15:572.8 (2007). The State has offered to settle that lawsuit for the maximum statutory compensation, $150,000, plus up to $40,000 for prospective claims such as job training, education, and medical expenses. *Id.* § 572.8(H). The wrongful conviction suit is based on a different legal standard from Thompson's *Monell* claim against the District Attorney's Office. *See, e.g.,* § 572.8(A) (requiring proof that conviction was reversed or vacated and that petitioner is "factually innocent of the crime).

7 The court relied on *Bryan County,* 520 U.S., at 418, and *Canton,* 489 U.S., at 390 n.10, as well as the Fifth Circuit's decision in *Grandstaff v. City of Borger,* 767 F.2d 161 (5th Cir. 1985), *abrogated on other grounds by Leatherman v. Tarrant County,* 507 U.S. 163, 167 (1993). App. 138a 139a. As discussed in Part I.C, *infra,* the court also relied on the Second Circuit's analysis in *Walker v. City of New York,* 974 F.2d 293, 300 (2nd Cir. 1992). App. 141a 142a.

8 Since the panel decision has been vacated, the judgment naming Connick, Debelier, Williams and Jordan still remains. This Court's review should include correcting that glaring error by the district court. *See* App. 112a n.27 (explaining why the district court erred by including those defendants in the judgment). In this petition, Jordan's name has been substituted with that of the current Orleans Parish District Attorney, Leon Cannizzaro.

9 Judge Prado wrote a concurrence for five judges explaining why the judgment should be affirmed. App. 45a 50a.

10 The film, currently in production, will be entitled "The Nine Lives of John Thompson, and will star Matt Damon and Ben Affleck as the attorneys who exonerated Thompson. *See* http:// movies.nytimes.com/movie/446373/The Nine Lives of John Thompson/details (last visited October 29, 2009).

11 Becky Bohrer, *Court upholds $14 million judgment against Orleans DA s office,* Assoc. Press, Aug. 10, 2009. To prevent a crippling seizure of assets, the office has been forced to consider bankruptcy. *Financial Woes Could Halt Justice System,* WDSU.com, Jan. 7, 2009, http:// www.wdsu.com/money/18426227/detail.html (last visited October 29, 2009).

12 *See, e.g., Bryan County,* 520 U.S., at 407 (explaining that " i]f a training] program does not prevent constitutional violations, municipal deeisionmakers *may eventually* be put on notice that a new program is called for) (emphasis added).

13 *See, e.g., Bryan County,* 520 U.S., at 407 08 (observing that "the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training … is the 'moving force behind the plaintiff's injury) (citing *Canton,* 489 U.S. at 390 91).

14 *See, e.g., Doe v. Broderick,* 225 F.3d 440, 456 (4th Cir. 2000); *Revene v. Charles Cty. Comm rs,* 882 F.2d 870, 874 75 (4th Cir. 1989); *Robles v. City of Fort Wayne,* 113 F.3d 732, 736 (7th Cir. 1997); *Szabla v. City of Brooklyn Park,* 486 F.3d 385, 392 93 (8th Cir. 2007) (en banc); *McDade v. West,* 223 F.3d 1135, 1141 42 (9th Cir. 2000); *Gold v. City of Miami,* 151 F.3d 1346, 1351 (11th Cir. 1998).

15 *See, e.g., Young v. City of Providence,* 404 F.3d 4, 28 29 (1st Cir. 2005); *Brown v. Gray,* 227 F.3d 1278, 1286 87 (10th Cir. 2000).

16 From the outset, *Walker* observed that municipal liability raised "elusive questions, such as whether "a single incident can] constitute an unlawful policy. *Id.,* at 296; *see also Robles,* 113 F.3d, at 735 (describing *Canton*'s failure to train standard as "somewhat elusive) (citation omitted).

17 Generally, the test requires showing that (1) a policymaker knows "to a moral certainty that employees will confront a given situation; (2) the situation "either presents the employee with a difficult choice of the sort that training or supervision will

make less difficult or that there is a history of employees mishandling the situation ; and (3) the employee's "wrong choice … will frequently cause the deprivation of a citizen's constitutional rights. 972 F.2d, at 297 98.

18 *See Amnesty America v. Town of West Hartford,* 361 F.3d 113, 130 n.10 (2nd Cir. 2004); *see also Aretakis v. Durivage,* No. 1:07 CV 1273, 2009 WL 249781, at *28 *30 (N.D.N.Y. Feb. 3, 2009) (slip op.) (applying *Walker* in light of heightened culpability and causation).

19 Indeed, in rejecting plaintiff's claim that the county had a custom of failing to document *Brady* material, the court remarked that the plaintiff "presents no evidence of a widespread practice of violating police and prosecutorial obligations under *Brady. Id.,* at 584.

20 *Moldowan* expressly held that *Brady* obligations apply to police officers. 578 F.3d, at 376 81. But the court did not indicate that its failure to train analysis would apply any differently to prosecutors indeed, it found police officers had *Brady* obligations by analogy to prosecutors. *Id.*

21 *See* note 18, *supra*, and accompanying text.

22 *And cf. Babi Ali v. City of New York,* 979 F.Supp. 268, 274 (S.D.N.Y. 1997) (finding *Walker* "still applies to a claim raised "thirty four years after the *Brady* decision, but in which plaintiff alleged "that the conduct of the Queens County District Attorney's Office indicates a history of mishandling *Brady* material); *see also, e.g., Gausvik v. Perez,* 239 F.Supp.2d 1047, 1057 (E.D. Wash. 2002) (distinguishing *Walker* in part because " p]laintiff was prosecuted in 1995, over thirty years after Brady was decided).

23 *See also Cozzo v. Tangipahoa Parish Council President Gov t,* 279 F.3d 273, 288 (5th Cir. 2002); *Snyder v. Trepagnier,* 142 F.3d 791, 798 (5th Cir. 1998) (rejecting single incident liability); App. 16a n.24. The one exception was on remand in *Bryan County* itself, which featured inadequate training identical to the *Canton* hypothetical. *See Brown v. Bryan County,* 219 F.3d 450, 458 61 (5th Cir. 2000); App. 16a 17a (discussing *Brown*). Even so, one judge dissented in *Brown*, urging the panel had misapplied circuit precedent on single incident liability and further arguing that this Court had *narrowed* the theory in *Bryan County. See Brown,* 219 F.3d at 474 77 (DeMoss, J., dissenting).

24 Judge Prado's *Thompson* panel opinion distinguished *Cousin* on the ground that the plaintiff conceded that the office's *Brady* training was adequate in 1995, which "says nothing of the training, supervision, and monitoring that existed when the DA's Office tried Thompson in 1985. App. 88a 89a. But that misses *Cousin*'s significance. As Judge Clement explained, *Cousin* "sustained the district court's conclusion that twenty five years of records involving this District Attorney's Office (covering the time period of Thompson's trial) reveal no pattern of *Brady* violations. App. 25a.

25 *See also Burge v. St. Tammany Parish,* 336 F.3d 363, 372 73 (5th Cir. 2003) (declining plaintiffs "argument that the single incident exception should be expanded based on the latent nature of a *Brady* claim).

26 *See, e.g., Canton,* 489 U.S., at 391 (requiring that "the identified deficiency in a city's training program must be closely related to the ultimate injury).

27 *Cf. Walker,* 974 F.2d, at 300 (reserving question of how deliberate indifference applies "with respect to other kinds of exculpatory evidence).

28 *See, e.g.,* App. 37a (explaining that Thompson was required to prove that "the assistant district attorney (or attorneys) responsible for the constitutional violation did not understand *Brady*, that this lack of understanding caused the failure to produce the report, and that *Brady* training could have resolved this lack of understanding).

29 Nor could the district attorney's office in this case claim Eleventh Amendment immunity. *See Hudson v. City of New Orleans,* 174 F.3d 677, 682 691 (5th Cir. 1999) (concluding that Orleans Parish District Attorney's Office is not an arm of the state and thus not entitled to Eleventh Amendment immunity). Since the issue depends on state structural and funding policies, the Eleventh Amendment immunity of district attorneys' offices varies considerably. *Compare Del Campo v. Kennedy,* 517 F.3d 1070, 1073 (9th Cir. 2008) (California district attorneys entitled to Eleventh Amendment immunity); *Brooks v. George County,* 84 F.3d 157, 168 (5th Cir. 1999) (Mississippi district attorneys); *Arnold v. McClain,* 926 F.2d 963, 965 66 (10th Cir. 1991) (Oklahoma district attorneys), *with Carter v. City of Philadelphia,* 181 F.3d 339, 355 (3rd Cir. 1999) (Pennsylvania district attorneys not entitled to Eleventh Amendment immunity); *Crane v. State of Texas,* 766 F.2d 193, 195 (5th Cir. 1985) (Texas district attorneys).

2010 WL 320374 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Harry F. CONNICK, in his official capacity as District Attorney; Eric Dubelier, in his official capacity as Assistant District Attorney; James Williams, in his official capacity as Assistant District Attorney; Leon Cannizzaro, Jr., in his official capacity as District Attorney; Orleans Parish District Attorney's Office, Petitioners,
v.
John THOMPSON, Respondent.

No. 09-571.
January 25, 2010.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioners' Reply Brief

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Cases

***1** The Court should grant certiorari in this case to police the outer boundaries of municipal liability and to resolve confusion caused by its own jurisprudence. Based on a single *Brady* violation, the *en banc* Fifth Circuit has affirmed a crippling failure-to-train award against the Orleans Parish District Attorney's Office. Only the strained extension of this Court's *Canton* decision allowed Thompson'scase to avoid dismissal. *See City of Canton v. Harris,* 489 U.S. 378 (1989). Three circuits now follow that misguided approach. Pet. 17-26. Six dissenting judges thus accurately warned that the result in this ease threatens to "encourage the extension of single incident liability," Pet. App. 9a, and erode the foundations of municipal liability law for district attorneys' offices across the nation.

Argument

This Case Cleanly Poses an Unsettled Question of Municipal Liability for Prosecutors Nationwide.

Respondent John Thompson says these questions are "fact-bound, splitless, [and] unlikely to recur." Opp. 1. He is wrong. The only pertinent fact is undisputed: that Thompson was harmed by a single *Brady* violation. The issue posed is ***2** whether that one violation can trigger failure-to-train liability for an entire prosecutorial office, absent a pattern of similar violations. The answer - on which four circuits have been unable to agree, Pet. 17-26 - lies hidden in an elusive footnote in this Court's two-decades-old *Canton* opinion. *See Canton,* 489 U.S., at 390 n.10. Only this Court can provide that answer and clarify whether district attorneys' offices nationwide may be exposed to civil liability for countless decisions their prosecutors make every day. [2]

Thompson's "most fundamental" objection to review, however, has nothing to do with the merits. Opp. 16, 25. He deems the ease unsuitable for certiorari because the evenly divided *en banc* court of appeals affirmed without controlling opinion. But that did not stop this Court from reviewing federal education law in *Zuni Public School District No. 89 v. Department of Education,* 550 U.S. 81, 89 (2007); the constitutionality of a municipal picketing ordinance in *Frisby v. Schultz,* 487 U.S. 474, 478 (1988); remand standards for pendent ***3** state claims in *Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 348 (1988); the constitutional assistance required for guilty pleas in *Hill v. Lockhart,* 474 U.S. 52, 55-56 (1985); or the standards for proving racial discrimination under § 1981 in *General Building Contractors Association, Inc. v. Pennsylvania,* 458 U.S. 375, 382 (1982). Evenly split courts did not thwart review because - one would assume - disagreement among numerous circuit judges typically flags a certworthy issue. It does here. [3]

Far from "involv[ing] different interpretations of the evidence," Opp. 17, the competing opinions in this case (joined by eleven of sixteen judges) took irreconcilable views of this Court's jurisprudence. Judge Clement's six-judge dissent makes this clear. She thought municipal liability case law "clearly and emphatically" counseled dismissal "as a matter of law," because Thompson's single *Brady* violation failed the standards of *Monell, Canton*, and *Bryan County.* Pet. App. 43a-44a. Her dissent thus warned, in its first sentence, that the result "should not encourage the extension of single-incident liability under *Monell.*" Pet. App. 9a; *see Monell v. Dep't of Social Serv's,* 436 U.S. 658 (1978). At stake ***4** are not competing facts, then, but divergent interpretations of municipal liability jurisprudence.

This shatters Thompson's major premise: *i.e.*, that Petitioners complain only about the "application of settled law." Opp. 16-18, 20-21. The law at issue, however, is neither *Monell* nor *Canton* generally, but a far more specific and unsettled aspect of those eases. As Thompson admits, the legal principle on which his ease hinges is that, in *certain* failure-to-train eases,

> a plaintiff need not prove a pattern of similar violations where … the need for the training is "obvious" and the violation of constitutional rights is the "highly predictable consequence" of the failure to train.

Opp. 18 (citing *Bd. of County Comm'rs of Bryan County v. Brown,* 520 U.S. 397, 407-09 (1997); *Canton,* 489 U.S., at 390 n.10). If prosecutors' *Brady* obligations do not fall within that rule, Thompson's ease would never have reached the jury.

That issue is not remotely "settled." *See* Pet. 13-26; Amicus Curiae Brief of National District Attorneys Association ("NDAA Amicus"), at 5-11. Failure-to-train claims ordinarily demand a pattern of employee wrongdoing. *See, e.g., Bryan County,* 520 U.S., at 405, 407-09; *Canton,* 489 U.S., at 391-92. Footnote dictum in *Canton* suggested that a single violation of certain, exceptional duties might substitute for a pattern. 489 U.S., at 390 n.10. But *Canton*'s sole example was police training on deadly force, which the Court has since called a ***5** mere "hypothesis" meant for "a narrow range of circumstances." *Bryan County,* 520 U.S., at 409.

Training police to arrest criminals is a far cry from training lawyers to interpret the law. The Court has never suggested the two are analogous for failure-to-train claims, with good reason.[4] As Judge Clement observed, "[t]o hold a public employer liable for failing to train professionals in their profession is an awkward theory." Pet. App. 29a. That explains why the circuit courts[5] have stumbled in this area, as the Second Circuit's *Walker* decision best illustrates. *See* Pet. 18-19; NDAA Amicus 8-10 (discussing *Walker v. City of New York,* 974 F.2d 293 (CA2 1992)).

Walke's test for detecting single-incident situations goes well beyond the "narrow range" *Canton* envisioned. *See* 974 F.2d, at 297-98; Pet. ***6** 18 n.17. For instance, *Walker* requires that a situation merely "present[] the employee with a difficult choice of the sort that training or supervision will make less difficult." 974 F.2d, at 297-98. Under that broad inquiry, virtually any employee misstep would expose municipalities to single-incident liability. For a district attorney's office, it would embrace not only *Brady* obligations, but also prosecutors' decisions on "search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, or many more." Pet. App. 27a. *Walker* thus converted an exceptional form of municipal liability into the norm, with particularly ruinous implications for prosecutorial offices.

Walker's flaws run yet deeper. The *Brady* violation there involved impeachment evidence and occurred shortly after *Brady* was decided. *Walker* suggested, however, that violations occurring later or involving exculpatory evidence would *not* qualify for single-incident liability. See Pet. 18-19; 974 F.2d, at 300. In addition to its inherent flaws, then, the *Walker* test does not even purport to reach all *Brady* violations.

Yet *Walker*'s confused extension of *Canton* has now bled into Thompson's case. Both the district court and the panel adopted *Walker* for the proposition that "Thompson did not need to prove a pattern of *Brady* violations." Pet. App. 80a (citing *Walker,* 974 F.2d, at 300); *see also* Pet. 22-23.[6] ***7** This put Thompson's dramatic story before the jury, despite the fact that: (1) Thompson proved no pattern of similar violations; (2) Thompson's violation occurred fourteen years after *Walker*'s and involved exculpatory, not impeachment, evidence; and (3) the Fifth Circuit had recently found no pattern of *Brady* violations by the *same* district attorney's office during the period covering Thompson's robbery conviction. *See* Pet. 24-25 (discussing *Cousin v. Small,* 325 F.3d 627, 637-38 (CA5 2003)).[7]

This case thus presents a dispute, not over evidence, but over the legal principle that sent that evidence to a jury. That principle is not "settled, controlling law," Opp. 18, but rather the strained extension of single-incident liability to a

scenario this Court never envisioned. Only because circuit courts have improperly interpreted this Court's jurisprudence - indeed, one footnote of it - did Thompson's claim survive dismissal. Pet. 17-26. Justice O'Connor predicted what would result from such an extension of *Canton:* "[a]llowing an inadequate training claim such as this one to go to the jury based upon a single incident … only invite[s] jury nullification of *Monell.*" *Canton,* 489 U.S., at 399 (O'Connor, J., concurring in part and dissenting in part).

***8** The Court should thus grant certiorari to resolve the confusion fomented by its own case law. No matter how deep the circuit disagreement, the Court regularly takes cases to temper application of precedent,[8] That is particularly so where the extent of government liability is at stake. *See, e.g., Sosa,* 542 U.S., at 701 (rejecting circuit courts' exception to federal tort immunity that threatened to swallow a significant exemption). Since the Court's "precedents frame the question presented, but … do not answer it," *Indiana v. Edwards,* 128 S. Ct. 2379, 2383, only this Court can settle the matter.

The Court's resources are well spent in clarifying the extent of municipal liability. The ***9** original *Monell* opinion found "no occasion to address … what the full contours of municipal liability under § 1983 may be." 436 U.S., at 695. Concurring, Justice Powell forecast that "[d]ifficult questions remain for another day," such as "substantial line-drawing problems in determining when execution of a government's policy or custom can be said to inflict constitutional injury such that government as an entity is responsible under § 1983." *Id.*, at 713 (Powell, J., concurring) (quotations omitted). Twenty years later, three Justices in *Bryan County* lamented that *Monell* has "produced a body of law that is neither readily understandable nor easy to apply." 520 U.S., at 433 (Breyer, J., dissenting). Thus, it is no surprise that a knotty problem in the failure-to-train area has arisen and persisted, demanding this Court's attention.[9]

Conclusion

The time is ripe to revisit the contours of failure-to-train liability, which the Court last addressed in 1989. Even then, three concurring Justices cautioned that "the resources of local government are not inexhaustible," and therefore warned:

> ***10** [t]he grave step of shifting those resources to particular areas where constitutional violations are likely to result through the deterrent power of § 1983 should certainly not be taken on the basis of an isolated incident.

Canton, 489 U.S., at 400 (O'Connor, J., concurring in part and dissenting in part). Yet that is precisely what this case and others like it have done. The unwarranted extension of single-incident liability to a *Brady* violation dissolves actual fault into vicarious fault and threatens the operation of district attorneys' offices across the nation.

The Court should grant certiorari.

Footnotes

1 Thompson now attempts to obscure this by rearguing the evidence. *See* Opp. 9 13, 18 21. But his skewed depiction of the office's *Brady* record is beside the point: both the district court and the court of appeals treated the case as presenting a single *Brady* violation unconnected to any pattern of similar violations. *See* Pet. 7 & n.7; Pet. App. 138a 142a (district court); Pet. App. 72a 80a (panel opinion).

2 Thompson claims this case is "extraordinary and "unique, in a transparent attempt to ward off review. *See* Opp. 16, 25, 32 34. Thompson's ordeal was certainly extraordinary, but the issue posed by this case is not. As Judge Clement explained, the Fifth Circuit's extension of *Canton* will expose district attorneys' offices to unprecedented liability based on prosecutors' decisions concerning "*Brady* search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, and] many more. Pet. App. 27a.

3 For the same reason, Thompson's argument that the *en banc* disposition is not "precedential is beside the point. Opp. 16, 25. Ironically, however, one of the *en banc* opinions has already been cited in a subsequent failure to train case in the Fifth Circuit. *See Peterson v. City of Fort Worth,* 588 F.3d 838, 860 n.4 (CA5 2009) (Montalvo, J., dissenting) (citing *Thompson v. Connick,* 578 F.3d 293, 314 (CA5 2009) (en banc) (Prado, J., joining)).

4 Indeed, in a similar context the Court has rejected the notion that legal malpractice can form the basis for a failure to train claim. *Sosa v. Alvarez Machain,* 542 U.S. 692, 701 (2004), rejected a court made exception to federal tort immunity because the exception would have allowed barred claims including legal malpractice to be recast as "a failure to train, a failure to warn, the offering of bad advice, or the adoption of a negligent policy.

5 Because Thompson ignores the unsettled state of the underlying legal rule, he misses the circuit confusion it has caused. Opp. 22 25. The Fifth Circuit has uncritically adopted the *Walker* approach for *Brady* violations. The Sixth Circuit has not adopted *Walker* but does recognize failure to train liability for single *Brady* violations. By contrast, the Eighth Circuit has neither adopted *Walker* nor approved single incident *Brady* training claims. Petitioner and its amici explain the divergent circuit approaches at greater length elsewhere. *See* Pet. 17 26; NDAA Amicus 8 10.

6 Thompson misses *Walker*'s significance. The fact that the Second Circuit "limited *Walker*'s test to certain *Brady* violations, *see* Opp. 22, underscores that the Fifth Circuit should not have applied the same test today to different *Brady* violations.

7 Thompson is flatly wrong about *Cousin.* Opp. 26. That decision addressed the office's *Brady* record over a twenty five year period that included Thompson's 1985 robbery conviction, as the Petitioners and Judge Clement carefully explained. *See* Pet. 24 25 & n.24; Pet. App. 25a.

8 *See, e.g., Safford UnilSed School Dist. No. 1 v. Redding,* 129 S. Ct. 2633, 2638 39 (2009) (reviewing application by divided *en banc* circuit court of Court's fourth amendment and qualified immunity cases); *Bobby v. Bies,* 129 S. Ct. 2145, 2149 (2009) (rejecting circuit court's application of double jeopardy and issue preclusion law to *Atkins* claim); *District Attorney s Office v. Osborne,* 129 S. Ct. 2308, 2319 (2009) (overturning appellate court's extension of due process rights to postconviction DNA testing); *Washington State Grange v. Washington State Repub. Party,* 128 S. Ct. 1184, 1192 (2008) (reviewing circuit court's interpretation of Court's election law precedents); *Garcetti v. Ceballos,* 547 U.S. 410, 418 (2006) (clarifying application of Court's first amendment jurisprudence to job related public speech); *Brown v. Payton,* 544 U.S. 133, 140 41 (2005) (reversing divided *en banc* circuit court's application of *Boyde v. California,* 494 U.S. 370 (1990)); *Norton v. Southern Utah Wilderness Alliance,* 542 U.S. 55, 61 (2004) (reviewing circuit court's interpretation of federal environmental management statutes under the APA); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.,* 535 U.S. 826, 828 29 (2002) (resolving whether "arising under language in 28 U.S.C. § 1331 encompassed counterclaims).

9 The Fifth Circuit's overextension of *Canton* also undermines the absolute immunity that shields prosecutors from failure to train claims, as Chief Judge Jones explained in her separate dissent. *See* Pet. 33 36; Pet. App. 2a 7a; *Van de Kamp v. Goldstein,* 129 S. Ct. 855 (2009). Thompson offers no pertinent rejoinder to this related, but distinct, reason for granting certiorari. *See* Opp. 27 28.

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2010 WL 2354753 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Harry F. CONNICK, in his official capacity as District Attorney; Eric DUBELIER, in his official capacity as Assistant District Attorney; James WILLIAMS, in his official capacity as Assistant District Attorney; Leon A. CANNIZZARO, Jr., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE, Petitioners,
v.
John THOMPSON, Respondent.

No. 09-571.
June 7, 2010.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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***i** Question Presented for Review

A municipality may be liable under 42 U.S.C. § 1983 for a failure to train employees that shows deliberate indifference to, and actually injures, the rights of citizens. *City of Canton v. Harris,* 489 U.S. 378, 389-91 (1978). A history of employee wrongdoing is ordinarily necessary to prove failure-to-train liability, but a single incident may suffice in rare cases. The Court has hypothesized only one - a failure to train armed police officers on using deadly force. The question presented in this case is:

Whether failure-to-train liability may be imposed on a district attorney's office for a prosecutor's deliberate violation of *Brady v. Maryland,* 373 U.S. 83 (1963), despite no history of similar violations in the office.

***ii** Parties To The Proceeding

All parties to the proceeding are set forth in the case caption. *See* Sup. Ct. R. 24.1(b).

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Cases

***1 Opinions Below**

The *en banc* decision and opinions of the United States Court of Appeals for the Fifth Circuit, Pet. App. 1a-50a, are reported at 578 F.3d 293 (CA5 2009). The panel opinion, Pet. App. 51a-113a, is reported at 553 F.3d 836 (CA5 2008). The unpublished memorandum opinion of the United States District Court for the Eastern District of Louisiana, Pet. App. 114a-144a, is unofficially reported at 2005 WL 3541035.

Jurisdictional Statement

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 10, 2009. Pet. App. 1a. This Court has jurisdiction to review this judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

Statutory Provision Involved

Title 42, section 1983, of the United States Code provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

***2 Statement of the Case**

In 1985, prosecutors in the Orleans Parish District Attorney's Office convicted John Thompson of attempted armed robbery. Aided by that conviction, prosecutors then convicted Thompson of capital murder in a separate case. A month before his execution in 1999, evidence came to light that exonerated Thompson for the robbery. With it came a stunning revelation: a prosecutor had deliberately buried the exculpatory evidence. Thompson's execution was stayed, his robbery conviction vacated, and his murder conviction eventually reversed. Pet. App. 10a.

Thompson then sued the district attorney's office and won a $14 million civil rights judgment. The basis of that judgment was not that an official policy had caused the evidence suppression. The jury rejected that theory. Pet. App. 11a. Nor was the basis that an official policymaker had ordered the suppression. The district court found no evidence supporting that theory. Pet. App. 61a. The judgment depended on a subtler premise. The jury found that the suppression occurred because the district attorney, Harry F. Connick, had been "deliberately indifferent" to the need to train prosecutors.

The district court did not require Thompson to prove that any history of *Brady* violations should have warned Connick to adjust office training. Pet. App. 138a-142a. Affirming the judgment, a Fifth Circuit panel held that - whereas "Thompson did not establish a pattern of *Brady* violations by the DA's Office," and indeed "d[id] not argue that there ***3** was evidence of a pattern" - no such pattern was necessary to establish failure-to-train liability. Pet. App. 72a, 76a, 79a-80a.

The end result was that a district attorney's office was found liable for a prosecutor's single *Brady* violation. In failure-to-train cases, however, a "pattern of injuries [is] ordinarily necessary to establish municipal culpability and causation." *Bd. of Comm'rs of Bryan County v. Brown,* 520 U.S. 397, 409 (1997). Liability may be based on a single constitutional violation only "in a narrow range of circumstances." *Id.*

Those narrow circumstances should not include a *Brady* violation. By ruling otherwise, the lower courts allowed a jury to find a district attorney's office liable, not for its own wrongdoing, but for wrongdoing by its employee. That imposition

of vicarious liability contravenes the Court's precedents, which "have consistently refused to hold municipalities liable under a theory of *respondeat superior*." *Id.*, at 403 (and collecting cases).

A. Connick's innovations in office structure, supervision, and training

Connick was already an experienced criminal defense attorney and prosecutor when he defeated incumbent Jim Garrison in 1974 to become district attorney of Orleans Parish, Louisiana's largest parish. App. 424-26. Connick would hold that ***4** position for almost 29 years. App. 145. During his tenure, Connick "completely restructured the office." App. 425. He vastly improved how the office processed its massive caseload, and how it mentored the more than 700 prosecutors who would work there over the years. Legal scholars have singled out Connick's systemic innovations as path-breaking. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff,* 55 Stan. L. Rev. 29, 58-84 (2002).

For instance, Connick re-imagined the system by which prosecutors "screen" potential cases, dramatically lowering the office's acceptance rate. This not only enhanced efficiency but also protected the rights of arrestees, who would be far less likely to languish in jail on flimsy charges. The most experienced prosecutors were typically designated for this critical screening function. App. 187, 202-03, 381, 387.

Connick also fundamentally changed how prosecutors were mentored. At the beginning of his tenure, he brought in eight former Assistant United States Attorneys, "specifically … to help [him] set this office up to train these people." App. 426. Connick redeployed his predecessor's best prosecutors in order to station two lawyers in each court section - a "junior" and a "senior" prosecutor. This functioned as an "excellent teaching tool" for young prosecutors, who were mentored by experienced attorneys as they progressed through various trial divisions and levels of responsibility. App. 377-79, 426-28. Young prosecutors would also be better advised on the technical aspects of ***5** criminal investigations since, by Connick's express order, a police officer was posted as an investigator in each court section. App. 425-27. Connick's office structure, in sum, was designed to allow prosecutors to amass experience of the most intensive and practical kind in a short period. App. 200-03.

Connick created an in-house system of mooting cases to reinforce this structure. App. 428-29. These "pre-trials" functioned as a rigorous training regime for all prosecutors below the supervisory level, and were personally overseen by the chief or deputy chief of trials. App. 193, 461. Pre-trials "covered just about every aspect of trial," from the prosecutor's theory of the case to any anticipated evidentiary problems. App. 387-89, 461-62. Supplementing this system, prosecutors met weekly with the chief of trials to review all pending cases. App. 389-90,428-29.

Connick also instituted numerous practices to alert prosecutors to developments in criminal law. For example, regular "Saturday morning sessions" were designed to train prosecutors on technical legal issues, everything from law enforcement technology to "specialized training on rape cases." App. 463. Connick also fostered the practice of circulating advance sheets, intended to "constantly get[] [attorneys] to read and to understand what was new in the law." App. 429. Moreover, Connick insisted that supervising attorneys - principally the chief of appeals - prepare and circulate regular inter-office memoranda highlighting legal developments. App. 389-91, 430-31. Those ***6** memoranda were the precursors to the "formal" policy manual Connick had prepared in 1987. App. 391-93, 467-68. At that time, a formal policy manual was itself an innovation in district attorneys' offices. App. 429.

In sum, Connick oversaw a marked evolution - spanning nearly three decades - in the supervision and training of prosecutors in the Orleans Parish District Attorney's Office. Connick sought to create a culture that encouraged prosecutors to understand and obey their legal obligations. He even inspired an intensive study published in a widely-cited *Stanford Law Review* article. The authors concluded that Connick's "principled screening practices … make [his] one of the most interesting prosecutor's offices in the country," meriting "widespread attention from other prosecutors and scholars." Wright & Miller, *supra*, at 60. Such farsighted policies created what Connick's chief of trials from 1984 to 1986, Bridget Bane, called a "system of tremendous checks and balances." App. 460-61. Timothy McElroy - a senior

prosecutor in 1985 who would become chief of screening in 1990 and eventually first assistant - summarized Connick's approach this way: "Harry was very energetic, very innovative and training was an important part of what he did. In fact, training was a very substantial part of Harry's office." App. 396.

B. Connick's policies on evidence disclosure

Connick's disclosure policies were no mystery: turn over what was required by state and federal ***7** law, but no more. App. 38-45, 90-91, 169-70, 199-200, 439-41. Connick did not lightly reject an "open-file" policy. In New Orleans, revealing too much about an investigation would put cooperating witnesses in mortal danger. App. 433. This wisely cautious approach went hand-in-hand with prosecutors' obligations to make disclosures required by the Sixth Amendment and *Brady*, as well as the Louisiana Code of Criminal Procedure. *See, e.g.*, App. 90-91, 199-200, 338, 440-41, 469.

Awareness of *Brady*'s strictures was ingrained in office culture. McElroy emphasized that "*Brady* in a prosecutor's world is something you study all the time." App. 377. In Connick's office, he explained, "[w]hen you walk in the door … [y]ou're instructed on *Brady* from the very beginning." App. 393. This was quite literally true. Bane recounted that any attorney interviewing for a position had to write essays on two topics that never varied: one on the exclusionary rule "and another … on *Brady* material." App. 465-66. Unsurprisingly, then, multiple witnesses testified without contradiction that the office's policy was to disclose all *Brady* materials, always and without exception. App. 158-60, 194, 198, 199-200, 338, 433-34, 438-41, 469. Moreover, regardless of whether they fell within *Brady*, office policy was to turn over *all* scientific reports, such as the lab report in this case. App. 199-200, 209, 282-84, 438, 486.

Prosecutors' compliance with *Brady* was not simply left up to chance, but was reinforced at multiple levels by Connick's office structure. App. ***8** 382-93, 464-65. Naturally, the decision to disclose particular evidence lay ultimately with the senior attorney in any case. But *Brady* questions would pass initially through an experienced screening attorney - who would flag potential *Brady* issues on a "Screening Action Form" - and proceed to review by an investigator, the junior attorney, and the senior attorney. App. 382-85, 464-65. The "pre-trial" exercises to which most cases were subjected reinforced this multi-level review of *Brady* issues. App. 387-89,464-65.

Brady was also addressed outside the ambit of trying particular cases. Weekly "trial meetings," for instance, would scrutinize every facet of pending cases, including *Brady* matters. App. 389-90. Nor were prosecutors left to shift for themselves in keeping abreast of legal developments. In addition to his practice of circulating advance sheets, Connick instructed his chief of appeals to prepare regular intra-office memoranda highlighting the evolution of prosecutors' legal and ethical obligations. App. 429-31, 448-50. That system of ongoing legal education extended to developments in *Brady.* App. 389-91.

In these ways, Connick's office structure reinforced prosecutors' professional obligations to comply with *Brady.* In the 1990s, Connick would add more formalized instruction to his office, such as in-house CLE programs. App. 391. But such "formal" *Brady* training - in the sense of classroom lectures on *Brady* and its progeny - was never the cornerstone of the office's system. *See, e.g.*, App. ***9** 171, 247. Connick took a different tack, crafting what he and his office supervisors believed was a far more practical and effective means of enabling prosecutors to honor their duties under *Brady.* Transcript Vol. IV, pp. 785-86. Undermining *Brady* was, as Bane put it, "the farthest thing from my knowledge and understanding of Harry Connick that I could conceive of." App. 469.

C. The suppression of blood evidence in Thompson's robbery case

Connick had been in office for a decade when the events surrounding Thompson's *Brady* violation occurred in late 1984 and 1985. At that time, Connick estimated that there were roughly 70 to 75 assistant district attorneys working in the

office, and that the office was screening about 15,000 cases a year and accepting roughly half for prosecution. Transcript Vol. IV, pp. 831, 840-41.

1. The *Brady* violation

On December 6, 1984, Raymond T. Liuzza Jr. ("Liuzza") was robbed, shot, and killed outside of his home in New Orleans. About three weeks later, siblings Jay, Marie, and Michael LaGarde were the victims of an attempted armed robbery while in their car in New Orleans. Jay LaGarde fought off the perpetrator, and, in the struggle, some of the robber's blood stained the cuff of Jay's pants. As part of the police investigation, crime scene technicians took a swatch of the pants with the robber's blood on it. Pet. App. 53a.

In January 1985, Thompson and Kevin Freeman were arrested for the Liuzza murder. The ***10** LaGardes saw Thompson's picture in the newspaper and believed he was the man who had attempted to rob them. They contacted the district attorney's office and identified Thompson. Pet. App. 53a-54a.

In February 1985, the armed robbery case was screened by assistant district attorney Bruce Whittaker, who received the police report, approved the case for prosecution, and filled out a Screening Action Form indicating that armed robbery charges should be brought. After noting that a technician had taken a bloody swatch of Jay LaGarde's pants, Whittaker wrote on the form that the state "[m]ay wish to do blood test." App. 647. He also recommended that the case be handled by Eric Dubelier as a special prosecutor because it involved the same defendant (Thompson) as the Liuzza murder case, which Dubelier was already handling. App. 46-54.

In March 1985, assistant district attorney James Williams handled a suppression hearing in Thompson's robbery case. Noting the reference to a blood test on the screening form, Williams stated in open court - and in the presence of Thompson's defense attorney - that "it's the state's intention to file a motion to take a blood sample from the defendant, and we will file that motion - have a criminalist here on the 27th." App. 47, 51, 82-83, 92-93. About one week before the armed robbery trial, the bloody pants swatch was sent for testing. The record does not reveal who ordered the test. Pet. App. 55a, 35a; App. 65.

***11** Two days before trial, Whittaker received a crime lab report, addressed to his attention, that showed the armed robber's blood was type B. App. 68-69, 178, 655. The report was never turned over to Thompson's attorneys. Pet. App. 55a. Whittaker claimed he placed the report on Williams' desk. App. 179. Williams, however, denied discussing the report with Whittaker or even seeing it until the report surfaced in 1999. App. 68-70. Dubelier also could not remember ever seeing it. App. 284. But he explained what he would have done with such a report:

> … I prosecuted thousands of case[s] … and turned over thousands of these type[s] of report. If I had the report, I would have turned it over. […] [W]e were obligated to turn over a crime lab report. That's the way it was. That was standard operating procedure in the office.

Id.

On April 11 and 12, 1985, Thompson was tried for armed robbery by Williams and assistant district attorney Gerry Deegan. App. 31, 77-78. Some time before trial, Dubelier had asked Williams to act as lead prosecutor. The Fifth Circuit panel described what happened as the trial began:

> On the first day of trial, Deegan checked all of the evidence out of the police property room, including the bloody swatch from Jay LaGarde's pants. Deegan then checked the ***12** evidence into the court property room, but never checked in the pants swatch.

Pet. App. 56a; App. 55, 238-39. The prosecutors relied only on the three eyewitness identifications by the LaGardes. App. 71-72. During the trial, Deegan questioned the crime-scene technician, but did not ask him about the bloody pants swatch. App. 78-80. The jury found Thompson guilty of attempted armed robbery, and he was sentenced to forty-nine and one-half years in prison. Pet. App. 56a.

From May 6 to 8, 1985, Dubelier and Williams tried Thompson for the first-degree murder of Liuzza and sought the death penalty. At trial, Freeman testified that Thompson shot Liuzza. An acquaintance of Thompson testified that Thompson made incriminating statements about the Liuzza murder and that he had sold Thompson's gun for him. Pet. App. 56a-57a. Realizing the prosecution would use his robbery conviction to impeach him, Thompson elected not to testify on his own behalf. The jury convicted Thompson of first-degree murder. During sentencing, Dubelier argued that Thompson's prior robbery conviction supported giving him the death penalty. The jury sentenced Thompson to death. Pet. App. 57a.

In the ensuing fourteen years, Thompson exhausted his appeals and his execution was set for May 20, 1999. Then, in late April 1999, an investigator in Thompson's habeas proceedings received, through a public records request, a microfiche copy of the lab report containing the blood type of the robbery perpetrator. Thompson ***13** was tested and found to be type O, definitively ruling him out as the LaGardes' attacker. Thompson's attorneys presented this information to Connick, who immediately moved to stay Thompson's execution. Pet. App. 57a-58a; Transcript Vol. IV, p. 769.

The ensuing investigation revealed what had happened. In April 1994, nearly a decade after Thompson's convictions, Deegan had confessed privately to a fellow prosecutor, Michael Riehlmann, that he had "intentionally suppressed blood evidence in the armed robbery trial of John Thompson." App. 367; Pet. App. 58a. Deegan, who was suffering from terminal cancer, divulged this shortly after learning he had only months to live. Deegan died about three months later. Riehlmann kept silent until the evidence was discovered five years later, in 1999. At Connick's instigation, Riehlmann was sanctioned by the Louisiana Supreme Court for failing to report Deegan's misconduct. *See In Re Riehlmann,* 2004-0680 (La. 1/19/05); 891 So.2d 1239; App. 362-67.

In 2002, the Louisiana Fourth Circuit Court of Appeal vacated Thompson's murder conviction, holding that the tainted robbery conviction had unconstitutionally deprived him of his right to testify in his own defense at his murder trial. *See State v. Thompson,* 2002-0361, pp. 8-9 (La. App. 4 Cir. 7/17/02); 825 So.2d 552, 557-58; App. 19. Thompson was retried for Liuzza's murder in 2003 although the main witness against him in 1985, Kevin Freeman, was now dead. Thompson was found not guilty. Pet. App. 59a-60a.

***14 2. Thompson's civil rights suit**

After his release, Thompson brought suit under § 1983 in the United States District Court for the Eastern District of Louisiana, alleging that the district attorney's office [2] violated his rights by failing to train prosecutors on their *Brady* obligations. *See generally Monell v. Dep't of Social Services,* 436 U.S. 658 (1978) (recognizing municipal liability under § 1983); *Canton,* 489 U.S., at 389-91 (recognizing municipal liability under limited circumstances for failing to train employees). [3]

In denying summary judgment, the district court rejected petitioners' argument that a pattern of similar violations was necessary to prove the office's "deliberate indifference" to *Brady* training. Pet. App. 138a-139a. After the close of evidence, ***15** petitioners again raised this issue by proposing a jury instruction that "deliberate indifference to training requires a pattern of similar violations." Transcript Vol. IV, p. 1013. Thompson's counsel told the court: "That's not the law, your Honor." *Id.* The court refused the proposed language, explaining that it had already rejected this argument at the summary judgment stage. *Id.*

The court instructed the jury that the failure to disclose the blood evidence violated *Brady* as a matter of law. App. 825. As to deliberate indifference, the court instructed the jury that Thompson was required to prove the following:
First, that the district attorney was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the Constitution to be provided to the accused.

Second, that the situation involved a difficult choice or one that prosecutors had a history of mishandling, such that additional training, supervision or monitoring was clearly needed.

Third, that the wrong choice by a prosecutor in that situation would frequently cause a deprivation of an accused's constitutional rights.

App. 828. [4] The court further explained that, in assessing those issues, the jury was "not limited to ***16** the nonproduced blood evidence and the resulting infringement of Mr. Thompson's right to testify," but could "consider all of the evidence presented during this trial." *Id.*

Based on these instructions, the jury was asked two questions about what caused "the *Brady* violation in the armed robbery case or any infringements of John Thompson's rights in the murder trial." App. 562. First, it was asked whether those injuries were "substantially caused by an official policy of the district attorney." *Id.* The jury answered "no." *Id.* Second, it was asked whether those injuries were "substantially caused by the district attorney's failure through deliberate indifference to establish policies and procedures to protect one accused of crime from these constitutional violations." *Id.* The jury answered "yes." *Id.;* Pet. App. 61a-64a. Based on its affirmative answer to the second question, the jury awarded Thompson $14 million. App. 562, Pet. App. 64a-65a. [5] Petitioners subsequently moved for judgment as a matter of law on the basis that Thompson had not proven any pattern of similar *Brady* violations, but the district court denied the motion. Mem. in Supp. of Mot. for J.M.O.L. (Doc 147-1), pp. 3-5; Order and Reasons (Doc 169), pp. 1, 5-6.

On December 19, 2008, a panel of the United States Court of Appeals for the Fifth Circuit affirmed. Pet. App. 71a-113a. The panel ***17** specifically rejected petitioners' argument about the required pattern of similar *Brady* violations. *Id.* at 72a-80a. Noting that "Thompson does not argue that there was evidence of a pattern," *id.* at 72a, the panel agreed with Thompson that a *Brady* violation fell within a narrow single-incident exception to the pattern requirement. *Id.* at 73a-79a. The panel thus held:

> Thompson did not need to prove a pattern of *Brady* violations to demonstrate that the failure to train was deliberately indifferent, and the district court did not err in denying Thompson's motion for judgment as a matter of law.

Id. at 80a (citing *Walker v. City of New York,* 974 F.2d 293, 300 (CA2 1992)). "Consequently," the panel explained, "the fact that Thompson did not establish a pattern of *Brady* violations by the DA's Office is not dispositive of his claims." *Id.* at 76a.

On March 11, 2009, the Fifth Circuit granted *en banc* rehearing and vacated the panel decision. [6] By separate order, the court asked counsel to brief several specific issues, including whether a single incident can give rise to failure-to-train liability. Mar. 13, 2009, Ltr. of Advisement; App. 10. On August 10, 2009, the equally divided *en banc* court ***18** affirmed, with two separate dissents. Pet. App. 2a, 2a-7a, 9a-44a. [7] Writing for six members of the court, Judge Edith Brown Clement would have held that Thompson's evidence of a single violation, accompanied only by "diffuse evidence of *Brady* misunderstanding among several assistant district attorneys," failed to meet the "heightened standards for culpability and causation" for failure-to-train liability. Pet. App. 13a-14a, 32a, 39a. [8]

This Court granted certiorari on March 22, 2010.

Summary Of The Argument

A municipality is liable under § 1983 for injuries attributable to its own actions, but not for those attributable to employee wrongdoing. *Monell,* 436 U.S., at 690-94. In limited circumstances, a failure to train employees may trigger municipal liability. *Canton,* 489 U.S., at 389-91. Because it raises the specter of vicarious liability, however, a failure-to-train claim demands stringent proof of fault and causation: inadequate training must show a municipality's deliberate indifference to, and must ***19** actually injure, the rights of citizens. *Id.* A history of employee wrongdoing is ordinarily necessary to prove fault and causation, but a single incident may suffice in rare cases. *Bryan County,* 520 U.S., at 409. The Court has hypothesized only one - when a city passes out guns to police offices but forgets to train them on the proper use of deadly force. *Canton,* 489 U.S., at 390 n.10.

This case asks whether that single-incident hypothesis should extend to a district attorney's alleged failure to train prosecutors on *Brady v. Maryland,* 373 U.S. 83 (1963). The lower courts ruled that it should - and allowed the case to go to the jury on that basis - but they were mistaken. Without a history of similar violations, a district attorney's allegedly deficient *Brady* training cannot meet the rigorous fault and causation requirements for failure-to-train liability. *See infra* Part I.A.

Prosecutors are not typical employees. They are trained professionals, equipped by education and ethics to assess their *Brady* obligations. A district attorney reasonably relies on prosecutors obeying the standards of their own profession. Absent powerful indications to the contrary, then, a district attorney cannot be deliberately indifferent for failing to "train" prosecutors. *See infra* Part I.A.1. Nor can a lack of training directly cause a *Brady* violation. In most cases, what actually causes a violation is the prosecutor's own lapse, not a district attorney's failure to train the prosecutor on what he was already equipped to know and do. *See infra* Part I.B.

***20** The lower courts misapplied *Canton* by extending its single-incident scenario to prosecutors' *Brady* compliance. The two situations are worlds apart. In *Canton*, untrained police officers were asked to intuit deadly force standards. A municipal employer who places its officers in that dilemma is, by definition, callously indifferent to the rights of citizens those officers will apprehend. But a district attorney who relies on prosecutors' professional ability to assess *Brady* material is not in remotely the same position. The lower courts simply missed the obvious: training police to arrest criminals is nothing like training lawyers to interpret the law. *See infra* Parts I.A.2 & I.B.

Based on this flawed analysis, the jury was allowed to impose liability on Connick's office for a single *Brady* violation unaccompanied by any pattern of previous violations. This case illustrates that extending *Canton* so far dissolves municipal into vicarious liability. *See infra* Part II. First, the basic premise of failure-to-train liability - deficient training - was never proven. Despite an absence of classroom-style *Brady* training, Connick's innovative office structure was itself a practical and effective way of monitoring *Brady* compliance, far more so than converting his office into a miniature law school. *See infra* Part II.A. Second, there was no proof of any conscious decision by Connick to ignore obvious *Brady* problems. Far from besmirching Connick's *Brady* record, the evidence showed a minuscule number of reported violations out of tens of thousands of prosecutions during the period covering Thompson's trial. *See infra* Part II.B. Third, the moving force behind the violation ***21** in Thompson's case had nothing to do with any training deficiency in Connick's office. Instead, Thompson's rights were violated when a prosecutor knowingly concealed the blood evidence, a flagrant disregard of the law that Connick had no reason to foresee and no amount of training could have prevented. *See infra* Part II.C.

This case extends failure-to-train liability where it was never meant to go. Years ago, Justice O'Connor warned what would follow: "Allowing an inadequate training claim such as this one to go to a jury based upon a single incident would

only invite jury nullification of *Monell.*" *Canton,* 489 U.S., at 399 (O'Connor, J., concurring in part and dissenting in part). So far, this case has fulfilled Justice O'Connor's prediction. The Court should overturn that result by clarifying that single-incident liability does not extend to a prosecutor's *Brady* violation.

Argument

I. A District Attorney's Office may not be liable under § 1983 for falling to train prosecutors on *Brady*, absent a history of violations.

A municipality is liable under § 1983 only for its own actions, and not for actions by its employees. *See, e.g., Bryan County,* 520 U.S., at 403; *Monell,* 436 U.S., at 690-94. A municipality acts illegally when its own policy is unconstitutional, or its policymaker orders illegal action. *Bryan County,* 520 U.S., at 404-05; *Pembaur v. City of Cincinnati,* 475 U.S. 469, 483-84 (1986). Finding municipal ***22** action is far more difficult, however, when liability is premised on a municipality's *failure* to act that supposedly causes an employee to inflict injury. *Bryan County,* 520 U.S., at 406; *see also City of Springfield v. Kibbe,* 480 U.S. 257, 268 (1987) (O'Connor, J., dissenting) (describing the causal connection as "an inherently tenuous one"). In such cases, "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Bryan County,* 520 U.S., at 405 (citing *Canton,* 489 U.S., at 391-92; *Oklahoma City v. Tuttle,* 471 U.S. 808, 824 (1985) (plurality opinion)).

Those rigorous standards govern claims alleging a municipality has inadequately trained its employees. *See generally Canton,* 489 U.S., at 390-92. It is not enough to show that an employee was poorly trained, that better training would have thwarted his bad act, or that "an otherwise sound program has occasionally been negligently administered." *Id.*, at 390-91. Rather, inadequate training must demonstrate a municipality's "deliberate indifference" - its callous and conscious disregard for rights. *Id.*, at 388-89 & n.7; *Bryan County,* 520 U.S., at 407. Additionally, an identified flaw in training must "actually cause" the particular injury. *Canton,* 489 U.S, at 391; *Bryan County,* 520 U.S., at 404. "Where a court fails to adhere to rigorous requirements of causation and culpability, municipal liability collapses into *respondeat superior* liability." *Bryan County,* 520 U.S., at 415.

***23** Failure-to-train liability ordinarily requires an underlying pattern of employee wrongdoing. *Bryan County,* 520 U.S., at 409. Otherwise, a municipality's mere failure to adjust its training would not ordinarily show deliberate indifference, nor directly cause employee wrongdoing. *See, e.g., id.*, at 407 (explaining that "[i]f a [training] program does not prevent constitutional violations, municipal decisionmakers *may eventually* be put on notice that a new program is called for") (emphasis added). Culpability and causation thus generally require proving a municipality's "continued adherence" to training whose flaws are exposed by repeated wrongdoing. *Id.*, at 407 (citing *Canton,* 489 U.S., at 390 n.10).

In "a narrow range of circumstances," however, liability may be premised on an employee's single violation. *Bryan County,* 520 U.S., at 409. The theory emerges from this hypothetical in *Canton*:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officer with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

489 U.S., at 390 n.10 (citing *Tennessee v. Garner,* 471 U.S. 1 (1985)). Single-incident liability was thus posed as a situation that glaringly demands ***24** targeted training because, without it, violations are inevitable. A city that blindly relies on armed officers' ability to obey the constitution announces a callous indifference that needs no confirmation by a history of incidents. The Court has never expanded this hypothetical, however, nor actually held a municipality liable under it. *See Bryan County,* 520 U.S., at 409 (noting that *Canton* had "simply hypothesized" its single-incident scenario).

This case asks whether *Canton*'s single-incident hypothesis may be pushed from police to prosecutors. Specifically, it raises the question whether a district attorney's office shows deliberate indifference by failing to formally "train" prosecutors to comply with *Brady*, where no history of similar violations should have alerted the office to a persisting problem.

For municipal liability purposes, training police officers and prosecutors occupy starkly different realms. Unless a pattern of incidents warns that prosecutors have been violating *Brady*, it is logically impossible for a district attorney's office to *consciously* ignore an obvious need to adjust *Brady* training. The training *Canton* envisioned is, to begin with, ill-suited to a putative failure to "train" prosecutors in their own profession. But basing liability on a single *Brady* violation stretches *Canton* past its breaking point. It transforms *Canton*'s culpability and causation standards into vicarious liability, a result the Court has consistently forbidden since *Monell* and which would therefore contravene § 1983. *See, e.g., Bryan County,* 520 U.S., at 403 (explaining that "[w]e ***25** have consistently refused to hold municipalities liable under a theory of *respondeat superior*").

A. Faced with no history of violations, a district attorney cannot consciously ignore an obvious need for *Brady* training.

(1). District attorneys are entitled to rely on prosecutors' adherence to the standards of their own profession.

Prosecutors are trained professionals, subject to a licensing and ethical regime designed to reinforce their duties as officers of the court. Absent powerful evidence to the contrary, a district attorney is entitled to rely on prosecutors' adherence to these standards. Making a district attorney liable for failing to "train" prosecutors in their own profession is, consequently, an awkward extension of *Canton* to begin with. Awkwardness becomes absurdity, however, where a pattern of violations has not alerted a district attorney to a persisting problem demanding a specific solution. Finding a failure-to-train under such circumstances divorces the theory from any notion of actual fault and instead imposes liability "*solely* because [the district attorney] employs a tortfeasor." *Monell,* 436 U.S., at 691 (emphasis in original).

The failure-to-train theory emerged solely from police training cases. Thus, while speaking to some extent of training "employees,"[9] *Canton* cast its ***26** holding in terms of "police training":

We hold today that the inadequacy of *police training* may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom *the police* come into contact.

Id., at 388 (emphasis added). The Court in *Canton* drew chiefly from circuit cases considering alleged failures to train police on the standards for arrests, [0] detention and interrogation, searches, [2] and executing warrants, [3] and also cited two of its own cases addressing deadly force training. *See Tuttle,* 471 U.S., at 829-31 (Brennan, J., joined by Marshall and Blackmun, JJ., concurring in part ***27** and concurring in judgment); *Springfield,* 480 U.S., at 268-70 (O'Connor, J., joined by Rehnquist, C.J., and Powell and White, JJ., dissenting). *Canton* itself involved an alleged failure to train police on providing medical attention to detainees. *See* 489 U.S., at 381-82. These sources indicate the genre of "training" uppermost in the Court's mind: instructing police on the constitutional strictures governing their interactions with citizens.

Training police to arrest criminals, however, is a far cry from training lawyers to interpret law. Police officers often need expert guidance on conforming to constitutional rules they themselves have no expertise in finding or interpreting. In those cases, officers require specialized training from their employer. Thus, *Canton* plausibly hypothesized liability for a municipal employer who ignores a glaring need for training officers on constitutional standards.

But prosecutors - and attorneys in general - have a distinctly different relationship to their municipal employers. Attorneys are professionals in the traditional sense of "person[s] … whose occupation requires a high level of training

and proficiency." Black'S Law Dictionary (8th ed. 2004). "Training," as Judge Clement's dissent observed, "is what differentiates attorneys from average public employees." Pet. App. 29a. Unlike police officers, prosecutors are extensively educated to discern the constitutional limits on their conduct. Simply to become attorneys, they must have graduated law school, passed a rigorous bar exam, and satisfied exacting character and fitness ***28** standards. *See, e.g.,* La. Sup. Ct. Rule XVII (2010). They are thereafter personally subject to continuing-education requirements and an ethical regime designed to reinforce the profession's standards. *See, e.g.*, La. Sup. Ct. Rule XXX (2010). As attorneys, prosecutors are officers of the court, [4] and accordingly have a "duty to seek justice, not merely to convict." ABA Standards for Criminal Justice 3-1.1(b) (2d ed. 1980).

Violating these obligations subjects lawyers to severe consequences. They may be suspended or disbarred by the profession's governing body. *See, e.g., Hernandez v. Mukasey,* 524 F.3d 1014, 1019 nn.1 & 2 (CA9 2008) (discussing varied state regulation of the legal profession). They may face contempt sanctions. Indeed, one of the prosecutors involved in the suppression in Thompson's robbery trial was disciplined by the Louisiana Supreme Court at the instigation of Connick himself. *See In re Riehlmann,* 2004-0680 (La. 1/19/05); 891 So.2d 1239; App. 365-67.

This Court routinely recognizes these professional standards. Justice Frankfurter once observed, "[f]rom a profession charged with [constitutional] responsibilities there must be ***29** exacted … qualities of truth-speaking, of a high sense of honor, of granite discretion." *Schware v. Board of Bar Examiners of New Mexico,* 353 U.S. 232, 247 (1957). The landmark *Strickland v. Washington* opinion presupposed attorneys' professional obligations, including "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. 668, 688 (1984); *see also Hernandez,* 524 F.3d, at 1018-19 (contrasting attorneys and non-lawyer immigration consultants). Justice O'Connor, dissenting from a decision to strike down certain state bans on lawyer solicitation, noted that, "[w]hile some assert that we have left the era of professionalism in the practice of law…, substantial state interests underlie many of the provisions of the state codes of ethics, and justify more stringent standards than apply to the public at large." *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 677 (1985) (O'Connor, J., dissenting) (internal citation omitted).

Bearing in mind this overarching professional regime, it is implausible to charge a district attorney's office with precisely the same duty to "train" prosecutors that *Canton* recognized with respect to police officers. *Canton* itself does not suggest that *every* employment relationship triggers an equivalent training duty for which a municipality may be liable. *See, e.g.*, 489 U.S., at 387 (holding "there are *limited circumstances* in which … a 'failure to train' can be the basis for liability under § 1983"); *id.*, at 390 (explaining that liability may arise "in light of the duties assigned to *specific officers or employees*") (emphases added). ***30** As Judge Clement explained, "it is highly unlikely that a municipality could be held liable for failing to train a doctor it employed in diagnostic nuances." Pet. App. 29a. In the same way, prosecutors have an orientation to the laws governing their duties fundamentally different from typical municipal employees.

Prosecutors should therefore not be lumped unthinkingly under *Canton*'s stringent fault standard, as though they were any other employee. "To hold a public employer liable for failing to train professionals in their profession is an awkward theory," as Judge Clement aptly observed. Pet. App. 29a. The theory is indeed awkward that puts a district attorney in the position of crafting a "training program" to prevent lapses by employees already professionally trained to detect and avoid them.

Canton does not direct a municipality to undertake such an overbroad and likely counter-productive approach to training. *Cf. Canton,* 489 U.S., at 392 (cautioning that diluting failure-to-train liability would "engage the federal courts in an endless exercise of second-guessing municipal employee-training programs"). Rather, a training program may trigger liability only when, in light of particular employees' duties,

> the need for more or different training is *so obvious*, and the inadequacy *so likely* to result in the violation of constitutional rights, that the policymakers … can reasonably be said to have been deliberately indifferent to the need.

***31** *Canton,* 489 U.S., at 390 (emphasis added). One strains to imagine, however, when it should *ever* be "obvious" to a district attorney that he needs to train prosecutors to know and obey the law. The opposite is true. Absent powerful indications to the contrary, a district attorney "is entitled to assume that attorneys will abide by the standards of the profession." Pet. App. 29a.

In sum, *Canton*'s training duty grew out of the police context and extends awkwardly to professionally trained employees such as prosecutors. Its only conceivable application to a putative failure to "train" prosecutors, then, is when a history of violations alerts the office to a specific problem that demands a targeted solution. Only that approach takes *Canton*'s stringent fault standard seriously. Only then can a district attorney plausibly be accused of a "continued adherence to an approach that [it] know[s] or should know has failed to prevent tortious conduct by employees." *Bryan County,* 520 U.S., at 407. Reading *Canton* any other way would unmoor it from *actual* municipal fault and would essentially direct district attorneys, on pain of § 1983 liability, to run their offices like a law school, a board of ethics, or a bar association.

(2).* Canton's *single-incident scenario is nothing like a* Brady *situation.

Given the implausibility of holding a district attorney culpable for not "training" prosecutors on what they are already equipped to know and do, one wonders what theory allowed Thompson's case to survive a motion to dismiss. It was this: the ***32** lower courts equated prosecutors' *Brady* compliance to the extreme scenario *Canton* had hypothesized for single-incident liability. The lower courts thus expanded single-incident liability far beyond anything *Canton* envisioned.

Failure-to-train liability ordinarily requires an underlying history of employee wrongdoing. *See, e.g., Bryan County,* 520 U.S., at 409. Otherwise, a municipality's failure to adjust training would seldom indicate its "continued adherence to an approach that [it] know[s] or should know has failed to prevent tortious conduct by employees." *Id.*, at 407 (citing *Canton,* 489 U.S., at 390 n.10). An employee's single violation would therefore establish municipal failure-to-train liability only in the rarest case. The Court has imagined only one: an excessive force violation that occurs because a city has passed out guns to officers but forgotten to train them on using deadly force. *Canton,* 489 U.S., at 390 n.10 (citing *Tennessee v. Garner,* 471 U.S. 1 (1985)).

The Court has shown no inclination to expand this hypothetical and, indeed, has never actually held a municipality liable under it. *See Bryan County,* 520 U.S., at 409 (explaining that *Canton* had "simply hypothesized" single-incident liability for a "narrow range of circumstances"). *Canton*'s extreme police-training scenario thus remains the lone benchmark for single-incident liability. The key question is whether it plausibly extends to a district attorney's office that fails to "formally train" prosecutors on *Brady.*

***33** Both lower courts concluded that it does, but only by abstracting the hypothetical from its peculiar facts. *See* Pet. App. 72a-80a, 141a-142a. For instance, the district court found the *Brady* scenario implicated single-incident liability because the office "knew to a moral certainty" that prosecutors would acquire *Brady* material; because "without training it is not always obvious what *Brady* requires"; and because withholding *Brady* material "will virtually always lead" to constitutional violations. *Id.* at 141a. The panel opinion relied on the same reasoning, along with expert testimony that "[e]very district attorney knows" that prosecutors will acquire *Brady* material and that not disclosing it will violate constitutional rights. *Id.* at 76a-79a. [5]

Both courts patterned their analysis on the Second Circuit's opinion in *Walker v. City of New York,* 974 F.2d 293 (CA2 1992), which had first suggested that single-incident liability may apply to a *Brady* violation. *See* Pet. App. at 142a, 80a (both citing *Walker*). The jury instructions were also drawn directly from *Walker.* To assess Connick's deliberate indifference, the jury was asked to consider:
1) whether "the district attorney was certain that prosecutors would confront" *Brady* decisions;

***34** 2) whether those situations "involved a difficult choice or one that prosecutors had a history of mishandling, such that additional training, supervision or monitoring was clearly needed"; and

3) whether "the wrong choice by a prosecutor in that situation would frequently cause a deprivation of an accused's constitutional rights."

App. 828.

Based on this chain of reasoning, both lower courts ruled that a district attorney's purported failure to train on *Brady* fell within *Canton*'s single-incident scenario. *See, e.g.*, Pet. App. 80a (concluding that "Thompson did not need to prove a pattern of *Brady* violations to demonstrate that [Connick's] failure to train was deliberately indifferent"). The jury was thus explicitly allowed to base deliberate indifference on a *Brady* violation unaccompanied by any pattern. To be sure, that was the only basis on which the jury *could* have found culpability, since, as the panel explained, "Thompson did not establish a pattern of *Brady* violations" and indeed "d[id] not argue that there was evidence of a pattern." *Id.* at 76a, 72a. [6]

The analysis adopted by the lower courts to shoehorn *Brady* into single-incident liability was grievously flawed. It illogically expanded the ***35** "narrow range" of single-incident circumstances far beyond anything *Canton* could have envisioned. Under this approach, a district attorney's liability for "training" is indistinguishable from vicarious liability.

The lower courts' chief mistake was to divorce *Canton*'s hypothetical from its facts. *Canton* imagined an extreme case in which city police officers find themselves with new firearms but no indication how to use them legally. By contrast, the lower courts merely asked whether municipal employees face a situation that "presents a difficult choice" that "will frequently cause" constitutional violations. That abstraction scarcely does justice to *Canton*' s hypothetical, which dealt not with "difficult choices" that "frequently" cause violations, but with impossible choices that inevitably cause them. *Canton*'s untrained officers were essentially asked to intuit deadly force standards. Saying they faced a "difficult choice" hardly captures the problem. A municipal employer who places its officers in that dilemma is, by definition, callously indifferent to the rights of citizens those officers will apprehend.

Going well beyond that scenario, the lower courts expanded single-incident liability to a far broader and more commonplace range of employee missteps. For a district attorney's office, such liability would extend not only to *Brady*, but also prosecutors' decisions on "search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, or many more." Pet. App. 27a. This converts a rare form of municipal ***36** liability into the norm, with particularly ruinous implications for prosecutorial offices.

The lower courts simply missed the obvious: failing to train police officers to arrest criminals is nothing like "failing to train" prosecutors to interpret the law. The former shows callous indifference, the latter a sensible reliance on professional safeguards. By sending Thompson's case to the jury without any proof of a history of similar violations, the lower courts expanded single-incident liability far beyond the "narrow range" *Canton* and *Bryan County* delineated, and thus breached the high wall around failure-to-train liability. The consequences were predictable: "Where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability." *Bryan County*, 520 U.S., at 415.

B. Faced with no history of violations, a district attorney's *Brady* training cannot be the moving force behind a violation.

Because the causal link in such cases "is an inherently tenuous one," *see Springfield,* 480 U.S., at 268 (O'Connor, J., dissenting), the Court has underscored that a failure-to-train claim demands an ironclad connection between an injury and a flawed training program. The Court has recited a litany of warnings to this effect. "[T]he identified deficiency in a

city's training program," *Canton* said, "must be closely related to the ultimate injury" and must have "actually caused" it." 489 U.S., at 391. But-for causation is insufficient. ***37** *Bryan County,* 520 U.S., at 410. Rather, a "direct causal link" must exist between training and injury, and a pattern of violations is usually necessary to prove it. *Id.*, at 404, 407-08. It is not enough to show that a program has sometimes been badly supervised, or that certain employees could have been better equipped to avoid the misconduct. *Canton,* 489 U.S., at 391. The "moving force" behind the injury must be the training program *itself*, and not "factors peculiar to the officer involved in the particular incident." *Bryan County,* 520 U.S., at 407-08.

A purported flaw in a district attorney's system of *Brady* compliance - such as a lack of "formal" training - cannot typically be the moving force behind a *Brady* violation for two reasons. First, the far more obvious cause of a violation lies with the professionally trained prosecutor himself. The only thing that could conceivably change this calculus is a history of *Brady* violations sufficient to alert a district attorney to a problem that demands a targeted solution. Second, the extreme police-training failure in *Canton's* single-incident hypothesis does not remotely embrace the *Brady* scenario faced by a professionally trained prosecutor.

In most cases, what *actually* causes a *Brady* violation is the prosecutor himself. Many things might explain the lapse. The prosecutor may have simply neglected his duties. He may have made a mistake about the materiality of particular evidence. *See, e.g., United States v. Bagley,* 473 U.S. 667 (1985) (defining materiality with respect ***38** to impeachment evidence). He may have had a defective understanding of *Brady.* He may have been misinformed about the existence of evidence because of his own laziness or the police's. *See, e.g., Kyles v. Whitley,* 514 U.S. 419, 437 (1995) (explaining that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). Conceivably, an office's structural mechanisms might have failed in a given case. Normal checks and balances may not have functioned properly. Evidence might have slipped through the cracks in an otherwise reliable system. *See, e.g., Strickler v. Greene,* 527 U.S. 263 (1999) (involving undisclosed potential *Brady* material that surfaced after trial despite open file policy). And, of course, one must not rule out the disturbing scenario that unfolded in Thompson's case: a prosecutor may have knowingly buried *Brady* material. *See, e.g., Banks v. Dretke,* 540 U.S. 668 (2004) (involving suppression of impeachment evidence that would have revealed government coaching of witness).

Consequently, someone investigating a *Brady* violation would suspect, first and foremost, that the prosecutor betrayed *his own* professional standards - *not* that he should have received better training from the district attorney. By definition, a prosecutor is a licensed professional already equipped to assess what to do with potential *Brady* material. *See supra* Part I.A.1. Only in the most unusual case would a *Brady* violation be traced to anything other than an individual prosecutor's lapse of judgment.

***39** Thus, the same reasons that counsel against attributing the requisite fault to a district attorney for a prosecutor's single *Brady* violation, *see supra* Part I.A, also counsel against finding the requisite causation. There is little reason to think that a district attorney's inadequate training *actually* causes a professional to betray the standards of his own profession. None of the plausible explanations for a *Brady* violation - a prosecutor's mistake, for instance, or faulty administration of an office system - establish a direct link between the injury and deficient training. Accurately diagnosed, the moving force will instead be "factors peculiar to the officer involved in the particular incident." *Bryan County,* 520 U.S., at 408.

Causation becomes even more tenuous when a *Brady* violation results not from a prosecutor's negligence - or even recklessness - but instead from his intentional misdeed. By analogy, a municipality's inadequate sexual harassment training cannot have been the moving force behind a police officer's rape of a detainee. [7] As one court explained, "while it may have been wise to tell officers not to sexually assault detainees, it is not so obvious that not doing so would result in an officer actually sexually assaulting a female detainee." *Parrish,* 594 F.3d, at 999. For the same reasons, whatever

insufficient *Brady* training a district attorney's office may have provided could ***40** not directly cause a prosecutor's knowing violation of *Brady*.

In sum, nothing about a *Brady* violation suggests that it escapes the rule that a "pattern of injuries [is] ordinarily necessary to establish municipal culpability and causation." *Bryan County,* 520 U.S., at 409. *Canton's* single-incident hypothesis confirms this. In that scenario, the city employer had no reason to think officers are equipped to interpret or even locate the proper constitutional standards for deadly force. *See* 489 U.S., at 390 n.10. Denying police officers those "specific tools," the Court explained, will lead to constitutional violations "with a high degree of predictability." *Bryan County,* 520 U.S., at 409-10. A resulting excessive force injury can therefore be directly linked to the city's lack of training. *See supra* Part I.A.2 (discussing *Canton*'s single-incident hypothesis).

A chasm lies between that scenario and a prosecutor's *Brady* violation, however. Unlike police officers, prosecutors are professionally trained to understand what *Brady* requires of them. *See supra* part I.A.1. A district attorney reasonably relies on their ability and integrity. That a district attorney may not provide "formal" *Brady* training to reinforce prosecutors' professional acumen does not, by any stretch of the imagination, put him in the same category as the city official who hands out firearms to untrained officers and hopes for the best.

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***41** As Justice O'Connor predicted years ago, "[a]llowing an inadequate training claim such as this one to go to the jury based on upon a single incident would only invite jury nullification of *Monell.*" *Canton,* 489 U.S., at 399 (O'Connor, J., concurring in part and dissenting in part). Absent a history of similar incidents, a prosecutor's *Brady* violation simply does not support an inference of culpable municipal action that *Monell* and *Canton* require. The facts of this case, as discussed below, illustrate that stretching single-incident liability to include this kind of employee malfeasance will dissolve the distinction between municipal and vicarious liability and "open municipalities to unprecedented liability under § 1983." *Canton,* 489 U.S., at 391.

II. This Case Exemplifies the dangers of expanding failure-to-train liabilty to a prosecutor's *Brady* violation.

The facts of this case highlight the flaws of extending failure-to-train liability to a *Brady* violation. First, they reveal how awkward the notion is of "training" prosecutors in their own profession. Despite not having formalized *Brady* instruction, Connick's office structure was itself a practical and effective way of monitoring *Brady* compliance - far more so than converting his office into a miniature law school. Second, the facts show how *Canton*'s rigorous fault standard was diluted. The office was found liable without proof of any conscious decision by Connick to ignore obvious or persisting problems with *Brady.* Third, the facts show how *Canton*'s stringent causation ***42** requirement was bypassed. The moving force behind Thompson's violation had nothing to do with a putative training deficiency in Connick's office. Instead, Thompson's rights were violated when a prosecutor knowingly concealed the blood evidence.

This case thus demonstrates the inevitable consequence of expanding *Canton*' s single-incident theory to include a district attorney's putative failure to train prosecutors on *Brady.* The office will be held liable "*solely* because [it] employs a tortfeasor." *Monell,* 436 U.S., at 691 (emphasis in original).

A. Connick's system of checks and balances was a sensible way of approaching *Brady* compliance.

By the time of the violation in this case, Connick had already instituted a practical and effective system for monitoring prosecutors' compliance with *Brady.* Connick's system did not comfortably equate to a "training program" under *Canton*, but that is just the point. As explained above, *Canton* applies awkwardly to training prosecutors in their own professional obligations to begin with. *See supra* Part I.A.1. Yet Thompson's case proceeded on this implausible basis. He could

therefore sidestep evidence of the office's compliance mechanisms and claim instead that a lack of "formal *Brady* training" showed Connick's deliberate indifference. Thompson was thus allowed to argue a failure-to-train claim without even establishing the basic premise that there was ***43** inadequate training to begin with. [8]

The reality was quite different. Despite an absence of classroom-style training, Connick introduced numerous structural measures designed to instruct and monitor prosecutors:

• He revolutionized the "screening" process.

• He established a system of junior and senior prosecutors in each court section.

• He created an in-house system of "pre-trying" cases.

• He instituted regular sessions for review of cases and for specialized instruction.

• He fostered the circulation of advance sheets and intra-office memoranda highlighting developments in criminal law.

Beginning in 1974, then, Connick oversaw the evolution of a "system of tremendous checks and balances" designed to reinforce his prosecutors' compliance with their legal and ethical obligations. App. 425-30, 460-63; *see generally supra* Statement, Part A.

Prosecutors' *Brady* compliance was therefore not left to chance. The office compliance structure was designed to - and actually did - address *Brady.* To be sure, no conceivable system could monitor ***44** every one of the thousands of *Brady* decisions prosecutors would make in a given year. And yet *Brady* was reinforced at multiple levels by the office-wide supervision and instruction that Connick instituted. Specific *Brady* questions would pass initially through screening and proceed - along with myriad other issues requiring prosecutors' judgment - up the chain through an investigator, a junior prosecutor, and a senior prosecutor. Internally supervised "pre-trials," weekly trial division meetings, and regular intra-office memoranda would each flag *Brady* issues and highlight doctrinal developments. Connick himself instituted or refined each of these mechanisms. *See generally supra* Statement, Part B.

Thompson was never required to prove that these practices were inadequate. Instead, he proceeded on the facile assumption that Connick's training *must* have been flawed because there were no "formal" training sessions addressing *Brady.* The lower courts accepted this premise. The district court reasoned that "no deponent could identify any training sessions on *Brady,*" and that "several deponents conceded that they were not formally trained, and that no one in the office received formal training." Pet. App. 140a. The panel agreed. Pet. App. 89a-91a. This simplistic view made "inadequate training" a foregone conclusion: the petitioners themselves stipulated there were no formal *Brady* training sessions. App. 27.

The lower courts uncritically assumed that the kinds of training lapses for which municipalities ***45** may be liable under *Canton* apply to a district attorney's purported duty to train prosecutors on their professional obligations. This case shows just how flawed that premise is. Connick more than responsibly fulfilled his institutional role as a district attorney by overhauling how his office was structured and how his prosecutors were supervised and instructed. At the same time, however, Connick was "entitled to assume that attorneys [would] abide by the standards of the profession." Pet. App. 29a. *Canton* did not impose on Connick an obligation to run his office as if it were a law school, a board of ethics, or a bar association. Only by taking such an unrealistic view of *Canton* could Connick be held liable for a failure to sponsor formal *Brady* training sessions.

B. The evidence showed no deliberate choice by Connick to ignore an obvious *Brady* compliance problem.

The expansion of *Canton*'s single-incident theory to this case resulted in imposing liability under a diluted fault standard. The evidence failed to demonstrate any conscious decision by Connick to ignore obvious or persisting problems with *Brady* compliance, which is precisely the kind of fault *Canton* demands. Nothing better illustrates that this case should never have been treated under the single-incident hypothesis to begin with.

Heightened culpability demands, as Judge Clement's dissent explained, that Connick ignored an obvious need to train prosecutors about the undisclosed evidence at issue. Pet. App. 14a-18a, 22a-24a. After all, *Canton* was premised on failing ***46** to train an officer, not on the general requirements of his position, but rather on a "specific skill necessary to the discharge of his duties." *Bryan County,* 520 U.S., at 410. *Canton*'s single-incident hypothesis is even more context-specific. It depends on "[t]he likelihood that a situation will recur and the predictability that an officer lacking *specific tools to handle that situation* will violate citizens' rights." *Id.*, at 409 (emphasis added). [9] Thus, the correct fault inquiry is not whether the office failed to train prosecutors about "*Brady* in general," which would be like asking whether the city in *Canton* failed to train officers about "arrests in general." Rather, the right question is whether Connick consciously "fail[ed] to train [prosecutors] on how to handle specific types of evidence such as the crime report at issue." Pet. App. 24a. [20]

The evidence showed nothing approaching such fault on Connick's part, and indeed it demonstrated quite the reverse. As Judge Clement emphasized, in thousands of cases handled by Connick's office in the decade preceding Thompson's violation, "only four convictions were overturned based on *Brady* violations … and there was not a single instance involving the failure to disclose a crime lab report ***47** or other scientific evidence." Pet. App. 25a. [2] Connick himself testified about these isolated incidents, App. 436-37, 452-53, and Thompson did not attempt to argue that they formed a "pattern of constitutional violations" [22] with the incident in his case. *See, e.g.*, Pet. App. 72a (explaining that "Thompson does not argue that there was evidence of a pattern").

Far from casting doubt on Connick's *Brady* record, the one circuit decision to scrutinize his record actually *approved* it. In *Cousin v. Small,* the Fifth Circuit surveyed the period covering Thompson's violation and found Connick's "enforcement of the [*Brady*] policy was not patently inadequate or likely to result in constitutional violations." 325 F.3d 627, 637-38 (CA5 2003). Given the high caseload in Connick's office during that period, the court

> ***48** agree[d] with the [district] court's conclusion that citation to a small number of cases, out of thousands handled over twenty-five years, does not create a triable issue of fact with respect to Connick's deliberate indifference to violations of *Brady* rights. [23]

Id. Thompson's evidence did not add anything to contradict the Fifth Circuit's conclusion about Connick's *Brady* record.

To finesse that absence of persistent *Brady* infringement in Connick's office, Thompson adduced evidence purportedly showing that the same group of prosecutors withheld other *Brady* material in his murder trial. *See, e.g.*, Pet. App. 22a n.41 & 38a n.67 (discussing and rejecting this argument). The problems with this argument were manifold, however. First and foremost, even assuming other *Brady* violations occurred in his subsequent trial, they could not substitute for the "pattern of constitutional violations" ordinarily required by *Canton* and *Bryan County.* Such a "pattern" refers to a history of *prior* violations a training program has failed to prevent, such that "municipal decisionmakers may eventually be put ***49** on notice that a new program is called for." *Bryan County,* 520 U.S., at 407. [24] Moreover, even on their own terms, Thompson's alleged additional violations had no connection to what led to the blood suppression. They instead concerned disputes about the materiality of inconsistent witness descriptions and impeachment evidence. *See, e.g.*, App. 293-306, 312-336. Thus, even if such non-disclosures occurred and violated *Brady*, they did not establish the sort of pattern that could support a finding of heightened culpability.

Even more fundamentally, these alleged non-disclosures have never been adjudicated *Brady* violations to begin with. To the contrary, many of them-- *i.e.*, claims that suppressed evidence showed witness bias - were rejected in Thompson's federal habeas proceedings. *See Thompson v. Cain,* 161 F.3d 802, 805-08 (CA5 1998); *Thompson v. Cain,* 1997 WL 79295, at *9-*19 (E.D. La. Feb. 24, 1997) (unpublished); *see also* Pet. App. 22a n.41 (discussing these adjudications). Others were simply presented as disconnected facts in Thompson's civil rights case. *See, e.g*, App. 94-108, 210-215, 220-22, 293-306, 312-36. The jury, however, was instructed only that the blood suppression violated *Brady* as a matter of law, and not whether other claimed non-disclosures violated *Brady.* Instead, the jury was merely told it was "not limited to the nonproduced blood evidence" in ***50** assessing Connick's fault. *Compare* App. 825 *with* App. 826. [25]

Whether a particular non-disclosure violates *Brady* is a legal question a jury cannot determine. *See, e.g., United States v. Oruche,* 484 F.3d 590, 595-96 (CA DC 2007) (explaining that "once the existence and content of undisclosed evidence has been established, the assessment of [its] materiality … under *Brady* is a question of law"). In a failure-to-train case, then, only courts are equipped to assess whether a plaintiff has shown additional constitutional violations and whether they constitute the pattern *Canton* and *Bryan County* require. Here, indeed, when the lower courts squarely addressed that issue, both ruled that Thompson's case should be exempted from the typical pattern requirement. [26] Those rulings would ***51** have been nonsensical had the courts thought Thompson's supposed additional violations established a pattern. In fact, the panel confirmed that "Thompson did not establish a pattern of *Brady* violations by the DA's Office." Pet. App. 76a.

Since Thompson could not prove a genuine pattern, he merely sought to impugn the office's reputation for *Brady* compliance. For instance, Eddie Jordan, the district attorney who succeeded Connick, testified that during Jordan's political campaign "some of the candidates, including myself, raised questions about" Connick's *Brady* record and "thought that … more could be done." App. 129-30. Jordan justified his opinion, however, only by referring to "several cases that had been reversed" (whose names he could not recall), and by mentioning a study by "[s]ome kind of national group or national report" (which was not part of the record) App. 130, 133. Finally, Jordan referred to a two-page letter from an Orleans criminal court judge - written in 1998, 13 years *after* Thompson's violation - expressing vague concerns about the office's *Brady* record and advocating an open-file policy. App. 133-35. [27]

***52** Thompson also attempted to paint certain statements by Connick and other prosecutors as indicative of a conscious failure to address *Brady* issues. But, as Judge Clement rightly explained, this evidence amounted to no more than "generic generalizations" that "could … support a deliberate indifference finding against any prosecutor's office for nearly any error that leads to a reversal of a conviction." App. 27a-28a. For instance, the lower courts pointed to evidence that Connick was "aware" prosecutors would "confront *Brady* issues on a regular basis" and that mishandling such issues "would result in constitutional violations." Pet. App. 76a; *see also id.* at 141a. There was also evidence that "many of the attorneys in [Connick's] office were only a few years out of law school." Pet. App. 78a. Finally, some prosecutors testified that *Brady* had "gray areas," *id.* at 77a, and that "*Brady* issues are complex and ambiguous," *id.* at 139a. *See* App. 171,218-20.

Such evidence proves nothing about the need for targeted *Brady* training in Connick's office, much less Connick's culpable indifference to such a need. That Connick knew prosecutors faced *Brady* issues, and that *Brady* implicates constitutional rights, are stunningly obvious to *any* district attorney. That Connick employed young attorneys as prosecutors is equally unremarkable. Besides, Connick had carefully structured his office precisely to shepherd young attorneys through various levels of responsibility. Finally, the fact that prosecutors thought *Brady* had "gray areas" proved, not that they were unfamiliar with *Brady* but that they were *familiar* with it. As any criminal law ***53** hornbook elucidates, *Brady* has always had "gray areas." *See, e.g.*, Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, Criminal Procedure § 24.3(b), at 1145 & 1144-50 (5th ed. 2009) (discussing "troublesome issue[s]" persisting under *Brady* and its progeny). Thompson's own expert witness apparently agreed: he explained that "*Brady* is an evolving concept." App. 256.

Thompson's evidence thus suggests exactly nothing about Connick's "indifference" to *Brady*, deliberate or otherwise. If it did, it would impugn *every* district attorney's office and transform *every* discretionary issue their prosecutors confront into a mother-lode of potential liability. And, as Judge Clement pointed out, that liability would not stop with *Brady*, but would include "search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, [and] many more." App. 26a-27a. [28]

***54 C. The moving force behind the violation was a prosecutor's knowing misdeed, not Connick's flawed training.**

Canton's expansion in this case also resulted in bypassing the stringent causation critical to failure-to-train liability. Thompson's violation was simply not linked to a putative office-wide training deficiency, but instead to a prosecutor's knowing misdeed. Against this reality, Thompson advanced the theory that the suppression was the product of prosecutors' poor *Brady* understanding, which was itself supposedly the product of poor training. Thus did Thompson strive to shoehorn the facts into a failure-to-train. The theory does not fit, however. The evidence may have permitted, at most, the inference that there were four bad apples in Connick's office instead of one. What it did not permit was the transparent fiction that the *Brady* violation had any link to poor training.

As already explained, failure-to-train demands an ironclad connection between an injury and a deficient training program, because the causal link in such cases "is an inherently tenuous one." *Springfield,* 480 U.S., at 268 (O'Connor, J., dissenting); *see generally supra* Part I.B. Thompson had to prove that the moving force behind his injury was prosecutors' confusion about how *Brady* applied to the undisclosed report *and* that their confusion was directly linked to Connick's training system. It was not enough to show diffuse uncertainty about *Brady*, nor that certain prosecutors should have been better schooled on *Brady. See e.g.*, Pet. App. 32a-33a ***55** (emphasizing the specificity of the causal inquiry). Such evidence could not show that a specific deficiency in office training actually caused what happened. *See, e.g., Canton,* 489 U.S., at 391 (asking whether "the injury would have been avoided had the employee been trained under a program that was not deficient *in the identified respect*") (emphasis added).

Meeting that standard confronted Thompson with a severe challenge. His own attorneys, after all, had uncovered the evidence that shockingly explained what caused his injury. Almost ten years after Thompson's conviction, one of the prosecutors on the robbery case, Gerry Deegan, was diagnosed with terminal cancer and told he had months to live. App. 362. In a bar one night, Deegan confessed to a fellow prosecutor the unconscionable thing he had done to Thompson. *Id.* Deegan had "intentionally suppressed blood evidence" that would have exonerated Thompson for the robbery. App. 367. Soon after that, Deegan died. His confession left it somewhat vague whether any of the other three prosecutors - Whittaker, Williams or Dubelier - were in on the suppression. [29] App. 362. But there was no question that Deegan was unburdening his conscience of something he had knowingly done.

***56** Deegan's own words proved the violation of Thompson's civil rights. Ironically, however, Thompson's attorneys had to distance his civil rights case from the confession. Their central theory demanded they directly link Thompson's injury, not to a single bad act, but to Connick's failure to train prosecutors *in general.* Any such link would have been obliterated by accepting the plain implications of Deegan's confession. For if Deegan, with or without help, had knowingly suppressed the evidence, then no training flaws Thompson might uncover could have actually caused his injury. Deegan, after all, did not confess to poor training. He did not confess that, a decade later, he achieved a better grasp of *Brady* and realized what he had done. Rather, Deegan came clean because what he had *knowingly* done was gnawing at his conscience.

The alternate theory Thompson settled on was that the four prosecutors withheld the report because they misunderstood their obligation to produce it, and that *Brady* training would have prevented that. Pet. App. 35a-36a. But Thompson supported that implausible version of events merely with a few suggestive answers from individual prosecutors on the

stand. For instance, Thompson's attorneys got Williams to fumble over whether *Brady* applied to impeachment evidence and whether it applied to a lab report that was only potentially exculpatory. App. 61-64, 216-18, 229-32. They were able to induce similar confusion from the office representative, Val Solino. App. ***57** 248-49, 483-84; Pet. App. 37a-38a. [30] Finally, a prosecutor who later investigated the suppression, Jerry Glas, claimed that Connick had argued with him in 1999 about whether the lab report was *Brady* material. App. 550-51. Connick, of course, denied ever saying any such thing, and insisted that *Brady* obviously covered the report. App. 154.

Skillful cross-examination cannot substitute for actual proof, however. Thompson's evidence may support the inference that prosecutors like Williams or Solino "occasionally make mistakes," or even that they were "unsatisfactorily trained." *Canton,* 489 U.S., at 391. At most, it may have suggested that some unspecified *Brady* problem may have been avoided if those attorneys "had had better or more training." *Id.* But these are black-letter failures to meet *Canton*'s causation standard. Thompson simply failed to adduce the kind of broad, systemic proof *Canton* demands to forge a solid link between an office-wide training deficiency and the suppression in his case.

To find that Thompson proved causation with evidence like this would require stacking one weak inference on top of another. Take, for instance, the possible confusion about *Brady*'s application to impeachment evidence. One would have to assume that passing confusion by two prosecutors on the stand in 2007 actually reflected a far broader misunderstanding in the office over twenty years ***58** before. One would have to assume further that such confusion arose from Connick's failure to train prosecutors. But even assuming all that, the evidence would still fail to establish causation for a simple reason: any purported confusion about impeachment evidence would have been irrelevant to Thompson's *Brady* violation, because the lab report was exculpatory, not impeaching. Thus, even disregarding the most obvious explanation for what happened - that Deegan buried the report - purported confusion about *Brady*'s application to impeachment evidence *could not have caused* the suppression in Thompson's case.

Or take the claimed uncertainty about how *Brady* applied to potentially exculpatory lab reports. One would have to assume that two prosecutors' doubts on the stand in 2007 established systemic confusion in the office in 1985, and, again, that such confusion arose from Connick's training. Or one would have to assume that Connick's alleged argument with a prosecutor in 1999 proved a particular deficiency in the office's *Brady* compliance in 1985. But even these clusters of implausible assumptions would not establish causation.

It was uncontradicted that office policy demanded turning over *all* scientific reports regardless of whether a prosecutor thought a particular report fell within *Brady.* Pet. App. 31a. As Judge Clement explained, even the same witness (Williams) who testified that *Brady* might not reach every report also "stated unequivocally that *all* technical or scientific reports, like the lab ***59** report, were required to be turned over to a defendant." Pet. App. 38a (emphasis in original); *see* App. 63-64, 199-200, 209, 230-32. Solino said the same: he "would have expected a prosecutor to turn that lab report over, period." App. 486. Dubelier, the senior prosecutor on Thompson's murder case, was the most explicit, testifying that he had

> turned over thousands of these type of reports. If I had the report, I would have turned it over. … [W]e were obligated to turn over a crime lab report. That's the way it was. That was standard operating procedure in the office.

App. 284. There was simply no evidence that a purported confusion about *Brady* could have overridden this consistent office policy of disclosing crime lab reports. Whatever caused the report's suppression in Thompson's case, it could not have been confusion about *Brady.*

Given the inherent weakness of his causation arguments, Thompson was left to insist that the jury could have rejected the theory that a "single rogue prosecutor" was responsible for hiding the evidence. *See* Pet. App. 36a-37a. But Thompson had to do much more than that. He had to forge a direct causal link between the nondisclosure and *office policy.*

Thompson did not meet that burden merely by suggesting that three or four prosecutors, instead of just one, were involved. Nor did he meet it merely by suggesting that certain prosecutors should have had a better grasp of *Brady*. Rather, Thompson was required to prove ***60** that a specific, systemic flaw in Connick's approach to *Brady* compliance actually caused the violation in his case. Thompson produced no such evidence, and the wisps of testimony he did produce could not obscure what really happened. A prosecutor - perhaps acting with others, perhaps acting alone - knowingly buried evidence that would have cleared Thompson. Nothing Connick's office did could have conceivably caused that evil act.

*****

Beginning with *Monell*, this Court has cautioned that "a municipality cannot be held liable *solely* because it employs a tortfeasor - or, in other words, … on a *respondeat superior* theory." 436 U.S., at 691 (emphasis in original). Both *Canton* and *Bryan County* reissued that warning. *See Canton,* 489 U.S., at 391-92; *Bryan County,* 520 U.S., at 415. Justice O'Connor even predicted that allowing certain inadequate training claims "to go to the jury based upon a single incident would only invite jury nullification of *Monell.*" *Canton,* 489 U.S., at 399 (O'Connor, J., concurring in part and dissenting in part).

This case is now poised to fulfill Justice O'Connor's prediction. The essence of vicarious liability is to make an employer answerable for an employee's wrongdoing simply by virtue of the employment relationship. That can be the only fair description of the basis for liability in this case. No history of similar violations should have alerted Connick that he needed training targeted to this sort of *Brady* problem. Nothing warned him not to rely on his prosecutors' professionally formed ***61** judgment in obeying *Brady.* And nothing warned him that the existing office policy - to turn over *all* lab reports, regardless of whether they fell under *Brady* - would not resolve exactly the situation presented in a case like Thompson's.

In sum, no evidence showed that Connick had the callous, conscious disregard *Canton* demands. No evidence established a direct link between the mechanisms Connick had instituted for *Brady* compliance and the suppression in Thompson's case. Because Gerry Deegan - the prosecutor who buried the blood evidence - is now dead, the precise events surrounding the suppression are impossible to reconstruct. But one thing is clear: the office's *training policy* did not cause it.

What allowed the lower courts to shoehorn Deegan's knowing misdeed into a "failure-to-train" claim is *Canton*'s single-incident theory - *i.e.*, its suggestion that certain duties so obviously cry out for targeted training that a municipality's failure to do so creates liability, even absent a pattern of violations. *See Canton,* 489 U.S., at 390 & n.10. The Court should clarify what should have been apparent already: *Canton*'s narrow hypothesis has no application to cases like this one. Absent a warning history of particular violations, there can be no obvious need to train prosecutors who are themselves professionally trained to understand and apply the law. Nor could the lack of such training directly cause a prosecutor's intentional violation. No training could prevent such flagrant disrespect for the law by a lawyer himself.

***62 Conclusion**

The Court should reverse the judgment of the district court and render judgment dismissing respondent's failure-to-train claim.

Footnotes

1 The *en banc* Fifth Circuit vacated the panel opinion, but ultimately split 8 8 and thus affirmed the district court's judgment. Pet. App. 2a.

2 Thompson also sued, in their individual and official capacities, Connick, Williams, and Dubelier, as well as Eddie Jordan, who held the position of Orleans Parish District Attorney in 2003. Pet. App. 60a. His official capacity claims against the

prosecutors are identical to his claim against the office itself. *See Kentucky v. Graham,* 473 U.S. 159, 165 66 (1985); Pet. App. 132a. In the certiorari petition and this brief, Jordan's name has been substituted with that of the current Orleans Parish District Attorney, Leon Cannizzaro.

3 Thompson's additional state and federal claims were dismissed at various stages. Pet. App. 60a 61a. For instance, after Thompson rested, the district court dismissed his conspiracy claim under 42 U.S.C. § 1985(3). Pet. App. 61a. At the close of evidence, the district court ruled that Dubelier and Williams were not "policymakers and thus could not create § 1983 liability on behalf of the office. *Id.* The only claim that proceeded to trial was Thompson's § 1983 claim against the office.

4 The three questions were drawn from the Second Circuit's analysis in *Walker v. City of New York,* 974 F.2d 293, 300 (CA2 1992). *See also infra* Part I.A.2.

5 The court later added over $1 million in attorneys' fees. June 18, 2007 Order (Doc 182).

6 Since the panel decision has been vacated, the judgment erroneously naming Connick, Dubelier, Williams and Jordan still remains. *See* Pet. App. 112a n.27 (explaining these defendants should not have been named because they no longer hold office); *see also, e.g., Castro Romero v. Becken,* 256 F.3d 349, 355 (CA5 2001) (explaining that official capacity claims are duplicative of claims against government entities).

7 Judge Prado wrote a concurrence for five judges explaining why the judgment should be affirmed. Pet. App. 45a 50a.

8 Agreeing with Judge Clement, Chief Judge Edith Jones wrote separately to highlight "the troubling tension between this unprecedented multimillion dollar judgment against a major metropolitan District Attorney's office and the policies that underlie the shield of absolute prosecutorial immunity. Pet. App. 2a 3a (discussing *Van de Kamp v. Goldstein,* 129 S. Ct. 855 (2009)).

9 *See, e.g., Canton,* 489 U.S., at 389 (deeming deficient training actionable for "a municipality's failure to train *employees*); *id.* (observing that *Monell* "will not be satisfied by merely alleging that the existing training program for *a class of employees, such as police officers,* represents a city] policy) (emphasis added).

10 *See Canton,* 489 U.S., at 383 n.3, 387 n.6 (relying on *Rymer v. Davis,* 754 F.2d 198 (CA6 1985); *Hays v. Jefferson Cty.,* 668 F.2d 869 (CA6 1982); *Spell v. McDaniel,* 824 F.2d 1380 (CA4 (1987); *Wierstak v. Heffernan,* 789 F.2d 968 (CA1 1986); *Fiacco v. Rensselaer,* 783 F.2d 319 (CA2 (1986); *Gilmere v. City of Atlanta,* 774 F.2d 1495 (CAll 1985); *Rock v. McCoy,* 763 F.2d 394 (CA10 1985); *Languirand v. Hayden,* 717 F.2d 220 (CA5 1983); *Lenard v. Argento,* 699 F.2d 874 (CA7 1983)).

11 *See Warren v. City of Lincoln,* 816 F.2d 1254 (CA8 1987).

12 *See Colburn v. Upper Darby Tp.,* 838 F.2d 663 (CA3 1988).

13 *See Bergquist v. Cry of Cochise,* 806 F.2d 1364 (CA9 1986). *Canton* also drew on one circuit decision regarding training police to avoid retaliatory prosecution. *See Haynesworth v. Miller,* 820 F.2d 1245 (CA DC 1987).

14 As Justice Cardozo (then Chief Judge of the New York Court of Appeals) once noted: "Membership in the bar is a privilege burdened with conditions. A lawyer is] received into that ancient fellowship for something more than private gain. He becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice. *People ex rel. Karlin v. Culkin,* 248 N.Y. 465, 470 71, 162 N.E. 487 (1928).

15 The panel added the details that certain prosecutors testified that *Brady* had "gray areas or was "an elastic thing, and that many prosecutors "were only a few years out of law school. *Id.* at 77a 78a.

16 Furthermore, as explained in Part II.B, *infra*, the evidence adduced at trial did not permit any inference of the "pattern of constitutional violations typically required to prove failure to train liability.

17 *See, e.g., Andrews v. Fowler,* 98 F.3d 1069 (CA8 1996); *Sewell v. Town of Lake Hamilton,* 117 F.3d 488, 490 (CA11 1997); *Currie v. Haywood County,* 2007 WL 1063277, 4 (CA6 Apr. 10, 2007); *Parrish v. Ball,* 594 F.3d 993, 999 (CA8 2010).

18 *See, e.g., Canton,* 489 U.S., at 390 (explaining that " t]he issue in a case like this one … is whether that training program is adequate); *Bryan County,* 520 U.S., at 411 (assuming that "a jury could properly find … that Sheriff Moore's assessment of Burns' background was inadequate).

19 *See also Canton,* 489 U.S., at 389 (describing a municipality's "failure to train its employees *in a relevant respect*) (emphasis added).

20 *Cf. Walker,* 974 F.2d, at 300 (reserving question of how deliberate indifference applies "with respect to other kinds of exculpatory evidence).

21 *See State v. Perkins,* 423 So.2d 1103, 1105 08 (La. 1982) (overturning conviction based on failure to disclose exculpatory witness statement); *State v. Curtis,* 384 So.2d 396, 397 98 (La. 1980) (overturning conviction for failure to disclose impeachment evidence); *State v. Evans,* 463 So.2d 673, 675 76 (La. App. 4 Cir. 1985) (ordering trial judge on remand to inspect obscured page of coroner's report to determine if it contained *Brady* material); *State v. Rosiere,* 476 So.2d 816, 820 (La. App. 4 Cir. 1985) (noting failure to disclose two exculpatory witness statements).

22 *See, e.g., Canton,* 389 U.S., at 397 (O'Connor, J., concurring in part and dissenting in part) (observing that failure to train liability may exist where "policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion).

23 Judge Prado's panel opinion distinguished *Cousin* on the ground that the plaintiff had conceded that Connick's *Brady* training was adequate in 1995, which "says nothing of the training, supervision, and monitoring that existed when the DA's Office tried Thompson in 1985. Pet. App. 88a 89a. But that misses *Cousin*'s significance. As Judge Clement explained, *Cousin* "sustained the district court's conclusion that twenty five years of records involving this District Attorney's Office (covering the time period of Thompson's trial) reveal no pattern of *Brady* violations. Pet. App. 25a.

24 *See also id.* (explaining that municipal decisionmakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish deliberate indifference).

25 The district judge was unclear about why the jury was allowed to consider additional alleged non disclosures in the murder trial. While explaining to counsel that he "was not going to ask the jury … was this other stuff also *Brady,* the judge said he would allow it to prove "the cumulative nature of and impact of] evidence, that is, … whether or not it all goes to the training and deliberate indifference arguments. Transcript Vol. IV, p. 1003. Thompson's counsel urged, somewhat differently, that the evidence "reflected on the adequacy of the training *or whether there was a pattern or a policy. Id.* at 1004 (emphasis added). When petitioners' counsel urged an instruction that "deliberate indifference to training requires a pattern or similar violations and … more than a single isolated act, Thompson's counsel flatly stated, "That's not the law, and the court rejected the proposed instruction. *Id.* at 1013.

26 *See, e.g.*, Pet. App. 76a (finding that "the evidence developed at trial clearly demonstrates that this case falls within the … narrow range of situations that do not require a pattern of misconduct); *id.*, at 141a (finding that this case falls within *Canton*'s "so obvious exception and therefore "a pattern is not necessarily required).

27 Connick testified that the letter was "very vague … didn't name anyone … and] didn't name any specific transgression. Nonetheless, Connick personally looked into the problem and counseled the prosecutor in the judge's section about managing his caseload. App. 434 35.

28 Thompson also relied on a 1987 office policy manual, which he claimed confined *Brady*, as a matter of official policy, to exculpatory evidence only. *See, e.g.*, Pet. App. 139a 140a (discussing policy manual). But the jury explicitly rejected the theory that Thompson's violation was caused by official policy. App. 562. Thompson cannot coherently rely on evidence of official policy, then, to establish Connick's failure to train. Furthermore, the one paragraph devoted to *Brady* in the lengthy policy manual does not purport to exhaustively instruct prosecutors about *Brady* legal contours. That is why the same paragraph admonishes that "each Assistant District Attorney] must be familiar with the law regarding exculpatory information possessed by the State. App. 265.

29 During a subsequent grand jury investigation initiated by Connick, indictments were prepared against Whittaker and Williams for obstruction of justice. Connick suspended the investigation, however, because he feared that there was insufficient evidence against anyone but Deegan, and that the charges may have prescribed. App. 456.

30 Both witnesses, it should be said, immediately backtracked and stated categorically that both the law and office policy would have mandated turning over the lab report. App. 61 64, 216 18, 229 32, 248 49, 486 89.

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2010 WL 3518664 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Harry F. CONNICK, in his official capacity as District Attorney; Eric DUBELIER, in his official capacity as Assistant District Attorney; James WILLIAMS, in his official capacity as Assistant District Attorney; Leon A. CANNIZZARO, Jr., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE, Petitioners,
v.
John THOMPSON, Respondent.

No. 09-571.
September 7, 2010.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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***1** Introduction

Gerry Deegan, the prosecutor who harmed John Thompson, is now dead. No one knows why Deegan buried evidence that would have cleared Thompson and no one knows who conspired with him. Blue Br. at 11-13. Deegan's former employer, the Orleans Parish District Attorney's Office, now stands liable for Thompson's injury, on the theory it should have trained prosecutors to disclose the kind of evidence Deegan buried. *See City of Canton v. Harris,* 489 U.S. 378 (1989). Once this case went to the jury on such a theory, the result was foreordained: Thompson was awarded millions for the wrong he suffered at Deegan's hands. Yet that verdict nullifies a basic principle of municipal liability and must be overturned.

Municipal liability may never be premised on employee fault. *See Bd. of Comm'rs of Bryan Cry. v. Brown,* 520 U.S. 397, 403 (1997) (stating "[w]e have consistently refused to hold municipalities liable under a theory of *respondeat superior*"). To avoid vicarious liability, a failure-to-train claim must ordinarily be proved by a history of employee misconduct. A single incident suffices only "in a narrow range of circumstances." *Id.* at 409-10. Those circumstances are not present here.

Classroom-style instruction of prosecutors may be an effective component of the many approaches to *Brady* compliance open to district attorneys. But not having such formal training does not prove a district attorney "deliberately indifferent" to constitutional rights. *Canton,* 489 U.S., at 389. Deliberate indifference can be shown only when a ***2** district attorney is notified of a specific training deficiency by past incidents of prosecutor malfeasance. *Bryan Cty.,* 520 U.S., at 407-08.

Thus, the jury in this case should not have been allowed to rely on a single *Brady* violation to "substitute for the pattern of injuries ordinarily necessary to establish … culpability and causation." *Id.* at 409. But it was. This error all,owed the jury to nullify the office's "immunity from *respondeat superior* liability," *Oklahoma City v. Tuttle,* 471 U.S. 808, 830 (1985) (Brennan, J., concurring), and hold the office liable for Deegan's malfeasance alone. The Court should reverse.

Argument

Evidently aware that the single-incident theory cannot support the verdict, Thompson runs from the theory altogether. First, Thompson erroneously reframes the question presented as evidence sufficiency. *See infra* part I. Next, he dilutes the exceptional nature of single-incident liability. *See infra* part II. He then claims the jury could have based liability on other *Brady* violations - violations which the jury was never asked to find and which Thompson never proved. *See infra* part III. Thompson also invents new theories of *Canton* liability. *See infra* part IV. He then speculates about alternate and irrelevant theories of causation. *See infra* part V. Finally, he implausibly denies that expanding single-incident liability to prosecutor errors will subject district attorneys to ruinous consequences. *See infra* part

***3 I. The issue is law, not facts.**

Thompson begins by reframing the question as a matter of fact, not law. Red Br. at i. The issue, however, is not whether the jury had sufficient evidence to impose liability, but whether the jury was wrongly allowed to consider single-incident liability at all. If, as petitioners contend, the single-incident theory had no place here, the verdict must be overturned because "there is no way to know that the invalid claim … was not the sole basis for the verdict." *United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki,* 358 U.S. 613, 619 (1959); *see also Sunkist Growers, Inc. v. Winkler & Smith Citrus Prods. Co.,* 370 U.S. 19, 2930 (1962) (because the Court "h[e]ld erroneous one theory of liability upon which the general verdict may have rested … it is unnecessary for us to explore the legality of the other theories").

This Court overturned a jury verdict in *Turtle* on precisely that basis. In *Turtle*, the jury was wrongly allowed to impose municipal liability for inadequate training based on one incident of excessive force. *See Tuttle,* 471 U.S., at 821 (plurality op.) (finding error because the instructions "allowed the jury to impose liability on the basis of … a single incident without the benefit of the additional evidence"); *id.* at 830 (Brennan, J., concurring) (finding error because "[u]nder the instruction in question, the jury could have found the city liable solely because [the officer's] actions … were so excessive and out of the ordinary"). The Court rejected respondent's argument that the verdict was nonetheless valid because the jury had ***4** before it "independent evidence" of inadequate training beyond the incident itself. *Id.* at 821-22 (plurality op.); *id.* at 830 (Brennan, J., concurring). It was enough that the verdict could have been based on an impermissible training theory.

Tuttle controls here. The district court treated this case as a candidate for single-incident liability and. instructed the jury accordingly. *See infra* part III.A; Blue Br. at 14-16, 33-34. The question presented, then, is legal and not factual: whether allowing the jury to impose single-incident liability contravened the Court's municipal liability cases.

II. Single-incident liability applies in narrow circumstances not present here.

Thompson can force his case into the single-incident paradigm only by diluting the concept. Thus, he claims single-incident liability is not a rare exception to the pattern rule, but instead one of many ways to prove deliberate indifference. He also argues that failing to formally train prosecutors on *Brady* is just like *Canton*'s paradigm single-incident scenario, which involved a complete failure to train police officers on using deadly force. Red Br. at 29-38, 49-50. Thompson is wrong on both counts.

Thompson's denial that single-incident liability applies only in rare cases flatly contradicts *Bryan County*. There, the Court left no doubt that pattern liability is the norm:

> If a [training] program does not prevent constitutional violations, municipal decisionmakers may *eventually be put on* ***5** *notice* that a new program is called for. Their continued adherence to an approach that they know or should know *has failed to prevent tortious conduct by employees* may establish the … "deliberate indifference" … necessary to trigger municipal liability.

520 U.S., at 407 (emphases added). By contrast, the Court deemed single-incident liability a "possibility" merely "hypothesized" for a "narrow range of circumstances." *Id.* at 409. It explained further that, in a single-incident scenario, one violation would "substitute for the pattern of injuries *ordinarily necessary* to establish municipal culpability and causation." *Id.* (emphasis added).

This follows from *Canton*'s logic. A pattern shows policymakers should have known flawed training was causing employee misconduct, thus weeding out vicarious liability claims. *See id.* at 407-08 (explaining that a pattern may tend to show fault and causation). A single violation cannot function that way as *notice*. That is why the Court has confined single-incident liability to the "narrow range of circumstances" that cry out for training regardless of previous injuries. *Id.* at 409.

Canton's single-incident paradigm is nothing like this case. When a city offers no deadly force ***6** training to armed police officers, it announces a callous indifference to the rights of every person those officers will arrest. *See Canton,* 489 U.S., at 390 n.10. A chasm lies between that scenario and a prosecutor's *Brady* decision. Unlike police officers, prosecutors are already equipped by professional education and ethical safeguards to follow *Brady*. If a district attorney decides not to reinforce their existing skills with formal instruction, that does not conceivably put him in the same category as the city official who arms untrained officers and hopes for the best. *See* Blue Br. at 25-36.

This does not imply that district attorneys have no duty to train simply because prosecutors graduated law school. Red Br. at 47; Br. for *Amici Curiae* Fmr. DOJ Officials *et al.* ("Fmr. DOJ Br."), at 13. Petitioners have never claimed that prosecutors become *Brady* experts by passing the bar. They do, however, enter the job with a skill set that enables them to understand and apply legal principles. To the extent it assists them, additional *Brady* training is undoubtedly worthwhile, but that is far from saying district attorneys are *deliberately indifferent* for not instituting it. While it is evident how a city should train police, it is far less clear how a district attorney should, in the abstract, effectively train prosecutors to avoid erring in the course of complicated and fact-driven legal analyses. Basing *Canton* liability on such an error - absent a pattern of misconduct linking it to a specific training flaw - dissolves municipal into vicarious liability.

***7** Thompson thus offers no reason why the pattern requirement should not apply to the claim that a district attorney's office failed to train on *Brady*. Requiring a pattern does not create a "blanket exemption" for district attorneys, *see* Red Br. at 45, but simply means *Canton* applies to them as to other municipalities. Nor does it amount to a "request for one free *Brady* violation" before section 1983 liability can attach. Fmr. DOJ Br. at 30. Every violation demands judicial redress, but not necessarily in the form of civil liability. Thompson's *amici* cannot seriously contend that a *Brady* violation is "free" unless it results in money damages.

Thompson's argument boils down to this: Connick was "aware" that prosecutors routinely face *Brady* decisions; that such decisions are often difficult; and that getting *Brady* wrong violates the Constitution. Red Br. at 27, 39-40. But if *Canton* turned on mere "awareness" of these unremarkable facts, then single-incident liability would fasten to every significant decision a prosecutor makes. *Canton* focuses on something quite different. It requires awareness, not of risks in general, but awareness that a lack of specific *training measures* will make violations occur. *See* 489 U.S., at 390 (inquiring whether "the need for more or different training is so obvious" and whether "the inadequacy [is] so likely to result in the violation of constitutional rights"). Thompson simply misses that *Canton* is not concerned with "a generalized showing of risk," *Bryan Cty.,* 520 U.S., at 410, but rather with a particular, conscious disregard for training.

***8 III. The jury was allowed to impose liability based on the blood suppression alone.**

Besides diluting what single-incident liability means, Thompson also denies this is a single-incident case at all. Principally, he claims that there were numerous other *Brady* violations. These claims are not only baseless, *see infra* part III.B, but irrelevant: the jury was allowed to impose liability based on the blood suppression alone.

A. The jury instructions framed this as a single-incident case.

The district court ruled repeatedly that Thompson's claim qualified for single-incident treatment. Both in denying summary judgment and in crafting jury instructions, the court ruled that Thompson need prove no pattern. *See* Pet. App. 139a-142a. The court expressly relied on *Canton*'s single-incident hypothesis, *id.* at 139a (quoting *Canton,* 489 U.S., at 390 n.10), and drew its deliberate indifference instructions directly from *Walker v. City of New York,* 974 F.2d 293, 300 (CA2 1992), which first held that *Brady* could support single-incident liability. Joint Appendix ("App.") 828; Blue Br. at 33-34; *see also* Pet. App. 142a (relying on *Walker*). The jury was thus asked whether a *Brady* decision "*involved a difficult choice* or one that prosecutors had a history of mishandling." App. 828 (emphasis added). This allowed it to find the office deliberately indifferent to training based on a single violation.

***9** The only possible candidate for that violation was the blood evidence. The court instructed the jury that "the non-produced blood evidence and the resulting infringement of Mr. Thompson's right to testify in the murder case violated his constitutional rights as a matter of law." App. 825. It explained that "the only issue that you need to decide concerns whether a policy, practice, or custom of the District Attorney's Office, or a deliberately indifferent failure to train the office's prosecutors proximately caused the non-production of the evidence." *Id.* The court refused to instruct the jury

whether other non-disclosures violated *Brady*. Transcr. Vol. IV, p. 1003 (explaining it "was not going to ask the jury … was this other stuff also *Brady*").

B. There were no other *Brady* violations.

Thompson, however, insists that the jury could have based liability on a "course" of additional violations in his murder trial. Red Br. at 5-6, 18-20, 25. Thompson's argument fails for numerous reasons. Most obviously, even *assuming* other violations, the instructions still erroneously allowed the jury to impose liability for the blood suppression alone. That requires overturning the verdict. *See supra* part I.

Moreover, the jury was never asked to find other violations. It was told the blood suppression violated *Brady* and that the "only issue" was whether the office caused it. App. 825; *see also* Transcr. Vol. IV, p. 1001-05. The jury was never instructed to decide whether Thompson's disconnected evidence constituted additional *Brady* ***10** violations; it was merely told it could "consider all of the evidence" in assessing deliberate indifference. App. 828. Even had it been asked to find other violations, that is a question of law juries cannot decide. Blue Br. at 50.

In any event, Thompson proved no other violations. He points to police reports supposedly exculpating him or impeaching two witnesses at the murder trial. *See, e.g.*, Red Br. at 5-6; 19-20. Yet. Thompson made virtually the same arguments on federal habeas and was rejected. *See Thompson v. Cain,* 1997 WL 79295, *9-*16 (E.D. La. Feb. 24, 1997) (unpublished); *Thompson v. Cain,* 161 F.3d 802, 805-08 (CA5 1998). [2]

Nonetheless, Thompson claims that such non-existent violations somehow impugned prosecutors' grasp of *Brady*. For instance, he relies heavily on witness Paul Schliffka's description of the murderer (recorded in police reports) with "close-cut" or "short" hair. App. 569, 612. Thompson says the reports were *Brady* material since Schliffka's description differed from Thompson's "full 'Afro' " ***11** hairstyle. Red Br. at 19. Because lead prosecutor Eric Dubelier disagreed, *see* App. 140-43, 293-300, 307-35, 349, Thompson denounces Dubelier's "total confusion about *Brady* and the indifference to *Brady* that pervaded the office." Red Br. at 19.

It is Thompson who is confused: there was no *Brady* violation concerning the Schliffka description. The description was not even "suppressed" because Thompson's defense counsel was actually aware of it during the murder trial. *See, e.g., United States v. LeRoy,* 687 F.2d 610, 618 (CA2 1982) (material not suppressed if defendant "either knew, or should have known, of the essential facts permitting him to take advantage of [that] evidence"). [3] Thompson also fails to note that the prosecution disclosed Schliffka's identity; that Schliffka himself testified; that he went into far more detail than the reports about the perpetrator's hairstyle; that he was cross-examined about it; and that he admittedly could not identify Thompson from a photo array. *See* App. 313-18, 328-35, 349; Transcr. Ex. 137, at 91-105, 94-97, 103-05 (*State v. Thompson,* May 7, 1985). Thus, the description also could not have impeached Schliffka nor materially affected the outcome. *See, e.g., Wilson v. Whitley,* 28 F.3d 433, 442 (CA5 1994) (undisclosed report immaterial where witness testimony is largely consistent with it); *accord:* ***12** *United States v. Bolden,* 545 F.3d 609, 623 (CA8 2008); *United States v. Ellis,* 121 F.3d 908, 916-18 (CA4 1997).

The debate over the Schliffka description was thus entirely artificial. Even assuming the description was not disclosed (*but see* App. 293-94, 304, 314), that did not violate *Brady. See, e.g., Kyles v. Whitley,* 514 U.S. 419, 436-37 (1995) (explaining that "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense"). [4] In any event, the real issue was not Dubelier's grasp of *Brady* in this instance, but whether the office's record showed Connick consciously ignored the need for formal training. How that was shown by debates over materials whose non-disclosure did not violate *Brady* is a mystery.

IV. Thompson invents new forms of *Canton liability*.

In another attempt to distance himself from the single-incident theory, Thompson rewrites *Canton*. He claims a "third way" of demonstrating deliberate indifference: "direct evidence" of "actual" policymaker indifference to training. Red Br. at 27. Related to this, Thompson also claims that liability can be shown by a "culture of indifference." Red Br. at 22. Neither theory is supported by the Court's precedents.

*13 A. Connick's personal grasp of *Brady* is irrelevant.

It is axiomatic that *Monell* and *Canton* define liability for municipalities, not for individuals. *See, e.g., Monell v. Dept. of Social Serv's,* 436 U.S. 658, 690 (1978) (holding that "municipalities and other local government units [are] included among those persons to whom § 1983 applies"). To be sure, a municipal policymaker may be one person, whose order therefore constitutes "official policy." *See, e.g., Pembaur v. City of Cincinnati,* 475 U.S. 469, 485 (1986) (holding county prosecutor's order as "final decisionmaker" could create liability). But that person's actions *not* done in a policymaking capacity - "personal" actions or opinions - have nothing to do with liability of the entity itself.

Thompson's novel "actual indifference" prong blurs this distinction. It glosses over the uncontradicted evidence of Connick's actions *as policymaker* taken over his 29-year tenure, in favor of evidence of Connick's *personal* understanding of *Brady*. The latter is patently irrelevant to anything that Connick did as policymaker and thus has no bearing on the office's liability. *Cf. Monell,* 436 U.S., at 694 (concluding that a local government may be sued for a "policy or custom … made … by those whose edicts or acts may fairly be said to represent official policy").

Nothing shows this better than Connick's remark that he "stopped reading law books" in 1974, which Thompson recycles four times. Red Br. at 8, 23, 38, 43. But Thompson gives only a fragment of Connick's statement:

> ***14** If you understand the way the office operated, I, I was not practicing law there. I was running an office. It was a big staff of well over 200 people. And I stopped reading law books when I was - when I became the DA, and looking at opinions. And my concern was the operation, the total operation of the office.

App. 144. The remark, in other words, has no bearing on the substance of Connick's *policymaking* role.

Connick did many things as policymaker. For instance, he streamlined how the office handled its massive caseload and he improved prosecutors' supervision and instruction, earning the praise of a widely cited *Stanford Law Review* article. Blue Br. at 3-9, 42-45; Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff,* 55 Stan. L. Rev. 29 (2002). But Connick's policymaking role - as his "stopped reading law books" remark conveyed - did not extend to issuing detailed judgments about prosecutors' legal obligations. For instance, Connick stationed "junior" and "senior" prosecutors in each court section as a teaching tool; he did not supervise the junior attorneys himself. He improved the process for screening thousands of cases; he did not prepare the screening forms himself. He had advance sheets distributed to prosecutors; he did not deliver lectures on the latest jurisprudence. *See, e.g.*, Blue Br. at 4-6, 8-9.

On Thompson's view, however, Connick's remark that he "stopped reading law books" meant that no one in the office read them. This confuses ***15** evidence of Connick's own personal grasp of *Brady* with his role as policymaker. Merely because Connick was "the sole policymaker," it cannot follow that any confusion of his about *Brady* sent cracks running through every prosecutor's judgment. Merely because Connick may have garbled *Brady*'s requirements at times, *see* App. 148-54, 441-42, 550-51, this cannot mean the office's prosecutors - over 700 of them - had been similarly misinformed by Connick himself over his 29-year tenure. Connick was an administrator, not an oracle.

B. The verdict forecloses Thompson's "culture" argument.

Thompson also argues that the jury could have based liability on a "culture of indifference" to *Brady*. *See* Red Br. at 22-23. But this fails the most basic requirement of municipal liability. Under *Canton* a plaintiff must prove more than a municipal "culture"; he must demonstrate a municipality's "deliberate choice to follow a course of action." *See* 489 U.S., at 389 (quoting *Pembaur,* 475 U.S., at 483-84 (plurality op.)).

As a major part of this argument, Thompson says the jury could have based liability on erroneous guidance provided by the 1987 office handbook. Red Br. at 9-11, 41-43. This is impossible, first, because the jury found that Thompson was not injured "by an official policy of the District Attorney." App. 830. The handbook unquestionably expressed office policy - *see, e.g.*, App. 392-93, 449-50, 467-68 - and Thompson ***16** cannot circumvent the verdict by using the handbook as a surrogate for training. [5]

In any event, it is not true that the handbook provided "objectively wrong" *Brady* guidance. Red Br. at 42. The handbook, on its own terms, does not purport to instruct prosecutors on *Brady* at all. The very paragraph Thompson attacks shows this: it commands prosecutors to "be familiar with the law regarding exculpatory information possessed by the State." App. 704. [6] Moreover, the sentence [7] on which Thompson trains his criticism is merely descriptive and does not purport to define the reach of *Brady*. [8] Similarly, the paragraph uses the word ***17** "exculpatory" to refer generically to *Brady* material, not to define *Brady*'s legal parameters. This Court has used "exculpatory" in the same sense. *See, e.g., United States v. Ruiz,* 536 U.S. 622, 628 (2002) (explaining that "*exculpatory* evidence includes 'evidence affecting' witness 'credibility' ") (quoting *Giglio v. United States,* 405 U.S. 150, 154 (1972)); *Strickler v. Greene,* 527 U.S. 263, 281 (1999) (explaining that "the term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose *exculpatory* evidence") (emphases added).

V. The jury was allowed to infer causation from one instance of prosecutorial misconduct.

The single-incident theory also allowed the jury to nullify *Canton*'s stringent causation standard. Thompson had to prove that a lack of formal *Brady* training was the "moving force" behind the violation. *Bryan Cry.,* 520 U.S., at 404. But the jury was allowed to infer that causal link from the blood suppression alone. *See* App. 826 (allowing jury to find an actionable policy based on a failure to act "so likely to result in the very violation that occurred in this case"); Blue Br. at 54-60. That is an inadequate basis for causation. *See, e.g., Tuttle,* 471 U.S., at 821 (plurality op.); *id.*, at 830 (Brennan, J., concurring). It is no response to say the jury could have relied on other evidence of causation. *See, e.g.*, Red Br. at 56-61. Because the jury could have relied on the single violation alone, the verdict must be invalidated. *See supra* part I.

***18** Additionally, Thompson's alternate causation theories fail for the same reasons as his fault arguments. For instance, supposedly inaccurate guidance from the handbook could not have caused the violation because the jury rejected "office policy" as a cause. Red Br. at 59; *see supra* part IV.B. Nor could the jury have inferred causation from "the sheer number of [*Brady*] violators and violations," because Thompson failed to demonstrate any violation beyond the blood evidence. Red Br. at 60; *see supra* part III.B.

Thompson ultimately retreats to speculation. He theorizes the jury could have rejected overwhelming evidence that a "single rogue prosecutor" buried the report, and instead have linked the suppression to three or four prosecutors' poor grasp of *Brady* - a defect supposedly caused by bad training. Red Br. at 57. This flimsy chain of inferences ignores the evidence, but, even if it were plausible, it would fall short of *actual* causation.

At most, Thompson would have proven that four prosecutors misunderstood *Brady*'s application to the blood evidence. But he showed no direct link between that putative misunderstanding and a training deficiency, which is what *Canton* requires. Thompson merely claims that, had these prosecutors been better instructed, that may have prevented the

suppression. Under *Canton* that is not enough. Causation cannot rest on evidence merely that certain employees were poorly trained, made mistakes, negligently administered office processes, nor "that [the] injury … could have been avoided if an officer had had better or more ***19** training, sufficient to equip him to avoid the particular injury-causing conduct." *Canton,* 489 U.S., at 391.

The admitted absence of any pattern of violations destroys Thompson's theory. Over Connick's 29-year tenure, anywhere from fifty to seventy prosecutors a year handled thousands of blood tests and other scientific reports. Yet Thompson could point to only four published opinions reversing convictions on *Brady* as of Thompson's 1985 trial, and none of those concerned the kind of evidence here. *See* Red Br. at 15-16; Blue Br. at 46-48. Thompson's other evidence impugning the office's *Brady* record is shockingly thin: *i.e.*, the testimony of Connick's political opponent based on cases whose names he could not remember and on a supposed study by "[s]ome kind of national group" which appears nowhere in the record. *See* Blue Br. at 51; App. 129-30, 133. [9]

***20** If Thompson's accusation of "broad" *Brady* misconceptions were valid, he should have easily amassed ample material for a pattern argument. Yet the evidence showed that prosecutors were routinely complying with *Brady* in general, and were disclosing all lab reports regardless of whether they fell under *Brady*. *See* Blue Br. at 58-59 (discussing uncontradicted evidence that office policy was to disclose all lab reports). The irresistible conclusion is that the tragic suppression in Thompson's case arose from "factors peculiar to the [employees] involved in [that] particular incident," *Bryan Cty.,* 520 U.S., at 408, and had nothing to do with a training deficiency.

Indeed, one need not speculate about what actually caused the suppression. The dramatic and uncontradicted evidence showed that one of the robbery prosecutors, Gerry Deegan, confessed that he had "intentionally suppressed blood evidence" excalpating Thompson. Other testimony showed that Deegan removed the evidence from the evidence room and failed to return it. Blue Br. at 11-13, 55-56.

Thompson understandably tries to minimize this', shocking revelation. He speculates that Deegan might have harbored "misgivings" about following other prosecutors' orders not to produce ***21** the report. Red Br. at 58-59. This ignores what Deegan said and did. Deegan did not express vague remorse: he unburdened his conscience of a wrong he had deliberately committed. Furthermore, even assuming Deegan left open the possibility that others conspired with him, that still fails to connect the suppression to training. It only means there may have been four malefactors instead of one. Thompson's brief is particularly evasive on this point. He quotes the testimony of prosecutor John Jerry Glas, who as a result of his investigation deemed the single rogue prosecutor theory "ridiculous." Red Br. at 61. Thompson omits that Glas thought it "ridiculous" only because he believed *two other* prosecutors had conspired with Deegan. App. 535. Glas, in fact, prepared indictments against them for obstruction of justice and malfeasance in office. App. 536-39.

VI. Expanding *Canton* will expose district attorneys to ruinous consequences.

Thompson implausibly minimizes the impact of extending *Canton* to single instances of prosecutor error. Red Br. at 53-55. But this expansion would encompass myriad legal judgments made by prosecutors, exposing district attorneys to ruinous liability and to federal management of their training practices.

Thompson offers no plausible basis for limiting training liability to *Brady* violations. *See* Red Br. at 54-55. The jury was allowed to find liability where a district attorney knows prosecutors confront a "difficult choice" that "will frequently cause" constitutional violations. App. 828. That ***22** lays the groundwork for liability based on prosecutors' routine judgments respecting, for instance, search and seizure, *see, e.g., Burns v. Reed,* 500 U.S. 478, 49-92 (1991), probable cause, *Kalina v. Fletcher,* 522 U.S. 118, 121 (1997), *Miranda* rights, *Johnson v. Rex,* 474 U.S. 967 (1985) (Burger, C.J., dissenting from denial of cert.), initiating a prosecution, *Imbler v. Pachtman,* 424 U.S. 409, 431 n.33 (1976), evaluation and presentation of evidence, *Buckley v. Fitzsimmons,* 509 U.S. 259, 273 (1993), and trial arguments, *Caldwell v. Mississippi,* 472 U.S. 320, 335-36 (1985).

Thompson overlooks another consequence of expanding *Canton*: it would "engage the federal courts in an endless exercise of second-guessing [district attorneys'] employee-training programs." *Canton,* 489 U.S., at 392. Thompson does not specify what sort of training regime would shield district attorneys from *Canton* liability. While certain former Justice Department officials identify a recently undertaken "comprehensive, multi-part approach designed to provide federal prosecutors with tools to address their discovery obligations," they assure the Court that district attorneys need not adopt the totality of such measures. Fmr. DOJ Br. at 12 (conceding that, due to lack of resources, "local offices cannot be expected to replicate DOJ's extensive training efforts"). *Which* measures they would have to adopt on pain of section 1983 liability would presumably be worked out over years of federal litigation.

***23** Thompson's urged expansion of *Canton* actually risks discouraging prosecutors from remedying earlier errors. In the *Brady* context, for example, a prosecutor assigned to post-conviction proceedings might be reluctant to search for exculpatory information for fear that its disclosure would trigger a lawsuit, like Thompson's, with the potential to shutter his office. *Cf. Warney v. Monroe County,* 587 F.3d 113, 126 (CA2 2009) (noting, in the prosecutorial immunity context, that "[p]rosecutors facing tough choices as to whether or not to seek exculpatory information post-conviction, should not have to fear … liability," because "such a peril would be an incentive to avoid exculpatory inquiries"). Just as the "public trust of the prosecutor's office would suffer if [the prosecutor] were constrained in making every decision by the consequences in terms of his own potential liability," *Imbler v. Pachtman,* 424 U.S. 409, 424-25 (1976), prosecutors should not be made to choose between remedying an injustice and bankrupting their office.

When someone is wrongfully convicted, state compensation schemes - not awkward expansions of *Canton* - are the proper means of redress. Louisiana is among 27 states, in addition to the federal government and the District of Columbia, that have adopted statutory compensation schemes. *See* http:// www.innocenceproject.org/docs/ Innocence Project Compensation Report.pdf, p. 15 (citing La. Rev. Stat. Ann. § 15:572.8 (2010) (last visited Sept. 7, 2010)). One advocate for such measures, the Innocence Project, rightly observes that "[a]fter years of fighting to prove their innocence, exonerees ***24** need a safety net, not another long legal battle." *Id.* at 13. Louisiana has already agreed to settle Thompson's state wrongful conviction claim for the statutory limits. Pet. at 6 n.6.

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Judge John Minor Wisdom once observed that "[i]n reviewing [a] … case when the plaintiff has been injured grievously, hard as our sympathies may pull at us, our duty to maintain the integrity of substantive law pulls harder." *Turner v. Atl. Coast Line R.R. Co.,* 292 F.2d 586, 589 (CA5 1961); *see* Pet. App. 43a. John Thompson was grievously injured by a prosecutor's wrongdoing. The massive verdict against his former employer, however, rests on vicarious liability and nothing more. This was never a failure-to-train case, and pretending otherwise invited nullification of the principle that a municipality is never liable for employee fault. *See Canton,* 489 U.S., at 399 (O'Connor, J., concurring) (observing that "[a]llowing an inadequate training claim such as this one to go to the; jury based upon a single incident would only invite jury nullification of *Monell*"). The verdict must be overturned.

***25 CONCLUSION**

The Court should reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Footnotes

1 Circuit decisions confirm this. *See, e.g., Sanders Burns v. City of Plano,* 594 F.3d 366, 381 (CA5 2010) (explaining that failure to train "generally require s] that the plaintiff demonstrate a pattern, and that the "single incident exception is "narrow) (citations omitted); *accord: Carr v. Castle,* 337 F.3d 1221, 1229 (CA10 2003); *Berg v. Cty. of Allegheny,* 219 F.3d 261, 276 (CA3 2000).

2 Moreover, the habeas courts rejected *Brady* claims as to a wider range of materials than the police reports. *See* 1997 WL 79295, at *9 (cataloguing seven items); 161 F.3d, at 806 (cataloguing nine items). Thompson suggests that the parties stipulated in his civil trial that non disclosure of these items violated *Brady*. *See* Red Br. at 19; App. 20 21 (citing "stipulation that listed "16 items containing favorable evidence that was not provided to Thompson in 1985). He is mistaken: the stipulation merely stated the items "were not provided to Thompson but explicitly reserved whether the items were admissible and whether they "constitute d] *Brady* material. App. 20 24 nn.1 5.

3 A testifying officer used the report to refresh his memory of what Schliffka had said. App. 666 68. Thompson's counsel was thus entitled to inspect the report and use it to cross examine the officer. La. Code Evid. art. 612(B) (2006).

4 It is ironic that Thompson would place such weight on this claim, since he did not even raise it on federal habeas. *See* Ex. 21 to Pl. Mem. in Opp'n to Summ. J. at 36 45 (making different *Brady* arguments as to the report).

5 The verdict also forecloses Thompson's argument that Connick's "restrictive disclosure policy supported liability. Red Br. at 39 40, 14 15. Moreover, Connick did not testify that this policy "heightened the risk of *Brady* violations: he merely agreed that not producing every police report "can lead to *Brady* violations, but "it doesn't follow that it will. App. 159.

6 This is precisely what office representative Val Solino tried to explain. Solino was asked to address the hypothetical of a prosecutor "looking to the handbook for guidance on *Brady*, but he rejected the premise that a prosecutor would have used the handbook in that way. *See* App. 483 84 (urging that " i]f you're asking what I would have done in 1985, I wouldn't have been resorting to this).

7 "In most cases, in response to the request of defense attorneys, the Judge orders the State to produce so called *Brady* material that is, information in the possession of the State which is exculpatory regarding the defendant. App. 704.

8 Solino never "conceded that this sentence was "deficient, Red Br. at 42, but testified only that it did not "completely describe *Brady* and agreed that *Brady* is "much broader. App. 482.

9 Thompson's *amicus*, the Innocence Network, fares no better. *See* Brief of the Innocence Network as *Amicus Curiae*, at 24 25. It claims a "shockingly high rate of *Brady* violations under Connick, but the decisions it cites show the opposite. Of the nineteen cases in which *Brady* violations were *alleged*, the claims were rejected in fifteen. In four of those, the *Brady* claims were so meritless that the Louisiana Supreme Court did not mention them in its published opinion. *See, e.g., State v. Deboue,* 552 So.2d 355 (La. 1989); *State v. Anthony,* 1998 0406 (La. 4/11/00); 776 So.2d 376; *State v. Frank,* 99 KA 0553 (La. 1/17/01); 803 So.2d 1; *State v. LaCaze,* 99 KA 0584 (La. 1/25/02); 824 So.2d 1063. Of the four remaining decisions, one was reversed on other grounds. *See State v. Cousin,* 96 KA 2973 (La. 4/14/98); 710 So.2d 1065. Of the three decisions finding a *Brady* violation, one is *this* case (*State v. Thompson,* 2002 K 0361 (La. App. 3 Cir. 7/17,/02); 825 So.2d 552); the other two (*Kyles v. Whitley,* 514 U.S. 419 (1995); *State v. Bright,* 2002 KP 2793 (La 5/25/04); 875 So.2d 37) involved violations adjudicated long after 1985 and which had nothing to do with the kind of suppression in Thompson's case.

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IN THE SUPREME COURT OF THE UNITED STATES

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HARRY F. CONNICK, DISTRICT :

ATTORNEY, ET AL., :

Petitioners :

v. : No. 09-571

JOHN THOMPSON :

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Washington, D.C.

Wednesday, October 6, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

STUART K. DUNCAN, ESQ., Appellate Chief, Baton Rouge, Louisiana; on behalf of Petitioners.

J. GORDON COONEY, JR., ESQ., Philadelphia, Pennsylvania; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 09-571, Connick v. Thompson.

Mr. Duncan.

ORAL ARGUMENT OF STUART K. DUNCAN

ON BEHALF OF THE PETITIONERS

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

This case asks when a district attorney's office may be liable under section 1983 for inadequately training prosecutors. The Petitioner, Orleans Parish District Attorney's Office, was found liable for the terrible injuries caused to Mr. Thompson by a Brady violation on the theory the office was deliberately indifferent to Brady training, this despite the fact that there was proved no pattern of previous misconduct by office prosecutors.

The district court exempted this case from the ordinary pattern requirement by making a flawed analogy to a hypothetical in this Court's City of Canton opinion. There, the Court suggested that a city may be liable, absent a pattern, if it fails to inform police officers of the basic constitutional standard for deadly force.

Extending that hypothetical to this case was error. It misunderstood Canton's distinction between single-incident and pattern liability, nullifying Canton's stringent standards of fault and causation.

JUSTICE GINSBURG: Isn't this something in between? Because in Canton, the hypothetical was one rookie police officer. Here, it wasn't one rogue prosecutor. There were four prosecutors who knew of this blood evidence, and there were multiple opportunities for them to disclose it, but four of them apparently thought it was okay under Brady to keep this quiet.

Now, if we were just talking about -- what was his name, Deegan? -- it would be a different case. But we have the three other prosecutors. And so I think it's questionable to characterize this as a single incident.

MR. DUNCAN: I understand your question, Justice Ginsburg. Our argument does not turn on whether it was one or three or four prosecutors. What our argument does turn on is that the theory from the Canton hypothetical, which does not require a pattern, was clearly at issue in this case. The district court analogized to Canton in order to allow the jury to find liability absent a pattern.

There is no question that, whether it was one or four prosecutors, this is a single incident of a Brady violation.

JUSTICE SOTOMAYOR: Counsel, this is a single incident, and Canton said if you know that a tort is likely to happen without training, then one incident is enough.

Every prosecutor knows that there can be Brady violations if people are not taught what Brady means, because it's not self-evident in every situation, correct?

MR. DUNCAN: That's -- that's true, Justice Sotomayor. Yes.

JUSTICE SOTOMAYOR: All right. So if you know that rookie prosecutors -- and most prosecutors' offices are filled with young ADAs who have just come out of law school. If you know that they are going to meet some situations where the answer is not intuitively known, like that if you get a lab report, you should turn it over, don't you have an obligation, isn't that what the jury said, to train them to turn over lab reports?

Now, I know you claim you had that policy.

MR. DUNCAN: Correct.

JUSTICE SOTOMAYOR: We can talk later about

whether or not there was sufficient evidence for the jury to disbelieve that you had that policy or not. That's a sufficiency of the evidence question.

But if you know that lab reports have to be turned over, you've conceded it's a Brady violation not to do it, and there was sufficient -- and you had no policy -- I know you are disputing that -- and you had no policy of turning it over, why aren't you responsible for a Canton-like violation?

MR. DUNCAN: The question is under the Brady scenario, which side of the Canton line does it fall on? Does it fall on the single-incident line or the pattern line? We say it falls on the pattern line.

JUSTICE GINSBURG: Life doesn't always come in just two categories, and my suggestion to you is this doesn't fit into a single rookie.

You have -- if you have four prosecutors who are not turning over this evidence, then it seems like there's kind of a culture in the office that we don't turn over -- either we don't understand Brady, because one suggestion was -- well, having the blood sample will show you -- you'd have to have the blood sample from Thompson to have it mean anything.

So there was misunderstanding about that. But what struck me was that the -- to shoehorn this into

a single incident, it doesn't fit. So we have a situation maybe that hasn't -- that we haven't directly confronted before.

MR. DUNCAN: I think the Court has in Canton, Your Honor. Let me answer it this way: If we pay close attention to the function of the single-incident hypothetical in Canton, I think it illuminates the kind of notice, the kind of fault, and the kind of causation that needs to arise out of a general situation.

So looking carefully, what Canton said is: A policymaker who fails to give police officers the basic constitutional standard for deadly force, which they are not equipped to know in the beginning, and without which they --

JUSTICE GINSBURG: Can you tell me -- I think I have a copy.

MR. DUNCAN: I'm sorry, Your Honor. Yes. This is -- this is -- I'm referring to the -- the basic Canton standard is at 390, page 390 of the Canton opinion. And specifically, the footnote is footnote 10, that discusses the two possibilities, the no-pattern and the pattern possibilities.

So -- and I'm reading from Canton at footnote 10. City policymakers know -- "For example,"

the Court said, "city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force... can be said to be 'so obvious' that the failure to do so" is "deliberate indifference."

Now, what we have there, as Justice O'Connor's concurrence in that case and then later the Court's opinion in Bryan County explain, you have a failure to inform city personnel of the basic standard without which they have no hope of doing their job in a constitutional manner. So you put your employees in a situation of impossibility, and when a deadly force violation occurs, what you have --

JUSTICE SCALIA: These are people who haven't gone to law school, right?

MR. DUNCAN: That's correct.

JUSTICE SCALIA: And do not know that you cannot apply deadly force in most circumstances?

MR. DUNCAN: They've got no background equipment to know what the constitutional standard is. And so that satisfies, in a general situation --

JUSTICE SCALIA: If you were giving guns to

lawyers, it might have been different.

(Laughter.)

MR. DUNCAN: It could be, Your Honor.

Here, you're giving --

JUSTICE SCALIA: Depending on the law school they went to or what?

{Laughter.)

MR. DUNCAN: It could be.

However, what you are giving to lawyers here is the task of analyzing legal judgments. Can lawyers' judgments go astray, Justice Sotomayor? Absolutely. Absolutely. But --

JUSTICE SOTOMAYOR: Now what you're suggesting is that for certainty you know that a lawyer's judgment is going to go astray because a particular area of law is that complicated.

Your people disagreed -- some of your people disagreed or didn't know whether turning over a lab report was a -- failure to turn over a lab report when you didn't know a defendant's blood type was a Brady violation. That has been conceded in this case, so I accept as a working proposition that they should have known that.

What you're suggesting is you get a pass because, even though you know that there's an area of

law that a young lawyer is not going to be able to figure out on their own, you fail to train them and you're okay.

MR. DUNCAN: Well, that --

JUSTICE SOTOMAYOR: That's not the Canton example.

MR. DUNCAN: That is not -- that's the Canton example, Your Honor. What we have here --

JUSTICE SOTOMAYOR: That's what you're saying.

MR. DUNCAN: No, that's not what we're saying. We're not saying that the policymaker inevitably knows my prosecutors are going to make this mistake, and so I need to train on it and I don't care about training on it.

JUSTICE SOTOMAYOR: Well, then why don't we just --

JUSTICE ALITO: Can we just -- can we clear something up?

MR. DUNCAN: Yes, sir.

JUSTICE ALITO: Are you -- are you accepting the proposition that Brady always requires that lab reports be turned over?

MR. DUNCAN: No, Your Honor. What we would concede in this case is --

JUSTICE ALITO: I know you concede that there was a Brady violation here --

MR. DUNCAN: Yes.

JUSTICE ALITO: -- but in answer to some of the questions, it seems to me you were possibly -- or at least you did not express an opinion on the suggestion that it is always a violation of Brady to fail to turn over a lab report.

MR. DUNCAN: I'm not aware that it would always be a violation of Brady. However, of course, we have evidence in this case that the -- uncontradicted evidence, that the office policy was to turn over all scientific reports. But --

JUSTICE KAGAN: Mr. Duncan, could I give you a hypothetical -- -

MR. DUNCAN: Sure.

JUSTICE KAGAN: -- just to test how strong your position is here.

So let's say that there is a new DA comes to town, and he says, there's going to be one attorney per case from now on, and it will be a random assignment system. So sometimes important cases will be tried by experienced attorneys, but sometimes they'll be tried by people right out of law school. And there will be no Brady supervision at all, no Brady training. And there

is a closed file system, that we only turn over what we're required to turn over and not anything else.

And in addition to that, if I, the DA, find that you have turned over things that you're not required to turn over, that will be taken into account in your yearly review for promotion purposes, for salary purposes, et cetera. That will be very severely frowned upon.

So he, the new DA --

MR. DUNCAN: I'm sorry -- repeat the last part again, the "severely frowned upon" part.

JUSTICE KAGAN: If you turn over anything that you didn't have to. Okay?

MR. DUNCAN: Exactly. I understand.

JUSTICE KAGAN: If you give any material that you're not required to do by law.

And so he puts into place this whole system and -- and says, okay, go to it. And what happens is that there are Brady violations. And there's a Brady violation in a capital case and the person sits on death row, or the person is executed, whichever, and there's a claim brought.

Is that claim not a good claim?

MR. DUNCAN: If there is a pattern of demonstrated --

JUSTICE KAGAN: There's not a pattern, because he just came to town and he just, you know, instituted all these policies, and this is the first Brady violation.

MR. DUNCAN: Not for the first Brady violation, Justice Kagan. But in your hypothetical, you noted a policy of actually assigning inexperienced prosecutors randomly to perhaps high-profile cases.

If that were the facts, the jury, as they could have in this case, could have found that an official policy actually caused the violation. But they didn't find it in this case. So the hypo leaves open that possibility.

JUSTICE KAGAN: But the failure to train or supervise in any way and the setting up a structural system that's pretty much guaranteed to produce Brady violations, that would not be enough?

In other words, even if the jury said yes, you are liable under that second theory -- not the policy theory, but the failure to train and supervise theory -- that -- that would have to be rejected?

MR. DUNCAN: No -- exactly, Your Honor. No liability there, because it doesn't meet the stringent fault and causation standards of Canton.

This goes back to --

JUSTICE SOTOMAYOR: But that's --

JUSTICE BREYER: Well, how is that so? The -- I've read the instruction that the court gave, and it seemed to me the instruction the Court gave was word-for-word taken from Canton. And when I read the question that you presented in your Petitioner's brief -- in the petition for cert, I thought what this case was about was an instance where there was only -- it was conceded that there was only one such instance.

But then when I read your second reiteration of the question, which is a little different, and read the briefs, I thought no, there are four other ones. And so what you're really asking us to do is to decide in the case of perfect instructions whether the evidence supports them. I didn't think I was getting into that, and, frankly, as raised, the brief I think clearly supports it, but others could disagree. But why are we getting into that business in this Court?

MR. DUNCAN: We're not asking you to.

JUSTICE BREYER: All right. Then what is it you're asking? Is there something in the instructions that is wrong? What?

MR. DUNCAN: Yes, the instructions --

JUSTICE BREYER: What?

MR. DUNCAN: -- reflect that the single

incident theory --

JUSTICE BREYER: Sorry. Where -- I'm reading the instruction. I have it here. What is it? I'm not saying you're wrong. I'm just saying, what in the words stated are wrong? And where is the request that they be stated differently? That I should look at that, and that they weren't. Okay.

MR. DUNCAN: Yes, Justice Breyer. Let me help you with that. The -- the -- at the Joint Appendix page 828, we have the instructions on deliberate indifference.

CHIEF JUSTICE ROBERTS: I'm sorry. What's the page number.

MR. DUNCAN: 828.

CHIEF JUSTICE ROBERTS: 828.

MR. DUNCAN: Joint Appendix 828.

There are the instructions on deliberate indifference. Let me start here, Justice Breyer. These instructions are taken from the Second Circuit's Walker decision, which was the first court that I am aware of to allow for the possibility of single-incident liability in a Brady situation.

The second instruction there allows a choice. It allows a choice for the jury to find that a single-incident situation -- I'm sorry -- that a

situation involving a Brady decision could arise and be a basis --

JUSTICE BREYER: What are the words -- I mean, it looked to me like the words on page 828 are pretty similar to my copy of what he actually said. So what are the words on page 828 that you think he should have said that he didn't say?

MR. DUNCAN: "The situation involved a difficult choice or one that prosecutors had a history of mishandling."

JUSTICE BREYER: All right. What he says here is, "The situation involved a difficult choice or one that the prosecutors had a history of mishandling, such that additional training, supervision, or monitoring was clearly needed."

So it looks to me like, unless I'm reading the wrong page, which I've sometimes done out of my memo here. It looks to me like he gave those words.

MR. DUNCAN: That is the -- I'm sorry. Then I misunderstood your question. Those are the actual instructions.

JUSTICE BREYER: I'm saying what is it that you asked the judge to do that he didn't do or that you asked him not to do that he did do? That's what happens. That's the way you object to an instruction.

MR. DUNCAN: I understand, Your Honor.
JUSTICE BREYER: Okay. So what is that?
MR. DUNCAN: I misunderstood. I was reading where I thought the single-incident theory was posed in the jury instructions. What the Petitioners --
JUSTICE SCALIA: I thought he asked that. So I was glad to see that. Thank you.
MR. DUNCAN: The Petitioners specifically asked that an instruction be given that required a pattern of similar violations --
JUSTICE BREYER: I want you to point out in the record the words that were said to the district court saying, Judge, I want you to say this, and then the judge didn't do it.
MR. DUNCAN: It is instruction number 14.
JUSTICE BREYER: Which is where?
MR. DUNCAN: The proposed instruction. I regret to say I don't believe that's in the Joint Appendix, Your Honor. And it is also --
JUSTICE BREYER: Then I think we take it as saying that you not objecting to what -- to instruction.
MR. DUNCAN: No, Your Honor.
JUSTICE BREYER: I mean, your whole brief is objecting to the instruction, and you didn't include the objection?

MR. DUNCAN: No, Your Honor. The argument is not about the specific jury instruction. It's about the legal theory. What it's about --

JUSTICE BREYER: Wait, wait. If you don't object to the instruction, then we're back to what I'm saying, that what you're objecting to is you don't think the evidence was such that, given that instruction, the jury could find guilt. And that's what I thought this case wasn't about to begin with, and there are three other instances. So I don't see why, given this instruction, the jury couldn't find guilt.

MR. DUNCAN: What our main complaint is, is about the failure of the district court to grant a motion for summary judgment and a judgment as a matter of law on the basis that a failure-to-train theory under these circumstances does not permit the single -- the single-incident --

JUSTICE SOTOMAYOR: I understood -- and maybe I'm confused -- that you were arguing that there was no set of circumstances in which a prosecutor could be handled -- could be liable on a theory of failure to train for one incident.

MR. DUNCAN: Absent a pattern. Correct.

JUSTICE SOTOMAYOR: That was the petition as it came --

MR. DUNCAN: Correct.

JUSTICE SOTOMAYOR: So it doesn't matter what the facts are. The facts that Justice Kagan gave you would never constitute an actionable claim against a prosecutor; is that your position in this case?

MR. DUNCAN: That's -- under the Canton hypothetical, yes. It would have to fall on the pattern side because the general Brady situation is unlike the single-incident --

JUSTICE SOTOMAYOR: So what you --

JUSTICE KAGAN: Could I add to my hypothetical, then?

MR. DUNCAN: Yes, Your Honor.

JUSTICE KAGAN: Suppose that this new district attorney said -- you know, every day he came into the office and he said: I think Brady is just crazy, and I think it's just the worst decision that the Supreme Court has ever issued; and as long as you don't get caught, anything you do is okay by me.

MR. DUNCAN: That sounds like a policy to me, Your Honor. That sounds like a policy, an actionable policy on the part of the policymaker.

JUSTICE KAGAN: It's not a policy. He's just, you know, making his views known around the office.

MR. DUNCAN: Well, this Court has defined "policy" as a deliberate choice to embark on a course of action in Pembaur, which this Court accepted. That sounds like a policy to me. If it's not a policy --

JUSTICE KAGAN: Then the policy is just that you -- you have to turn over what you have to turn over, nothing else, and if you turn over anything else you'll get penalized for doing so. That's the policy.

MR. DUNCAN: Well, then the policy is constitutional. So what we would look to is, are prosecutors failing to exercise their judgment properly pursuant to that policy? And that falls very squarely within the second part of the Canton choices, which requires a pattern.

This case is about the alleged failure to remedy, to guide, to reinforce, the pre-existing legal judgment that a prosecutor has by virtue of being a legal professional.

JUSTICE GINSBURG: Is that so? I mean, you are assume that everyone who goes to law school takes a course in criminal procedure, and I think there are many law schools where they don't even have such a course and others where most -- I don't know anywhere it's compulsory to take a course in criminal procedure. So you're assuming that. And, of course, the time is

running. There's something I wanted to ask you about Brady, which seems to me unlike others and why you would want special vigilance. And that is, Miranda warnings, you know what was said; search and seizure, you know what the police did. But the problem with Brady -- and this case illustrates it so well -- is you don't know. If the prosecutors don't do what they're supposed to do, there's a very high risk, as there was in this case, that it will never come to light.

So, recognizing the legal obligation of the prosecutor and the temptation not to come out with Brady evidence because it doesn't help the State's case, shouldn't there be extra vigilance when we're talking about a Brady claim?

MR. DUNCAN: Well, of course, there should be vigilance, but the question you pose, Justice Ginsburg, is whether the latency, the hiddenness, that characterizes Brady violations should change where we locate the Canton violation. Should it be enough to put it into the single-incident, so-obvious category, or still in the pattern category? But Canton doesn't indicate that the latency of a particular violation should -- should turn on which category it goes into. Instead, it's the nature of the employee duties and the employees themselves and how

that situation gives notice to a policymaker about when there are obvious training risks. That's what we're talking about.

So to go back to the hypothetical in Canton, whether or not a deadly force situation is secret or not -- of course, it's not. But the office has failed not just to train, but to inform of the basic constitutional duty without which those officers have no chance of fulfilling their duties. And when they do a deadly force violation under those circumstances, the causal link will be very strong. It will be strong enough to meet Canton.

And so there you have -- there you have a situation where deliberate indifference and causation are met without the pattern. But what -- you do not have that in the situation of Brady compliance because, as -- as everyone agrees Brady involves gray areas. It is -- it is impossible to determine beforehand exactly why a Brady violation will occur and what specific training measures would prevent it from occurring.

And what that means is this falls plainly within what Canton said about the pattern situation. And here's what Canton said in the footnote 10 following onto the hypothetical. "It could also be that the police, in exercising their discretion, so often violate

constitutional rights that the need for further training must have been plainly obvious...."

That's the situation we have posed by the Brady situation in general.

JUSTICE BREYER: All right. But, look -- I -- he read the instructions. They came right out of Canton. Seems perfect.

Now you're saying, well, whether they did or not, you cannot have an incident -- you can't have liability if there's only one incident. And at that point, I say, gee, I don't know. I mean, maybe it depends on what the incident is. Maybe the incident involved somebody saying, hey, Brady? What's Brady? Or somebody saying, what's a criminal trial? I mean, that person needs training.

And -- or -- but I don't even have to think of that here, because there were four incidents here. And, therefore, I don't have to try to make up weird hypotheticals. So where we have four instances and we have correct instructions, what's the problem?

MR. DUNCAN: Your Honor, there weren't four instances. There was one Brady violation that possibly could have involved one to four prosecutors. That's one --

JUSTICE BREYER: Okay. Okay. We have -- we

have -- all this case? I thought that they had several instances in other cases.

MR. DUNCAN: No. No, Your Honor.

JUSTICE BREYER: All involved -- in other words, there has never in this office been an instance of a Brady violation outside of this case.

MR. DUNCAN: No, Your Honor. That's not true.

JUSTICE SCALIA: Not -- not before this case. There was some --

JUSTICE BREYER: After, that's what it was.

JUSTICE SCALIA: -- later, as far as we know.

MR. DUNCAN: There were some -- there were four reported Brady violations before this case, in the decade leading up, involving this office, that had nothing to do with the circumstances involved here.

JUSTICE BREYER: Ah. There were four Brady violations involving this office, okay?

MR. DUNCAN: Correct, out of tens of thousands of prosecutions.

JUSTICE BREYER: All right. So now we're talking about not one; we are talking about four --

MR. DUNCAN: We're -- but we're not --

JUSTICE BREYER: -- over many years, with

tens of thousands of violations, correct?

MR. DUNCAN: What was -- the Fifth Circuit panel in this case affirmatively said Thompson did not even try to prove a pattern, and he did not prove a pattern of violations. The Fifth Circuit panel said that.

JUSTICE BREYER: This is helpful. Thank you.

JUSTICE KENNEDY: On your instruction in --

MR. DUNCAN: Yes, Your Honor.

JUSTICE KENNEDY: -- at J.A. 28 second, would the instruction in your view have been proper, if the "or" had been replaced by an "and." So: "The situation involved a difficult choice and one that prosecutors had a history of mishandling."

MR. DUNCAN: That's closer to what it should be, Justice Kennedy, yes, because that begins to capture the pattern requirement. It's not -- it's not the pattern instruction that was specifically put forth by the Petitioners in instruction number 15.

JUSTICE KENNEDY: Has there been -- has there been any argument that you have waived your objection to the instructions?

MR. DUNCAN: Not by Petitioners -- not by the Respondent in this case. There's no -- there's no

-- question --

JUSTICE GINSBURG: Did you -- did you object to it? To this charge?

MR. DUNCAN: The -- the charge?

JUSTICE GINSBURG: With the "or" -- difficult choice "or" one that prosecutors had a history of mishandling.

MR. DUNCAN: No, the Petitioners did not object to the -- the specific formulation of that charge. Immediately after that charge, though, they -- they said, no, but we -- we have to have a pattern instruction here. In other words --

JUSTICE KENNEDY: In other words, the pattern instruction was -- it was -- was rejected?

MR. DUNCAN: It was rejected. It was rejected twice, Your Honor, first in the formal jury instructions and then at the charge colloquy.

JUSTICE SOTOMAYOR: But that wasn't the question presented to us. You didn't present to us an issue of whether the jury instruction --

MR. DUNCAN: No, Your Honor.

JUSTICE SOTOMAYOR: -- was wrong or not.

MR. DUNCAN: What we present is the legal theory on which this case was submitted -- what got to the jury in the first place never should have got to

that legal theory at all.

JUSTICE SOTOMAYOR: You see, what I'm trying to figure out is whether your position is that under no circumstance, even the hypothetical that Justice Kagan set forth, could you be charged with a single-incident Canton violation. That is your -- your theory?

MR. DUNCAN: With respect to the Brady situation, Your Honor.

JUSTICE SOTOMAYOR: The Brady situation.

MR. DUNCAN: Let me answer it this way: What -- what the Canton single-incident hypo is talking about is failing to provide employees with basic tools, without which they absolutely have no chance of fulfilling their constitutional obligations. If we -- it's difficult to imagine that situation for prosecutors.

It is -- it's conceivable that a district attorney's office set up -- sets up a structure where prosecutors have no chance of even knowing whether there's Brady evidence in the file. If you have that situation, then it's closer to the Canton single-incident hypothetical, but not involving the exercise of legal judgment in particular cases. We say no.

JUSTICE SOTOMAYOR: Well, how do you

exercise legal judgment if you don't even know what you're supposed to turn over? That was Justice Ginsburg's question.

MR. DUNCAN: That's exactly -- that's my point. That's my point. If you don't -- if you don't even -- in other words, if you don't even have a police file, for instance, you can't exercise your legal judgment if you don't even know what -- what the subject of your legal -- the object of your legal judgment is.

But that's not this case. What we're talking about here is a failure to remedy, reinforce, refine existing legal judgment that prosecutors have.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. DUNCAN: If there are no further questions, thank you.

CHIEF JUSTICE ROBERTS: Mr. Cooney.

ORAL ARGUMENT OF J. GORDON COONEY, JR.

ON BEHALF OF THE RESPONDENT

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

Although the Petitioners' brief attempts to relitigate factual issues that were resolved against them by the jury, they have raised today only one question of law, and that is whether this Court should

write into section 1983 a per se rule that the only way, the only way, a civil rights victim can ever establish the deliberate indifference of a district attorney is if he can prove a prior significant history of assistant prosecutors violating other citizens' constitutional rights.

JUSTICE SCALIA: For -- for Brady violations. They limit the principle to Brady violations.

MR. COONEY: Yes, Your Honor. And I would submit that --

JUSTICE SCALIA: Well, that's a significant limitation, don't you think?

MR. COONEY: But I would submit, Your Honor, that this Court's -- that their requirement for proving deliberate indifference is, first, contrary to the teaching of this Court in Canton and subsequent cases. It finds no place in the language of section 1983 --

JUSTICE KENNEDY: But at the -- but at the outset it seemed to me -- and correct me if I'm wrong -- that you misstate the theory on which you seek to -- to have a reversal, and that this is a failure-to-train case. You didn't mention that.

MR. COONEY: Your Honor --

JUSTICE KENNEDY: This is a failure-to-train

case; is it not?

MR. COONEY: It is absolutely a deliberate indifference to the need to train and provide other protections to the office.

JUSTICE KENNEDY: Well, I think that's very important.

JUSTICE ALITO: Yes, if you could -- could you just say as succinctly as possible what you would tell assistant district attorneys if you were the district attorney for this jurisdiction, and you, with the benefit of hindsight, having seen this case, what kind of -- what would you tell them they should do with respect to Brady?

MR. COONEY: Yes, Your Honor. First of all I think Canton says you have to look at the specific circumstances. And so I don't think there's a one-size-fits-all way or message that has to be provided.

JUSTICE ALITO: No, but you are training them, so: Now I want to tell you what you have to do under Brady.

MR. COONEY: Well, first --

JUSTICE ALITO: What do you tell them?

MR. COONEY: In this office, Your Honor, I think the first thing one has to confront is Mr.

Connick's testimony and, in fact, the concession that the Petitioners made on pages 6 and 7 of their merits brief that the office started with what the brief described as "Connick's disclosure policies were no mystery" -- turn over what the law required and nothing more. I mean, that would be --

CHIEF JUSTICE ROBERTS: Well, Justice Alito's question was, what you would tell the assistant DAs? What's your answer?

MR. COONEY: And Mr. Chief Justice, with -- if -- first of all, I wouldn't start with that rule. But if I started with that rule it would be incumbent upon me --

JUSTICE SCALIA: Why wouldn't you start with that rule? The rule is perfectly lawful, my goodness.

MR. COONEY: Your Honor, I'm not saying it's an unlawful rule. However, it requires a countervailing message. And if you're going to adopt --

JUSTICE ALITO: I really would appreciate it if you'd get to my question. Brady requires that exculpatory evidence be turned over. Now, do you -- do you think the assistant prosecutors didn't even know that?

MR. COONEY: Your Honor, I don't know that. It seems from the record in this case they thought that

only something that screamed "exculpatory evidence" on its face needed to be turned over.

JUSTICE ALITO: Okay. Now, you phrase -- you are the instructor. You phrase the lesson that you think is required by Brady that has to be given to them.

MR. COONEY: I think at a minimum it has two pieces, Your Honor. It has basic instruction about how to go about fulfilling the Brady obligation, and how do you go about looking through the file to make sure you know what's there, making sure you have documents that are in the possession of the police.

Thinking in advance, as this Court talked about in the Agurs case, about what the evidence is going to be at trial and looking thoughtfully at that evidence to determine whether or not the evidence was favorable to the accused and needs to be produced.

CHIEF JUSTICE ROBERTS: Okay. That's your instruction on Brady. Now, you're basing liability on -- on this incident of failing to comply with Brady. So you say they should have instructed on Brady.

What else should they have instructed on?

MR. COONEY: Well --

CHIEF JUSTICE ROBERTS: You're the -- you're the new DA, and you're setting up -- I need to instruct my people. What -- what do they instruct on? I know

they instruct on Brady under your view. What else?

MR. COONEY: I think the second thing that the -- that the office really should do is to -- to talk about the importance of safeguarding the innocent here, that our job is not just to secure convictions.

JUSTICE SOTOMAYOR: Counsel, I'm --

CHIEF JUSTICE ROBERTS: Well, we're looking at -- we're looking at specifics where they're going to violate the Constitution. I think that's a good thing, to tell them they have an obligation as well to protect the innocent.

But we're worried about violations of our constitutional requirements. We know Brady is one. What's the next one? What's day 2 in the course?

MR. COONEY: Well, Your Honor, I -- I do think that there are other constitutional requirements involved. Most of the hypotheticals, however, that have been brought before the Court as a parade of horribles aren't actions by the district attorney.

JUSTICE ALITO: I mean, with respect, I really don't think, as a young district -- assistant district attorney, that you have told me anything that's going to be really helpful to me other than, you know, follow the law, which you certainly should do, in dealing with my obligation to turn over physical

evidence, which is what's involved here.

MR. COONEY: Your Honor --

JUSTICE ALITO: Or a lab report regarding physical evidence.

Now, suppose I have -- I have several cases. I have this case, where I have got blood -- I have physical evidence, I have a blood test. I have another case where all I have was physical evidence, but there has been no testing of it.

Now, do I have to turn over that physical evidence?

MR. COONEY: In this case, there has been a stipulation by the district attorney's office that you do. And I think if you think about the evidence in this case --

JUSTICE ALITO: I have to turn over all physical evidence that's in my possession?

MR. COONEY: No, Your Honor.

JUSTICE ALITO: Okay.

MR. COONEY: But here, the specific --

JUSTICE ALITO: Now, what's the instruction that you're going to give me to tell me where I'm going to draw that line?

MR. COONEY: If you have physical evidence that, if tested, can establish the innocence of the

person who is charged, you have to turn it over.

JUSTICE ALITO: Well, how do I know that before the --

JUSTICE SOTOMAYOR: Well, didn't they here? Didn't they make it available?

JUSTICE ALITO: How do I know that before the physical evidence is tested?

Suppose I've got all sorts of items that were found at the -- at the scene, and they might have DNA on them. They might have epithelial samples on them -- you know, all this fancy forensic testing that's done these days. Do I have to turn over all of that?

MR. COONEY: No, Your Honor. In this case, what we're talking about is a piece of evidence, a specific piece, several specific pieces of physical evidence, that it has been stipulated the prosecutors knew contained the blood of the perpetrator.

It -- the rule and the training that should have been provided in this instance, particularly since the DA argues that it was perfectly clear that that should have been produced --

JUSTICE ALITO: Now, you see what I'm getting at is that you're dealing with a very specific situation. So the instruction would be: If you have physical evidence and you have tested it for blood and

you have a -- you have the result of the blood test, but you don't know whether -- you don't know the blood type of the accused, that -- that's Brady evidence, and that has to be turned over.

And you're saying that the failure to provide training to every assistant district attorney on a question of that specificity gives rise to a -- a potential claim, gives rise to a claim?

MR. COONEY: Your Honor, what I'm saying is I think there are at least three layers to the training that were missing here. One was the clear message about the importance of Brady compliance. The second was the basic ground rules about how you go about your Brady obligation. And, third, if you have evidence that can conclusively establish to a scientific certainty the innocence of the person being charged, you have to turn it over or get it -- get it tested. You can't just put it in your hip pocket and say, I know --

JUSTICE SOTOMAYOR: Wait a minute. Wait a minute. What evidence is there that they put this in their hip pocket?

There was a disclosure that the evidence existed. Where is the evidence that the defense counsel didn't have access to asking for it?

MR. COONEY: Yes, Your Honor --

JUSTICE SOTOMAYOR: Or asking for it to be tested? Where was that suppressed?

MR. COONEY: The -- the only information -- there was a discovery response that was filed very shortly before trial, long after Mr. Thompson was charged with the crime, where in response to one of the questions, the response was: "Inspection to be permitted." If you look at the chronology --

JUSTICE SOTOMAYOR: And what -- where's the Brady violation for telling a defense attorney there was a blood sample there, you can test it?

MR. COONEY: Your Honor, there was no information provided. It was -- the simple response was that the request was for all scientific evidence, and it simply -- and physical evidence from the scene of the crime. The answer was: "Inspection to be permitted."

Then the blood evidence, the very next day, after the response was provided, was removed from the crime lab by the prosecutors, never to be found again. And defense counsel testified without impeachment at trial that he went to the evidence locker, looked in the evidence locker, found certain pieces of physical evidence consistent with the discovery response, but not the blood evidence, neither the blood report nor the physical specimens that were involved in this case, Your

Honor.

JUSTICE SOTOMAYOR: So that you are claiming there was suppression of that evidence?

MR. COONEY: Absolutely, Your Honor.

CHIEF JUSTICE ROBERTS: So if it is -- prosecutors can violate a defendant's constitutional rights by making improper statements in their closing arguments.

Do you have to instruct new -- I suspect new prosecutors coming out of law school don't know what those rules are. Do you have to give instruction on what they can say in closing arguments?

MR. COONEY: Your Honor, I think, first of all, the issue has to rise to a constitutional level in order to be talking about this for section 1983 purposes.

CHIEF JUSTICE ROBERTS: Yes. My understanding is -- I don't -- I'm not an expert in criminal law. I need training in that. But my understanding is that comments in a closing argument can give rise to a constitutional violation.

So you should -- you should train those people. You know that. You know that that can happen, just as you know there can be Brady violations. So they need training in exactly what they can say and can't say

in closing argument.

JUSTICE KENNEDY: And Miranda and proper supervision of affidavits in support of search warrants, and proper instructions that tell the police not to exceed the scope of the warrant. So this is -- our course is expanding.

MR. COONEY: Justice Kennedy --

JUSTICE KENNEDY: The -- the point of concern here is that we're going to have to go through a list, case by case, of everything there has to be training on.

MR. COONEY: I think -- I think there are some important distinctions here. And, first of all, when you're talking about search and seizure, when you're talking about Miranda, you're talking about those things, the actor that is committing the constitutional tort there is not the district attorney. It's the police. What we're talking about here, the constitutional tort --

CHIEF JUSTICE ROBERTS: When you're talking about improper comments in closing argument, it is the prosecuting attorney.

MR. COONEY: But the second important distinction, Your Honor -- and I do believe training should be given there. But I think there's a

fundamental distinction between a Brady violation, which happens in private and may never be revealed and, if revealed, often happens long after trial and long after incarceration, and a situation where a prosecutor makes an improper comment during a closing jury, which is made in public. Defense counsel has the opportunity right there to stand up and say, Your Honor, I object, and the court has the ability to address that issue then and there.

With a Brady violation, you don't have any of that. It's made in secret. It's --

CHIEF JUSTICE ROBERTS: So you don't -- you don't have to train with respect to closing arguments?

MR. COONEY: Your Honor, I think they do. But I think there's -- there's a particular issue. There's particular force in this context because of the unique nature of Brady, because it's made in private, because it is -- by definition, if the information has been concealed, it has not been revealed prior to the time the defendant suffers constitutional harm. He's -- he's found guilty, he's sentenced to death, et cetera.

The Brady violation, unlike your situation, Mr. Chief Justice, doesn't come to light, perhaps ever. But in Mr. Thompson's case --

JUSTICE GINSBURG: So we have --

MR. COONEY: -- more than a decade after he was convicted.

JUSTICE GINSBURG: And it's something like I was trying to get at before when I said Miranda is out there, you know what was said, you know what was seized, talking about -- but Brady is, if the prosecutor doesn't come out with it, high risk it will never come out.

So we have use of force, plus -- that can kill people if you're not properly trained. Brady, because if they don't come up with the information, it could have what almost happened in this case.

Anything else on this special list?

MR. COONEY: Your Honor, I --

JUSTICE GINSBURG: The concern was that you don't want to have to give the prosecutors a clinical law school course before you let them do their job.

MR. COONEY: I agree with that concern, Your Honor. And -- and I think it's important to remember that in this case, this was a no-training case. The evidence in the light most favorable to Mr. Thompson was there was zero Brady training in the office.

JUSTICE KAGAN: So what would have been enough? I mean, is an hour a year enough? Is an hour a month enough?

MR. COONEY: I think that would have been

dependent on what its content was, Your Honor, and the other circumstances of the office.

If you look at Canton, what Canton does is it asks the question: Is there an obvious need for training based on the circumstances of this particular --

JUSTICE SCALIA: Wait. As I understand it, you -- you really have a need to train them, when you know defense counsel is coming over to look at the physical evidence, don't remove from the locker some of the physical evidence.

(Laughter.)

JUSTICE SCALIA: You want to give a course in that?

MR. COONEY: Your Honor, what -- what happened is the physical evidence very conveniently was being sent to the crime lab when it was removed. And so we don't know what the motivation was as to why that physical evidence was removed at that time. What we know is for many, many months --

JUSTICE SCALIA: Well, then, you shouldn't have -- you shouldn't have mentioned it. I thought you were -- you were asserting that it was intentionally removed in order to prevent defense counsel from seeing it.

MR. COONEY: What we assert, Your Honor --
JUSTICE SCALIA: You don't know that.
MR. COONEY: It was certainly not -- it was intentionally not placed back in into evidence after it came back from the crime lab, and there was actual testimony from the grand jury that was handling this and looking into this situation for some period of time --
JUSTICE KENNEDY: Well, of course, there's a --
MR. COONEY: -- of not just that.
JUSTICE KENNEDY: There is a causation problem here. Even assuming training, if Deegan was going to destroy the evidence or remove it anyway, as he admitted later to Riehlmann, then the training or lack of training is just irrelevant.
MR. COONEY: Your Honor, I think there are --
JUSTICE KENNEDY: But I'm very concerned about that causation aspect.
MR. COONEY: First of all -- let me address that directly. First of all, the causation question was put to the jury; the jury instruction very clearly said in order for there to be liability here, the fault must be in the training program, not in the individual prosecutor. And the defense argued vehemently that

there was a lack of causation. What's interesting here is --

JUSTICE ALITO: But the judge actually, though, instructed the jury -- this is back on J.A. 828 -- in order to find that the district attorney's failure to adequately train, monitor, or supervise amounted to -- deliberate indifference, et cetera.

So liability could have been predicated not on the lack of adequate training, but the absence of a process by which superiors in the district attorney's office reviewed all of the Brady decisions that were made by more junior prosecutors; isn't that correct?

MR. COONEY: Your Honor, the concept of monitoring or supervision was actually a concept that defendants injected into the case. And so, to the extent that there is any concern that there's an expansion from training, it's been error that's invited. And I don't believe it's error, Your Honor, but it's not something that -- that was put into the case by the defense or the court.

JUSTICE ALITO: Why wouldn't -- why wouldn't that be error? That the -- the head of a very large office is personally liable under Canton for violations that are -- that are produced by actions taken by subordinates, unless there is an elaborate process to

review all of the decisions that are made by those subordinates? Doesn't that go well beyond anything Canton permits?

MR. COONEY: Your Honor, again, the clear thrust of this case was a failure-to-train case. The concept of monitoring and supervision was introduced by the defense, not by the -- by the plaintiffs. But to get back to Justice Kennedy's case --

JUSTICE SOTOMAYOR: Could you please state in simple terms to me what exactly they failed to train these prosecutors to do, that the prosecutors didn't do? What training -- Justice Alito asked it generally; I'm asking specifically -- what is the exact training that was required in this situation that caused the violation in this case?

MR. COONEY: Number one, there was absolutely no Brady training at all.

JUSTICE SOTOMAYOR: Forget about no Brady training. What -- I think Justice Alito asked this question. What specifically would the training have said or done that would have avoided this Brady violation?

MR. COONEY: First of all, I think a broad statement in training about the importance of safeguarding the rights of the accused --

JUSTICE SOTOMAYOR: Now, that seems to suggest that you're claiming that if there was an intentional violation by the prosecutors, that that statement would have avoided the prosecutor from doing something he or she knew was illegal. Is that what you're intending?

MR. COONEY: No, it isn't, Your Honor.

JUSTICE SOTOMAYOR: Okay. So tell me.

MR. COONEY: The -- the second aspect of -- of it, though, is what I said to Justice Alito, and that is that if you have physical evidence which, if tested, would establish either the guilt or the innocence of the -- of the defendant, it needs to be produced. Or at least tested.

JUSTICE SOTOMAYOR: That goes to the sufficiency --

MR. COONEY: Right.

JUSTICE SOTOMAYOR: -- whether they had a policy to turn over or -- because it was tested, so there was no Brady violation from the failure to test here.

MR. COONEY: The Brady violation was for failure to produce; you're right.

JUSTICE BREYER: Isn't -- am I right -- am I right on this? Here -- I read on page 4 of your brief

that it seemed what happened -- and I might not be right. Correct me if I'm not. What happened is a piece of paper called the lab report came to the -- one of the prosecutors' attention 2 days before the trial, and what it said was the blood that was the perpetrator's was type B. And the person on trial has blood of type O. Is that what happened?

MR. COONEY: Your Honor, certainly what the crime lab report said was that the blood that was tested of the perpetrator was type B.

JUSTICE BREYER: And the -- and the prosecutor knew that the person on trial had type O?

MR. COONEY: We don't know that, Your Honor.

JUSTICE BREYER: Ah, that's something --

MR. COONEY: That's the unresolved factual question.

JUSTICE BREYER: I see.

MR. COONEY: And I think that's where causation comes in, Your Honor, because I think there are two possibilities.

JUSTICE BREYER: Did it turn out at the trial that eventually the prosecutor knew it was type O?

MR. COONEY: It turned out that Mr. Thompson was in fact type O. But the evidence is --

JUSTICE BREYER: When the did they learn

that?

MR. COONEY: The evidence is unclear as to whether or not the assistants knew at the time that John Thompson had type O blood.

CHIEF JUSTICE ROBERTS: Could I ask you what -- most law offices with which I'm familiar, the training is mentoring. In other words, the young attorneys learn from the older attorneys, often by following them along -- around.

Would it have been an adequate training program for this office simply to say, new prosecutors, you don't get to be first chair prosecutors until after a year, and you're going to follow one of the prosecutors around and learn from them? Is that an adequate training program?

MR. COONEY: If, in fact, the senior prosecutors, Your Honor, have a good familiarity with the constitutional requirements --

CHIEF JUSTICE ROBERTS: Yes.

MR. COONEY: -- absolutely.

CHIEF JUSTICE ROBERTS: Even -- even if the violation that becomes the basis for the claim later on is one that, you know, didn't come up in that year? We -- they didn't have a Brady issue in that first year. They went around; they sat in on a lot of trials; but

there wasn't a Brady issue and so they didn't learn about this type of question. And --

MR. COONEY: I think --

CHIEF JUSTICE ROBERTS: Does that give rise to a claim of the sort you're bringing here?

MR. COONEY: I think the failure here -- and I think we have to come back to the deliberate indifference piece because what would happen there in that instance, Your Honor, even if the training was not provided, I think as experience has shown under Canton, that claim would fail for failure to show the deliberate indifference of the policymaker.

But here you had substantial evidence about Mr. Connick's indifference.

JUSTICE ALITO: Mr. Cooney, when you -- when you gave the specific instruction that you think should be provided to assistant district attorneys, what you stated was a questionable understanding of Brady, I think. You -- did I understand you correctly?

You said that Brady means that if the prosecutor has physical evidence which, if tested, might establish the defendant's innocence, that is exculpatory evidence that must be turned over.

MR. COONEY: Your Honor, that certainly has been the position taken by the district attorney's

office in this case --

JUSTICE ALITO: Is that consistent with Arizona v. Youngblood?

MR. COONEY: Your Honor, I believe it -- it is consistent with Brady that if -- if one has a piece of evidence that can conclusively establish that the defendant is innocent, that it can't be the law that the prosecutor can just put it in his hip pocket, not get it tested, and not turn it over to the defense, and not worry about whether they're prosecuting an innocent man.

JUSTICE SOTOMAYOR: But, you see, it was tested. And it was made available to the defense. Turning over -- using the word "turning over" is ridiculous, because they're not going to physically give it to the defense attorney to go off and do what he wants. They're going to give it to a lab that will establish a chain of custody, et cetera, et cetera.

So it was made available. He went to look at it, but the looking at it wouldn't have told the defense attorney anything. They had to make it available for testing. He never asked for testing. They did the lab reports. So now we come down to the only failure is in the turning over of this report. Correct?

MR. COONEY: No, Your Honor. First of all,

there is -- there is a stipulation, stipulation L at J.A. 14: Prior to the armed robbery trial, Mr. Thompson and his attorneys were not advised of the existence of the blood evidence, that the evidence had been tested, that a blood type was determined definitively --

JUSTICE SOTOMAYOR: Now, what did I just say? The failure to turn over the report, correct?

MR. COONEY: But -- but -- yes, Your Honor. But what also is present here is the defense never had the chance to -- never saw the physical blood evidence itself.

JUSTICE SOTOMAYOR: Never knew it existed?

MR. COONEY: Never knew it existed, Your Honor.

JUSTICE SOTOMAYOR: That's --

MR. COONEY: There is testimony, clear testimony to that effect. If you look at Mr. Williams's testimony in this case, there is a section of the cross-examination where John Thompson's defense counsel at the original criminal trial said just that. He didn't know it existed.

JUSTICE SCALIA: But it isn't -- it isn't clear from what -- according to what you said earlier, it isn't clear that it was intentionally withheld from

the defense. It might have just been -- you said it was sent to the lab when -- when he came to look for it.

MR. COONEY: But --

JUSTICE SCALIA: So would training have -- have gone into that detail? Don't send something to the lab when defense counsel is coming over to look for it. I mean, you know, that -- that's pretty detailed.

MR. COONEY: Yes, Justice Scalia, but here there's a stipulation that the crime lab report with the conclusive evidence about the perpetrator's blood type was never --

JUSTICE SCALIA: Okay, but -- but that --

MR. COONEY: -- ever provided.

JUSTICE SCALIA: That's the lab report. That -- that's what Justice --

MR. COONEY: And the physical evidence was never seen, Your Honor, by defense counsel.

JUSTICE SCALIA: For all we know, by accident, right? And the training would -- would probably not have remedied that -- that difficulty.

MR. COONEY: Your Honor, four prosecutors -- it is clear that four prosecutors knew about the existence of blood evidence for months, and it was never produced to the defense. And that blood evidence would have conclusively established John Thompson's innocence.

JUSTICE SCALIA: The defense was told to come over and look for it -- to look at it. And when he came over to look at it -- for all we know, by accident -- it was -- it had been sent to the lab.

MR. COONEY: But -- but Your Honor, the "it" was not come over and see the blood evidence. It was -- there was a broad request for -- for --

JUSTICE SCALIA: Yes, I understand, but -- yes. Okay.

MR. COONEY: -- physical evidence at the crime scene, including things that had nothing to do with the blood. So there's nothing that the defense lawyer would have known by going to the evidence room to say: I know there is nothing here.

CHIEF JUSTICE ROBERTS: But isn't that -- isn't that best practice? In other words, I thought that was the good thing, when what the prosecutor does is say look at everything we've got. And as my brother has suggested, what is important may not be there for either deliberate misconduct or by happenstance.

MR. COONEY: But the point here, Your Honor -- and I think this goes to the causation point, that -- that it would appear -- it would appear from looking at Mr. Williams's testimony that there was a deliberate effort to stay away from blood evidence in

the carjacking case. And Mr. Williams conceded that. So this idea that this was an innocent error on the part of the prosecutors does not find support in the record.

The question is --

JUSTICE ALITO: Well, if it was willful --

JUSTICE SOTOMAYOR: But that dooms your case. If it wasn't an innocent error, if it was an intentional violation of Brady, there is no training that was going to stop him from doing that.

MR. COONEY: No, Your Honor, I think there is a difference between a tactical choice to do something sharp, on the one hand, and a knowing Brady violation, on the other hand.

And the jury could clearly conclude -- particularly because the 30(b)(6) witness in this office testified that, in his view, it wasn't Brady material unless the -- unless the prosecutors knew John Thompson's blood type -- the jury could clearly conclude that what happened here was these four prosecutors didn't understand and never got a clear message about -- about what Brady required, and they -- they did not produce this evidence.

There is nothing that clearly showed that they committed knowing Brady violations in this case.

JUSTICE KAGAN: Mr. Cooney, I'm still

confused as to sort of how much is enough by way of training and how you would ask a court or a jury to decide that.

You suggested to the Chief Justice formal training wasn't -- isn't necessary if there's some supervision, if there's some mentoring. But, you know, this seems to give cities no sense of what they have to do. No safe harbors. Is that your position?

MR. COONEY: Your Honor, I think that Canton articulates a very flexible test. And I don't think Canton says there is one size that fits all. And I think the protection that district attorney's offices get from Canton is from the standard of deliberate indifference.

And if one looks at the 21 years of experience under Canton, there have been between 6 and 8 cases against prosecutors' offices under this kind of theory, in total, where there was some payout from the prosecutors' offices to the defense. Total. In the 21 years.

So -- and the Court said -- this Court said in Canton, judge and jury doing their job are adequate to the test. I think we have been spending a lot of time focusing on how much training. The fact is, this is a no-training case, where evidence that the -- that

the defendants now concede should have been produced wasn't produced, and four people knew about it and failed to produce it.

In addition, there were multiple additional pieces of Brady material in the murder case that weren't produced. And this --

CHIEF JUSTICE ROBERTS: Would this have been -- would this be a no-training case if the rule was you have to be in the office for 3 years as a second chair prosecutor before we let you have a case, and, in fact, you have to be here 10 years before we let you have a capital case? That's all it says. Is that sufficient training?

MR. COONEY: I think, again, you would have to look at the circumstances of the office. I think with this -- this presumption against disclosure that was present in Connick's office, that takes this case out of the realm of the typical prosecutor's case, because it is a bare minimum disclosure rule.

I think there needs to be -- if you're going to have that bare minimum disclosure rule, there needs to be something to counterbalance it. If you look at what the assistants testified to in this case, they all knew what not to produce. What they didn't know was what to produce.

JUSTICE GINSBURG: But what do you do with the Dubelier testimony? Didn't he testify that it was standard operating procedure to turn over all lab reports?

MR. COONEY: Your Honor, I think there are two very quick answers to that. If one looks at J.A. 550 to 551, which was Mr. Glas, the grand jury prosecutor's, testimony.

What he clearly said was, during the grand jury, when Mr. Connick decided to terminate the grand jury, Mr. Connick and his first assistant were actually arguing with Glas that if the prosecutors didn't know John Thompson's blood type, they didn't need to turn over the blood report.

So that's number one. I think there is an issue of fact that has to be resolved in our favor solely from J.A. 550 and 551.

And the second is, Your Honor, the -- the rule, the bare minimum discovery rule. Louisiana law did not require the production of crime lab reports in 1985.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Duncan, have you 3 minutes remaining.

REBUTTAL ARGUMENT OF STUART K. DUNCAN

ON BEHALF OF THE PETITIONERS

MR. DUNCAN: Justice Alito and Justice Kagan, you asked repeatedly questions designed to elicit a response from my colleague: What would you tell a ADAs with respect to training -- and I believe Justice Sotomayor as well -- that would have prevented such a thing? And I didn't hear a clear answer.

The legal issue in this case turns on the fact that, in the deadly force scenario that Canton marks out as the paradigm single-incident case, it is very clear what a police office needs to tell a police officer. Here's the deadly force standard under Tennessee v. Garner: Don't shoot people unless there's a reasonable probability of physical danger to yourself or to others. You've got to tell them that.

With respect to the Brady scenario, it's not clear at all. Yes, of course, training is useful. Yes, of course, training is important. But how do you connect up a lack of specific training with a particular violation that occurs?

And having heard the argument, I'm -- I'm no longer clear as to what the theory of the case of my colleague's is about what caused the violation. Whatever caused the violation, I haven't heard about a specific training measure that would have actually prevented what happened in this case.

CHIEF JUSTICE ROBERTS: How do you train your new hires? First day, somebody right out of law school shows up and says, I want to be an assistant district attorney. How do you train them?

MR. COONEY: I think the first thing you do is you have a hiring process that emphasizes the important of -- the importance of Brady, as this office did. Brady was important. One witness said -- McElroy -- from the moment you walked in the door, you had to write an essay on Brady. Brady was emphasized as being very important. And then --

JUSTICE KAGAN: Mr. Duncan, that I think you can't say, because that's just overturning what the jury found.

MR. DUNCAN: I -- I don't think -- the jury couldn't have found that that didn't occur, Your Honor. The jury found that that was inadequate.

JUSTICE KAGAN: The jury found that there was inadequate training.

MR. DUNCAN: Correct, Your Honor.

JUSTICE KAGAN: In fact, the jury found -- I think, if you look at the record -- the jury could have found, a reasonable jury could have found, that there was no training here.

MR. DUNCAN: A reasonable jury could have

found -- well, Your Honor, we don't contest the finding of inadequate training. What we contest is the ingredients that lead -- that can lead to a deliberate indifference finding on the basis of inadequate training.

And what we say is that this case, that is a general case about you failed to train on Brady, it doesn't fit within the single-incident hypothetical. And what I was trying to get at with -- with response to your questions and Justice Alito's question was that, if you can't say with any specificity, well, what training do you give?

You asked repeatedly, Your Honor, how much training is enough? So is an hour a year? I thought I heard my colleague say that an hour a year may make this not a no-training case, and so what you have there is a pattern --

JUSTICE BREYER: So we have to overturn the jury finding?

MR. DUNCAN: No, Your Honor. Absolutely not.

JUSTICE BREYER: We don't?

MR. DUNCAN: No, you do not.

JUSTICE BREYER: Because they found that the failure to adequately train amounted to deliberate

indifference to the fact that inaction would obviously result in a constitutional violation. That's what they found.

Now, how can we -- assuming that's true and accepting it and not overturning it -- find that there was something unlawful? Because you're arguing -- you're all arguing about whether the training program really was adequate or not. They found it was not. What do we do?

CHIEF JUSTICE ROBERTS: You can answer.

MR. DUNCAN: Thank you, Your Honor, Mr. Chief Justice.

The correct resolution is the lower court should dismiss the failure-to-train claim as a matter of law because there was no demonstration of a pattern of violations, and this situation does not fall within the narrow range of circumstances that Canton foresees for single-incident liability.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:05 p.m., the case in the above-entitled matter was submitted.)

2016 WL 7634839 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF NORTH CAROLINA, et al., Petitioners,
v.
NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al., Respondents.

No. 16-833.
December 27, 2016.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for a Writ of Certiorari and Volume I of the Appendix

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***i** Questions Presented

This case involves a challenge under Section 2 of the Voting Rights Act, 52 USC §10301 ("§2"), and the federal Constitution to North Carolina election reforms - specifically, a photo-ID requirement, a 7-day reduction in early voting, and the elimination of same-day registration, out-of-precinct voting, and pre-registration for 16-year-olds. Following two trials with over 130 expert and fact witnesses, the district court issued a 479-page opinion finding those reforms had neither discriminatory effect nor intent.

Without disturbing those *effect* findings, the Fourth Circuit found the reforms were motivated by discriminatory *intent.* It relied on "evidence" that, *inter alia*, North Carolina enacted its reforms soon after being "release[d]" from preclearance under Section 5 of the Voting Rights Act, 52 USC §10304 ("§5"), by *Shelby County v. Holder,* 133 S. Ct. 2612 (2013), App. 33a; that North Carolina had received preclearance objections to election laws over the past three decades; and that legislators knew that African-Americans used some of the eliminated mechanisms at higher rates.

The following questions are presented:

1. Whether a federal court has the authority to reimpose, under §2 of the Voting Rights Act, the same "anti-retrogression" preclearance standard invalidated as to §5 by *Shelby County.*

2. Whether the Fourth Circuit erred in holding that, although the challenged reforms did not adversely *affect* minority voting, the North Carolina ***ii** legislature nonetheless *intended* to deny African-Americans the right to vote.

3. Whether statistical racial disparities in the use of voting mechanisms or procedures are relevant to a vote denial claim under §2.

***iii** Parties to the Proceeding

Petitioners State of North Carolina; Governor Patrick McCrory; the North Carolina State Board of Elections; Kim Westbrook Strach, in her official capacity as the Executive Director of the State Board of Elections; Joshua B. Howard, in his official capacity as a member of the State Board of Elections; Rhonda K. Amoroso, in her official capacity as a member of the State Board of Elections; Joshua D. Malcolm, in his official capacity as a member of the State Board of Elections; Paul J. Foley, in his official capacity as a member of the State Board of Elections; Maja Kricker, in her official capacity as a member of the State Board of Elections; and James Baker, in his official capacity as a member of the North Carolina State Board of Elections were Defendants in the district court and Appellees in the court of appeals.

Respondents North Carolina State Conference of the NAACP, Rosanell Eaton, Emmanuel Baptist Church, Bethel A. Baptist Church, Covenant Presbyterian Church, Barbee's Chapel Missionary Baptist Church, Armenta Eaton, Carolyn Coleman, Jocelyn Ferguson-Kelly, Faith Jackson, Mary Perry, and Maria Teresa Unger Palmer were Plaintiffs in the district court and Appellants in appeal No. 16-1468. Respondents Louis M. Duke, Josue E. Berduo, Nancy J. Lund, Brian M. Miller, Becky Hurley Mock, Lynne M. Walter, and Ebony N. West were Plaintiffs-Intervenors in the district court and Appellants in appeal No. 16-1469. Respondents the League of Women Voters of North Carolina, the North Carolina A. Philip Randolph Institute, Unifour Onestop Collaborative, Common Cause North Carolina, Goldie Wells, Kay Brandon, Octavia Rainey, Sara Stohler, ***iv** and Hugh Stohler were Plaintiffs in the district court and Appellants in appeal No. 16-1474. Respondent the United States was a Plaintiff in the district court and Appellant in appeal No. 16-1529.

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***1** Introduction

This case involves challenges under Section 2 of the Voting Rights Act ("§2") and the federal Constitution to North Carolina election reforms. Those reforms include a photo-ID law more lenient than the one this Court upheld eight years ago, see *Crawford v. Marion Cty. Election Bd.,* 553 U.S. 181 (2008), and other voting adjustments that were already in effect during two statewide elections in which African-American participation *increased.* These sensible changes place North Carolina within the majority of current State election practices. The district court found North Carolina's reforms had no discriminatory effect on African-Americans and were enacted with no discriminatory intent. Overriding the district court, however, the Fourth Circuit not only found those reforms motivated by "racially discriminatory intent," but compared them to laws from "the era of Jim Crow." App. 26a, 46a. That extraordinary decision merits review for three separate reasons.

First, the Fourth Circuit's decision effectively nullifies this Court's decision in *Shelby County v. Holder,* 133 S. Ct. 2612 (2013), which invalidated the ***2** coverage formula for preclearance under Section 5 of the Voting Rights Act ("§5"). Palpably indignant that North Carolina's reforms were enacted soon after the State's "release from the [§5] preclearance requirements," App. 33a, the Fourth Circuit in essence invented its own preclearance regime under §2. That decision guts *Shelby County*'s basic premise that "history did not end in 1965," 133 S. Ct. at 2628, and that States should therefore be restored to equal sovereignty in regulating elections. Evidently in the Fourth Circuit's eyes, where North Carolina is concerned, it is *always* 1965.

Second, the Fourth Circuit's decision addresses an extraordinarily important question in a way that is egregiously misguided and that threatens numerous State election laws. Simply put, the decision insults the people of North Carolina and their elected representatives by convicting them of abject racism. That charge is incredible on its face given the pains the legislature took to ensure that no one's right to vote would be abridged, and the fact that the reforms align North Carolina with the majority of current State practices. It becomes even more perplexing given that the Fourth Circuit did not disturb the district court's findings that the reforms have no discriminatory *effect.* And it becomes downright absurd

given that the Fourth Circuit bluntly overrode the district court's meticulous findings on a classic fact question - intent - reached after weeks of trial. Worst of all, the basis for the Fourth Circuit's decision is not specific to North Carolina. On the contrary, the panel's "evidence" showing discriminatory intent would overturn election laws in numerous States. A federal circuit should not take a step of such enormity without this Court's review.

***3** Third, the decision compounds confusion among federal circuits regarding use of statistical disparities in §2 vote denial claims. Four circuits - the Fifth, Sixth, Seventh, and Ninth - already disagree on whether discriminatory *effect* can be proved solely through racial disparities in the use of particular voting mechanisms. Adding confusion to confusion, the Fourth Circuit has adopted the principle that legislators' mere awareness of such disparities may prove discriminatory *intent* - even where the challenged laws have *no* discriminatory effect.

Opinions Below

The opinion of the court of appeals is reported at 831 F.3d 204. App. 1a-78a. The opinion of the district court is available at 2016 WL 1650774. App. 79a-532a.

Jurisdiction

The court of appeals entered its judgment on July 29, 2016. App. 1a. On October 14, 2016, the Chief Justice extended the time for filing a petition for certiorari to November 28, 2016. No. 16A362. On November 15, 2016, the Chief Justice further extended the time for filing a petition for certiorari to December 26, 2016. *Id.* This Court has jurisdiction under 28 USC §1254(1). The court of appeals had jurisdiction under 28 USC §§1291 and 1331.

Statutory Provisions Involved

Section 2 of the Voting Rights Act provides, in relevant part:
(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or ***4** political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color … as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice….

52 USC §10301.

Statement

A. North Carolina's Electoral Reform Laws

In 2013, the North Carolina legislature enacted a package of election reforms known as SL 2013-381. Of the law's 20 measures, App. 105a-107a, only five are relevant here.

Voter ID: Under previous law, poll workers confirmed voter identity through signature attestation. App. 89a. SL 2013-381 improved that antiquated system by requiring in-person voters to present photo ID. Qualifying IDs include a

driver's license; a free voter-ID card available from the DMV; a United States passport; a military or veterans ID card; or a tribal enrollment card. App. 120a-121a.

***5** The legislature provided a two-year "soft roll out" before the ID requirement would take effect in 2016, and appropriated about $2 million to educate voters. App. 107a, 133a. The State Board of Elections also undertook "database matching efforts" to assess which voters lacked qualifying ID, and then mailed over 200,000 voters "resources for obtaining free photo ID" and offering assistance through a "postage pre-paid response card." App. 134a-137a.

In 2015, the legislature amended the law to expand qualifying IDs and to establish an exception allowing voters lacking ID to cast a provisional ballot if they declare a "reasonable impediment" to obtaining ID and provide alternative identification. App. 118a-119a, 177a (discussing SL 2015-103). That provisional ballot *must* be counted unless the stated excuse is "factually false, merely denigrating to the ID requirement, or obviously nonsensical." App. 119a, 181a. This exception mirrors a South Carolina law precleared in 2012. *South Carolina v. United States,* 898 F. Supp. 2d 30, 40 (D.D.C. 2012); App. 200a-201a.

Early Voting: SL 2013-381 reduced the early-voting period from 17 to 10 days. App. 121a. The first seven days had been the least-used, and the lengthier early-voting period had fostered "political gamesmanship" - in particular, locating early-voting sites in areas favoring only one political party. App. 344a-345a. To preserve early-voting opportunities, however, SL 2013-381 offset the decrease in early-voting *days* with a requirement that aggregate early-voting *hours* equal those in the previous analogous election, thus expanding evening and weekend early-voting opportunities. App. 122a, 224a-225a, 402a-404a. These revisions were scheduled to go into effect ***6** in January 2014. Even after reducing its early-voting period, North Carolina would remain within the mainstream of State early-voting practice. Many States offer no early voting at all, and a supermajority offer no weekend voting. App. 201a-203a; see *infra* at 21.

Out-of-Precinct Voting: In 2005 the North Carolina Supreme Court interpreted State law to require voters to vote in the precinct where they reside. *James v. Bartlett,* 607 S.E.2d 638, 642-44 (2005); App. 95a. *James* observed that in-precinct voting makes elections more efficient and prevents fraud. App. 376a-377a. That same year, however, the legislature (then Democrat-controlled) retroactively overruled *James* and allowed voters to vote in the wrong precinct (but the correct county) by casting a provisional ballot. App. 97a. SL 2013-381 restored the pre-2005 system by eliminating out-of-precinct voting. App. 123a-124a. That change was scheduled to take effect in January 2014. By eliminating out-of-precinct voting, North Carolina would join a majority of States that disallow the practice. App. 253a; see *infra* at 21.

Same-Day Registration: North Carolina law allows voters to register up to 25 days before an election. App. 97a-98a. Since 2007, voters could both *register* and *vote* at early-voting sites during the early-voting period. App. 98a. Administrative problems with that regime led to potentially thousands of ineligible voters participating in elections. App. 364a-365a. SL 2013-381 repealed this provision, thus restoring the pre-2007 system. App. 123a. That change was scheduled to take effect in January 2014. By eliminating same-day registration, North Carolina would join a super- ***7** majority of States that do not allow the practice. App. 229a; see *infra* at 21.

Pre-Registration: Since 2009, North Carolina allowed pre-registration by 16-year-olds who would not be 18 before the next general election. App. 99a. Experience showed, however, that pre-registered individuals could become confused about their eligibility to vote. App. 383a. SL 2013-381 therefore ended pre-registration by 16-year-olds, while maintaining it for 17-year-olds who will be 18 on election day. App. 124a. That change was scheduled to take effect in September 2013. By eliminating pre-registration of 16-year-olds, North Carolina would join a super-majority of States that do not allow the practice. App. 259a-260a; see *infra* at 21.

B. Procedural History

On August 12, 2013 - the day SL 2013-381 was enacted - the North Carolina Conference of the NAACP and the League of Women Voters challenged the reforms under the federal Constitution and §2 of the Voting Rights Act. On September 30, 2013, the United States brought a challenge under §2. App. 125a. Various proceedings led to a preliminary injunction that eventually went into effect in 2015. App. 129a; see *League of Women Voters of N.C. v. North Carolina,* 769 F.3d 224, 242 (4th Cir. 2014) ("*LWV*") (ordering entry of preliminary injunction); *North Carolina v. League of Women Voters of N.C.,* 135 S. Ct. 6 (2014) (staying Fourth Circuit mandate pending certiorari); *North Carolina v. League of Women Voters of N.C.,* 135 S. Ct. 1735 (2015) (denying certiorari).

***8** Except for the photo-ID requirement (which would not take effect until 2016), the 2014 midterm primary and general elections took place with the SL 2013-381 reforms in effect. During the May 6, 2014 midterm primary, relative to the 2010 midterm, African-American turnout increased from 11.4% to 13.4%. During the subsequent midterm general, again relative to the 2010 midterm, African-American participation again increased - this time from 40.4% to 42.2%. This represented the highest overall turnout increase of any group, a greater increase than white turnout (which increased from 45.7% to 46.8%), and "the smallest white-African American turnout disparity in any midterm election from 2002 to 2014." App. 127a, 130a, 436a.

On June 18, 2015 - weeks before trial was to begin - the legislature enacted SL 2015-103, expanding qualifying photo IDs and establishing the reasonable impediment exception. Given that enactment, "the United States … abandoned its discriminatory effect claim to the voter-ID law." App. 126a.

The district court bifurcated the trial. In July 2015, a three-week trial addressed all challenged reforms except photo-ID. App. 130a-131a. The court heard testimony from 93 fact witnesses and sixteen experts. *Id.*; App. 87a. Subsequently, in January 2016, a six-day trial addressed photo-ID, featuring testimony from a further nineteen fact witnesses and five experts. App. 131a.

1. The District Court's Opinion

On April 25, 2016, the district court issued a 479-page opinion upholding all challenged provisions ***9** under §2 and the Constitution. Appendix B, App. 79a. As to §2, the court found the provisions had no discriminatory impact and were not motivated by discriminatory intent. App. 521a-530a. The voluminous opinion can only be summarized here.

a. No discriminatory impact

To assess discriminatory impact, the district court analyzed whether (1) the challenged practices "impose a discriminatory burden" on African-American voters, and (2) that burden is caused by discriminatory "social and historical conditions." App. 273a (citing *LWV,* 769 F.3d at 242). The court considered the "totality of the circumstances," aided by the nine factors from *Thornburg v. Gingles,* 478 U.S. 30 (1986). App. 273a-275a. It concluded that plaintiffs failed to establish that, "under the electoral system established by SL 2013-381 and SL 2015-103, African Americans or Hispanics 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' " App. 435a (quoting 52 USC §10301(b)).

The court found that none of the challenged provisions impeded African-American political participation. For instance, it found that at least 94.3% of registered African-American voters already possessed qualifying photo-ID, App. 164a, and that voters lacking IDs could easily vote under the generous reasonable impediment exception. App. 167a, 397a-399a. It also found that none of the other challenged provisions imposed a discriminatory burden given the "many [remaining] convenient registration and voting mechanisms that … provide African Americans an equal opportunity to participate in the political process." App. 435a. The court ***10** buttressed its conclusion with data from the two 2014 statewide elections showing *increased* African-American participation while the SL 2013-381 reforms were in effect. App. 436a.

The court's meticulous application of the *Gingles* factors strongly favored North Carolina. For instance, the court found that the plaintiffs' expert failed to "catalogue any official discrimination after the 1980s" and that "by the turn of that decade, African-Americans were making significant headway in political strength." App. 305a. The court thus found a clear break separating North Carolina's "shameful past discrimination" from "the past quarter century." App. 307a. Similarly, the court found no link between African-Americans' socioeconomic disadvantages and their "ability … to cast a ballot and effectively exercise the electoral franchise after SL 2013-381," given the "multitude of voting and registration options available in the State[.]" App. 326a-327a. Indeed, of the nine *Gingles* factors, the court found only one - the existence of "racially polarized" voting - unambiguously supported plaintiffs. App. 307a-308a.

Applying the last *Gingles* factor with particular rigor, the court found none of North Carolina's justifications for the reforms was "tenuous." App. 332a. To the contrary, the court found the provisions served legitimate goals such as deterring voter fraud (App. 336-337a, 376a), safeguarding voter confidence (App. 373a, 467a-468a), making early voting fairer, more efficient, and less subject to political gamesmanship (App. 344a), and eliminating administrative problems (App. 353a-359a, 383a-385a).

***11** Finally, the court considered whether, under the "totality of the circumstances," the eliminated mechanisms - the prior early-voting schedule, same-day registration, or out-of-precinct voting - had fostered minority participation. The court found no evidence that they had done so, particularly given figures showing increased minority turnout and registration in the 2014 elections. App. 295a; see also App. 292a (early voting), 378a (out-of-precinct voting), 525a (same-day registration).

b. No discriminatory motive

The district court then analyzed whether SL 2013-381 had been motivated by a racially discriminatory intent. App. 438a. The court applied the factors from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and was "not persuaded that racial discrimination was a motivating factor." App. 470a.

First, the court considered whether the law bore more heavily on one race. It considered plaintiffs' "strongest fact" to be that African-Americans had previously used some eliminated mechanisms at rates higher than whites, App. 440a, but concluded that "North Carolina's remaining mechanisms continue to provide African Americans with an equal opportunity to participate in the political process." *Id.*

Plaintiffs also sought to prove discriminatory intent through evidence that some legislators had requested racial data on the use of certain voting practices. But the district court found it impossible to determine, from plaintiffs' evidence, the "character" of much of the data the legislature actually received. App. 442a. Some of the data, particularly as to same-***12** day registration, was not available to the legislature until after SL 2013-381 had been drafted and debated. App. 444a-445a. Whatever the available data included, however, the district court found that "*[a]ny* responsible legislator" would have needed that type of information. App. 443a (emphasis added). First, because photo-ID laws are regularly challenged on the basis of alleged racial disparities, legislators "would need to know the disparities in order to account for such challenges." *Id.* Second, at the time of the requests, North Carolina was still subject to preclearance, meaning that "evaluating racial impact was a prerequisite to evaluating the likelihood that any voting change would be pre-cleared[.]" *Id.*

Second, the court considered whether the North Carolina legislature had a "consistent pattern" of actions disparately impacting minorities. Referring to its detailed *Gingles* findings, App. 292a-387a, the court found "little evidence of official discrimination since the 1980s." App. 458a.

Third, the court considered the challenged laws' "historical background." The North Carolina legislature had been in the process of developing SL 2013-381 at the time of this Court's decision in *Shelby County* on June 25, 2013; after that decision, the legislature revised and expanded the bill, passing it a month later. App. 104a-117a. Plaintiffs argued that the legislature's expansion of the bill following *Shelby County* showed discriminatory purpose. App. 459a. The district court rejected that argument, finding the more persuasive explanation to be that the end of preclearance simply "altered the burden of proof calculus for North Carolina legislators considering changes to voting laws." App. 461a. The court also ***13** found that "all concede" that the legislature followed all procedural rules in enacting the challenged laws. App. 462a.

Fourth, the court found that no "contemporary statements" by legislators showed discriminatory intent. App. 466a-468a. To the contrary, the court had already found legislators' explanations for the law non-tenuous under *Gingles.* App. 332a-387a.

Finally, the court considered the "cumulative evidence" of intent and found that "[t]he State's proffered justifications for the combined mechanisms under review … are consistent with the larger purpose of achieving integrity, uniformity, and efficiency in the political process." App. 468a.

2. The Fourth Circuit's Opinion

On July 29, 2016, the Fourth Circuit reversed. It left undisturbed the district court's conclusion that the challenged provisions had no discriminatory impact. However, the court rejected as "clearly erroneous" the district court's factual conclusion as to the legislature's *motive* in enacting SL 2013-381. App. 26a. Indeed, the court concluded that the "record 'permits only one resolution' " of the issue, App. 57a-58a: that those provisions were "enacted with racially discriminatory intent in violation of the Equal Protection Clause … and §2 of the [Voting Rights Act]." App. 26a.

As a threshold matter, the court framed its intent analysis against the background of North Carolina's record of racially polarized voting. App. 30a. It found that the legislature knew that African-American voters were "highly likely" to vote for Democrats, and that, "in recent years, African Americans had begun ***14** registering and voting in unprecedented numbers," leading to "much of the recent success of Democratic candidates in North Carolina." App. 39a. That, the Court reasoned, gave the Republican-majority legislature an "incentive for intentional discrimination." App. 31a.

Proceeding to the *Arlington Heights* factors, the court first considered the historical background of the reforms. While conceding that past discrimination has only "limited weight" after *Shelby County,* the court nonetheless stated that the State's "pre-1965 history of pernicious discrimination informs our inquiry." App. 33a. The court also said it could not ignore that the reforms were enacted "within days of North Carolina's release from … preclearance," because otherwise North Carolina could " 'pick up where it left off in 1965' to the detriment of African American voters in North Carolina." App. 33a-34a (alteration omitted) (quoting *LWV,* 769 F.3d at 242).

Contrary to the district court's finding, the Fourth Circuit found the record "replete" with instances since the 1980s where "the North Carolina legislature has attempted to suppress and dilute the voting rights of African Americans." App. 34a. Principally, the court pointed to: (1) "over fifty objection letters" sent by the U.S. Department of Justice ("DOJ") between 1980 and 2013 contesting proposed election law changes in North Carolina, App. 35a; and (2) "fifty-five successful cases" brought under §2 during the same period, App. 36a.

Second, the Fourth Circuit considered the sequence of events leading up to enactment of the reforms. The court assigned special weight to the fact that SL 2013-381 followed "immediately" after the ***15** *Shelby County* decision removed North Carolina from §5 preclearance. *Id.*

Third, the court considered legislative history. While little history existed, the court focused on some legislators' "requests for and use of race data [.]" App. 47a. The court inferred from this that the legislature deliberately targeted practices "disproportionately used by African Americans." App. 48a. The court did not acknowledge or address the district court's contrary findings about this data, including the finding that "[a]ny responsible legislator" would have needed to consider such data in light of North Carolina's still-existing preclearance obligations. App. 443a.

Fourth, the Fourth Circuit thought the challenged laws bore more heavily on African-Americans because those voters " 'disproportionately used' the removed voting mechanisms and disproportionately lacked DMV-issued photo ID." App. 48a. The court concluded this was enough to show unequal impact and rejected as irrelevant the district court's finding that the evidence "demonstrated that North Carolina's remaining mechanisms continue to provide African Americans with an equal opportunity to participate in the political process." App. 48a-51a, 440a.

Having concluded that racial discrimination motivated the North Carolina reforms, the Fourth Circuit shifted the burden to the State to prove that the law would have been enacted absent that motive. App. 55a. The court conceded that, "a rational justification can be imagined for … some of the challenged provisions," and also that the district court "addressed the State's justifications for each provision at length." App. 56a. Nonetheless, the Fourth Circuit ***16** independently reviewed the record and concluded that the "evidence plainly establishes race as a 'but-for' cause of SL 2013-381." App. 58a. The panel therefore invalidated the challenged provisions in their entirety. App. 67a, 71a.

Reasons for Granting the Petition

The Court should grant certiorari for three separate reasons. First, the Fourth Circuit's decision effectively nullifies *Shelby County.* Second, it resolves an issue of extraordinary importance - whether a State has *deliberately* structured its election laws to disenfranchise African-Americans - in a way that is profoundly misguided and that threatens numerous State election laws. Third, it exacerbates existing conflict among federal circuits over analysis of §2 vote denial claims.

I. The Fourth Circuit's Decision Effectively Nullifies *Shelby County*.

The Fourth Circuit's decision cannot be reconciled with *Shelby County,* which invalidated the formula for application of §5 of the Voting Rights Act. See 52 USC §§10303, 10304. In particular, the panel restores the §5 preclearance standard - which North Carolina is no longer required to satisfy - by reading it into §2, a separate provision with a different "structure, purpose, and application." *Holder v. Hall,* 512 U.S. 874, 883 (1994) (Kennedy, J., joined by Rehnquist, C.J.). This is a sufficient reason to grant certiorari. See S. Ct. R. 10(c) (certiorari appropriate if a federal circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court").

***17** The purpose of §5 was to prevent States subject to preclearance from enacting "voting-procedure changes … that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States,* 425 U.S. 130, 141 (1976). Those States could obtain "preclearance only by proving that the [proposed] change had neither the purpose nor the effect" of retrogression. *Shelby Cty.,* 133 S. Ct. at 2620 (alteration and quotes omitted). Potential retrogression was analyzed by comparing a State's proposed new voting rules to the "baseline" of existing or contemplated rules and determining whether the new rules would " 'abridge[ ] the right to vote' relative to the status quo [.]" *Reno v. Bossier Par. Sch. Bd.,* 528 U.S. 320, 334 (2000) ("*Bossier II*"); see *Shelby County,* 133 S. Ct. at 2626-27; *Georgia v. Ashcroft,* 539 U.S. 461, 482 (2003); *Reno v. Bossier Par. Sch. Bd.,* 520 U.S. 471, 478 (1997) ("*Bossier I*"); *Hall,* 512 U.S. at 883. One consequence of the anti-retrogression rule was to establish a one-way ratchet that locked in incremental improvements in minority voting opportunities.

The §2 test is discrimination, not retrogression. In a §2 case, the baseline is not the status quo, but the "hypothetical alternative" of "what the right to vote *ought to be*[.]" *Bossier II,* 528 U.S. at 334; *Hall,* 512 U.S. at 884 ("Unlike in §5

cases … a benchmark does not exist by definition in §2 dilution cases."). If a State's voting rules are discriminatory, "the status quo itself must be changed." *Bossier II,* 528 U.S. at 334; see also *Hall,* 512 U.S. at 880-81. But at the threshold, States subject only to §2 may choose from a wide range of nondiscriminatory voting regulations, as long as they do not act with discriminatory purpose.

***18** While the panel purported to apply §2, in actuality it employed a variant of §5's anti-retrogression analysis. Neither the district court nor the panel found evidence that North Carolina's reforms have *actual discriminatory* effect, or even any direct evidence that they were intended to do so. Instead the panel identified *potentially retrogressive* effect, and inferred discriminatory intent from that.

Over and over again, the panel returned to the fact that North Carolina had *changed* its law to remove voting mechanisms that had existed before. App. 33a, 50a-52a, 54a-55a. It accused the legislature of "re-erect[ing] … barriers" to minority electoral participation that previous legislatures had lowered. App. 39a-40a. It gave little weight to the fact that - as the district court observed - SL 2013-381 and SL 2015-103 simply aligned North Carolina with election laws in other States, many of which do not offer early voting, same-day registration, out-of-precinct voting, or preregistration. See App. 51a-52a, 201a, 229a, 253a, 259a. Instead, the panel asserted instead that "*removing* voting tools … meaningfully differs from not initially implementing such tools." App. 52a. That analysis plainly derives not from §2 but §5, the provision "which uniquely deal[t] only and specifically with *changes* in voting procedures[.]" *Bossier II,* 528 U.S. at 334. And that reasoning also effectively restores a version of the previous preclearance regime by enjoining the reforms based on their *potential* effects alone. Considering the panel's indignation that North Carolina enacted its reforms on the heels of *Shelby County* - which, as the panel put it, "release[d]" the State from preclearance, App. 33a, 41a-42a, 45a - that appears exactly what the panel had in mind.

***19** The panel also contradicted *Shelby County* in a deeper sense. If *Shelby County* stands for anything, it means that even in States with shameful histories of discrimination, "history did not end in 1965." 133 S. Ct. at 2628. The Constitution does not allow the sins of Civil Rights-era legislators to be visited on their grandchildren and great-grandchildren. *Id.* at 2929. Nor does it permit Congress to perpetually assume that former §5 jurisdictions maintain minority voting rights purely under threat. *Id.* at 2627.

But in the eyes of the panel, where North Carolina is concerned, it is *always* 1965. The Fourth Circuit's opinion conjures a menacing world where "race and politics" are "inextricab[ly] linked," App 14a, where "powerful undercurrents" tempt legislators to racial warfare, App. 40a, and where the current majority targets its racial opponents with "almost surgical precision," App. 16a. In sum, the Fourth Circuit barely attempted to hide its view that North Carolina's Republican legislators - having been vexed for six decades by §5 - itched to "pick up where [they] left off in 1965" as soon as they were given the opportunity. App. 33a-34a (quotes and alteration omitted). That rule of decision, however, comes not from *Shelby County* but from William Faulkner: "The past is never dead. It's not even past."

The Court should grant certiorari to resolve the conflict between the Fourth Circuit's decision and *Shelby County.*

***20 II. By Inappropriately Convicting North Carolina Of Deliberate Racial Discrimination, The Fourth Circuit Provides a Roadmap For Invalidating Many State Election Laws.**

A second reason to grant certiorari is that the Fourth Circuit has decided an extraordinarily important question in a way that is egregiously misguided and that threatens numerous State election laws. See S. Ct. R. 10(a), 10(c). There is no worse charge against a State than deliberate racial discrimination, especially in how the State governs elections. This Court's decisions wisely limit such a charge to the clearest-cut cases. Yet the Fourth Circuit did not hesitate to level it here: It accused and convicted the North Carolina legislature of *deliberately designing* its laws not just to disenfranchise African-Americans, but to usher in a new "era of Jim Crow." App. 46a. That decision is an affront to North Carolina's citizens and their elected representatives and provides a roadmap for invalidating election laws in numerous States.

A. The Fourth Circuit's Intent Analysis Is Egregiously Misguided.

Two things in particular demonstrate how extraordinary the Fourth Circuit's decision is, how far it goes beyond this Court's precedents, and why it calls out for review.

1. First, the notion that *these* election laws are reminiscent of "the era of Jim Crow" is ludicrous. To the contrary, North Carolina's reforms leave it with a voting system in the national mainstream and, indeed, one more open than many other States.

***21** Three practices eliminated by North Carolina's reform - same-day registration, out-of-precinct voting, and pre-registration - are *already* disallowed by most States. A supermajority of States disallows same-day registration and pre-registration of 16-year-olds (38 and 40, respectively), and a majority does not count out-of-precinct ballots (26). See also, *e.g., Ohio Democratic Party v. Husted,* 834 F.3d 620, 628-29 (6th Cir. 2016). A fourth practice - early voting - was not eliminated but shortened from 17 to 10 days, while maintaining aggregate voting hours from prior elections. App. 343a. Again, this puts North Carolina in the mainstream: 37 States offer early-voting periods ranging from four to 45 days, and North Carolina remains one of only 22 States to offer weekend early voting. [2] By making these sensible reforms, North Carolina was not receding into the racist past; it was aligning with *current* State practices.

Nor is North Carolina's photo-ID law a reversion to the "Jim Crow" past. As this Court held in *Crawford,* such laws constitutionally further "weighty" interests in "preventing voter fraud" and promoting "public ***22** confidence in the integrity of the electoral process." *Crawford,* 553 U.S. at 191, 197. And compared to the law upheld in *Crawford,* North Carolina's law has far more features designed to maximize the right to vote, including:

• its lengthy implementation period, App. 164a, 454a;

• the $2 million the legislature set aside to educate voters about the ID requirement, App. 133a;

• the State's efforts to identify voters who lack qualifying ID and provide means for them to obtain a free one, App. 136a;

• the legislature's expansion of the list of qualifying IDs before the requirement's effective date, App. 117a; and

• the lenient "reasonable impediment exception" that allows voters lacking ID to cast a provisional ballot. App. 118a, 529a; *South Carolina,* 898 F. Supp. 2d 30) (preclearing identical requirement).

Under *Crawford,* it is hard to imagine any but the most draconian photo-ID laws being invalidated as purposefully discriminatory. The panel's decision to invalidate *this* lenient law on that basis - while equating it with "Jim Crow," App. 46a - shows that something has gone badly awry.

2. Second, to the best of our knowledge, the Fourth Circuit's decision marks the first time in history that an election law has been invalidated as purposefully discriminatory without *either* discriminatory effect *or* direct evidence of discriminatory intent. Such a ***23** dramatic step beyond this Court's precedents warrants review.

This Court has admonished that "discriminatory purpose" means "more than intent as volition or intent as awareness of consequences." *Pers. Adm'r of Mass. v. Feeney,* 442 U.S. 256, 279 (1979) (citing *United Jewish Orgs. of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 179 (1977) (Stewart, J., concurring)). Rather, it means a decision-maker acted " 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* It is deeply implausible that North Carolina's ID law was enacted "because of" its *potential* impact on African-American voters when the legislature actively ensured

it would *not* adversely affect that group, see App. 117a, 118a, 133a, 136a, and where not a shred of legislative history suggests such intent.

It is even more shocking for a court of appeals to override a district court's finding on a paradigmatic fact question - legislative motive - based on a paper record. The district court's finding that "racial discrimination was [not] a motivating factor" in SL 2013-381, App. 470a, derived from a meticulous examination of a more than 25,000-page record that features the testimony of 21 expert and 112 fact witnesses across two trials spanning 21 days. App. 87a. Nonetheless, based on its own evaluation of the evidence, the Fourth Circuit announced that this massive record " 'permits only one resolution,' " namely that "race [was] a 'but for' cause of SL 2013-381." App. 57a-58a (quoting *Pullman-Standard v. Swint,* 456 U.S. 273, 292 (1982)).

Furthermore the panel cited only one case in which an appellate court reversed a district court's finding ***24** and rendered its own finding of intentional racial discrimination: *Hunter v. Underwood,* a case where Alabama *conceded* that the century-old law at issue was motivated by discriminatory intent, and where the law's "disparate effect persists today." 471 U.S. 222, 227, 229, 231 (1985). App. 27a. In less flagrant situations, however, this Court has found "error" when a district court "resolve[s] the disputed fact of [discriminatory] motivation at the summary judgment stage." *Hunt v. Cromartie,* 526 U.S. 541, 552-53 (1999). And that rule has even greater force, as here, where a court of appeals reviews the district court's resolution of fact questions after lengthy trial proceedings involving live witnesses. In that situation, even if a reviewing court is convinced the lower court erred, "the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance." *Pullman-Standard,* 456 U.S. at 293.

The panel's decision casts a pall over every electoral measure the North Carolina legislature may pass in the future, and on the weakest possible factual and legal grounds. The Court should grant review and reverse it.

B. The Fourth Circuit's Intent Analysis Provides A Roadmap For Invalidating Election Laws In Numerous States.

Respondents will likely try to characterize the Fourth Circuit's decision as fact-bound and affecting only North Carolina. The opposite is true. Most of the "evidence" the Fourth Circuit relied on to find discriminatory intent could readily be deployed to invalidate the election laws of numerous States. The potential multi-State effects of the Fourth Circuit's ***25** decision thus furnish an independent reason for granting certiorari.

1. The Fourth Circuit's principal theory for identifying discriminatory intent was that "racially polarized" voting in North Carolina provided an incentive for Republicans to discriminate against African-Americans as reliable Democratic voters. App. 33a, 39a-40a. The court's opinion hammers this theme repeatedly. App. 14a, 30a, 32a, 38a.

It is hard to imagine a more destabilizing addition to the §2 vote denial analysis than "racial polarization." Polarized voting, after all, "is not a problem unique to the South." *Nw. Austin Mun. Util. Dist. No. One v. Holder,* 557 U.S. 193, 228 (2009) ("*NAMUDNO*") (Thomas, J., concurring). African-American voters typically favor the Democratic Party - by forty points or more - in every part of the Nation, [3] both in States formerly subject to §5 preclearance and in States that were not. [4] If polarized voting implies discriminatory targeting whenever ***26** election laws are reformed, *any* new voting regulation proposed by Republicans in *any* State would be suspect *by definition.* The partisan toxicity that wrongheaded standard would introduce into the Voting Rights Act can scarcely be imagined.

Moreover, making a vote denial analysis turn on racial polarization fits badly with this Court's precedents. Even in the context of vote *dilution*, where polarization has been a part of this Court's analysis since *Gingles,* see 478 U.S. at 48, courts have not yet resolved what polarization *is*, how to identify it, and how much of it is enough to matter. See Powers, *supra,* at 888-89. Transposing polarization into vote *denial* cases, as the Fourth Circuit has done here, is hardly a promising idea.

Moreover, the Fourth Circuit's polarization analysis again conflicts with *Shelby County.* To be sure, the *dissent* in that case - in terms strikingly similar to the Fourth Circuit's - thought polarization incentivizes racial discrimination and thus justifies preclearance. *Shelby Cty.,* 133 S. Ct. at 2643 (Ginsburg, J. dissenting). But the majority disagreed, sharply distinguishing such "second-generation barriers" as involving "vote dilution," not "access to the ballot." *Id.* at 2629. And elsewhere this Court has cautioned that "racially polarized voting is not evidence of unconstitutional discrimination." *NAMUDNO,* 557 U.S. at 228 (Thomas, J., concurring) (citing *City of Mobile, Ala. v. Bolden,* 446 U.S. 55, 71 (1980)); see also *Rogers v. Lodge,* 458 U.S. 613, 623-24 (1982) (rejecting inference based on polarization but affirming finding of discrimination on other grounds). Indeed, the Fourth Circuit virtually *conceded* as ***27** much, see App. 31a, but drew the inference anyway. Its willingness to open that door for the first time should not go unreviewed.

2. The panel's supposed historical evidence of official discrimination in North Carolina, moreover, could be used to strike down voting laws in any former preclearance State. The Fourth Circuit identified as key evidence "over fifty [DOJ] objection letters" sent under §5 of the Voting Rights Act from 1980 to 2013. App. 35a. But if having received such letters over the past three decades shows *present* discriminatory intent, then numerous former §5 States are in even greater jeopardy of having election changes invalidated under §2 - such as Alabama (64 objection letters since 1980), Mississippi (125), Georgia (97), Louisiana (100), Texas (134), and South Carolina (76). See *Section 5 Objection Letters,* https://www.justice.gov/crt/section-5-objection-letters. The Fourth Circuit insisted this reasoning would not "freeze [ ] election law in place as it is today," App. 72a, but why wouldn't such a freeze be the *inevitable* result of the Fourth Circuit's guilt-by-past-conduct standard?

Assuming they are probative at all, the §5 letters show nothing like the pervasive intentional discrimination suggested by the Fourth Circuit. To begin with, the vast majority focuses on purported disparate effects rather than purposeful discrimination. See, *e.g.*, DOJ Ltr. of Apr. 11, 1986. Eleven of the fifty were subsequently *withdrawn* by DOJ. See *Objection letter table,* https://www.justice.gov/crt/voting-determination-letters-north-carolina. Of the thirty-nine remaining objections, only *ten* actually concerned the *State* as ***28** opposed to a municipality, county, or school board. Finally, contrary to the Fourth Circuit's suggestion that "several [letters] since 2000" concerned "North Carolina," App. 35a, no letter concerned the State, as opposed to a locality, after 1996. In other words, the State went from 1996 to 2013 - *seventeen* years - without receiving a §5 letter from DOJ.

Finally, a §5 objection does not equate to a *finding* of anything. It means only that the recipient government has not carried its burden to show that a proposed change lacks discriminatory purpose or effect. See *Georgia v. United States,* 411 U.S. 526 (1973); 28 CFR 51.19. App. 35a. If a court can infer discriminatory intent by North Carolina on that basis, it can do so in any former preclearance jurisdiction.

3. The same is true of the Fourth Circuit's use of §2 lawsuits against North Carolina. App. 36a. In past decades §2 lawsuits have challenged election laws in many States, many successfully. See, *e.g.*, Robert A. Kengle, *Voting Rights in Georgia: 1982-2006,* 17 S. Cal. Rev. L. & Soc. Just. 367, 402 (2008) (discussing dozens of §2 cases in Georgia). Are courts to infer that any election law enacted *today* by any State that lost a §2 lawsuit in the past is motivated by discriminatory intent? The Fourth Circuit's standard plainly suggests the answer is yes.

Furthermore, when one considers the "evidence" the Fourth Circuit cited, it is obvious why the mere existence of prior §2 lawsuits does not reliably indicate intentional discrimination. Relying on a law review article, the court purported to identify "fifty-five successful" §2 lawsuits in North Carolina since 1980. See App. 36a (citing Anita S. Earls, Emily Wynes, LeeAnne Quatrucci, ***29** *Voting Rights in North Carolina: 1982-2006,* 17 S. Cal. Rev. L. & Soc. Just. 577 (2008)). Even a cursory review of that article shows the Fourth Circuit was mistaken. While the article *surveys* fifty-five lawsuits, see *id.* (App. B), not every one concerned intentional discrimination. [5] Many of the cases were resolved in favor of the defendant. See, *e.g., Gause v. Brunswick County,* 92 F.3d 1178 (4th Cir. Aug. 13, 1996) (table); *Lewis v. Alamance,* 99 F.3d 600 (4th Cir. 1996). Only a small number involved *legislative* action. See, *e.g., Gingles,* 478 U.S. 30; *Haith v. Martin,*

618 F. Supp. 410 (E.D.N.C. 1985) (enjoining election of judges under non-precleared laws). And only a handful involved the *State,* as opposed to a local government body. Finally, the surveyed cases do not contain one relevant and successful suit after 1997 - sixteen years before North Carolina enacted the reforms under review. [6] If this is enough to support an inference of intentional discrimination by North Carolina, few States are safe.

4. The Fourth Circuit also relied on evidence that African-Americans in North Carolina ***30** disproportionately lack "DMV-issued ID"; that African-American voters use some mechanisms restricted by SL 2013-381 at rates higher than whites; and that the legislature was aware of those figures when enacting the law. App. 47a-48a. Using this sort of evidence to show discriminatory intent, however, would leave many States' election laws vulnerable as well.

For instance, as the district court pointed out, plaintiffs' own expert testified that "ID possession disparities exist nationwide" and that he could not "find a combination of acceptable photo IDs that will make these disparities go away." App. 448a; see also, *e.g., Husted,* 834 F.3d at 631 (noting "evidence that African Americans may use early in-person voting at higher rates than other voters"). The Fourth Circuit's analysis, therefore, "would likely invalidate voter-ID laws in any State where they are enacted, regardless of the assortment of IDs selected." App. 448a.

As for the legislature's awareness of those statistical differences, the district court pointed out that "[a]ny responsible legislator would need to know" about such data to account for inevitable legal challenges to election laws - particularly considering that the allegedly suspect requests occurred when North Carolina was still under preclearance. App. 443a. In other words, the Fourth Circuit based its finding on actions *any* legislator should have taken to evaluate the potential racial impact of an election change - *especially* in a State then subject to preclearance.

5. Inevitably, respondents will point to the Fourth Circuit's supposed "smoking gun," in which the State supposedly conceded that it "did away with one of the ***31** two days of Sunday voting" - *i.e.*, when shortening the early-voting period - because " '[c]ounties with Sunday voting in 2014 were disproportionately black.' " App. 40a (quoting Defs.' Prop. Findings of Fact and Conclusions of Law); App. 711a. In fact, that "smoking gun" is just smoke and mirrors.

To hypothesize that North Carolina intended to keep African-Americans from voting by eliminating only the first of two Sunday early-voting days is absurd. "[I]n 2010, *no* African American voted on the first Sunday of early voting" in North Carolina, because no county *offered* voting on that day. App. 218a. All voters, furthermore - white and African-American alike - were more likely to vote during the *last* ten early-voting days than during the first seven. App. 208a. The panel's interpretation thus implies that North Carolina intended to disenfranchise African-Americans by eliminating a voting day that *not a single African-American voter had actually used* during the previous midterm general election, while not only retaining voting on the days that African-Americans use most, but *increasing* the voting hours on those days. App. 224a-225a (describing increase in early voting availability, including Sunday voting, between 2010 and 2014); App. 402a-404a. The argument defeats itself.

The Fourth Circuit also grossly distorts what North Carolina actually stated. App. 711a. The State's proposed findings included racial statistics to illustrate how the then-Democrat-controlled board of elections ensured that Sunday voting would be available in heavily Democrat and/or African-American counties but not in counties more likely to ***32** vote for Republicans. See *id.*; see also App. 344a-345a (finding such manipulation had occurred). North Carolina cannot be faulted for making that point, nor for its response - namely, to "make [early voting] more convenient for *all* voters" by concentrating early voting on the days all voters are likeliest to use. App. 712a (emphasis added). As the State explained, those efforts led to an *increase* in "the number of days for Saturday and Sunday early voting, and the number of counties that held Saturday or Sunday voting." App. 224a-225a, 402a-404a. There is no "smoking gun" here - only more evidence of the care and evenhandedness that went into these sensible electoral reforms.

III. The Fourth Circuit's Decision Exacerbates Circuit Confusion About The Relevance Of Statistical Disparities In §2 Claims.

A third reason to grant certiorari is that the Fourth Circuit's decision adds another layer of conflict to the already muddled approach of federal circuits to statistical evidence in §2 claims. Four circuits - the Fifth, Sixth, Seventh, and Ninth - already disagree on whether statistical racial disparities in the use of particular voting mechanisms can prove discriminatory effect under §2. The Fourth Circuit's holding - that legislators' awareness of statistical disparities may prove discriminatory *purpose* even in the absence of discriminatory effect - complicates matters still further. The Court should grant certiorari to clarify that mere disparities in the use of voting mechanisms are insufficient to prove discriminatory purpose or effect under §2.

The Ninth and Seventh Circuits have held that statistical racial disparities in possession of required ***33** voter-ID are insufficient to prove a §2 vote denial claim. In *Gonzalez v. Arizona,* the Ninth Circuit affirmed the district court's conclusion that Arizona's photo-ID law did not violate §2 solely because "Latinos, among other ethnic groups, are less likely to possess the [required] forms of identification[.]" 677 F.3d 383, 407 (9th Cir. 2012) (internal quotations omitted), *aff'd on other grounds sub nom. Arizona v. InterTribal Council of Arizona, Inc.,* 133 S. Ct. 2247 (2013). Instead, the court required "evidence that Latinos' ability or inability to obtain or possess identification for voting purposes … *resulted in* Latinos having less opportunity to participate in the political process and to elect representatives of their choice." *Id.* (emphasis added). Similarly, in *Frank v. Walker,* the Seventh Circuit rejected the district court's conclusion that disparities in African-Americans' possession of qualifying IDs established a §2 denial claim. 768 F.3d 744, 752-53 (7th Cir. 2014), *cert. denied,* 135 S. Ct. 1551. The Seventh Circuit concluded that those findings "do not show a 'denial' of anything" under §2, which, instead, requires showing that minority voters "have less 'opportunity' than whites to get photo IDs." *Id.* at 753.

In *Ohio Democratic Party v. Husted,* the Sixth Circuit followed the same approach in rejecting the claim that Ohio's six-day reduction in its early-voting period violated §2 or the Equal Protection Clause. 834 F.3d 620. The court reversed the district court's inference of a discriminatory burden from the mere fact that "African Americans have shown a preference for voting [during the eliminated period] at a rate higher than other voters." *Id.* at 627-28. In the Sixth Circuit's view, this analysis begged the pertinent §2 question, which is whether the voting change "*actually* ***34** disparately impacts African Americans" by giving them "less opportunity" than others to participate. *Id.* at 639 (emphasis added).

The Fifth Circuit has taken a different approach. In *Veasey v. Abbott,* a fractured en banc court relied in part on statistical disparities to conclude that a Texas voter-ID law "disparately impacts African-American and Hispanic registered voters[.]" 830 F.3d 216, 251, 264 n.61 (5th Cir. 2016), *pet. for certiorari filed,* Sept. 23, 2016. With respect to the discriminatory *purpose* inquiry, the court "remand[ed] for a reweighing of the evidence." *Id.* at 231, 230 (plurality) (quoting *Pullman-Standard,* 456 U.S. at 292). Nonetheless, the court added that the "circumstantial" evidence supporting discriminatory intent included the fact that "drafters and proponents of [the Texas ID law] were aware of the likely disproportionate effect of the law on minorities." *Id.* at 236.

The Fourth Circuit's decision in this case further muddies the standards for §2 vote denial claims in two respects. First, the Fourth Circuit has adopted yet a *third* approach to statistical racial disparities in the use of voting mechanisms. Unlike the Sixth, Seventh, and Ninth Circuits - but like the Fifth - the Fourth Circuit considers such disparities as highly probative that minorities have been denied voting opportunities under §2. But unlike the Fifth Circuit, which considered such disparities as to both discriminatory impact *and* purpose, the Fourth Circuit considers them as to *purpose* even when the challenged laws lack discriminatory impact.

Second, the Fourth Circuit has confused the standard of review for district court findings. Whereas the Fifth Circuit followed this Court's "usual ***35** requirement" of ordering remand instead of reweighing intent evidence, see *Pullman-*

Standard, 456 U.S. at 292, the Fourth Circuit declared that the massive district court record permitted only one factual conclusion - namely that the North Carolina legislature acted with racially discriminatory intent. App. 57a-58a.

The confusion has been deepened still further by the Fourth Circuit's decision in *Lee v. Virginia State Board of Elections,* in which a different panel upheld a Virginia photo-ID law quite similar to North Carolina's. See F.3d , 2016 WL 7210103 (4th Cir. Dec. 13, 2016). The *Lee* panel was bound by the decision under review here but sought to distinguish it on various minor grounds - *e.g.*, that the Virginia legislature acted before *Shelby County* was decided, that no racial data had been reviewed by the legislature, and so on. See *id.* at *9-10. That reasoning only illustrates that the Fourth Circuit's analysis does not lead to predictable resolutions of photo-ID cases, even within the same circuit.

The Court should grant certiorari to resolve this conflict over the relevance of statistical racial disparities in the application of §2 of the Voting Rights Act.

Conclusion

The petition for writ of certiorari should be granted.

Footnotes

1 See generally National Conference of State Legislatures, Election Laws and Procedures Overview (Aug. 19, 2016) ("NCSL Overview) (cataloguing election practices), www.ncsl.org. The district court noted that accurately counting State election practices is "subject to interpretation and coding, App. 229a, so its figures are marginally different from the NCSL's. App. 201a 203a, 229a, 253a, 259a.

2 See NCSL Overview. North Carolina also continues to be one of 27 States to offer no excuse absentee voting, see *id.*, a practice whose availability mitigates any effects from reducing early voting days.

3 See Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation,* 3 Harv. L. & Pol'y Rev. 59, 71 72 Table 2 (2009).

4 See Stephen Ansolabehere, Nathaniel Persily, Charles Stewart III, *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. F. 205 (2013); see also John M. Powers, *Note: Statistical Evidence of Racially Polarized Voting in the Obama Elections, and Implications for Section 2 of the Voting Rights Act,* 102 Geo. L.J. 881, 892 (2014) (noting "courts have recently found racial bloc voting patterns in Section 2 cases litigated against jurisdictions in Wyoming, New York, and Ohio).

5 See, *e.g., Bartlett v. Stephenson,* 535 U.S. 1301 (2002) (addressing whether whole county provision in state constitution was voided by §2); *Lake v. N.C. State Bd. of Elections,* 798 F. Supp. 1199 (M.D.N.C. 1992) (unsuccessful lawsuit challenging extension of election hours).

6 Of the four after 1997, two are irrelevant. See *Bartlett,* 535 U.S. 1301 (whole county provision in state constitution not voided by §2); *Kindley v. Bartlett,* No. 5:05 cv 00177 (E.D.N.C. 2005) (county chairman challenged non precleared provisional ballot law). The other two did not turn out favorably for the plaintiff. See *Sample v. Jenkins,* No. 5:02 cv 00383 (E.D.N.C. 2002) (dismissed following preclearance approval); *White v. Franklin County,* No. 5:03 cv 00481 (E.D.N.C. 2004) (mooted by intervening events).

2017 WL 632527 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF NORTH CAROLINA, et al., Petitioners,
v.
NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al.

No. 16-833.
February 13, 2017.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Reply in Support of Petition for a Writ of Certiorari

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***1** Introduction

The Court should grant review where a circuit court convicts a State legislature of seeking to re-inaugurate the "era of Jim Crow," App. 46a; where it invents a judicial version of the pre-clearance standard decommissioned by *Shelby County v. Holder,* 133 S. Ct. 2612 (2013); where it finds intentional racial discrimination based on "evidence" that would convict many other States of the same false charge; and where it signals a radical shift in reviewing district court fact finding under the Voting Rights Act. Each of these astonishing steps was taken by the Fourth Circuit panel below in facially invalidating North Carolina's 2013 election reforms, including a photo ID requirement. The Court should grant certiorari and reverse that misguided decision, which usurps North Carolina's sovereign authority to regulate its own elections. Respondents offer no reason to let that decision stand.

***2 Reasons for Granting the Petition**

I. The Fourth Circuit's Decision Effectively Nullifies *Shelby County*.

The Petition showed that, while the panel "purported" to apply §2 of the Voting Rights Act, "in actuality it employed a variant of §5's anti-retrogression analysis" in contravention of *Shelby County.* Pet. 18, 16-19. Respondents' three objections to that argument hold no water.

First, Respondents note that the panel did not "mention" the §5 standard. NAACP 25; U.S. 14. That misses the point. Petitioners showed that the Fourth Circuit "restore[d]" the now-inapplicable §5 standard "by *reading it into §2.*" Pet. 16 (emphasis added). The fact that the panel disguised that obsolete analysis under the veneer of §2 should fool no one.

Second, Respondents defend the panel's heavy reliance on *changes* to North Carolina's election laws - a key focus of the §5 retrogression analysis, Pet. 17-18 - as merely considering a law's "historical background" for discriminatory intent. NAACP 26; U.S. 14 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 267 (1977)). But under the panel's analysis, *any* change to voting practices used at higher rates by minorities is *presumptively* discriminatory where there is "racial polarization." See App. 30a-33a, 39a-40a. This is an anti-retrogression rule by another name, and effectively places North Carolina *back* under the preclearance regime discarded by *Shelby County* - now administered by courts instead of the Justice Department. Pet. 16-19.

***3** Third, and relatedly, the NAACP asserts the panel did not "*unduly* rely on North Carolina's pre-1965 history of official racial discrimination." NAACP 27 (emphasis added). Even that effectively concedes conflict with *Shelby County*, which taught that "history did not end in 1965." 133 S. Ct. at 2628. If Congress may not burden North Carolina based on "40-year-old facts having no logical relation to the present day," *id.* at 2629, the Fourth Circuit's reliance on "North Carolina's pre-1965 history of pernicious discrimination" to "inform[] [its] inquiry" directly repudiates this Court's precedent - especially given the panel's candid statement that North Carolina's "long-ago history bears *more heavily* here than it might otherwise." App. 33a-34a (emphasis added).

If there were doubt that the panel's analysis conflicts with *Shelby County*, its discussion of polarization mirrors passages from the *Shelby County* dissent, see *Shelby County,* 133 S. Ct. at 2643 (Ginsburg, J., dissenting); later cites that dissent as *authority*, see App. 29a (citing *id.* at 2635 (Ginsburg, J., dissenting)); and adopts the reasoning of the very same 2006 Voting Rights Act re-authorization report that *Shelby County* rejected. App. 31a (citing H.R. Rep. No. 109-478, at 35 (2006)). It is fair to say that the Fourth Circuit's opinion reads like a *continuation* of the *Shelby County* dissent.

Shelby County freed former preclearance States like North Carolina to legislate without "long-ago history" - however shameful - forever besmirching the motives of today's legislators. At a minimum, the decision *must* mean that those States may adjust voting procedures as they choose - potentially in ways ***4** §5 would have blocked - provided they satisfy §2.

Bartlett v. Strickland, 556 U.S. 1, 23 (2009) (explaining §2 "is not concerned with maximizing minority voting strength"). But it *cannot be* consistent with a judicial approach like the Fourth Circuit's which - openly disdainful of *Shelby County's* result - smuggles §5 preclearance into §2. The Court should grant certiorari to resolve the conflict with *Shelby County.*

II. The Panel's Extraordinary Decision Provides A Roadmap For Invalidating Many State Election Laws.

A. The Fourth Circuit's Intent Analysis Is Egregiously Misguided.

This Court should grant review where a circuit court finds a State has deliberately structured its election laws to disenfranchise minority voters. Pet. 20-24. That is especially true here - where the Fourth Circuit hyperbolically concluded that a slate of mainstream election reforms heralded a new "era of Jim Crow," App. 46a, overriding page after page of contrary district court findings on the paradigmatic fact question of discriminatory intent. Pet. 22-23. The Fourth Circuit's extraordinary decision merits review for those reasons alone. Respondents' opposition only strengthens that conclusion.

1. Respondents do not contest that North Carolina eliminated voting practices that a majority (and in some cases a super-majority) of States *already* disallow. Pet. 21. No matter, say Respondents, because North Carolina eliminated them "simultaneously" and "with racial intent." NAACP 12. ***5** But the first argument proves little (why should it matter whether the practices were eliminated together or piecemeal?), and the second is question-begging, premised on the panel's tendentious reweighing of the evidence. See *infra* 7-11. Respondents are thus left arguing that North Carolina is racist for adopting reforms that "leave it with a voting system in the national mainstream and, indeed, one more open than many other States." Pet. 20.

Respondents wrongly characterize North Carolina's Voter ID law as "one of the strictest … in the nation." NAACP 12. They conveniently overlook numerous vote-maximizing features of the 2013 voter ID law - such as its *two-year* roll out, the millions spent on voter education and the drive to distribute free IDs, not to mention the expansion of qualifying IDs and the generous "reasonable impediment" exception later enacted in 2015. Pet. 5, 22. Respondents also fail to explain how a similar South Carolina ID law could have been precleared in 2012 under the stricter §5 standard. *Id.* at 5 (citing *South Carolina v. United States,* 898 F. Supp. 2d 30, 40 (D.D.C. 2012)).

2. Nor do Respondents identify a single case reversing a district court's finding of no discriminatory intent without also finding discriminatory *effect.* See U.S. 22; NAACP 16-17; *cf.* Pet. 22-23. The closest they come, *NAACP v. Gadsden County School Board,* 691 F.2d 978, 981-82 (11th Cir. 1982), is factually far afield (it involved a pre-Civil Rights at-large voting scheme that replaced an all-white primary and diluted African-American votes), and also legally inapposite (it involved a claim of vote dilution, not vote denial). ***6** NAACP 16. Respondents' inability to find an analogous decision underscores how epochal the Fourth Circuit's decision is - and thus deserving of review.

Respondents paper over the lack of discriminatory effect in two ways. First, they repeat the panel's conclusion that North Carolina's reforms "bear more heavily" on African-American voters. U.S. 21; NAACP 15. That is misleading. By "bear more heavily," the panel meant a *hypothetical* burden based on African-Americans' use of some eliminated mechanisms at *slightly* higher rates than whites. See App. 48a-50a. Respondents ignore the district court's *additional* finding - undisturbed by the panel - that African-American access to the ballot is still guaranteed by the "many [remaining] convenient registration and voting mechanisms that … provide African Americans an equal opportunity to participate in the political process." App. 435a; Pet. 9.

Second, Respondents assert that elimination of same-day registration and out-of-precinct voting had a discriminatory effect. NAACP 16; U.S. 6, 21. They fail, however, to acknowledge the undisturbed district court findings squarely rejecting their characterization. Respondents' own expert calculated the difference between African-American and white same-day registration rates to be *less than two-tenths of a percent*, App. 244a-45a, "at best weak evidence that the

elimination of [same-day registration] caused African Americans to be affected disproportionately." App. 245a-46a. As for out-of-precinct voting, the district court found most of Respondents' trial witnesses whose votes were disqualified "had made ***7** no effort whatsoever to determine the location of their assigned precinct," App. 258a, and did not credit Respondents' expert testimony that African Americans were disproportionately burdened. App. 321a.

3. Finally, the NAACP defends the panel's discriminatory intent finding as based on undisputed facts rather than determinations of witness credibility. NAACP 17, 32-33. That theory contradicts the record, which teems with credibility assessments. App. 88a, 137a, 159a, 170a, 225a-26a, 237a, 269a, 306a, 313a, 315a-16a, 325a, 361a, 456a, 493a, 517a. Incredibly - in the face of a massive record involving hundreds of witnesses, Pet. 8-9 - the panel flatly declared that the record 'permits only one resolution of the factual issue' " of intent. App. 58a (quoting *Pullman-Standard v. Swint,* 456 U.S. 273, 292 (1982)). That stunning decision merits review.

B. The Fourth Circuit's Reasoning Would Overturn Numerous State Election Laws.

Respondents also fail to disprove that the factors the panel relied on to find intentional discrimination "could readily be deployed to invalidate the election laws of numerous States." Pet. 24.

1. Respondents concede that the panel relied heavily on the theory that racial "polarization" in voting incentivizes Republican-controlled legislatures to suppress the votes of Democrat-supporting minorities. NAACP 23; U.S. 24; see App. 14a, 30a-40a. And they do not contest that such polarization is nationally widespread. Pet. 25; *Nw. Austin Mun. Util. Dist. No. One v. Holder,* 557 U.S. 193, 228 (2009) ***8** (Thomas, J., concurring). The upshot is inescapable: if racial polarization implies discriminatory intent, and if such voting patterns appear everywhere, then courts are to view virtually *every* Republican election reform as presumptively designed to suppress minorities. Pet. 25-26. Since Republicans control the legislatures of 32 States today, and have unified control of the government in 25, the panel's presumption shadows at least half the Nation. The panel's interpretation also contradicts *Shelby County*, which rejected the theory that incentives supposedly created by polarization justify inferring discriminatory motive. See 133 S. Ct. at 2626; *cf. id.* at 2643 (Ginsburg, J. dissenting); Pet. 26.

2. Respondents defend the panel's historical evidence supposedly showing North Carolina's legislators sought to suppress African-American voters, but they scarcely engage Petitioners' arguments that this "evidence" proves nothing. Pet. 27-29. For example, the NAACP asserts that the handful of DOJ §5 letters sent to North Carolina meant something more than determinations that the State had not met its burden to prove non-retrogression. NAACP 30. That is wrong. See generally *Georgia v. United States,* 411 U.S. 526 (1973); 28 CFR §51.52. Now that *Shelby County* has decommissioned preclearance, such letters mean little. Both oppositions also cite two §2 cases against North Carolina now before this Court. U.S. 28; NAACP 26. Neither case has been decided, however. One - *Covington v. North Carolina* - struck down the State's effort to "*increase*, significantly, the number of majority-black General Assembly districts," and in ***9** any event its implementation has since been stayed by this Court. 316 F.R.D. 117, 134 (M.D.N.C. 2016) (emphasis added), *jurisdictional statement filed* (Nov. 14, 2016) (No. 16-649), *stayed* (Jan. 10, 2017) (No. 16A646).

More importantly, Respondents do not disagree that DOJ's use of §5 objection letters was widespread outside of North Carolina before *Shelby County*, Pet. 27, or that many States (and State subdivisions) have been sued successfully under §2 over the past decades, *id.* at 28. Respondents also do not claim that North Carolina's record in either regard is unusual. If a few §5 letters and §2 lawsuits spread over decades can evidence discriminatory intent today, there is no denying that the panel's reasoning would throw many States' election laws into doubt.

3. As for the photo ID requirement, Respondents reiterate a series of discredited canards. One is that after requesting data on possession of given forms of identification by minority groups, the North Carolina legislature eliminated "only" the forms of ID African Americans disproportionately possess. NAACP 6. Leaving aside the innocent explanation for the request that the district court credited, App. 443a, Respondent's story is false. As the district court found, there

is no evidence that the legislature knew that all the forms of ID it eliminated are held by African Americans. App. 456a. There *was* evidence, instead, that legislators were told one form of eliminated identification - student IDs - is held disproportionately by *white* voters. App. 457a.

***10** Respondents have no response, furthermore, to the district court's conclusion - which credited Plaintiffs' own expert - that *no combination* of "acceptable photo IDs … will make these disparities go away." App. 448a. Respondents thus also cannot disagree that reliance on ID-possession disparities "would likely invalidate voter-ID laws in any State where they are enacted, regardless of the assortment of IDs selected." *Id.*

Respondents claim that North Carolina discriminated by *not* imposing an ID requirement for absentee voting, where fraud has been documented but which whites use disproportionately. U.S. 9, 16, 27; NAACP 6, 14. Respondents neglect to inform the Court that North Carolina *did* take measures to improve the security of absentee voting. App. 342a (describing new requirements for absentee voting). Nothing undermines Petitioners' showing that if North Carolina's ID law is suspect, so is virtually every other State's.

4. Unable to cabin the panel's reasoning, Respondents dredge up various theories that supposedly confirm intentional discrimination. Space is too limited to address them all. In each case, however, the best response is simply to look at the underlying facts, which paint a strikingly different picture.

One example is Respondents' repeated assertion that North Carolina enacted its reforms in the dead of night, without necessary process or debate. U.S. 16 (alleging "unprecedented procedural tactics employed … 'in an attempt to avoid in-depth scrutiny' "); NAACP ***11** 6, 8, 13, 21. That would surely surprise Respondents' trial witnesses, "all" of whom "concede[d] that the General Assembly acted within all the procedural rules," App. 462a, and the Senate Minority leader, who declared that " 'we've had a good and thorough debate on this bill over two days. … I think we've reviewed the bill in great detail. I think everyone in the room knows what we're doing now.' " App. 463a. Another example is the NAACP's assertion that the panel "relied upon statements in the legislative record regarding the professed purposes of the bill to find that it was, in fact, motivated by race." NAACP 17 (citing App. 58a, 61a, 64a-65a). *None* of the cited passages refers to race; each refers to the neutral goals of fair and orderly elections.

As anticipated, Respondents brandish the vaunted "smoking gun" that supposedly proves discriminatory intent, but only repeat the panel's distortion of the State's language. U.S. 9-10, 16, 27-28; NAACP 8; see Pet. 30-32. The United States fails even to read the State's words in context; they accuse Petitioners of manufacturing a *post hoc* explanation that was "not the reason provided by the State" at the time, U.S. 28, but overlook that the State *did* provide that very reason. App. 717a.

III. The Fourth Circuit's Decision Exacerbates Conflicts Over The Use Of Statistical Evidence.

The panel's reliance on statistical disparities to evidence discriminatory intent - in the absence of discriminatory effects - conflicts with decisions of the Sixth, Seventh, and Ninth Circuits holding that such evidence does not demonstrate discriminatory effects. ***12** Pet. 32-34. It is also in tension with a Fifth Circuit decision indicating that such evidence can demonstrate intent where discriminatory effect is proven. Pet. 34. Here again, Respondents fail to rebut that showing.

Respondents stress that the contrary circuit cases concern discriminatory effects rather than intent. U.S. 28-29; NAACP 35-36. Not only did Petitioners make that clear all along, Pet. 32, but the distinction matters little. Section 2 does not distinguish between "effects" and "intent": it forbids voting laws that "result[] in" voting denial or abridgment on account of race. 52 USC §10301. When circuits treat the same evidence in different ways under §2, it is no answer to split hairs between "effect" and "intent." Besides, if statistical disparities do not evidence discriminatory effect, why should they evidence intent to create those (nonexistent) effects?

Lastly, Respondents defend the panel's decision to find discriminatory intent without remand, contrary to decisions of this Court and the Fifth Circuit. The NAACP seeks to distinguish *Veasey v. Abbott,* 830 F.3d 216 (5th Cir. 2016), NAACP 31-33, but cannot avoid the fact that in two complex voting rights cases where circuit courts disagreed with district courts' weighing of evidence, one circuit remanded while the other resolved the facts on its own. The United States, in contrast, characterizes this case as *sui generis,* citing the Fourth Circuit's later analysis in *Lee v. Virginia State Board of Elections,* 843 F.3d 592 (4th Cir. 2016); U.S. 29, but its distinctions are largely contradicted by the record in this case. The panel ***13** plainly pushed its resolution of factual questions beyond the bounds of appellate review.

Conclusion

The petition for writ of certiorari should be granted.

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2016 WL 4610979 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

GLOUCESTER COUNTY SCHOOL BOARD, Petitioner,
v.
G.G., by his next friend and mother, Deirdre Grimm.

No. 16-273.
August 29, 2016.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for a Writ of Certiorari

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***i** QUESTIONS PRESENTED

Title IX prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a), while its implementing regulation permits "separate toilet, locker rooms, and shower facilities on the basis of sex," if the facilities are "comparable" for students of both sexes, 34 C.F.R. § 106.33. In this case, a Department of Education official opined in an unpublished letter that Title IX's prohibition of "sex" discrimination "include[s] gender identity," and that a funding recipient providing sex-separated facilities under the regulation "must generally treat transgender students consistent with their gender identity." App. 128a, 100a. The Fourth Circuit afforded this letter "controlling" deference under the doctrine of *Auer v. Robbins,* 519 U.S. 452 (1997). On remand the district court entered a preliminary injunction requiring the petitioner school board to allow respondent - who was born a girl but identifies as a boy - to use the boys' restrooms at school.

The questions presented are:

1. Should this Court retain the *Auer* doctrine despite the objections of multiple Justices who have recently urged that it be reconsidered and overruled?

2. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

3. With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?

***ii** PARTIES TO THE PROCEEDING

Petitioner Gloucester County School Board was Defendant-Appellee in the court of appeals in No. 15-2056, and Defendant-Appellant in the court of appeals in No. 16-1733.

Respondent G.G., by his next friend and mother, Deirdre Grimm, was Plaintiff-Appellant in the court of appeals in No. 15-2056 and Plaintiff-Appellee in the court of appeals in No. 16-1733.

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*1 INTRODUCTION

As petitioner Gloucester County School Board (the Board) pointed out in the stay application that the Court granted on August 3, 2016, this case presents an extreme example of judicial deference to an administrative agency's purported interpretation of its own regulation. For that and several other reasons, this case provides the perfect vehicle for revisiting the deference doctrine articulated in *Auer v. Robbins,* 519 U.S. 452 (1997), and subsequently criticized by several Justices of this Court.

The statute at the heart of the administrative interpretation here is Title IX of the Education Amendments of 1972. Enacted over forty years ago, Title IX and its implementing regulation have always allowed schools to provide "separate toilet, locker rooms, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. No one ever thought this was discriminatory or illegal. And for decades our Nation's schools have structured their facilities and programs around the idea that in certain intimate settings men and women may be separated "to afford members of each sex privacy from the other sex." *United States v. Virginia,* 518 U.S. 515, 550 n.19 (1996).

The Fourth Circuit's decision turns that longstanding expectation upside down. Deferring to the views of a relatively low-level official in the Department of Education (Department), the court reasoned that for purposes of Title IX the term "sex" does not simply mean physiological males and females, which is what Congress and the Department (and everyone else) thought the term meant when the regulation was promulgated. Instead, the Department and the Fourth

Circuit now tell us that "sex" is ambiguous as applied to persons whose subjective gender ***2** identity diverges from their physiological sex. App. 17a-20a. According to the Fourth Circuit, this means a physiologically female student who self-identifies male - as does the plaintiff here - must be allowed under Title IX to use the boys' restroom.

The Fourth Circuit reached this conclusion, not by interpreting the text of Title IX or its implementing regulation (neither of which refers to gender identity), but by deferring to an agency opinion letter written just last year by James Ferg-Cadima, the Acting Deputy Assistant Secretary for Policy for the Department of Education's Office of Civil Rights. App. 121a. The letter is unpublished; its advice has never been subject to notice and comment; and it was generated in direct response to an inquiry about the Board's restroom policy *in this very case.* Nonetheless, the Fourth Circuit concluded - over Judge Niemeyer's dissent - that the letter was due "controlling" deference under *Auer.* App. 25a. On that basis, the district court immediately entered a preliminary injunction allowing the plaintiff to use the boys' restroom.

Shortly after the Fourth Circuit's decision, the Department (along with the Department of Justice) issued a "Dear Colleague" letter seeking to impose that same requirement on every Title IX-covered educational institution in the Nation. But just last week, the Departments' effort was halted by a nationwide injunction issued by a federal district judge in Texas.

These recent developments highlight the urgent need for this Court to grant this petition and resolve the issues ***3** presented by the Fourth Circuit's decision. As explained in more detail below, the Court should grant the petition for three reasons. First, this case provides an excellent vehicle for reconsidering - and abolishing or refining - the *Auer* doctrine. Second, if the Court decides to retain *Auer* in some form, this case provides an excellent vehicle for resolving important disagreements among the lower courts about *Auer*'s proper application. Third, this case provides an excellent vehicle for determining whether the Department's understanding of Title IX reflected in the Ferg-Cadima and "Dear Colleague" letters must be given effect - thereby resolving once and for all the current nationwide controversy generated by these directives.

OPINIONS BELOW

This petition seeks review of two related cases in the court of appeals, Nos. 15-2056 and 16-1733. No. 15-2056 is G.G's appeal of the district court's order denying his request for a preliminary injunction. The opinion of the court of appeals in that case is available at 822 F.3d 709 (4th Cir. 2016). App. 1a-60a. The district court's opinion in that case is available at 132 F.Supp.3d 736 (E.D. Va. 2015). App. 84a-117a.

No. 16-1733 is the Board's appeal of the district court's order granting a preliminary injunction after the remand in No. 15-2056. The district court's opinion in that case is available at 2016 U.S. Dist. LEXIS 93164. App. 71a-72a.

*4 JURISDICTION

In No. 15-2056, the court of appeals entered its judgment on April 19, 2016. App. 3a. It denied the Board's petition for rehearing en banc on May 31, 2016. App. 61a. No. 16-1733 remains pending in the court of appeals. The Board timely filed this petition for a writ of certiorari on August 29, 2016. See 28 U.S.C. § 2101(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972 provides, in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance …

20 U.S.C. § 1681(a).

34 C.F.R. § 106.33 provides:

> A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

*5 STATEMENT

A. Facts

G.G. is a 17-year-old student at Gloucester High School. G.G. is biologically female, meaning that G.G. was born a girl and recorded as a girl on the birth certificate. "However, at a very young age, G.G. did not feel like a girl," and around age twelve began identifying as a boy. App. 85a. In July 2014, between G.G.'s freshman and sophomore years, G.G. changed his first name to a boy's name and began referring to himself with male pronouns. He has also started hormone therapy, but has not had a sex-change operation.

In August 2014, before the start of G.G.'s sophomore year, G.G. and his mother met with the principal and guidance counselor to discuss G.G.'s situation. The school officials were supportive of G.G. and promised a welcoming environment. School records were changed to reflect G.G.'s new name, and the guidance counselor helped G.G. e-mail his teachers asking them to address G.G. using his male name and male pronouns. App. 87a-88a. As G.G. admits, teachers and staff have honored these requests. *Id.* at 148a.

Neither G.G. nor school officials, however, thought that G.G. should start using the boys' restrooms, locker ***6** rooms, or shower facilities. Instead, G.G. and his mother suggested G.G. use a separate restroom in the nurse's office rather than the boys' room, and the school agreed. App. 149a. G.G. claims he accepted this arrangement because he was "unsure how other students would react to [his] transition." *Id.* But four weeks into the school year G.G. changed his mind and sought permission to use the boys' restroom. The principal granted G.G.'s request on October 20, 2014. G.G. says he asked for access to the boys' restroom because he found it "stigmatizing" to use the restroom in the nurse's office. *Id.*

Immediately after G.G. started using the boys' restrooms, the Board began receiving complaints from parents and students who regarded G.G.'s presence in the boys' room as an invasion of student privacy. App. 144a. Parents also expressed general concerns that allowing students into restrooms and locker rooms of the opposite biological sex could enable voyeurism or sexual assault. The Board held public meetings on November 11 and December 9, 2014, to consider the issue, and citizens on both sides expressed their views in thoughtful and respectful terms.[2] At the December 9 meeting, the Board ***7** adopted a resolution recognizing "that some students question their gender identities," and encouraging "such students to seek support, advice, and guidance from parents, professionals and other trusted adults." The resolution then concluded:

Whereas the [Board] seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore

It shall be the practice of the [Board] to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Id. at 144a.

Before the Board adopted this resolution, the high school announced it would install three single-stall unisex bathrooms throughout the building - regardless of whether the Board approved the December 9 resolution. These unisex restrooms would be open to *all* students who, for whatever reason, desire greater privacy. They opened for use shortly after the Board adopted the resolution. G.G., however, refuses to use these unisex bathrooms because, he says, they "make me feel even more stigmatized and isolated than when I use the restroom in the nurse's office." App. 151a.

***8** A few days after the Board's decision, a lawyer named Emily T. Prince [3] sent an e-mail about the Board's resolution to the Department, asking whether it had any "guidance or rules" relevant to the Board's decision. App. 118a-120a. In response, on January 7, 2015, James A. Ferg-Cadima, an Acting Deputy Assistant Secretary for Policy in the Department's Office of Civil Rights sent a letter stating that "Title IX … prohibits recipients of Federal financial assistance from discriminating on the basis of sex, *including gender identity*," and further opining that:

The Department's Title IX regulations permit schools to provide sex-segregated restrooms locker rooms, shower facilities, housing, athletic teams, and single-sex classes *under certain circumstances.* When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.

App. 121a, 123a (emphasis added).

The Ferg-Cadima letter cites no document requiring schools to treat transgender students "consistent with their gender identity" regarding restroom, locker room, or shower access. It instead cites a Q&A sheet on the ***9** Department website, which says only that schools must treat transgender students consistent with their gender identity *when holding single-sex classes.* See United States Department of Education, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* (Dec. 1, 2014), http://bit.ly/1HRS6yI (emphasis added) (last visited Aug. 29, 2016) (Q&A #31) (opining "[h]ow … the Title IX requirements *on single-sex classes* apply to transgender students) (emphasis added).

B. District Court Proceedings

G.G. filed suit against the Board on June 11, 2015 - two days after the end of the 2014-15 school year. His complaint alleged that the Board's resolution violated Title IX and the Equal Protection Clause, and sought declaratory and injunctive relief, damages, and attorneys fees.

On June 29, 2015, the Department of Justice ("DOJ") filed a "statement of interest" accusing the Board of violating Title IX. See App. 160a-183a. The statement did not even cite 34 C.F.R. § 106.33, let alone explain how the Board's policy could be unlawful under the regulation's text. Instead, DOJ trumpeted the Ferg-Cadima letter as the "controlling" interpretation of Title IX and the regulation, even though DOJ acknowledged that the letter had never been "publicly issued." See *id.* at 171. [4] DOJ ***10** also asserted that "an individual's gender identity is one aspect of an individual's sex," *id.* at 169a, but failed to cite any statute or regulation adopting or supporting that view.

Without ruling on G.G.'s equal-protection claim, the district court dismissed G.G.'s Title IX claim and denied a preliminary injunction. See App. 82a-83a (order); 84a-117a (opinion). It held that G.G.'s Title IX claim was foreclosed by 34 C.F.R. § 106.33, the regulation allowing comparable separate restrooms and other facilities "on the basis of sex." App. 97a-98a.

The district court assumed, for the sake of argument, that the phrase "on the basis of sex" includes distinctions based on *both* gender identity as well as biological sex. App. 99a, 102a. Yet even under this broad reading of "sex," it would remain permissible under section 106.33 to separate restrooms by biological sex *or* gender identity. Consequently, as the district court pointed out, section 106.33 would forbid the Board's policy only if "sex" refers *solely* to distinctions based on gender identity, and excludes those based on biological sex. *Id.* at 99a. The district court held that this would be an absurd construction, however. Indeed, if applied to the Title IX *statute*, it would permit discrimination against men or women, so long as the recipient discriminates on account of gender identity rather than biological sex. *Id.* at 102a.

***11** Consequently, the district court refused to give controlling weight to the interpretation of Title IX and 34 C.F.R. § 106.33 in the Ferg-Cadima letter. First, the district court observed that letters of this sort lack the force of law under *Christensen v. Harris County,* 529 U.S. 576, 587 (2000), and cannot receive *Chevron* deference when interpreting Title IX. App. 101a. The Court also held that the letter should not receive deference under *Auer v. Robbins,* 519 U.S. 452 (1997), because it contradicts the unambiguous language of 34 C.F.R. § 106.33, which allows schools to establish separate restrooms "on the basis of sex" - even if one assumes that "on the basis of sex" refers to *both* gender identity *and* biological sex. Thus, the district court regarded the Ferg-Cadima letter as an attempted amendment to, rather than an interpretation of, 34 C.F.R. § 106.33, and held that to be binding any such amendment must go through notice-and-comment rulemaking. App. 102a-103a.

C. Appeal to the Fourth Circuit in No. 15-2056

Over Judge Niemeyer's dissent, the Fourth Circuit reversed the district court's dismissal of G.G.'s Title IX claim, and held that the district court should have enforced the Ferg-Cadima letter as the authoritative construction of Title IX and 34 C.F.R. § 106.33 under *Auer.* App. 13a-25a.

First, the panel held that section 106.33 was "ambiguous" as applied to "whether a transgender individual is a male or a female for the purpose of access to sex-segregated restrooms," and that the Ferg-Cadima letter ***12** "resolve[d]" this ambiguity by determining sex solely by reference to "gender identity." *Id.* at 19a, 18a.

Second, the panel held that the letter's interpretation - "although perhaps not the intuitive one," *id.* at 23a - was not, in the words of *Auer,* "plainly erroneous or inconsistent with the regulation or the statute." *Id.* at 20a. In the panel's view, the term "sex" does not necessarily suggest "a hard-and-fast binary division [of males and females] on the basis of reproductive organs." *Id.* at 22a.

Third, the panel found that the letter's interpretation was a result of the agency's "fair and considered judgment," because the agency had consistently enforced this position "since 2014" - that is, for the previous several *months* - and it was "in line with" other federal agency guidance. *Id.* at 24a. While conceding that the Ferg-Cadima interpretation was "novel," given that "there was no interpretation of how section 106.33 applied to transgender individuals before January 2015," the panel nonetheless thought this novelty was no reason to deny *Auer* deference. *Id.* at 23a.

The panel, however, did not address the district court's reason for rejecting the agency interpretation - namely, that it would make the phrase "on the basis of sex" *exclude* biological sex and refer *only* to gender identity, a construction that would absurdly mean that Title IX no longer protects men or women from discrimination on the basis of biological sex. App. 99a, 102a. Nor did the panel acknowledge that the agency was expressly interpreting the Title IX *statute*, not merely the regulation. ***13** See App. 121a (stating that "*Title IX* … prohibits [funding] recipients … from discriminating

on the basis of sex, *including gender identity* ….") (emphases added). The panel thus did not address the district court's conclusion that giving the letter controlling deference would permit agencies to "avoid the process of formal rulemaking by announcing regulations through simple question and answer publications." App. 103a

Judge Niemeyer dissented from the panel's decision to give controlling effect to the Ferg-Cadima letter, for many of the reasons given by the district court. App. 40a-60a. Judge Niemeyer explained that the premise for applying *Auer* was absent, because "Title IX and its implementing regulations are not ambiguous" in allowing separate restrooms and other facilities on the basis of "sex." *Id.* at 43a. To the contrary, those provisions "employ[ ] the term 'sex' as was generally understood at the time of enactment," as referring to "the physiological distinctions between males and females, particularly with respect to their reproductive functions." *Id.* at 53a-55a. He also explained that the DOJ's conflation of "sex" in Title IX with "gender identity" would produce "unworkable and illogical result[s]," undermining the privacy and safety concerns that motivated the allowance of sex-separated facilities in the first place. *Id.* at 42a-43a.

Judge Niemeyer also noted that the Fourth Circuit's endorsement of the Ferg-Cadima letter will require schools to allow students with gender-identity issues not only into the restrooms but also into the locker rooms and showers reserved for the opposite biological sex. In Judge Niemeyer's view, this would violate other students' ***14** "legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex." *Id.* at 50a.

The Board moved for rehearing en banc, which the panel denied on May 31, 2016. *Id.* at 61a-66a. Judge Niemeyer dissented but declined to call for an en banc poll, stating that "the momentous nature of the issue deserves an open road to the Supreme Court." *Id.* at 65a. The Board then asked for a stay of the Fourth Circuit's mandate pending the filing of a certiorari petition. This, too, was denied, again over Judge Niemeyer's dissent. *Id.* at 67a-70a. The mandate in No. 15-2056 issued on June 17, 2016.

D. The "Dear Colleague" Letter Of May 13, 2016

After the Fourth Circuit's ruling, two federal officials, the Department's Catherine E. Lhamon and DOJ's Vanita Gupta, quickly issued a "Dear Colleague" letter to every Title IX recipient in the country. *Id.* at 126a-142a. This document expands on the Ferg-Cadima letter by imposing detailed requirements on how schools must accommodate students with gender-identity issues, including the following edicts:

• Every student claiming to be transgender must be allowed to access restrooms, locker rooms, shower facilities, and athletic teams consistent with his or her gender identity. The Ferg-Cadima letter had hedged this requirement by including the word "generally." App. ***15** 123a. The "Dear Colleague" letter removes the hedge and allows for no exceptions. *Id.* at 134a.

• A school must allow a student access to the restrooms, locker rooms, and showers of the opposite biological sex after the "student *or* the student's parent or guardian, as appropriate" merely notifies the school that the student will *assert* a gender identity different from his or her biological sex. App. 130a (emphasis added). No medical or psychological diagnosis or evidence of professional treatment need be provided. *Id.*

• Non-transgender students who are unwilling to use restrooms, locker rooms, or showers at the same time as a classmate of the opposite biological sex may be relegated to a separate, individual-user facility. App. 134a. But a school cannot require the transgender student to use that separate, individual-user facility, no matter how many non-transgender students object to the presence of a student of the opposite biological sex in restrooms, locker rooms, or showers. *Id.*

The letter went out on May 13, 2016, only 24 days after the Fourth Circuit's decision. Needless to say, it did not go through notice-and-comment rulemaking.

The Dear Colleague letter has been challenged by over twenty States in two federal lawsuits. See ***16** *Texas v. United States of America,* No. 7:16-cv-00054 (N.D. Tex. May 25, 2016); *Nebraska v. United States of America,* No. 4:16-cv-03117 (D. Neb. July 8, 2016). On August 21, 2016, a federal district court in Texas issued a nationwide preliminary injunction against enforcement of the regulatory interpretation contained in the Dear Colleague letter and in similar guidance documents. See *Texas, supra,* ECF No. 58; Pet. App. 183a-229a.

E. The Proceedings After Remand, Including No. 16-1733

Meanwhile, on remand from the Fourth Circuit, the district court promptly entered a preliminary injunction without giving the Board any notice or opportunity to submit additional briefing or evidence. App. 71-72a. The injunction orders the Board to permit G.G. to use the boys' restroom at Gloucester High School "until further order of this Court." *Id.* at 72a. It does not enjoin the Board from enforcing its policy with respect to locker rooms and showers - even though the Ferg-Cadima letter, which the Fourth Circuit endorsed as "controlling" authority, generally requires schools to allow transgender students to access locker rooms, shower facilities, housing, and athletic teams that accord with their gender identity. App. 123a.

The Board appealed this preliminary-injunction order, which created a second case in the Fourth Circuit, No. 16-1733. The district court denied the Board's request to stay its injunction pending appeal. App. 73a-75a. The Board's request that the Fourth Circuit stay the injunction pending appeal was also denied, again over Judge Niemeyer's dissent. App. 76a-81a.

***17** Finally, the Board asked this Court to recall and stay the Fourth Circuit's mandate in No. 15-2056, and to stay the district court's preliminary injunction, pending this certiorari petition. This Court granted the Board's request on August 3, 2016. *Gloucester Cnty. Sch. Bd. v. G.G.,* 136 S. Ct. 2442 (2016) (per curiam). In this combined petition, the Board seeks a writ of certiorari as to No. 15-2056, and a writ of certiorari before judgment at to No. 16-1733. See S. Ct. R. 12.4.

*18 REASONS FOR GRANTING THE PETITION

The Court should grant the petition for three reasons. First, this case provides an excellent vehicle for reconsidering - and abolishing or refining - the doctrine of *Auer* deference that has recently been questioned by several Justices. Second, if the Court decides to retain *Auer,* this case provides an excellent vehicle for resolving important disagreements among the lower courts about *Auer*'s proper application. Third, this case provides an excellent vehicle for determining whether the Department's understanding of Title IX and section 106.33 - an understanding it has recently sought to impose upon educational institutions throughout the Nation - is controlling.

I. THE COURT SHOULD GRANT CERTIORARI TO RECONSIDER THE DOCTRINE OF *AUER* DEFERENCE.

As to the first reason: The Fourth Circuit did not even attempt to show that the Ferg-Cadima letter reflects the most plausible construction of 34 C.F.R. § 106.33. Instead, its ruling hinged entirely on *Auer* deference - a doctrine that requires courts to enforce an agency's interpretation of its own regulations unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer,* 519 U.S. at 461 (citation omitted); see also *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945). Several members of this Court have expressed interest in revisiting the doctrine of *Auer* deference, ***19** which gives agencies enormous power over policy issues of interest across the political spectrum. [5] This case presents an ideal vehicle for doing so, because the issue is fully preserved and because the Fourth Circuit discussed the *Auer* framework extensively and regarded it as outcome-determinative. App. 15a-24a. [6]

The problems with *Auer* deference have been well rehearsed. See, *e.g., Decker,* 133 S. Ct. at 1339-42 (Scalia, J., concurring in part and dissenting in part); *Perez,* 135 S. Ct. at 1213-25 (Thomas, J., concurring in the judgment); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules,* 96 Colum. L. Rev. 612 (1996); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It,* 10 Admin. L.J. Am. U. 1, 4-12 (1996). Four of the most important reasons for this Court to abandon or limit the scope of the *Auer*-deference regime are as follows:

***20** First, as this case illustrates, *Auer* deference effectively gives an agency the power to invade the province of both Congress and the courts in determining federal law on all kinds of issues of interest to all kinds of constituencies. See, *e.g., Decker,* 133 S. Ct. at 1342 (Scalia, J., dissenting) (*Auer* "contravenes one of the great rules of separation of powers [that he] who writes a law must not adjudge its violation."); *Perez,* 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment) (*Auer* is an unconstitutional "transfer of judicial power to the Executive branch," and "an erosion of the judicial obligation to serve as a 'check' on the political branches."); *id.* at 1210-11 (Alito, J., concurring in part and concurring in the judgment) (noting that "the opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect").

Here, in purporting to interpret section 106.33, the Department effectively changed the meaning of the *statutory* term "sex" in Title IX. To be sure, it did so in a manner that furthered the views of the present Administration. But that same strategy could easily be adopted by a future administration with radically different views. Indeed, it could be deployed to effectively amend in a different direction, and without any meaningful judicial review, not only Title IX, but also other federal statutes dealing with matters such as health care, the environment, labor relations, and financial-services regulation. For those reasons, the type of *Auer* deference applied by the Fourth Circuit here raises serious separation-of-powers problems. See, *e.g.*, Manning, *supra*, at 631-54.

***21** Second, the *Auer* doctrine is poorly formulated. It instructs courts to enforce an agency's interpretation of its own regulations unless that interpretation is "plainly erroneous *or* inconsistent with the regulation." *Auer,* 519 U.S. at 461 (emphasis added). But that disjunctive formulation leaves substantial ambiguity: The phrase "inconsistent with the regulation" implies *de novo* rather than deferential review. And it is not apparent how the "plainly erroneous" prong of the *Auer* deference test will ever do any work: Every "plainly erroneous" interpretation of a regulation will also be "inconsistent with the regulation," and the disjunctive "or" means that a litigant challenging the interpretation need only show that the agency's interpretation fails under the less deferential half of this test. This petition presents a prime opportunity for the Court to resolve this ambiguity - even if a majority of the Court wishes to retain some form of *Auer* deference.

The third problem for the *Auer* doctrine is the text of the Administrative Procedure Act, which plainly states that:
[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and *determine the meaning or applicability of the terms of an agency action.*

5 U.S.C. § 706 (emphases added). How can this statutory command be reconciled with a regime that requires the judiciary to *defer* to an agency's interpretation of its regulations, rather than "determine the meaning" of ***22** those agency rules for itself? No one thinks the APA's command to "interpret constitutional … provisions" requires courts to defer to an agency's beliefs on what the Constitution means. So why do matters suddenly become different when an agency purports to "determine the meaning" of one of its rules?

To be sure, some APA provisions require courts to defer to some forms of agency decisionmaking, but those provisions do so in unmistakable language. See, *e.g.*, 5 U.S.C. § 706(2)(E) (authorizing courts to set aside agency factfinding only when "unsupported by substantial evidence"); *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951) (holding that

section 706(2)(E) requires deferential judicial review of agency factfinding). In contrast to those provisions, the APA's straightforward instruction that courts "decide all relevant questions of law" and "determine the meaning … of an agency action" leaves the *Auer* doctrine in a precarious position. The APA tells the *courts* to "determine the meaning" of an agency's rules, but *Auer* tells the *agency* to "determine the meaning" of its rules so long as it stays within the boundaries of reasonableness.

The opinion in *Seminole Rock* said nothing about how its ostensible deference regime might be reconciled with the text of the APA, see 325 U.S. 410, but it had good reason for that omission: the APA had not been enacted yet. So the *Seminole Rock* Court can be forgiven for failing to explain how its deference concept can co-exist with section 706 of the APA. It is harder to justify the post-*Seminole Rock* decisions that reflexively followed this pre-APA decision without acknowledging the intervening ***23** statute or attempting to explain how *Seminole Rock* could survive the APA. [7]

Nor can *Auer* be defended on the ground that *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), likewise ignored section 706 of the APA. This Court eventually supplied a rationale for *Chevron* that comports with the APA: Influenced heavily by Justice Breyer's scholarship, [8] the Court held in *United States v. Mead Corp.* that *Chevron* can apply only when Congress affirmatively intends to delegate interpretive or gap-filling authority to an agency. See 533 U.S. 218, 229-34 (2001). After *Mead,* a court that applies *Chevron* is not "deferring" to an agency's interpretation of a statute. Rather, it is interpreting the statute *de novo,* and asking whether Congress intended to authorize the agency to act within certain statutory boundaries. If the answer is "yes," the statute *means* that the agency gets to decide and that reviewing courts must respect the agency's decision. *Mead* enables *Chevron* to co-exist with ***24** section 706 of the APA. No such rationale has ever been provided for *Auer.*

This leads to the fourth problem with *Auer* deference: It cannot be sustained in its current form after this Court's decisions in *Christensen, Mead,* and *Barnhart v. Walton,* 535 U.S. 212 (2002). In pre-*Mead* days, when the *Chevron* framework established a blanket presumption that agencies rather than courts would fill gaps and resolve ambiguities in statutory language, *Auer* deference could be defended as *Chevron*'s logical corollary. If an agency's interpretive rules or informal correspondence would receive *Chevron* deference when courts interpret federal statutes, it was reasonable to accord those documents equal weight when interpreting agency regulations - which, after all, have the same force and effect as a federal statute.

Auer became much harder to defend after *Mead,* which withholds *Chevron* deference from interpretive rules and other agency correspondence that never went through notice-and-comment rulemaking. For example, how can a document like the Ferg-Cadima letter receive nothing more than *Skidmore* deference when interpreting a statute, [9] but trigger much higher deference as soon as it purports to interpret an agency regulation? And if the Ferg-Cadima letter is entitled to *Chevron*-like deference when it purports to interpret 34 C.F.R. § 106.33, why doesn't that make it into a substantive rule that carries ***25** the force of law and therefore must go through notice and comment? See 5 U.S.C. § 553.

In short, *Mead* established symmetry between the *Chevron*-*Skidmore* divide and the distinction between substantive and interpretive rules. "Interpretive rules" need not go through notice and comment because they lack the force of law, but for this reason cannot receive *Chevron* deference. To confer *Chevron* deference upon such interpretive rules would give them the force of law, thereby triggering section 553's notice-and-comment requirements. But *Auer* deference throws a wrench into this perfectly crafted arrangement, by allowing such things as the Ferg-Cadima letter to receive the force of law even though they never went through notice and comment. If nothing else, the Court should grant certiorari to align the *Auer*-deference regime with the post-*Mead Chevron* regime. That alone would require reversing the Fourth Circuit's decision.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE DISAGREEMENTS AMONG THE LOWER COURTS OVER WHEN THE *AUER*-DEFERENCE FRAMEWORK, IF IT SURVIVES, SHOULD BE APPLIED.

Assuming *Auer* survives, this case also presents an opportunity for the Court to resolve serious disagreements among the lower courts on the proper application of *Auer* deference. As explained below, there currently exists a serious circuit conflict on the question whether *Auer* deference can apply at all to informal agency pronouncements. There is also deep disagreement among ***26** the circuits about whether *Auer* deference can apply to agency positions that - like the Ferg-Cadima letter - are developed in the context of the very dispute in which deference is sought. And the Texas district court's recent decision to enjoin the Department's efforts to impose its interpretation on schools throughout the Nation both exacerbates the conflict and illustrates the urgent need for this Court to resolve the questions presented here.

A. The Fourth Circuit's Decision To Extend *Auer* Deference To The Ferg-Cadima Letter Conflicts With Rulings From The First, Seventh, And Eleventh Circuits.

As noted, the Ferg-Cadima letter did not go through notice and comment, and it is about as informal an agency document as one can imagine. The letter was not publicized; there is no evidence it was approved by the head of an agency; and it was signed only by a relatively low-level federal functionary, an Acting Deputy Assistant Secretary for Policy. The Fourth Circuit did not think any of this mattered; it was enough that the Department was willing to stand by the letter in the federal amicus brief. App. 16a-17a. But a letter such as this would not have received *Auer* deference in the First, Seventh or Eleventh Circuits.

For example, the First Circuit's ruling in *United States v. Lachman,* 387 F.3d 42, 54 (1st Cir. 2004), refused to extend *Auer* deference to non-public or informal agency interpretations - and it linked *Auer* deference to the same formality requirements that trigger *Chevron* deference under *Mead*:

> ***27** [A]gency interpretations are only relevant if they are reflected in public documents.… [U]nder *Chevron,* the Supreme Court has made clear that informal agency interpretations of statutes, even if public, are not entitled to deference. See generally *United States v. Mead Corp.,* 533 U.S. 218 (2001). While this is not a situation involving the interpretation of a statute, *the same requirements of public accessibility and formality are applicable in the context of agency interpretations of regulations.*… The non-public or informal understandings of agency officials concerning the meaning of a regulation are thus not relevant.

387 F.3d at 54 (emphasis added).

The Seventh Circuit has likewise held that it will not extend *Auer* deference to informal agency pronouncements such as the Ferg-Cadima letter. In *Keys v. Barnhart,* 347 F.3d 990 (7th Cir. 2003), that court explained that *Christensen* and *Mead* have curtailed the scope of *Auer* deference, limiting it to agency pronouncements that carry the "force of law" and that would qualify for deference under *Chevron* if they were purporting to interpret statutes:

> *Auer* … gave full *Chevron* deference to an agency's amicus curiae brief; yet in the *Christensen* case the Supreme Court stated flatly that "interpretations such as those in opinion letters - like interpretations contained in policy statements, agency manuals, and enforcement ***28** guidelines, all of which lack the force of law - do not warrant *Chevron*-style deference." … Briefs certainly don't have "the force of law." …
>
> Probably there is little left of *Auer.* The theory of *Chevron* is that Congress delegates to agencies the power to make law to fill gaps in statutes. See, *e.g., United States v. Mead Corp., supra,* 533 U.S. at 226-27…. It is odd to think of agencies as making law by means of statements made in briefs, since agency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself; and it is odd to think of Congress delegating lawmaking power to unreviewed staff decisions.

347 F.3d at 993-94 (Posner, J.). And in *U.S. Freightways Corp. v. Commissioner,* 270 F.3d 1137 (7th Cir. 2001), the Seventh Circuit applied *Skidmore* rather than *Auer* to the IRS Commissioner's interpretation of his regulations, because "the interpretive methodologies he has used have been informal." *Id.* at 1141-42.

Likewise, the Eleventh Circuit's decision in *Arriaga v. Florida Pacific Farms, L.L.C.,* 305 F.3d 1228, 1238 (11th Cir. 2002), applied *Skidmore* rather than *Auer* to agency opinion letters that purport to interpret the agency's regulations.

Against the First, Seventh, and Eleventh Circuits stand the Fourth Circuit as well as other courts of appeals that have found the lack of procedural formality ***29** irrelevant to whether the *Auer*-deference framework should apply - even after this Court's decisions in *Christensen* and *Mead.* See, *e.g., Cordiano v. Metacon Gun Club, Inc.,* 575 F.3d 199, 207-08 (2nd Cir. 2009) (holding that "agency interpretations that lack the force of law," while not warranting deference when interpreting ambiguous statutes, "do normally warrant deference when they interpret ambiguous *regulations*"); *Encarnacion ex. rel George v. Astrue,* 568 F.3d 72, 78 (2nd Cir. 2009) (holding agency's interpretation is entitled to *Auer* deference "regardless of the formality of the procedures used to formulate it") (quotation omitted); *Bassiri v. Xerox Corp.,* 463 F.3d 927, 930 (9th Cir. 2006) (granting *Auer* deference to agency interpretation "even if [adopted] through an informal process" that "is not reached through the normal notice-and-comment procedure" and that "does not have the force of law"); *Smith v. Nicholson,* 451 F.3d 1344 (Fed. Cir. 2006) (affording *Seminole Rock* deference "even when [the agency's interpretation] is offered in informal rulings such as in a litigating document").

It appears the circuits are currently divided 4-3 on whether an agency's regulatory interpretation produced through informal processes can qualify for *Auer* deference after *Christensen* and *Mead.* The Fourth Circuit's decision here directly implicates this circuit split, and it is ripe for this Court's review.

***30 B. The Fourth Circuit's Decision To Extend *Auer* Deference To The Ferg-Cadima Letter Is In Substantial Tension With Decisions In The Ninth And Federal Circuits.**

Another relevant feature of the Ferg-Cadima letter is that it was issued solely in response to G.G.'s dispute with the Board. Days after the Board passed its resolution of December 9, 2014, a transgender activist e-mailed the Department and solicited the letter, specifically with respect to the Board's policy. App. 118a-120a. But this fact was of no moment to the Fourth Circuit, which held that *Auer* deference should apply even if the agency had never before expressed these views apart from G.G.'s dispute with Board. App. 17a. The Fourth Circuit had company in reaching this conclusion: At least four other courts of appeals agree that *Auer* deference should apply even when the agency adopts its interpretation solely in the context of the dispute before the court. [0]

***31** But opinions from the Ninth Circuit and the Federal Circuit have refused to extend *Auer* deference in similar situations. In *Vietnam Veterans of America v. CIA,* 811 F.3d 1068 (9th Cir. 2015), the Ninth Circuit refused to apply *Auer* deference to an interpretation of agency rules that was " 'developed … only in the context of this litigation.' " *Id.* at 1078. And in *Massachusetts Mutual Life Insurance Co. v. United States,* 782 F.3d 1354 (Fed. Cir. 2015), the Federal Circuit refused to apply the *Auer* framework to an IRS interpretation that was "advanced for the first time in litigation." *Id.* at 1369-70. So the Fourth Circuit's ruling implicates yet another division among the courts of appeals, and the Court should grant certiorari to resolve it.

C. The Nationwide Federal Injunction Decision From Texas Also Conflicts With The Fourth Circuit's Approach.

The lower courts are also divided over whether *Auer* deference should extend to the specific agency interpretations at issue in this case. Eight days ago, on August 21, 2016, a federal district court in Texas refused to extend ***32** *Auer* deference to the Department's bathroom, locker room and shower edicts, finding that 34 C.F.R. § 106.33 unambiguously allows

Title IX recipients to establish separate facilities on the basis of biological sex. See *Texas v. United States of America,* Case No. 7:16-cv-00054, ECF No. 58; Pet. App. 183a-229a. That decision is significant here for two distinct reasons.

First, as a practical matter, it exacerbates the existing conflicts and disagreements over the proper application of *Auer* deference and Title IX to transgender individuals. Indeed, given that decision, and based on competing views of *Auer,* schools in one section of the Nation - states within the Fourth Circuit - are now bound by the Department's view of Title IX, while at the same time the Department is currently prohibited from even attempting to impose that same view on schools in the rest of the Nation.

Second, the Texas decision highlights the urgent, nationwide importance of the issues presented in this petition. Every recipient of Title IX funds throughout the Nation - ranging from universities to elementary schools - is now being substantially affected by the disagreement among the lower courts about the proper application of *Auer* deference. That is an additional reason for this court's review, especially given the deep disagreements that already exist over whether *Auer* deference should extend to agency documents such as the Ferg-Cadima letter.

*33 III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DEPARTMENT'S INTERPRETATION OF TITLE IX AND 34 C.F.R. § 106.33 IS BINDING.

Finally, granting this petition will give the Court an excellent opportunity to determine whether the Department's specific interpretation of Title IX is binding. In fact, that interpretation is flatly wrong and therefore, under any reasonable view of *Auer,* is not legally binding on anyone.

1. Nothing in Title IX's text or structure supports the foundational premise of the Ferg-Cadima letter - namely, that the proscription of discrimination "on the basis of sex … includ[es] gender identity." App. 121a. The term "gender identity" is nowhere in Title IX. Congress knows how to legislate protection against gender identity discrimination: it has done so elsewhere, but not in Title IX. [2] Conversely, numerous bills have attempted to introduce the concept of gender identity into federal laws, but failed. [3] The interpretive alchemy of deeming ***34** "sex" to include "gender identity" would revise those legislative defeats into victories. That is not how statutory interpretation works. See, *e.g., Hively v. Ivy Tech Cmty. Coll.,* F.3d , 2016 U.S. App. LEXIS 13746, at *7 & n.2 (7th Cir. July 28, 2016) (noting, "despite multiple efforts, Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation").

To the contrary, when federal law deploys the term "sex" in anti-discrimination statutes, it prohibits discrimination based on "nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex." *Johnston v. Univ. of Pittsburgh,* 97 F.Supp.3d 657, 676 (W.D. Pa. 2015) (citing *Etsitty v. Utah Transit Auth.,* 502 F.3d 1215, 1222 (10th Cir. 2007). As Judge Niemeyer's dissent explained, during the period when Title IX was enacted and its regulations promulgated, "virtually every dictionary definition of 'sex' referred to the physiological distinctions between males and females, particularly with respect to their reproductive functions." App. 54a (collecting definitions). In other words, the prohibition on "sex" discrimination in laws like Title IX and Title VII "do[es] not outlaw discrimination against … a person born with a male body who believes himself to be a female, or a person born with a female body who believes herself to be a male." ***35** *Ulane v. E. Airlines, Inc.,* 742 F.2d 1081, 1085 (7th Cir. 1984).

2. Moreover, reading "sex" to include "gender identity" would make a hash of Title IX's scheme allowing facilities and programs to be separated by "sex." [4] If "sex" signifies, not biology, but rather one's "internal" sense of maleness or femaleness, the whole concept of permissible sex-separation collapses. What sense could there be in allowing "separate living facilities for the different sexes," 20 U.S.C. § 1686, if a biological male could legally qualify as a woman based merely on his *subjective* perception of being one? The answer is none. *Cf. United States v. Virginia,* 518 U.S. 515, 550 n. 19 (1996) (admitting women to VMI "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements").

3. Nor is the Ferg-Cadima interpretation supported by the theory of sex-stereotyping discrimination in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). *Cf.* App. 122a n.2 (relying on *Price Waterhouse*). A *Price Waterhouse* claim is "based on behaviors, mannerisms, and appearances," such as when a male employee is fired because he "wear[s] jewelry … considered too effeminate, ***36** carr[ies] a serving tray too gracefully, or tak[es] too active a role in child rearing." *Johnston,* 97 F.Supp.3d at 680 (internal quotations and citation omitted). But *Price Waterhouse* does not require "employers to allow biological males to use women's restrooms," because "[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Etsitty,* 502 F.3d at 1224. If anything, the Board's policy is the *opposite* of sex stereotyping: it designates male and female restrooms based solely on biology, regardless of whether a man or a woman satisfies some stereotypical notion of masculinity or femininity. See, *e.g., Johnston,* 97 F.Supp.3d at 680-81 (rejecting sex stereotyping claim on this basis).

4. Furthermore, an interpretation of Title IX according to the Ferg-Cadima view would render the statute unconstitutional, and must be avoided for that reason alone. See, *e.g., Rust v. Sullivan,* 500 U.S. 173, 190 (1991) (describing constitutional avoidance canon). For instance, it would cause Title IX to violate the Spending Clause by failing to give "clear notice" of conditions attached to federal funding. [5] No funding recipient could have had "clear notice" of the novel interpretation of Title IX in ***37** this case. Indeed, the *G.G.* majority confirmed as much by finding the Title IX regulation was ambiguous as applied to transgender individuals. App. 18a. *Cf. Bennett v. Ky. Dep't of Educ.,* 470 U.S. 656, 666 (1985) (no "clear notice" violation where there was "no ambiguity with respect to" funding condition).

5. Finally, taking the Ferg-Cadima letter's construction of "sex" seriously would turn Title IX against itself. As the district court pointed out, the relevant regulation would bar the Board's policy only if "sex" means *solely* "gender identity" and excludes any notion of "biological sex." App. 99a-102a. As applied to Title IX, that preposterous construction would legalize just the kind of biologically based discrimination against men and women that Title IX was enacted to prevent. For instance, schools could exclude biological women from taking science classes or joining the chess team, so long as they allowed biological men who identify as females to do so. Only transgendered people would be protected under this Title IX regime; men and women who identify with their biological sex would receive no protection at all.

Indeed, if "sex" means *only* "gender identity," the Board's policy would not implicate Title IX *at all* because it addresses only "biological sex" and *excludes* consideration of gender identity. But that is absurd: everyone agrees that the Title IX regulation squarely addresses - and expressly allows - sex-separated restrooms, exactly like the ones provided by the Board's policy.

***38 CONCLUSION**

Some regard transgender restroom access as one of the great civil-rights issues of our time. But that makes it all the more important to insist that federal officials follow the procedures for lawmaking prescribed in the Constitution and the Administrative Procedure Act. To condone the agency behavior displayed in this case is to condone future use of these maneuvers by other agency officials, and in support of other causes - without any way of ensuring that the Executive Branch will always be controlled by people who share one's most deeply held beliefs.

At bottom, then, this case is not really about whether G.G. should be allowed to access the boys' restrooms, nor even primarily about whether Title IX can be interpreted to require recipients to allow transgender students into the restrooms and locker rooms that accord with their gender identity. Fundamentally, this case is about whether an agency employee can impose that policy in a piece of private correspondence. If the Court looks the other way, then the agency officials in this case - and in a host of others to come - will have become a law unto themselves.

***39** The petition for a writ of certiorari should be granted.

Footnotes

1 This petition uses "he, "him, and "his to respect G.G.'s desire to be referred to with male pronouns. That choice does not concede anything on the legal question of what G.G.'s "sex is for purposes of Title IX and its implementing regulation.

2 The Fourth Circuit's opinion tries to depict the citizens who opposed G.G's presence in the boys' room as largely "hostil e] to G.G., selectively quoting the few intemperate statements and subtly implying they represented the whole. App. 10a. The video of the meetings, however, shows that the overwhelming majority of those expressing concern did so with courtesy and decency, not "hostility. *See* http://bit.ly/2bsVO6h (Dec. 9, 2014 meeting); http://www.gloucesterva.info/channels47and48 (containing link to Nov. 11, 2014 meeting video).

3 Ms. Prince describes herself as the "Sworn Knight of the Transsexual Empire. *See* https://twitter.com/emily esque?lang en. Her name appears in the signature of the e mail that DOJ filed in the district court, when the file is opened in Preview for Mac.

4 DOJ cited two other documents issued by the Department of Education, but neither addresses whether schools must allow transgender students into restrooms or locker rooms that correspond with their gender identity. See ECF No. 28 at 9; see also, *supra*, at 7 8.

5 See, *e.g., Decker v. Nw. Envtl. Def. Ctr.,* 133 S. Ct. 1326, 1338 39 (2013) (Roberts, C.J., concurring); *id.* at 1339 42 (Scalia, J., concurring in part and dissenting in part); *Perez v. Mortg. Bankers Ass n,* 135 S. Ct. 1199, 1210 11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211 13 (Scalia, J., concurring in the judgment); *id.* at 1213 25 (Thomas, J., concurring in the judgment).

6 By contrast, in *Foster v. Vilsack,* 820 F.3d 330 (8th Cir. 2016) (petition for certiorari pending), the Eighth Circuit's opinion does not cite or discuss *Auer* or any *Auer* related rulings from this Court. It simply declares, without analysis, that the agency's "reasonable interpretation is "owe d] deference. *Id.* at 335.

7 See, *e.g., Udall v. Tallman,* 380 U.S. 1, 16 17 (1965); *Thorpe v. Hous. Auth. of City of Durham,* 393 U.S. 268, 276 (1969).

8 See Stephen Breyer, *Judicial Review of Questions of Law and Policy,* 38 Admin. L. Rev. 363 (1986); *id.* at 373 (criticizing notion that *Chevron* should apply to all agency interpretations of law as "seriously overbroad, counterproductive and sometimes senseless.); Cass R. Sunstein, *Chevron Step Zero,* 92 Va. L. Rev. 187 (2006) (explaining how Justice Breyer's views influenced this Court's rulings in *Christensen, Mead* and *Barnhart v. Walton,* 535 U.S. 212 (2002)).

9 See *Mead,* 533 U.S. at 229 34; *Christensen,* 529 U.S. at 587.

10 *Intracomm, Inc. v. Bajaj,* 492 F.3d 285, 293 & n.6 (4th Cir. 2007) (deferring to Secretary's interpretation advanced in case under review); *Woudenberg v. U.S. Dep t of Agric.,* 794 F.3d 595, 599, 601 (6th Cir. 2015) (deferring to agency ruling in the case under review); *Bible ex rel. Proposed Class v. United Student Aid Funds, Inc.,* 799 F.3d 633, 639, 651 (7th Cir. 2015) (deferring to agency's interpretation advanced in amicus briefs), *cert. denied,* 136 S. Ct. 1607 (2016); *Biodiversity Conservation All. v. Jiron,* 762 F.3d 1036, 1062 68 (10th Cir. 2014) (deferring to agency interpretation advanced during administrative appeal); *Polycarpe v. E&S Landscaping Serv. Inc.,* 616 F.3d 1217, 1225 (11th Cir. 2010) (deferring to agency interpretation advanced in amicus brief).

11 To be sure, the Fourth Circuit's decision to invoke *Auer* deference in the circumstances presented here was also wrong for a host of other reasons, see Application for Stay, No. 16A52, at 18 29, including this Court's reminder in *Gonzales v. Oregon,* 546 U.S. 243 (2006), that *Auer* deference is inappropriate where that pronouncement "cannot be considered an interpretation of the regulation as opposed to the underlying statute. *Id.* at 247. As discussed, the Ferg Cadima letter offered an interpretation of Title IX itself, and not merely the regulation. See *supra* at 11.

12 See, *e.g.,* 42 U.S.C. § 13925(b)(13)(A) (prohibiting discrimination based on "sex, gender identity …, sexual orientation, or disability); 42 U.S.C. § 3796gg (assisting victims "whose ability to access traditional services and responses is affected by their … gender identity).

13 See, *e.g.*, H.R. 2015 (110th Cong. 2007); H.R. 3017 (111th Cong. 2009); S. 1584 (111th Cong. 2009); H.R. 1397 (112th Cong. 2011); S. 811 (112th Cong. 2011); H.R. 1755 (113th Cong. 2013); S. 815 (113th Cong. 2013) (unenacted versions of Employment Non Discrimination Act, which would have prohibited gender identity discrimination).

14 See, *e.g.*, 20 U.S.C. § 1686 (allowing "separate living facilities for the different sexes); 34 C.F.R. § 106.32 (allowing "separate housing on the basis of sex, provided facilities are " p]roportionate in quantity and "comparable in quality and cost); 34 C.F.R. § 106.34 (allowing "separation of students by sex within physical education classes and certain sports "the purpose or major activity of which involves bodily contact).

15 *Arlington Cent. Sch. Bd. of Educ. v. Murphy,* 548 U.S. 291, 297 (2006) (clear notice absent where text "does not even hint fees due to prevailing party); *NFIB v. Sebelius,* 132 S. Ct. 2566, 2606 (2012) (Congress's spending clause power "does not

include surprising participating States with post acceptance or retroactive conditions (quoting *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 25 (1981)).

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2016 WL 5462546 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

GLOUCESTER COUNTY SCHOOL BOARD, petitioner,
v.
G.G., by his next friend and mother, Deirdre Grimm.

No. 16-273.
September 26, 2016.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Reply in Support of Petition for a Writ of Certiorari

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***1** INTRODUCTION

G.G.'s arguments opposing review are no more persuasive now than when G.G. unsuccessfully opposed the Board's earlier stay application. First, G.G. offers nothing to contradict the conclusion by several Justices that *Auer v. Robbins,* 519 U.S. 452 (1997), should be reconsidered. Second, G.G.'s attempt to avoid the circuit conflicts described in the petition mischaracterizes the decision below. Third, this case remains an excellent vehicle for resolving both the divisions over *Auer* and - if the Court chooses - the proper interpretation of Title IX and its implementing regulation.

G.G.'s suggestion that the Court should nevertheless "wait and see" how other courts address these issues ignores the fact that the merits of *Auer* have already been exhaustively discussed in judicial opinions and legal scholarship. More importantly, the suggestion also ignores the enormous costs *now* being inflicted nationwide on educational institutions, school boards, and States by the regulatory mischief on vivid display in this case. Just as those widespread and irreparable harms justified this Court's recall and stay of the Fourth Circuit's mandate, they likewise justify immediate review.

I. *AUER*'S VIABILITY RICHLY MERITS REVIEW, INDEPENDENT OF THE TITLE IX ISSUE.

G.G. disputes none of the Board's challenges to *Auer.* Thus, G.G. does not dispute that *Auer* deference to agency regulatory interpretations gives officials enormous ***2** power over controversial policies, as dramatically illustrated by decision below. Nor does G.G. dispute that *Auer* deference in its current form violates the Administrative Procedure Act. Nor does G.G. dispute that, contrary to separation of powers, *Auer* empowers an agency to invade the law-making and law-interpreting provinces of Congress and the courts. Pet. 18-25.

1. Tellingly, G.G. also does not dispute that *Auer* is untenable after *Mead,* which substantially cabined *Chevron's* application to agency interpretations of the statutes they administer. See Pet. 23-25; see also *United States v. Mead Corp.,* 533 U.S. 218, 229-34 (2001) (holding *Chevron* applies only when Congress affirmatively intends to delegate interpretive or gap-filling authority to an agency). And *Mead* itself is a complete answer to G.G's argument that overruling or limiting *Auer* would require "special justification." Opp. 17. Fundamental incompatibility with subsequent precedents

is justification for overruling or limiting earlier ones. See, *e.g.*, *Obergefell v. Hodges,* 135 S. Ct. 2584, 2598-99 (2015); *Lawrence v. Texas,* 539 U.S. 538, 573-75 (2003).

2. G.G. attempts to buttress *Auer* by citing a forthcoming article by Professors Sunstein and Vermeule. See Opp. 17-18 (citing Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 83 U. Chi. L. Rev. (forthcoming 2016), available at http://ssrn.com/abstract=2716737). But G.G. ignores two decades of scholarly criticism of *Auer.* See Brief of Cato Institute at 5-8 (detailing academic criticism of *Auer*). In any event, Sunstein and Vermeule do not explain how *Auer* comports with *Mead.* Nor do they explain how extending ***3** *Auer* to informal agency letters honors the APA requirement that "substantive" agency rules undergo notice and comment. See 5 U.S.C. § 553(b)(3). Nor do they address the most fundamental objection to applying *Auer* here: If the Ferg-Cadima interpretation binds the federal courts and Title IX recipients, then why is it not a "substantive" rule that must undergo notice and comment? See Pet. 24-25; see also *Texas v. United States,* No. 7:16-cv-00054 (N.D. Tex. Aug. 21, 2016) (App. 212a-217a) (holding May 13, 2016 "Dear Colleague" letter is a substantive rule triggering notice and comment).

Once agency pronouncements such as the Ferg-Cadima letter receive the *Auer* mantle, they carry the force of law - as illustrated by the fact that, if the decision below stands, any school in the Fourth Circuit that departs from the letter's "guidance" will be sued, face the loss of federal educational funds, or both. The propriety of that state of affairs - which is "a basic [issue] going to the heart of administrative law," *Decker v. Nw. Envtl. Def. Ctr,* 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring) - is squarely posed by this case and should be taken up by the Court.

II. AMONG OTHER ISSUES, THE CIRCUITS ARE DIVIDED OVER THE PROPER APPLICATION OF *AUER* TO INFORMAL AGENCY OPINION LETTERS.

G.G. is also mistaken in challenging the circuit divisions explained in the petition (at 25-29), and in suggesting that, regardless, this case "does not implicate" them. Opp. 18.

***4** 1. Taking the second point first: G.G.'s argument that the divisions outlined in the petition are not "implicated by this case" (Opp. 18) attempts to rewrite the Fourth Circuit's decision. G.G. is of course correct that the Department of Education (Department) asserted its position in this case, not just in the Ferg-Cadima letter, but also in a statement of interest and amicus brief. *Id.* But that is irrelevant: The only document to which the Fourth Circuit actually deferred was the Ferg-Cadima letter. See App. 18a (noting United States requested deference to "OCR's January 7, 2015 letter"); see also *id.* 41a (Niemeyer, J., dissenting) (noting "the majority relies entirely on [the] 2015 letter"). Thus, Fourth Circuit law now requires courts to defer to informal agency letters *regardless* of whether they are accompanied by statements of interest or amicus briefs.

2. G.G. also argues that the 4-3 circuit split on deference to informal agency pronouncements like the Ferg-Cadima letter is "questionable." Opp. 18. It is not.

For example, while *United States v. Lachman,* 387 F.3d 42, 54 (1st Cir. 2004), concerned informal statements at industry seminars rather than in an opinion letter (Opp. 19), the *reasons* the First Circuit gave for refusing to defer in that setting plainly apply here. The court explained that *Mead's* "requirements of public accessibility and formality are *applicable in the context of agency interpretations of regulations,*" and consequently held that "[t]he *non-public or informal understandings* of agency officials concerning the meaning of a regulation are thus not relevant." *Id.* at 54 (emphases added). In light of *Lachman,* G.G. cannot (and does not) deny that the First ***5** Circuit would not have deferred to the Ferg-Cadima letter had this case arisen there.

The same is true of the Seventh Circuit. Although G.G. is correct that the analysis in *Keys v. Barnhart,* 347 F.3d 990 (7th Cir. 2003), of informal agency interpretations was arguably dicta, G.G. does not dispute that the discussion of that issue in *U.S. Freightways Corp. v. Commissioner,* 270 F.3d 1137 (7th Cir. 2001) (Wood, J.), was essential to the holding there.

Thus, under the holding in *U.S. Freightways,* the Ferg-Cadima letter would not have received "full *Chevron* deference" had this case arisen in the Seventh Circuit. Cf. *id.* at 1141-42.

To be sure, as G.G. points out (at 19), *U.S. Freightways* did not expressly discuss *Auer.* But the opinion clearly assumes that *Mead* overtook *Auer* as to regulations, just as it cabined *Chevron* as to statutes: Judge Wood's opinion noted that the same considerations that under *Mead* preclude "full *Chevron* deference" to informal agency interpretations of statutes *also* preclude such deference to informal interpretations of regulations. *Id.* at 1142. And Judge Posner's subsequent opinion in *Keys* made that view explicit as to *Auer* - leaving no doubt on that point in the Seventh Circuit. See *Keys,* 347 F3d at 993.

As to the Eleventh Circuit: G.G. does not dispute that the decision below conflicts with *Arriaga v. Florida Pacific Farms, L.L.C,* 305 F.3d 1228, 1238 (11th Cir. 2002), which applied *Skidmore* rather than *Auer* to opinion letters interpreting agency regulations. Nor does G.G. dispute that, under *Arriaga,* the Eleventh Circuit would *not* ***6** have deferred to the Ferg-Cadima letter. Instead, G.G. suggests that Eleventh Circuit law is unclear because, three years before *Arriaga,* the Eleventh Circuit applied *Auer* to an informal opinion letter "without explanation." Opp. 20 (citing *Falken v. Glynn Cty.,* 197 F.3d 1341, 1350 (11th Cir. 1999)). But the "explanation" for the shift is obvious: *Mead* was decided in the interim and, as already explained, is incompatible with *Auer.*

There can thus be no doubt that this case would have come out differently if it had arisen in the First, Seventh, or Eleventh Circuits. In short, the 4-3 split identified in the petition concerning deference to informal agency opinions is real.

***7 III.THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING BOTH THE DIVISIONS OVER *AUER* AND THE PROPER INTERPRETATION OF TITLE IX AND ITS REGULATION.**

G.G. incorrectly suggests that other concerns make this case a poor vehicle for resolving the divisions over *Auer* and the proper interpretation of Title IX.

A. This Case Presents No Finality Concerns.

G.G. first suggests that this case is a bad vehicle because the judgment below is nonfinal. Opp. 23-25. But the Court's general reluctance to review cases "in an interlocutory posture" is inapplicable here. *Mount Soledad Mem'l Ass'n v. Trunk,* 132 S. Ct. 2535, 2536 (2012) (Alito, J., concurring in denial of certiorari).

First, the Fourth Circuit's decision turned on a pure question of law - whether the Ferg-Cadima letter merits *Auer* deference. App. 71a-72a. The Board's petition therefore does not implicate the subsidiary factual matters alluded to by G.G. See Opp. 4 & nn. 2-3, 27 (discussing questions regarding transgender people). As Judge Niemeyer observed, "the facts of this case, in particular, are especially 'clean,' such as to enable the [Supreme] Court to address the [legal] issue without the distraction of subservient issues." App. 65a.

Second, there is no question about the ultimate impact of the decision below. Following the Fourth Circuit's decision, the district court *immediately* entered a preliminary injunction based entirely on that decision. Pet. ***8** 16. This case thus sharply contrasts with cases like *Mount Soledad,* in which at the time certiorari was sought, "it remain[ed] unclear precisely what action the … Government will be required to take" as a result of the court of appeals' decision. 132 S. Ct. at 2536 (Alito, J., concurring). Here there is no doubt about the ultimate outcome in the district court - the injunction has already been entered - or in the subsequent Fourth Circuit appeal.

Third, the Board has also sought certiorari before judgment in the *second* Fourth Circuit appeal (which challenges the district court's injunction) even as it seeks review of the Fourth Circuit's earlier decision. Pet. 17. Indeed, when seeking

a stay the Board told this Court it would seek review in both cases - see Reply in Supp. of Stay at 4 - and the Court consequently stayed both cases. *Gloucester Cty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016) (per curiam). If the Court wishes to have the preliminary injunction before it as well as the Fourth Circuit's decision, the petition provides that option.

Moreover, this case meets Rule 11's standard for certiorari before judgment as well as the usual Rule 10 standards. Given that the Fourth Circuit's decision immediately spawned a nationwide transgender non-discrimination policy imposed by mid-ranking officials at the Departments of Justice and Education, this is undoubtedly a case of "imperative public importance." Pet. 14-16. And this Court has not hesitated to review preliminary-injunction decisions that, like the decision below, involve pure questions of law and present issues of nationwide significance. See, *e.g.,* ***9** *United States v. Texas,* 136 S. Ct. 906 (2016) (granting certiorari); *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015); *Glossip v. Gross,* 135 S. Ct. 2726 (2015); *Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751 (2014); *Arizona v. United States,* 132 S. Ct. 2492 (2012); *Pleasant Grove City v. Summum,* 555 U.S. 460 (2009); *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.,* 547 U.S. 47 (2006); *Mazurek v. Armstrong,* 520 U.S. 968 (1997).

B. This Case Is A Superior Vehicle For Revisiting *Auer* In A Setting In Which It Is Having Nationwide Impact.

G.G. is also mistaken in suggesting that in various respects the Fourth Circuit's decision is too narrow to be a good vehicle for resolving the questions presented. Opp. 25, 27-28.

First, the precise question decided below makes this case an ideal vehicle for considering how best to curtail *Auer.* The Fourth Circuit held that *Auer* requires deference to an informal, unpublished letter, written by a low-level agency official, in the context of the very dispute in which deference was sought. Pet. 8. The decision thus puts *Auer's* defects on maximum display. See, *e.g., Perez v. Mortg. Bankers Ass'n,* 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment) (stating that *Auer* effects an unconstitutional "transfer of judicial power to the Executive Branch"); *Christensen v. Harris Cty,* 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters - like interpretations contained in policy statements, agency manuals, and enforcement ***10** guidelines, all of which lack the force of law - do not warrant *Chevron*-style deference.").

Second, G.G.'s suggestion that the Fourth Circuit's decision "concern[s] access to restrooms only" is false. Opp. 25. The letter to which the court deferred extends beyond restrooms to facilities such as "locker rooms, shower facilities, [and] housing." App. 123a. The United States has already told a federal district court that "the reasoning of *Gloucester's* holding applies to changing facilities with equal force." Mem. in Supp. of Prelim. Inj. at 15, in *United States v. North Carolina,* No. 1:16-cv-00425 (M.D.N.C. July 5, 2016), ECF No. 74. And G.G.'s counsel has taken the same position. See Mem. in Supp. of Prelim. Inj. at 14, *Carcano v. McCrory,* No. 1:16-cv-00236 (M.D.N.C. May 16, 2016), ECF No. 23 (arguing "[t]he Fourth Circuit's controlling decision in *G.G.* applies with equal force to 'changing facilities,' such as locker rooms").

But even if the Fourth Circuit's decision were limited to restrooms, it would still merit this Court's review. See, *e.g., Texas v. United States* (App. 219a-223a, 229a) (rejecting *G.G.* and issuing nationwide injunction against federal edicts regarding transgender access to school restrooms); Order at 4-5, *Carcano v. McCrory,* No. 1:16-cv-00236 (M.D.N.C. Aug. 26, 2016), ECF No. 127 (following *G.G.* and issuing preliminary injunction against North Carolina law concerning restroom access). Even if so limited, the decision rests on an indefensible application of *Auer* that is already having nationwide impact. See Pet. 3, 14-16, 31-32. This case is therefore an ideal candidate for reconsidering *Auer*'s deference regime.

***11 C. The Department's Interpretation Of Title IX And Its Implementing Regulation Is Not Entitled To Deference Under Any Standard.**

G.G.'s attempt to defend the Department's interpretation of Title IX and its implementing regulation is also meritless. See Opp. 29-36. Although full exploration of that issue should await merits briefing, the Department's interpretation cannot bear scrutiny under *any* deference standard, save perhaps the Fourth Circuit's rubberstamp regime.

First, the Ferg-Cadima letter interprets - not merely the regulation - but the term "sex" in the Title IX *statute.* See App. 121a ("*Title IX*" bans discrimination "on the basis of sex, including gender identity") (emphasis added). But *Auer* does not apply to an agency interpretation of the underlying statute, *Gonzales v. Oregon,* 546 U.S. 243, 256-57 (2006), and informal opinion letters do not receive *Chevron* deference under *Mead. Christensen,* 529 U.S. at 587. See also Pet. 8, 31 n.11; Jonathan H. Adler, *What "Sex" Has to Do with Seminole Rock,* Yale J. Reg.: Notice & Comment (Sept. 16, 2016), http://yalejreg.com/nc/what-sex-has-to-do-with-seminole-rock-by-jonathan-h-adler/ ("[T]he relevant ambiguity exists in the underlying statutory language as well.… In such cases, agency interpretations of their own regulations are, for all practical purposes, interpretations of the *statute*, and are therefore only eligible for deference under *Chevron* - and *Chevron* (as explicated in *Mead*) requires an agency to do more than issue a guidance letter or file a brief.").

***12** Second, even assuming the regulation were sufficiently ambiguous to invoke *Auer,* cf. Pet. 11, 33-34, G.G.'s own argument shows that the Board's policy satisfies the regulation. G.G. concedes that "[t]he term 'sex' in 34 C.F.R. § 106.33, as in the underlying statute, encompasses *all* physiological, anatomical, and behavioral aspects of sex." Opp. 30 (emphasis added). But the Board's policy itself treats sex as a "physiological" and "anatomical" concept. See App. 144a (limiting restrooms and locker rooms to "biological" sexes). The policy would only violate the regulation if "sex" means *only* "gender identity," which, as the district court explained, would be absurd. App. 99a, 102a.

Third, G.G. candidly admits (at 1) that the Department's interpretation of "sex" would have been unfathomable when the regulation was adopted. But this is an admission that *Auer* cannot justify the Department's novel interpretation. See, *e.g., Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512 (1994) (noting that an agency interpretation is not entitled to deference if alternative reading is "compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation"). It is also an admission that the Congress that enacted Title IX never intended to delegate to the Department the prerogative to resolve complex issues of transgender access to restrooms. See *Mead,* 533 U.S. at 229-34 (noting that *Chevron* applies only when Congress affirmatively intends to delegate interpretive authority).

Finally, G.G. suggests that such a delegation is nevertheless found in 20 U.S.C. § 1682. Opp. 34. But that statute ***13** authorizes Federal agencies empowered to administer educational funding to effectuate Title IX *only* "by issuing rules, regulations, or orders of general applicability," which, moreover, must be "approved by the President." 20 U.S.C. § 1682. The Ferg-Cadima letter obviously does not qualify.

*14 CONCLUSION

The petition for a writ of certiorari should be granted.

Footnotes

1 G.G. also mistakenly asserts that this case does not implicate the second division discussed in the petition over whether *Auer* applies to positions first articulated in the dispute at issue. See Pet. 30 31. Contrary to G.G.'s assertion (at 20), the Department's "interpretation of § 106.33 dates back only to 2015, not to "2013. See App. 18a (noting United States requested deference to "OCR's January 7, 2015 letter); App. 23a (noting "the Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015). And that 2015 "interpretation arose out of a request concerning the policy in *this* case. See Pet. 8 9.

2017 WL 65477 (U.S.) (Appellate Brief)
Supreme Court of the United States.

GLOUCESTER COUNTY SCHOOL BOARD, Petitioner,
v.
G.G., by his next friend and mother, Deirdre Grimm.

No. 16-273.
January 3, 2017.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief of Petitioner

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*i QUESTIONS PRESENTED

Title IX of the Education Amendments of 1972 ("Title IX") prohibits discrimination "on the basis of sex," 20 U.S.C. §1681(a), while its implementing regulation permits "separate toilet, locker room, and shower facilities on the basis of sex," if the facilities are "comparable" for students of both sexes, 34 C.F.R. §106.33. In this case, a Department of Education official opined in an unpublished letter that Title IX's prohibition of "sex" discrimination "include[s] gender identity," and that a funding recipient providing sex-separated facilities under the regulation "must generally treat transgender students consistent with their gender identity." App. 128a, 100a. The Fourth Circuit afforded this letter "controlling" deference under the doctrine of *Auer v. Robbins,* 519 U.S. 452 (1997). On remand the district court entered a preliminary injunction requiring the petitioner school board to allow respondent - who was born a girl but identifies as a boy - to use the boys' restrooms at school.

The questions presented are:

1. Should *Auer* deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

2. With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. §106.33 be given effect?

*ii PARTIES TO THE PROCEEDING

Petitioner Gloucester County School Board was Defendant-Appellee in the court of appeals in No. 15-2056, and Defendant-Appellant in the court of appeals in No. 16-1733.

Respondent G.G., by his next friend and mother, Deirdre Grimm, was Plaintiff-Appellant in the court of appeals in No. 15-2056 and Plaintiff-Appellee in the court of appeals in No. 16-1733.

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Cases

*1 INTRODUCTION

The Fourth Circuit has adopted an agency interpretation of Title IX that is plainly wrong and that would make this landmark law unrecognizable to the Congress that enacted it four decades ago.

Title IX forbids discrimination in educational programs "on the basis of *sex,* " 20 U.S.C. §1681(a) (emphasis added), a straightforward prohibition intended to erase discrimination against women in classrooms, faculties, and athletics. No one imagined, however, that Title IX would erase all distinctions between men and women, nor dismantle expectations of privacy between the sexes. That is why Title IX permits "separate living facilities for the different sexes," 20 U.S.C. §1686, including "separate toilet, locker room, and shower facilities on the basis of sex[.]" 34 C.F.R. §106.33. For over forty years, our Nation's schools have structured facilities around that sensible idea - namely, that in intimate settings men and women may be separated "to afford members of each sex privacy from the other sex." *United States v. Virginia,* 518 U.S. 515, 550 n.19 (1996).

***2** The interpretation adopted by the Fourth Circuit turns that expectation upside down. Deferring to an unpublished letter written in January 2015 by a mid-level official in the Department of Education ("Department"), the court reasoned that the term "sex" in Title IX does not mean the physiological distinctions between males and females - which is what Congress (and everyone else) thought the term meant when Title IX was enacted and its regulations issued in the mid-1970s. Instead, we are now told that "sex" is ambiguous as applied to persons whose gender identity diverges from their physiology. According to the Fourth Circuit, this means a physiologically female student who identifies as a male must be allowed to use the boys' restroom, and vice versa. It also means that the policy of the petitioner Gloucester County School Board ("Board") - which separates restrooms by physiological sex, while also providing unisex restrooms for all students - *is prohibited* by Title IX.

That preposterous interpretation is foreclosed by the text, structure, and history of Title IX and its implementing regulation, and no amount of deference to an administrative agency can justify it.

OPINIONS BELOW

This Court has granted review of two related cases in the court of appeals, Nos. 15-2056 and 16-1733. No. 15-2056 is G.G.'s appeal of the district court's order dismissing the Title IX claim and denying a preliminary injunction. The opinion of the court of appeals in that case is available at 822 F.3d 709 (4th Cir. 2016). ***3** App. 1a-60a. The district court's opinion is available at 132 F. Supp. 3d 736 (E.D. Va. 2015). App. 84a-117a.

No. 16-1733 is the Board's appeal of the district court's order granting a preliminary injunction after the remand in No. 15-2056. The district court's opinion is available at 2016 WL 3581852 (E.D. Va. June 23, 2016). App. 71a-72a.

JURISDICTION

In No. 15-2056, the court of appeals entered its judgment on April 19, 2016. App. 3a. It denied the Board's petition for rehearing en banc on May 31, 2016. App. 61a. No. 16-1733 remains pending in the court of appeals. The Board timely petitioned for certiorari on August 29,2016, see 28 U.S.C. §2101(c), and this Court granted the writ on October 28, 2016. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972 provides, in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]

20 U.S.C. §1681(a).

> ***4** Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

20 U.S.C. §1686.

Department of Education Title IX regulations provide, in relevant part:

> A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

34 C.F.R. §106.33.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

Marking Title IX's fortieth anniversary in 2012, the White House praised its "commonsense" prohibition on sex discrimination in education and observed that the law "marked a momentous shift for women's equality in classrooms, on playing fields, and in communities throughout our nation." That is exactly ***5** right. In the words of its principal sponsor, Senator Birch Bayh of Indiana, Title IX aimed "a death blow" at "one of the great failings of the American educational system" - namely, "corrosive and unjustified discrimination against women." 118 Cong. Rec. 5809, 5803. At the same time, however, Title IX carefully preserved settled expectations of privacy by permitting "separate living facilities for the different sexes, 20 U.S.C. §1686, and "separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. §106.33 ("section 106.33"). That exception was "designed," as Senator Bayh explained, "to allow discrimination only in instances where personal privacy must be preserved." 121 Cong. Rec. 16060.

1. Title IX prohibited sex discrimination as a means of ending educational discrimination against women.

Title IX emerged from Congress's multifaceted efforts in the early 1970's to address discrimination against women. See generally Paul C. Sweeney, *Abuse Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment,* 66 UMKC L. Rev. 41, 50-54 (1997). Frustrated with lack of progress on the Equal Rights Amendment ("ERA"), Senator Bayh decided to pursue its goals through other means. Birch Bayh, *Personal Insights and Experiences Regarding the Passage of Title IX,* 55 Clev. St. L. Rev. 463, 467 (2007). Believing that the worst discrimination against women was in "the educational area," *id.* at 468, Bayh focused on the Higher Education Act of ***6** 1965, which granted money to universities. Sweeney, *supra,* at 51. In 1972, while that Act was being amended, floor amendments added the text that is now Title IX. See 117 Cong. Rec. 39098; 118 Cong. Rec. 5802-03.

Those amendments were principally motivated to end discrimination against women in university admissions and appointments. See 117 Cong. Rec. 39250, 39253, 39258; 118 Cong. Rec. 5104-06. Title IX's architects viewed such discrimination as rooted in pernicious stereotypes about women. As Senator Bayh vividly put it, "[w]e are all familiar with the stereotype of women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children, and never work again." 118 Cong. Rec. 5804. Title IX meant to extirpate such "myths about the 'weaker sex.' " *Id.*

Indeed, in the debates Senator Bayh used the term "sex discrimination" and "discrimination against women" as virtually interchangeable. See, *e.g.,* 118 Cong. Rec. 5803. House members did the same, explaining that the legislation would afford "Women … [an] equal opportunity to start their careers on a sound basis," 117 Cong. Rec. 39253 (Rep. Sullivan), and that extending such protection to "women" would be "[a]ll that this title does[.]" 117 Cong. Rep. 39259 (Rep. Green).

***7** *2. Title IX allows certain facilities and programs to be separated by sex.*

At the same time, Congress understood that not all distinctions between men and women are based on stereotypes. Foremost among those are distinctions needed to preserve privacy. As ERA proponents had grasped, "disrobing in front of the other sex is usually associated with sexual relationships," Barbara A. Brown, Thomas I. Emerson, Gail Falk, Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 Yale L.J. 871, 901 (1971), and thus implicated the recently-recognized right to privacy. See *id.* at 900-01 (citing *Griswold v. Connecticut,* 381 U.S. 479 (1965)). That privacy right "would permit the separation of the sexes" in intimate facilities such as "public rest rooms[.]" *Id.*

Both the Senate and House grasped this commonsense principle. For instance, Senator Bayh noted sex separation would be justified where "absolutely necessary to the success of the program" such as "in classes for pregnant girls," and "in sports facilities or other instances where personal privacy must be preserved." 118 Cong. Rec. 5807. [2] Representative Thompson ***8** - "disturbed" by suggestions that banning sex discrimination would prohibit all sex-separated facilities - proposed an amendment stating that "nothing contained herein shall preclude any educational institution from maintaining separate living facilities because of sex." 117 Cong. Rec. 39260. The language was introduced that day and adopted by the House without debate. 117 Cong. Rec. 39263. Although Bayh's version lacked a similar proviso, the conference committee included Thompson's language without further discussion. H.R. Conf. Rep. No. 92-1085 at 222.

Subsequently, the Department of Health, Education, and Welfare ("HEW") proposed a Title IX regulation fleshing out the statute's reference to "living facilities." See Comment, *Implementing Title IX: The HEW Regulations,* 124 U. Pa. L. Rev. 806, 811 (1976) (noting "living facilities" was ambiguous). The HEW regulation provided that living facilities would include "toilet, locker room and shower facilities." HEW, 39 Fed. Reg. 22228, 22230 (June 20, 1974). The final regulations retained HEW's definition. HEW, 40 Fed. Reg. 24128, 24141 (June 4, 1975); 34 C.F.R. §106.33. [3] ***9** HEW's regulations continued to use the statutory term "sex," without elaboration.

When Congress considered the HEW regulation on "living facilities," Senator Bayh again linked the issue to privacy. He introduced into the record a scholarly article explaining that Title IX "was designed to allow discrimination only in instances where personal privacy must be preserved. For example, the privacy exception lies behind the exemption from the Act of campus living facilities. The proposed regulations preserve this exception, as well as permit 'separate toilet, locker room, and shower facilities on the basis of sex.' " 121 Cong. Rec. 16060.

Title IX regulations contain another relevant provision for separation between male and female students, also based on physical differences. Funding recipients are prohibited from discriminating on the basis of sex in athletic activities and must provide "equal athletic opportunity for members of both sexes." 34 C.F.R. §106.41(a), (c); HEW, 40 Fed. Reg. 24128 (June 4, 1975). Nonetheless, they are permitted to establish "separate teams for members of each sex where selection … is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. §106.41(b).

3. Title IX is enforced by multiple agencies through formal rules and clear notice.

Title IX is authorized by the Spending Clause, see ***10** *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74 (1992), and Congress has accordingly vested enforcement responsibility with "[e]ach Federal department and agency … empowered to extend Federal financial assistance to any education program or activity[.]" 20 U.S.C. §1682. Those agencies may "effectuate" Title IX by "issu[ing] rules, regulations, or orders of general applicability," and "[n]o such rule, regulation, or order shall become effective unless and until approved by the President." *Id.*; see also 20 U.S.C. §1232(f) (requiring that certain Department acts be transmitted to leaders of Congress).

Title IX may be enforced by terminating federal financial support to noncompliant institutions. 20 U.S.C. §1682. Agencies seeking to enforce Title IX in that way must comply with certain procedural requirements, including notice and opportunity for a hearing, and must provide written reports on the termination to Congress. *Id.*

B. Factual Background

G.G. is a 17-year-old student at Gloucester High School who was born female. JA61, 64. [4] According to G.G., however, "I was born in the wrong sex." App. 151a. In XX/XX/2014, a psychologist diagnosed G.G. with gender dysphoria, a condition involving "incongruence between a person's gender identity" and birth sex. JA64-65. G.G. defines "gender identity" as one's "innate sense of being male or female," in contrast to ***11** one's "sex … assigned at birth." JA64. G.G. was advised to "transition" to a male gender identity by adopting a male name and "us[ing] … the [boys'] restroom." JA66. G.G. has since legally adopted a male name, but has not undergone any genital surgery and is still anatomically female. JA89. [5]

In August 2014, before the 2014-15 school year began, G.G. and G.G.'s mother met with the Gloucester High School principal and guidance counselor. App. 148a. The officials "expressed support for [G.G.] and a willingness to ensure a welcoming environment." *Id.* Records were changed to reflect G.G.'s male name, and teachers were told that G.G. was to be addressed by a male name and pronouns. G.G. was also permitted to continue with a home-bound physical education program, which meant G.G. did not need to use the school's locker room. App. 149a.

G.G. initially agreed to use a separate restroom, being "unsure how other students would react to [G.G.'s] transition." *Id.* However, after two months G.G. "found it stigmatizing to use a separate restroom" and "determined that it was not necessary" to ***12** do so. *Id.* The principal allowed G.G. to use the boys' restroom beginning on October 20, 2014. *Id.*

The next day, the Board began receiving numerous complaints from parents and students who regarded G.G.'s presence in the boys' restroom as an invasion of student privacy. App. 144a; Pet. 6. The Board considered the problem and, after two public meetings on November 11 and December 9, 2014, adopted the following policy:

Whereas the GCPS [Gloucester County Public Schools] recognizes that some students question their gender identities, and

Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and

Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore

It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Id.

***13** Before the Board adopted this resolution, the high school announced it would install three single-stall unisex bathrooms, regardless of whether the Board approved the December 9 resolution. JA71-72, 73. These unisex restrooms - which were available on December 16 - would be open to all students who, for whatever reason, desire greater privacy. App. 144a-145a. G.G. refuses to use them, however, claiming they make G.G. feel "stigmatized and isolated." App. 151a. G.G. acknowledges that male classmates may be "uncomfortable" using the restroom with G.G., but asserts that they should "avail [themselves] of the recently installed single stall bathrooms." JA75.

C. Procedural History

1. The Ferg-Cadima letter

On December 14, 2014, five days after the Board passed its resolution, a lawyer sent an e-mail to the Department asking whether it had any "guidance or rules" relevant to the Board's resolution. App. 119a. On January 7, 2015, James A. Ferg-Cadima, an Acting Deputy Assistant Secretary for Policy in the Department's Office of Civil Rights, sent a letter in response. App. 121a ("Ferg-Cadima letter").

The Ferg-Cadima letter stated that "*Title IX* … prohibits recipients of Federal financial assistance from discriminating on the basis of sex, *including gender identity.*" App. 121a (emphases added). The letter acknowledged that Title IX and its regulations "permit schools to provide sex-segregated restrooms locker ***14** rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances," App. 123a, while providing the following guidance as to those circumstances:

When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.

Id.

The Ferg-Cadima letter cited no agency document requiring schools to treat transgender students "consistent with their gender identity" regarding restroom, locker room, or shower access. Instead it cited a Department Q&A sheet, which says only that schools must treat transgender students consistent with their gender identity when holding single-sex *classes.* See United States Department of Education, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* (Dec. 1, 2014), http://bit.ly/1HRS6yI (emphasis added) (Q&A #31) (opining "[h]ow … the Title IX requirements *on single-sex classes* apply to transgender students) (emphasis added).

2. District Court proceedings

G.G. sued the Board on June 11, 2015, six months after the Board passed its resolution, claiming the Board's policy violates the Equal Protection Clause ***15** and Title IX. JA75-78. *G.G.* sought declaratory and injunctive relief, damages, and attorneys' fees. JA78.

G.G. moved for a preliminary injunction on June 18, 2015. ECF 18. With respect to Title IX, G.G. argued that section 106.33 does not allow a school to "assign transgender boys to the girls' room," and that Title IX therefore requires giving G.G. access to the boys' restroom. *Id.* at 37. G.G. reiterated that "gender identity" means "one's sense of oneself as male or female," *id.* at 1, or "the conviction of belonging to a particular gender," *id.* at 2, and asserted further that "[f]rom a medical perspective, there is no distinction between an individual's gender identity and his or her 'biological' sex or

gender." *Id.* at 17 n.13. G.G. also cited the Department's purported position that Title IX requires access to sex-separated facilities consistent with gender identity and urged the district court to defer to that position under *Auer*. *Id.* at 38.

On June 29, 2015, the United States filed a "statement of interest" in support of G.G., arguing that "prohibiting a student from accessing the restrooms that match his gender identity is prohibited sex discrimination under Title IX." App. 160a, 162a. The United States did not cite section 106.33, nor explain how the Board's policy could be unlawful under the regulation. Instead, it relied on the Ferg-Cadima letter as the ***16** "controlling" interpretation of Title IX and section 106.33. See App. 172a. [6]

Without ruling on the equal protection claim, the district court dismissed G.G.'s Title IX claim and denied a preliminary injunction. App. 82a-83a (order); 84a-117a (opinion). First, the district court held that the Title IX claim was "precluded by Department of Education regulations" - specifically section 106.33. App. 97a-98a. The court reasoned that section 106.33 allows separation of restrooms by "sex" and, "[u]nder any fair reading, 'sex' in section 106.33 clearly includes biological sex." App. 99a. The court thus concluded that the Board's policy of "providing separate bathrooms on the basis of biological sex is permissible under the regulation," regardless of whether "sex" encompasses "gender identity," as G.G. urged. *Id.*

Second, the district court refused to give controlling weight to the Ferg-Cadima letter. The district court observed that letters of this sort lack the force of law under *Christensen v. Harris County,* 529 U.S. 576, 587 (2000), and cannot receive *Chevron* deference ***17** when interpreting Title IX. App. 101a; see *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984). The Court also held that the letter should not receive deference under *Auer v. Robbins,* 519 U.S. 452 (1997), because it would prevent school districts from establishing separate restrooms "on the basis of sex," as section 106.33 "clearly allows." App. 102a.

3. Fourth Circuit appeal in No. 15-2056

The Fourth Circuit reversed the district court's dismissal of G.G.'s Title IX claim, holding that the district court should have accepted the Ferg-Cadima letter as the "controlling" construction of Title IX and section 106.33 under Auer. App. 13a-25a.

First, the panel held that section 106.33 was "ambiguous" as applied to "whether a transgender individual is a male or a female for the purpose of access to sex-segregated restrooms," and that the Ferg- Cadima letter "resolve [d]" this ambiguity by determining sex solely "by reference to … gender identity." *Id.* at 19a-20a, 18a.

Second, the panel held that the letter's interpretation - "although perhaps not the intuitive one," *id.* at 23a - was not, in the words *of Auer*, "plainly erroneous or inconsistent with the regulation or the statute." *Id* at 20a, 22a-23a. In the panel's view, the term "sex" does not necessarily suggest "a hard-and-fast binary division [of males and females] on the basis of reproductive organs." *Id.* at 22a.

***18** Third, the panel found that the letter's interpretation constituted the agency's "fair and considered judgment," because the agency had consistently enforced this position "since 2014" - that is, for the previous several *months* - and it was "in line with" other agency guidance. *Id.* at 24a. While conceding the interpretation was "novel," given "there was no interpretation of how section 106.33 applied to transgender individuals before January 2015," the panel nonetheless thought this novelty was no reason to deny *Auer* deference. *Id.* at 23a. [7]

The Board moved for rehearing en banc, which was denied on May 31, 2016. *Id.* at 61a-66a. The Board then asked for a stay of the Fourth Circuit's mandate pending its filing a certiorari petition. This too was denied, again over Judge Niemeyer's dissent. *Id.* at 67a-70a. The mandate in No. 15-2056 issued on June 17, 2016. [8]

***19** *4. Proceedings after remand*

On remand, the district court entered a preliminary injunction without taking additional briefing or evidence. App. 71a-72a. The injunction ordered the Board to permit G.G. to use the boys' restroom at Gloucester High School. *Id.* at 72a. The Board appealed this order, creating a second case in the Fourth Circuit, No. 16-1733. The Board's request to stay the injunction pending appeal was denied by the district court, App. 73a-75a, and the Fourth Circuit, again over Judge Niemeyer's dissent. App. 76a-81a.

Finally, the Board asked this Court to recall and stay the Fourth Circuit's mandate in No. 15-2056, and to stay the district court's preliminary injunction, pending this certiorari petition. That request was granted on August 3, 2016. *Gloucester Cnty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016) (per curiam). The Board timely petitioned for a writ of certiorari on three questions, which this Court granted as to questions two and three. Order, Oct. 28, 2016. In this brief, these questions have been renumbered as questions one and two, respectively.

***20** SUMMARY OF ARGUMENT

The interpretation of Title IX and its implementing regulation adopted by the Fourth Circuit would upend the ingrained practices of nearly every school in the Nation on a matter of basic privacy and dignity - whether separate restrooms, locker rooms, and showers may be provided for boys and girls, as defined by their physical sexual attributes.

The majority deemed "controlling" an agency's view that "sex" in Title IX turns, not on physiological distinctions between males and females, but on "gender identity" - meaning one's internal perception of being male or female. That profoundly mistaken view would outlaw the (until now) universally accepted practice of separating restrooms, locker rooms, showers, athletic teams, and dormitory rooms based on physiological differences between the sexes. It would also transform Title IX's straightforward prohibition on "sex" discrimination into a different prohibition on "gender identity" discrimination which Congress never contemplated or enacted. The Fourth Circuit's decision cannot stand. This Court should reverse on either of two distinct grounds.

I. Most fundamentally, the Court should reverse because no matter what level of deference is given to the agency, the interpretation of Title IX and its regulation adopted by the Fourth Circuit is wrong.

A. The Board's policy is plainly valid under the Title IX regulation at issue - section 106.33 - which has ***21** long permitted separation of restrooms by "sex." Indeed, the Board went above and beyond the accommodation section 106.33 contemplates by providing additional unisex restrooms for *any* student who desires greater privacy for whatever reason.

To invalidate the Board's policy under Title IX, the Fourth Circuit adopted a view that equates the term "sex" *entirely* with "gender identity," effectively compelling schools to disregard the very physiological differences that justify separation in the first place. That cannot be right as a matter of Title IX's text, history, and structure.

All indicators of statutory meaning show that when Title IX was enacted, Congress understood "sex" to refer to physiological distinctions between men and women. Title IX-era dictionaries unanimously defined sex based on

those physical characteristics, and modern dictionaries overwhelmingly do the same. None treats gender identity as determinative of sex.

Neither does Title IX's legislative history. While seeking to end discrimination against women, Title IX's architects deliberately allowed separation of the sexes to protect privacy - an interest rooted in physical differences between the sexes that would be nullified by equating sex with gender identity.

B. The Fourth Circuit's interpretation would also undermine Title IX's structure and purposes. Requiring schools to evaluate access to intimate facilities based on gender identity rather than physiological differences would lead them either to (1) abandon sex- ***22** separated facilities altogether, or (2) undertake case-by-case evaluations of a student's gender presentation.

The first approach would nullify the privacy safeguards envisioned by Title IX's proponents and expressly provided in the statute and implementing regulation. The second approach would be impossible to administer and, in any event, would ironically incentivize sex-stereotyping discrimination outlawed by the Constitution and federal anti-discrimination law. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 250-51 (1989) (plurality opinion). Making sex turn on gender identity, furthermore, poses a threat to female-only athletic teams, one of Title IX's signal achievements.

C. Even assuming Title IX theoretically *permitted* the interpretation adopted by the Fourth Circuit, it would surely come as a surprise to four decades of Title IX recipients. That has constitutional significance: as a Spending Clause statute, Title IX must give fair notice of its conditions. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291, 296 (2006); *Pennhurst State School & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981). The latent possibility that schools would be required to treat sex as equivalent to gender identity, on pain of losing federal funding, would offend that clear-notice requirement. This Court should interpret Title IX to avoid this constitutional problem.

II. Alternatively, the Court may reverse because the Fourth Circuit should not have extended *Auer* deference to the agency interpretation.

***23** A. *Auer* deference applies only when an agency interprets its own regulations. The Ferg-Cadima letter, however, turns on what the agency thinks Title IX *itself* requires, not merely on what the regulatory language means. But even indulging the assumption that the letter interprets the regulatory language, that language merely parrots Title IX by importing the term "sex" directly from the statute. This Court has held that agencies cannot claim *Auer* deference when they interpret regulatory terms that come directly from statutes. *Gonzales v. Oregon,* 546 U.S. 243, 247 (2006).

B. Assuming *Auer* deference applies, it only aids agencies when regulatory language is ambiguous and the agency clarifies it in a permissible way. *Christensen,* 529 U.S. at 588. But for many of the same reasons that Title IX forecloses the agency's interpretation, the regulations do as well. "Sex" is not an ambiguous term: as used in Title IX, it plainly refers to physiological differences between men and women. And reading "sex" as depending on gender identity is not a permissible interpretive choice in any event.

C. Finally, *Auer* deference is inapplicable because the Department ignored procedural requirements for acting with the force of law. This Court has held that agency interpretations of statutes merit *Chevron* deference only when agencies act with the force of law by employing relatively formal procedures. *United States v. Mead Corp.,* 533 U.S. 218 (2001); *Christensen,* 529 U.S. at 588. That rule ensures agencies can only bind ***24** courts and regulated parties through methods Congress provided. This Court has implied that *Auer* should be limited in a similar way, and should now so hold.

Even if *Auer* might apply to some informal agency acts, it should not apply here. Congress has required specific processes, including but not limited to those in the Administrative Procedure Act, that the Department must follow if it seeks to

act with the force of law. See 20 U.S.C. §1682. The Ferg-Cadima letter was not issued pursuant to those procedures and should therefore not control in court.

ARGUMENT

In agreeing to review the Fourth Circuit's decision, this Court granted certiorari on two questions: (1) whether the Fourth Circuit properly deferred to the agency's interpretation under *Auer v. Robbins,* 519 U.S. 452 (1997), Pet. 25-32, and (2) whether - regardless of *Auer* - that interpretation was correct. Pet. 33-38; see also *id.* at 33 (arguing the agency's "interpretation is flatly wrong"). This brief addresses these questions in reverse order for two reasons.

First, understanding how Title IX addresses sex-separated facilities illuminates why *Auer* never should have applied. For instance, it is not ambiguous whether Title IX and section 106.33 permit separate restrooms based on physiological differences between the sexes - they plainly do - which removes the premise for applying *Auer.*

***25** Second, a new administration will take office on January 20, 2017. This raises the possibility that the guidance on which the Fourth Circuit relied will be altered or rescinded. Even that development, however, would leave the question of whether the underlying interpretation was correct. See, *e.g.*, Pet. Reply 1 (asking Court to resolve "the proper interpretation of Title IX and its implementing regulation"). This Court can - and should - resolve that distinct question, apart from whether *Auer* should have applied. That is because the meaning of Title IX and section 106.33 on this issue is plain and may be resolved as a matter of straightforward interpretation, instead of remanding for needless additional litigation in the lower courts.

I. The Board's Policy Separating Restrooms By Physiological Sex Is Plainly Valid Under Title IX And Section 106.33.

The Fourth Circuit accepted an interpretation of Title IX and its implementing regulation that conclusively determines "sex" according to "gender identity," meaning the internal perception of oneself as male or female. App. 15a-16a, 20a. That interpretation is unambiguously precluded by the text, history, and structure of Title IX and its implementing regulation and should be rejected by this Court.

***26** A. The Text And History Of Title IX And Section 106.33 Refute The Notion That "Sex" Can Be Equated With "Gender Identity."

The most straightforward way to resolve the interpretive question in this case is the one taken by the district court. See App. 97a-100a. As that court correctly explained, the Title IX regulation at issue - section 106.33 - "specifically allows schools to maintain separate bathrooms based on sex as long as the bathrooms for each sex are comparable." App. 99a. That regulation confirms the legality of the Board's policy under Title IX, *regardless* of whether the term "sex" may include some notion of a person's "gender identity." See *id.* (concluding that, because Board's policy is permitted by the regulation, "the Court need not decide whether 'sex' in … [s]ection 106.33 also includes 'gender identity' ").

As the district court explained, it is beyond dispute that the agency that adopted section 106.33 in the mid-1970s understood "sex," at a minimum, to *include* physiological distinctions between men and women. See App. 99a (observing, "[u]nder any fair reading, 'sex' in [s]ection 106.33 clearly includes biological sex"). Indeed, as discussed below, all relevant indicia of meaning show that the understanding of "sex" shared by Title IX's architects was *wholly* determined by those physiological distinctions. Yet the position accepted by the Fourth Circuit majority implies the opposite: that one's internal, perceived sense of gender identity is *determinative* when it diverges from ***27** physiological sex. See App. 20a (accepting as a "plausible" reading one that "determin[es] maleness or femaleness with reference to gender identity"). Practically speaking, this means that physiological sex is not only irrelevant but invalid under Title IX as a general basis

for classification. To put the matter most starkly, the interpretation accepted by the Fourth Circuit *forbids* something the statute and regulation *permit*: using physiological sex to separate boys and girls in restrooms.

1. The linguistic evidence found in dictionary definitions confirms that the term "sex" in Title IX and section 106.33 turns overwhelmingly on the physiological differences between men and women. Those sources provide *no* support for the notion adopted by the Fourth Circuit that "sex" *equates* with "gender identity," to the exclusion of physiology.

The panel majority and Judge Niemeyer's dissent cited nine dictionaries between them, covering a period from before the enactment of Title IX to the present day. Every single one referred to physiological characteristics as a criterion for distinguishing men from women. App. 21a-22a (majority) (citing *American College Dictionary* 1109 (1970), *Webster's Third New International Dictionary* 2081 (1971), *Black's Law Dictionary* 1583 (10th ed. 2014), and *American Heritage Dictionary* 1605 (5th ed. 2011)); App. 54a-55a (dissent) (citing *The Random House College Dictionary* 1206 (rev. ed. 1980), *Webster's New Collegiate Dictionary* 1054 (1979), *American Heritage Dictionary* ***28** 1187 (1976), *Webster's Third New International Dictionary* 2081 (1971), *The American College Dictionary* 1109 (1970), *Webster's New World College Dictionary* 1331 (5th ed. 2014); *The American Heritage Dictionary* 1605 (5th ed. 2011), and *Merriam-Webster's Collegiate Dictionary* 1140 (11th ed. 2011)).

For instance, the majority's dictionary definitions include concepts such as "anatomical," "physiological," and "morphological" differences; "biparental reproduction"; and "sex chromosomes." App. 21a. Similarly, the dissent's definitions include concepts such as "structural" differences, "reproductive functions," and "reproductive organs." App. 54a-55a. The fact that "*even today*, the term 'sex' continues to be defined based on the physiological distinctions between males and females" strongly suggests that is what the term meant in the 1970s-era statute and regulation. App. 55a (Niemeyer, J., dissenting).

Nevertheless, the majority found ambiguity in certain definitions of "sex," observing that the definitions in two dictionaries contemporary with Title IX "used qualifiers such as references to the '*sum* of' various factors, '*typical* dichotomous occurrence,' and '*typically* manifested as maleness and femaleness.' " App. 22a. The majority failed to read those supposed "qualifiers" in context.

For instance, the majority pointed out that the *American College Dictionary* (1970) and *Webster's Third New International Dictionary* (1971) referenced ***29** the " '*sum of*' various factors" bearing on sex. *Id.* (emphasis in maj. op.). But the panel overlooked that the "factors" to be "sum[med]" up consist of "anatomical and physiological differences" (in the former dictionary) and " 'the morphological, physiological, and behavioral peculiarities of living beings *that subserve[ ] biparental reproduction*' " (in the latter). App. 21a (emphasis added). The reference in *Webster's* to "typical" sex characteristics, meanwhile, appears to refer to the usual range of expression of those characteristics, rather than acknowledging the existence of alternative definitions of sex. App. 21a-22a. In other words, whatever "factors" might be relevant and whatever variation from the "typical" case might exist, both dictionaries confirm that physiological characteristics - and those related to "reproduction" in particular - are the overriding consideration.

The majority nonetheless argued that where "the various indicators of sex … diverge," these dictionary definitions "shed little light on how exactly to determine" whether a person is male or female. App. 22a. But that is false: as discussed above, the 1970s-era definitions relied on by the majority distinguish men from women based on physical characteristics. More importantly, for the majority's point to have any relevance to this case, a person's perceived gender identity would have to have been considered an "indicator[] of sex" that can contradict other "indicators" - ***30** and no dictionary definition contemporary with Title IX suggested that it was. [9]

To be sure, the majority cited three dictionaries that referred to non-physiological factors in defining sex: two that included "behavioral peculiarities" or "gender" as an aspect of sex, *see* App. 21a-22a (quoting *Webster's Third New International Dictionary* 2081, and *Black's Law Dictionary* 1583), and one that "includes in the definition of 'sex' '[o]ne's

identity as either female or male,' " App. 22a (quoting *American Heritage Dictionary* 1605). However, the majority's editions of *Black's* and *American Heritage* were published in 2014 and 2011, respectively, and have little probative value as applied to Congress's understanding of language enacted in the mid-1970s. See, *e.g., MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.,* 512 U.S. 218, 228 (1994) (rejecting reliance on a dictionary "not yet even contemplated" when statute was enacted); *St. Francis Coll. v. Al-Khazraji,* 481 U.S. 604, 610-13 (1987) (defining "race" according to dictionaries and ***31** encyclopedias existing "when [42 U.S.C.] §1981 became law in the 19th century"). [0] Even if modern dictionaries were probative, not even the 2011 *American Heritage Dictionary* went as far as G.G.'s position that one's perceived "identity" overrides physiological sex. And if it did, that dictionary would have exactly the same problem that the Fourth Circuit and the Ferg-Cadima letter created, namely, a gender identity-based definition of "sex" that swallows up all other definitions. This Court has rejected proposed interpretations derived from a "meaning set forth in a single dictionary … which not only *supplements*, the meaning contained in all other dictionaries, but *contradicts* one of the meanings contained in virtually all other dictionaries." *MCI Telecomms.,* 512 U.S. at 227.

Of those three dictionaries, only *Webster's Third New International Dictionary,* published in 1971, was contemporary with Title IX. App. 21a-22a. But its definition of "sex" - based on a combination of "morphological, physiological, and behavioral peculiarities" - does not include gender identity at all. Nor could it: ***32** as already explained, the various factors identified in the definition are limited to those that "subserve[] biparental reproduction," and so could hardly refer to the internal perception of oneself as male or female.

In short, the majority had no linguistic basis for holding that the term "sex" in Title IX could have been understood to refer to gender identity rather than the objective physiological characteristics distinguishing men from women - much less make gender identity override those physiological characteristics. See also Brief of *Amici* Members of Congress.

2. Title IX's legislative history, which the panel majority did not address, confirms the dictionary definitions. See, *e.g., St. Francis Coll.,* 481 U.S. at 612-13 (confirming textual meaning through legislative history). Congress's manifest purpose in Title IX was to fix the pervasive problem of discrimination against women in educational programs. Title IX's proponents were consequently focused on prohibiting "sex" discrimination, see 118 Cong. Rec. 5803; 117 Cong. Rep. 39251, but at the same time sought to preserve schools' ability to separate males and females to preserve "personal privacy," see 118 Cong. Rec. 5807 ***33** (Sen. Bayh). [2] See *supra* at 6-10. Not a shred of legislative history suggests that Congress considered "gender identity" at all, much less that the concept could supplant physiology. Nor is there any evidence that HEW considered "sex" to include gender identity when section 106.33 was promulgated. Even G.G. has indicated that the Congress that enacted Title IX and the agency that adopted section 106.33 were focused on physiological sex and never conceived of gender identity. Opp. 1. That effectively concedes that the position adopted by the Fourth Circuit transforms the statutory prohibition from one that protects women against discrimination vis-à-vis men (and vice versa), into one concerned with the quite different issue of "gender identity" discrimination. See also Brief of *Amici* William Bennett et al.

3. Other indications of congressional purpose point in the same direction. For example, the subsequently enacted Violence Against Women Act ("VAWA") - a Spending Clause statute, like Title IX - prohibits funded programs or activities from discriminating based on *either* "sex" or "gender identity." 42 U.S.C. §13925(b)(13)(A). "Sex" and "gender identity" must have meant distinct things to the Congress that enacted VAWA, for equating sex with gender identity would create surplusage. See, *e.g.,* ***34** *National Credit Union Admin. v. First Nat'l Bank & Tr. Co.,* 522 U.S. 479, 501 (1998) (rejecting agency interpretation under *Chevron* for this reason).

Other statutes enacted after Title IX relate to discriminatory acts based on "gender" and "gender identity," implying Congress distinguished outward manifestations of sexual identity - akin to sex - from inward, perceived ones. 18 U.S.C. §249 (federal hate crimes); 42 U.S.C. §3716(a)(1)(C) (Attorney General authority to assist with State and local investigations and prosecutions); 20 U.S.C. §1092(f)(1)(F)(ii) (crime reporting by universities).

Not only is a separate provision for gender identity absent from the text of Title IX, but in other contexts Congress has repeatedly *declined* to enact statutes forbidding gender identity discrimination in education. The Student Non-Discrimination Act, introduced in 2010, 2011, 2013, and 2015 in both the Senate and the House, [3] would condition school funding on prohibiting gender identity discrimination. Another measure, the "Equality Act," would amend the Civil Rights Act of 1964 to prohibit gender identity discrimination in various contexts, including employment and education. [4] Neither bill has ever left committee.

***35** 4. When determining the nature and limits of sex discrimination law, this Court has always focused on physiological differences, especially in contexts involving the lawful separation of males and females. For example, in *Virginia*, this Court determined that male-only admission to the Virginia Military Institute violated equal protection, but noted that the required co-educational integration "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." 518 U.S. at 550 n.19. Similarly, as Justice Kennedy wrote for the Court in *Tuan Anh Nguyen v. INS,* a more rigorous standard for proving paternity as opposed to maternity did not violate equal protection because "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." 533 U.S. 53, 62-63 (2001). Justice Stevens captured the essence of this point in *City of Los Angeles, Department of Water & Power v. Manhart,* when he wrote for the Court that "[t]here are both real and fictional differences between women and men." 435 U.S. 702, 707 (1978). Physiological differences between men and women - especially when it comes to privacy - are real ones. Nowhere is that more true than in the educational settings of bathrooms, showers, and sports teams.

Those cases support interpreting Title IX and its regulations to allow the privacy-based separation of ***36** men and women on the basis of physiological differences. [5] As this Court has observed, "[t]o fail to acknowledge even our most basic biological differences … risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen,* 533 U.S. at 73. The same commonsense principle applies to Title IX.

B. Equating "Sex" With Gender Identity Would Undermine Title IX's Structure.

In addition to violating Title IX's text and history, the interpretation accepted by the Fourth Circuit - requiring access to sex-separated facilities based on gender identity - would undermine Title IX's structure and make the statute impossible to administer. Gender identity, as G.G. explained below, means individuals' "innate sense of being male or female," which may differ from "the sex they were assigned at birth." JA64. Making access to sex-separated facilities turn on this elusive concept would lead to obvious and intractable problems of administration. Because "[i]t is implausible that Congress meant [Title IX] to operate in this manner," *King v. Burwell,* 135 S. Ct. 2480, 2494 (2015), this is yet another reason to reject the interpretation accepted by the Fourth Circuit.

***37** To put it plainly: how is a school to determine a student's gender identity for purposes of managing access to sex-separated restrooms, locker rooms, or showers? The Fourth Circuit's opinion does not say, and no standard suggested below provides any plausible answer.

1. The standard suggested by G.G.'s definition of "gender identity" - one's "innate sense of being male or female," JA64 - implies that a student's mere assertion of his or her gender identity settles the matter. [6] But if members of one physiological sex could obtain access to facilities reserved for the other sex simply by announcing their gender identity, the sex separation contemplated by Title IX and its regulations would cease to exist. A school might wish to keep boys and girls in separate facilities, but in practice any given facility would be open to members of both sexes. Some may use the opposite sex's facilities to express their gender identity, but others will do so for less worthy reasons. A "pure assertion" standard gives no way to distinguish them.

That outcome would come as a shock to Title IX's congressional advocates, who authorized separate "living facilities" to ensure that members of different ***38** sexes *would* be separable in certain intimate settings. *Supra* at 7-10. If Title IX's proponents had contemplated that members of one sex could use the opposite sex's facilities, based on their perception of having been "born in the wrong sex," App. 151a, there would have been no reason for permitting separation of sexes in intimate settings. See App. 57a (Niemeyer, J. dissenting). The interpretation accepted by the Fourth Circuit thus nullifies what the framers of Title IX and its regulations plainly sought to preserve: spaces available to members of one physiological sex and off-limits to the other.

2. Some of G.G.'s pleadings below may imply an alternative approach, but it fits Title IX no better. This approach appears to turn on gender presentation (*i.e.,* whether someone appears to be relatively more masculine or feminine) and corresponding feelings of discomfort on being required to use a facility consistent with physiological sex. In other words, because G.G. "presents" as a boy, JA65, 67, 73, and feels more at home in a boys' restroom, JA73-74, G.G. should have access to boys' restrooms. But that standard would create even more serious problems than the first one. It suggests that schools must evaluate access claims based on how consistently or comprehensively a student presents his or her gender identity. The Department appears to have joined that approach initially - App. 181a (supporting preliminary injunction because G.G.'s "gender identity is male and [he] presents as male in all aspects of his life") - but has since ***39** disavowed it. See App. 57a-58a (Niemeyer, J. dissenting); App. 130a.

That is for good reason, because such an approach would require schools to engage in sex-stereotyping discrimination. Administrators would inevitably have to evaluate students' access to facilities based on relative masculine or feminine traits - which is classic sex-stereotyping. See *Price Waterhouse,* 490 U.S. at 250-51 (forbidding adverse actions against women under Title VII based on stereotypical views of women's appearance or mannerisms). The only way out of this trap is to understand "sex" as the Board's policy does - namely, as referring to objective physiological criteria. That standard *rejects* classifying students based on whether they meet any stereotypical notion of maleness or femaleness, and in that sense is the *opposite* of sex-stereotyping.

3. Even if the problem of standards were resolved, other contradictions would arise. For instance, making access turn on gender identity would perpetuate discrimination in a different form. Persons whose gender identities align with physiological sex would have access only to one facility, but individuals such as G.G. could opt in to the opposite sex's facilities depending on their gender presentation or the status of their transition to the opposite sex. There would thus be different degrees of access depending on divergence of gender identity from physiology: another classic case of discrimination.

***40** This standard would also create new legal risks for regulated schools. For instance, below the United States urged denying "any recognition" to the "discomfort" expressed by "parents and community members … to students sharing a common use restroom with transgender students[.]" App. 180a. Doing so would " 'cater to … perceived biases[.]' " *Id.* 181a (quoting United States Dep't of Labor, Directive: Job Corps Program Instruction Notice No. 14-31 3-4 (May 1, 2015)). As callous as that position sounds on paper, it also has likely legal consequences - for example, if a sexual assault victim felt that the presence of the opposite sex in restrooms, lockers, or showers created a hostile environment. See Jeannie Suk Gersen, *The Transgender Bathroom Debate and the Looming Title IX Crisis,* The New Yorker (May 24, 2016).

Yet another problem arises in the context of athletics, where regulations provide a similar safe harbor for sex separation. As mentioned *supra*, Title IX regulations prohibit discriminating on the basis of sex in athletic activities and require recipients to "provide equal athletic opportunity for members of both sexes." 34 C.F.R. §106.41(a), (c). But the regulations also provide for "separate teams for members of each sex where selection … is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. §106.41(b). That separation is plainly grounded in physiology: Even beyond privacy interests in contact sports, providing separate teams for female students creates more opportunities for participation and protects them from injury.

***41** Sex separation in athletics only works, however, if "sex" means physiological sex; if it means "gender identity," nothing prevents athletes who were born male from opting onto female teams, obtaining competitive advantages and displacing girls and women. See, *e.g., Transgender Track Star Stirs Controversy Competing in Alaska's Girls' State Meet Championships,* CBS New York, XX/XX/2016 (noting an "18-year old runner … [who] was born male and identifies as female" competed in "Class 3A girls' sprints"). Given the Fourth Circuit majority's position that " 'sex' should be construed uniformly throughout Title IX and its implementing regulations," App. 25a, such an outcome appears inevitable.

These and other serious practical problems [7] counsel strongly against the Fourth Circuit's attempt to transform the statutory prohibition on sex discrimination into the distinctly different prohibition on gender identity discrimination.

C. If "Sex" Were Equated With "Gender Identity," Title IX And Its Regulations Would Be Invalid For Lack Of Clear Notice.

Even if Title IX and its regulations did not unambiguously *forbid* the interpretation advanced by the ***42** Department and accepted by the Fourth Circuit, they certainly did not foreshadow it. Again, as G.G. admits, that interpretation was unimaginable at the time Title IX and its regulations were first adopted. Opp. 1. If that is true - and it is - the Fourth Circuit's holding would make Title IX violate the Spending Clause for failure to afford funding recipients clear notice of the conditions of funding.

Title IX was enacted under the Spending Clause, and the threat of withdrawing federal funding is the main enforcement mechanism. See 20 U.S.C. §1682. "Legislation enacted pursuant to the spending power is much in the nature of a contract, and therefore, to be bound by federally imposed conditions, recipients of federal funds must accept them voluntarily and knowingly." *Murphy,* 548 U.S. at 296 (quotes and alteration omitted) (quoting *Pennhurst,* 451 U.S. at 17). For that reason, "when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out unambiguously," for "States cannot knowingly accept conditions of which they are unaware or which they are unable to ascertain." *Id.* (quotes and citation omitted).

For over four decades, States have accepted Title IX funding with the understanding that they could maintain separate facilities based on men and women's different physiologies; nothing in the text of Title IX or its implementing regulations "even hint[s]" that they would ever have to do anything else. *Id.* at 297. If the Fourth Circuit's position is plausible, then ***43** it sets the stage for a funding condition that States never could have anticipated. See Brief of *Amici* States of West Virginia et al.

That position must be rejected under the rule of constitutional avoidance. See, *e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). That rule supports interpreting Title IX in a way that does not permit the Fourth Circuit - or the Department - to "surpris[e] participating States with post-acceptance or retroactive conditions." *NFIB v. Sebelius,* 132 S. Ct. 2566, 2606 (2012) (quoting *Pennhurst,* 451 U.S. at 25). This is yet another reason to reject the interpretation embraced by the Fourth Circuit.

II. The Fourth Circuit Erred In Extending *Auer* Deference To The Ferg-Cadima Letter.

Alternatively, this Court can reverse the Fourth Circuit on the ground that the panel erred in extending *Auer* deference to the interpretation in the Ferg-Cadima letter.

***44 A. *Auer* Deference Is Inapplicable Because The Ferg-Cadima Letter Interprets Title IX, Rather Than Department Regulations.**

The simplest reason why *Auer* deference should not extend to the Ferg-Cadima letter is that the letter does not interpret the Department's Title IX *regulations.* Instead, the letter interprets the term "sex" in *Title IX itself.* That distinction is critical to the letter's legal effect, for this Court has held that *Auer* deference is inappropriate where an agency's view "cannot be considered an interpretation of the regulation" as opposed to the underlying statute. See *Gonzales,* 546 U.S. at 247.

1. Identifying the interpretive object of the Ferg-Cadima letter begins with reading the letter on its own terms. When the letter states its key conclusion - that "sex" includes "gender identity" - it says it is interpreting Title IX, not a regulation: "*Title IX* … prohibits recipients of Federal financial assistance from discriminating on the basis of sex, including gender identity." App. 121a. That language can only mean that Title IX *itself* - at least in the Department's view - incorporates a prohibition on gender identity discrimination.

The rest of the letter points in the same direction. It opens by referring to guidance documents concerning "application of *Title IX* … to gender identity discrimination." App. 121a (emphasis added). The Q&A sheet the letter cites as precedent also interpreted the ***45** statute: it posed the hypothetical question, "How do the *Title IX* requirements on single-sex classes apply to transgender students?" It answered that "*[u]nder Title IX*, a recipient generally must treat transgender students consistent with their gender identity [.]" App. 16a (quoting Q&A #31) (emphasis added). This reasoning is plainly driven by an interpretation of Title IX itself and not the Department's regulations, which means that the basic premise for applying *Auer* is absent.

To be sure, the Ferg-Cadima letter notes that Department "regulations" permit certain sex-separated facilities. App. 123a. But nothing suggests that the Department's position - that schools "must treat transgender students consistent with their gender identity" - turns on an interpretation of that regulatory language. *Id.* at 123a. To the contrary, the letter refers to the regulation merely to note the situations in which recipients may "treat students differently on the basis of sex," and then peremptorily states that in those situations schools must treat transgender students according to "gender identity." *Id.* Every indication, then, is that the Department's position turns on the letter's major premise that "*Title IX*" prohibits discrimination "on the basis of sex, including gender identity." App. 121a.

Limiting *Auer* deference to interpretations of regulations rather than statutes follows from the justifications this Court has provided for *Auer* - namely, ***46** agencies' "historical familiarity and policymaking expertise" with regulatory regimes under their supervision and their supposed insight into the regulations they promulgated. See *Martin v. Occupational Safety & Health Review Comm'n,* 499 U.S. 144, 153 (1991); *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512 (1994). Whatever force those justifications may have as to regulations, they have none when an agency interprets *Congress's* words. Just so here: the Department was interpreting the *statutory* term "sex," and its interpretation is therefore not entitled to *Auer* deference.

2. Even assuming *arguendo* that the Ferg-Cadima letter interpreted the regulatory language rather than Title IX, *Auer* does not apply when - as here - the regulation only "restate[s] the terms of the statute itself." *Gonzales,* 546 U.S. at 257. The point of *Auer*, as *Gonzales* explained, is that agencies have authority to interpret their own words, at least in some circumstances. But "[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Id.*

The *Gonzales* exception to *Auer* applies not only when an agency imports entire statutory provisions into the Code of Federal Regulations *verbatim*, but also when a regulation's key terms of art derive from the statute. In *Gonzales*, the regulation "repeat[ed] ***47** two statutory phrases" - specifically, "legitimate medical purpose" and "the course of professional practice" - "and attempt[ed] to summarize" others. *Id.* Because nothing "turn [ed] on any difference between

the statutory and regulatory language," the Court held that "the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute." *Id.*; see also *Kentucky Retirement System v. EEOC,* 554 U.S. 135, 149 (2008) (*"KRS"*) (applying *Gonzales* when agency paraphrased statutory language without clarifying its substance); *Fed. Exp. Corp. v. Holowecki,* 552 U.S. 389, 398 (2008) (noting *Auer* may not apply to interpretation of regulatory term "change" because "[i]t is a term Congress used in the underlying statute that has been incorporated in the regulations by the agency"). [8]

That reasoning forecloses *Auer* deference here, for as in *Gonzales*, the Department's regulations merely "parrot" the relevant statutory term. Title IX provides that its anti-discrimination rule shall not be "construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for *the different sexes.*" 20 U.S.C. §1686 ***48** (emphasis added). The Department's regulations address that exemption by providing that a funding recipient "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one *sex* shall be comparable to such facilities provided for students of *the other sex.*" 34 C.F.R. §106.33 (emphasis added).

In the regulation, HEW applied its interpretive authority and expertise not to elaborate on the definition of "sex," but to flesh out the statute's reference to "living facilities." *Implementing Title IX, supra,* at 826; App. 98a. The regulation builds on the statute by describing which facilities count and by adding the proviso that when separate facilities are established, they must be "comparable." But this litigation does not turn on any of that. Instead, it turns on the meaning of "sex" - a term Congress used in the statute and which the regulations reuse without elaboration. The Department cannot claim that its interpretation of that term "turns on any difference between the statutory and regulatory language." *Gonzales,* 546 U.S. at 257. To the contrary, the term "sex" "comes from Congress, not the [agency]," and the agency has no "special authority" to interpret it. *Id.*

This Court's decision in *KRS* confirms this conclusion. See 554 U.S. 135. That case involved the Age Discrimination in Employment Act ("ADEA"), which forbids discriminating against workers "because of … age." 29 U.S.C. §623(a)(1). As in this case, an agency ***49** had promulgated a regulation setting out what a regulated party *could* do: specifically, that giving " 'the same level of benefits to older workers as to younger workers' does not violate the [ADEA]." See *KRS,* 554 U.S. at 149 (quoting 29 C.F.R. §1625.10(a)(2)) (emphasis omitted). And as here, the agency interpreted the regulation's key criterion (age differences) to include other unenumerated factors (factors correlated with age, such as receipt of pension benefits). *Id.* But this Court refused to defer to that interpretation, reasoning that "the regulation 'does little more than restate the terms of the statute itself.' " *Id.* (quoting *Gonzales,* 546 U.S. at 257). This case is even easier than *KRS,* because the regulatory language there was further removed from the statutory language than section 106.33 is from Title IX.

Of course, the Department could attempt to invoke its interpretive authority as to the statutory term "sex," in which case it could argue that whatever interpretation it reaches is entitled to *Chevron* deference. As discussed below, the Department has never done so. See *Gonzales,* 546 U.S. at 258. And as discussed above, the statutory text forecloses its interpretation. *Supra* at 26-32.

B. *Auer* Deference Is Inapplicable Because The Governing Regulation, Like Title IX, Is Unambiguous.

Assuming that *Auer* could extend to the Department's interpretation of "sex," *Auer* applies only when regulatory language is ambiguous. *See* ***50** *Christensen,* 529 U.S. at 588. When the regulation is unambiguous, *Auer* does not aid the agency; courts instead apply the regulation as written. *Id.* Any other rule "would … permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* With respect to the term "sex," the regulation is not ambiguous, however, and certainly not in the way implied by the Ferg-Cadima letter.

1. As this Court has held, "ambiguity" in the context of interpreting statutes and regulations means more than room for semantic disagreement: "[a]mbiguity is a creature not of definitional possibilities but of statutory context [.]" *Brown v. Gardner,* 513 U.S. 115, 118 (1994); see also also *MCI Telecomms,* 512 U.S. at 226 (explaining courts should not merely "defer to the agency's choice among available dictionary definitions"). An analogy to identifying ambiguity under *Chevron* is illustrative: under *Chevron,* a court can determine a statute is ambiguous "only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." See *Gen. Dynamics Land Sys., Inc. v. Cline,* 540 U.S. 581, 600 (2004); *Chevron,* 467 U.S. at 843 n.9. Those tools include canons of construction, *Nat'l Credit Union Admin.,* 522 U.S. at 501, awareness of how statutory structures work as a whole, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000), and "common sense," *id.* at 133.

***51** Here, the standard tools of statutory construction show that the term "sex" in the Department's regulations does not extend to gender identity - and certainly does not permit gender identity to *determine* a person's sex. 34 C.F.R. §106.33. As explained above, Congress understood the term "sex" in Title IX to refer to the physiological differences between men and women, and the same considerations apply with equal force to the term as it appears in the regulations promulgated by HEW. The practical concerns that would arise if "sex" meant something other than physiology are essentially identical. Just as with the interpretation of Title IX, these considerations show that "sex" in the Department regulations unambiguously refers to physiology. [9]

2. The Department's decision to introduce gender identity into the regulatory scheme in the teeth of this history raises two related concerns. First, agency acts are arbitrary and capricious when an agency "relie[s] on factors which Congress has not intended it to consider [.]" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). That ***52** is, insofar as "sex" is ambiguous, the Department can only clarify it with reference to the factors that Congress authorized. See *Michigan v. EPA,* 135 S. Ct. 2699, 2706-07 (2015) (citing, *inter alia, Motor Vehicle Mfrs.,* 463 U.S. at 43). That includes the factors Congress would have thought relevant to the definition of sex - *i.e.*, "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished," App. 21a (quoting *American College Dictionary* 1109) - but not a factor like gender identity, which no one would have thought included in the term "sex," much less determinative of its meaning.

Second, even when resolving ambiguities, "agencies must operate within the bounds of reasonable interpretation." *UARG v. EPA,* 134 S. Ct. 2427, 2442 (2014) (quotes omitted). A term "that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.* (quotes and alteration omitted). Likewise, "an agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference." *Id.* (quotes, citation, and alteration omitted). Those principles foreclose the approach the Ferg-Cadima letter takes. The letter purports to resolve a putative ambiguity of "sex" as related to gender identity that ends up undermining Congress's purposes and sets up potentially intractable problems of administration. *Supra* at 32-44. In short, what the Department *cannot* ***53** do under the guise of resolving "ambiguities" is introduce extraneous factors that would render a forty-year-old anti-discrimination rule "unrecognizable to the Congress that designed it." *Id.* at 2444 (quotes omitted).

3. At a minimum, *Auer* deference can extend only to interpretations that would have been foreseeable at the time the regulation was promulgated. Extending *Auer* to unforeseeable interpretations would offend the requirement of the Administrative Procedure Act that members of the public have the opportunity to comment on regulations affecting them, see *Mission Group Kansas, Inc. v. Riley,* 146 F.3d 775, 782 (10th Cir. 1998), and potentially the fair notice requirement of federal due process, see *Upton v. SEC,* 75 F.3d 92, 98 (2d Cir. 1996); *Gen. Elec. Co. v. EPA,* 53 F.3d 1324, 1329 (D.C. Cir. 1995). This Court has already declined to apply *Auer* in an analogous context, where an agency first announced its position in amicus briefs filed after "a very lengthy period of conspicuous inaction[.]" *Christopher v. SmithKline Beecham Corp.,* 132 S. Ct. 2156, 2168 (2012).

The notion that Title IX's anti-discrimination rule requires that members of different physiological sexes be allowed to share restrooms, lockers, and showers would have been inconceivable until the Ferg-Cadima letter was issued. Not only did that letter cite no precedent relevant to restroom, locker, and shower facilities, *supra* at 14-15, but the Fourth Circuit itself conceded that the "interpretation is novel because there ***54** was no interpretation as to how §106.33 applied to transgender individuals *before January 2015* [.]" App. 23a (emphasis added). Doubtless members of the public would have wanted to comment on this "novel" question. *Mission Group Kansas,* 146 F.3d at 782. The regulations should be interpreted to avoid springing such a surprise on affected parties.

C. *Auer* Deference Is Inapplicable Because The Department Failed To Follow The Necessary Formal Procedures.

Finally, the Ferg-Cadima letter does not merit deference because the Department ignored the formal procedures required to act with the force of law. The Fourth Circuit held, in essence, that an agency can "control[]" a court's interpretation of a regulation merely by issuing an informal opinion letter signed by an intermediate agency official. App. 25a. Whatever *Auer's* proper scope should be, it should not extend so far.

1. The Ferg-Cadima letter does not carry the force of law under Mead *and* Christensen.

Extending *Auer* to an informal document like the Ferg-Cadima letter creates conflict between *Auer* and the related doctrine of deference to agency statutory interpretations embodied in *Chevron.* As several courts of appeals have held, *Auer* doctrine should be tailored to avoid that tension.

***55** 1. This Court's decisions in *United States v. Mead Corp.,* 533 U.S. 218 (2001), and *Christensen v. Harris County,* 529 U.S. 576 (2000), establish the scope and theoretical foundations of the modern *Chevron* doctrine. *Mead* holds that deference to agency interpretations of statutes rests on the assumption that Congress sometimes implicitly delegates to agencies the authority to create law by filling the gaps in statutes. 533 U.S. at 226-27, 229. For an agency act to carry the force of law, the agency has to act within the scope of that delegation, *i.e.,* there must have been a substantive delegation of lawmaking power to the agency from Congress, and the agency must have exercised that delegation through the procedural channels Congress created. *Id.*

Only acts carrying the force of law are entitled to *Chevron* deference. *Id.*; see also *id.* at 243 (Scalia, J., dissenting). For example, as indicated in *Christensen,* even where an agency has authority to act with the force of law, it typically needs to employ formal procedures such as "formal adjudication or notice-and- comment rulemaking" - or at least close equivalents - to ensure that a particular act compels deference in court. See 529 U.S. at 587. When an agency act does not carry the force of law, it does not bind a court, but instead carries weight proportionate only to its " 'power to persuade.' " *Mead,* 533 U.S. at 234-35 (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944)).

The *Mead*/*Christensen* rule resolves a legal puzzle. Under the APA, an agency must follow formal, public ***56** procedures when it creates law - as opposed to engaging in informal adjudications or issuing nonbinding guidelines or interpretations. See 5 U.S.C. §552(a)(1)(D) (requiring that "interpretations of general applicability" be published in the Federal Register); *id.* §553(b) (providing procedures for notice-and-comment rulemaking). Lower federal courts have often worked to prevent agencies from circumventing procedural requirements by issuing purportedly nonbinding guidance documents. See *Gen. Elec. Co. v. EPA,* 290 F.3d 377 (D.C. Cir. 2002); *Appalachian Power Co. v. EPA,* 208 F.3d 1015 (D.C. Cir. 2000); *Chamber of Commerce v. Dep't of Labor,* 174 F.3d 206 (D.C. Cir. 1999). Yet without *Mead* and *Christensen,* such informal documents *would* have binding legal force in the sense that they bind courts. This Court's *Mead*/*Christensen* rule thus prevents agencies from creating law without observing mandatory procedures.

2. Under the Fourth Circuit's approach, however, the puzzle that *Mead* and *Christensen* resolved for *Chevron* purposes persists under *Auer,* where agencies interpret their own regulations. This Court held in *Christensen* that an informal

"opinion letter" - much like the Ferg-Cadima letter - "lack[s] the force of law" and so "do[es] not warrant *Chevron-style* deference" when it purports to interpret a statute. 529 U.S. at 587. Yet because the majority in this case thought the Ferg-Cadima letter interpreted Department regulations, it gave the letter "controlling" deference under *Auer.* That creates a paradox under ***57** which agency actions that do not carry the force of law nonetheless bind courts - and thereby end up carrying the force of law at least as to the parties.

It is difficult to square that paradox with any plausible account of congressional intent. Only Congress could have delegated the Department the ability to authoritatively fill gaps in its own regulations by informal means. See *La. Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374-75 (1986) (explaining that agencies cannot create new powers for themselves). But Title IX and the APA give no reason to conclude that Congress intended to allow the Department to do so. Even if Congress's delegation of lawmaking power to agencies does implicitly entail an authoritative gap-filling power applicable to regulations, it is "odd" to think that Congress would delegate that power to informal acts by mid-level officers like Mr. Ferg-Cadima. See *Keys v. Barnhart,* 347 F.3d 990, 994 (7th Cir. 2003) (Posner, J.).

The principal justifications for *Auer* deference do not require courts to defer to informal agency interpretations. This Court has customarily explained *Auer* in terms of agencies' "historical familiarity and policymaking expertise" with regulatory regimes under their supervision. See *Martin,* 499 U.S. at 153; *Thomas Jefferson Univ.,* 512 U.S. at 512. But while expertise-based factors justify the persuasive weight given to agency interpretations of statutes under *Skidmore,* see *Mead,* 533 U.S. at 228, they do not justify ***58** *Chevron* deference, which requires a congressional delegation, see *id.* at 229. The rationales underlying *Auer*, in other words, justify giving informal agency interpretations of regulations due weight, but not letting them control in court. See also Brief of *Amici* Cato Institute, Michael W. McConnell, Richard A. Epstein et al.

3. Applying *Auer* deference to the Ferg-Cadima letter would also be inconsistent with doctrines governing the reviewability of agency actions. Final agency acts with binding legal effect are typically subject to immediate judicial review under the APA by parties with standing to challenge them. *See Bennett v. Spear,* 520 U.S. 154, 177-78 (1997) (setting out standards for APA reviewability). But courts have consistently ruled that informal opinion letters and guidance documents are *not* immediately reviewable, reasoning that they do not carry binding legal effect. See, *e.g., Indep. Equip. Dealers Ass'n v. EPA,* 372 F.3d 420, 427 (D.C. Cir. 2004). If opinion letters carry only persuasive weight, that rule makes sense. But the Fourth Circuit's application of *Auer* deference implies that countless opinion letters bearing on agency regulations *do* have legal effect; they revise the meaning of ambiguous regulations, "controlling" judicial resolution of cases and binding private parties. App. 25a. The implication is that agencies are creating law every day without risk of being held to immediate account in court, a circumstance this Court has repeatedly sought to avoid. See ***59** *United States Army Corps of Eng'rs v. Hawkes Co.,* 136 S. Ct. 1807 (2016); *Sackett v. EPA,* 132 S. Ct. 1367 (2012).

4. The most plausible solution that preserves *Auer* is to maintain the symmetry and consistency of the *Chevron* and *Auer* deference doctrines. If the Department wants documents like the Ferg-Cadima letter to have controlling effect in court, it should follow procedures sufficient to give them the force of law. If the Department does not want to follow those procedures, it should not expect its positions to merit controlling deference. See Matthew C. Stephenson & Miri Pogoriler, Seminole Rock's *Domain,* 79 Geo. Wash. L. Rev. 1449, 1464 (2011).

Some circuit courts have already indicated that *Chevron-like* formality considerations should apply in cases governed by *Auer.* [20] And this Court has implied the same thing. In *Central Laborers' Pension Fund v. Heinz,* the Court addressed an IRS regulation where two agency interpretations were contrary to the regulation's plain meaning: a provision of the Internal Revenue Manual, and the United States' amicus brief before the Court. 541 U.S. 739, 748 (2004). The Court rejected reliance on both: "neither an unreasoned statement in the manual nor allegedly longstanding agency practice can trump a formal regulation with the procedural history necessary to take on the force ***60** of law." *Id.* Although the Court did not mention *Auer,* the import of the Court's language is that informal agency positions, because they lack the

force of law, cannot command the kind of deference that makes them binding on courts. The principle alone requires reversal of the Fourth Circuit's decision here.

5. Deference to informal agency interpretations is particularly inappropriate where, as here, the interpretation is issued for the first time in an effort to affect the outcome of a specific judicial proceeding. See Pet. 26-27. For example, in *Vietnam Veterans of America v. CIA,* 811 F.3d 1068 (9th Cir. 2015), the Ninth Circuit refused to apply *Auer* deference to an interpretation of agency rules that was " 'developed … only in the context of this litigation.' " *Id.* at 1078. And in *Massachusetts Mutual Life Insurance Co. v. United States,* 782 F.3d 1354 (Fed. Cir. 2015), the Federal Circuit refused to apply the *Auer* framework to an IRS interpretation that was "advanced for the first time in litigation." *Id.* at 1369-70. Both of these decisions correctly recognize that deferring to an informal agency interpretation that is developed solely to influence the judicial proceeding in which deference is sought creates enormous incentives for gamesmanship. According *Auer* deference in such circumstances also denies the public - or other affected parties - any effective ability to ensure that their views are adequately heard and considered before the agency acts. This too is a sufficient basis for reversing the Fourth Circuit's decision to invoke *Auer* deference.

***61** 6. Even under this modest approach to *Auer* deference, that doctrine would still retain vitality in certain circumstances. For example, *Auer* deference might apply when agencies resolve legal issues in the course of formal agency adjudications, or when they issue official guidance after notice and comment. However, it no longer makes sense for *Auer* to extend to *ad hoc,* informal agency acts such as the Ferg- Cadima letter - especially when such acts are taken in the context of the very proceeding in which deference is sought.

2. The Ferg-Cadima letter issued without observance of procedures required by Title IX.

Even if *Auer* deference remains theoretically applicable to agency actions that would not deserve deference under *Chevron*, it at least should not apply to agency actions taken in excess of the lawmaking powers Congress has delegated.

Congress enumerated in Title IX the circumstances under which the Department can bind regulated entities with the force of law. See 20 U.S.C. §1682. The Department can initiate formal administrative adjudications to enforce Title IX by terminating federal funding. *Id.* DOE may also "effectuate" Title IX's anti-discrimination policy by issuing "rules, regulations, or orders of general applicability[.]" *Id.* To issue such rules, regulations, and orders, the Department must follow statutory procedures beyond those prescribed by the APA. Specifically, section 1682 ***62** states that "[n]o such rule, regulation, or order shall become effective unless and until approved by the President." *Id.* In addition, Congress has imposed certain requirements when the Department issues a "regulation," defined as "any generally applicable rule, regulation, guideline, interpretation, or other requirement that - (1) is prescribed by the Secretary or the Department; and (2) has legally binding effect in connection with, or affecting, the provision of financial assistance under any applicable program." 20 U.S.C. § 1232(a). Such regulations must, for example, be transmitted to the Speaker of the House of Representatives and the President pro tempore of the Senate "[c]oncurrently" with their publication. *Id.* §1232(f).

If the Department intended the Ferg-Cadima letter to have binding legal effect, it breached its procedural obligations. No formal adjudication has taken place, so if the letter had legally binding effect it must be a "regulation" within the meaning of section 1232(a). But nothing in the record indicates that the Ferg-Cadima letter was directly approved by the President, *id.* §1682, or transmitted to the leaders of Congress, *id.* § 1232(f). As noted above, the Department did not follow the publication, notice, and public comment procedures necessary for binding "rules," "regulations," or "interpretations of general applicability" under the APA. *See* 5 U.S.C. §§552, 553

The Department cannot claim binding legal effect for agency acts while failing to observe procedural requirements ***63** imposed by Congress. In the *Chevron* context, this Court has made clear that "deference is not warranted where the regulation is 'procedurally defective' - that is, where the agency errs by failing to follow the correct procedures in issuing the regulation." See *Encino Motorcars, LLC v. Navarro,* 136 S. Ct. 2117, 2125 (2016). Moreover, Congress's provision

of particular means for an agency to act with the force of law implies that the agency lacks the force of law when it acts in other ways. See *Mead,* 533 U.S. at 23132; *Gonzales,* 546 U.S. at 260.

To be sure, the Department can avoid many of Title IX's procedural obligations by issuing *nonbinding* documents. For example, the Department does not need presidential approval when issuing nonbinding "interpretive guidelines." See *Equity in Athletics, Inc. v. Dep't of Educ.,* 639 F.3d 91,106 (4th Cir. 2011). But in the *Chevron* context, the Department would sacrifice judicial deference by doing so. Applying *Auer* deference in circumstances like these would once again go beyond *Chevron* by allowing the Department to bind private parties without following procedural prerequisites.

That, in essence, would make the agency a law unto itself, thereby raising all the concerns that have led several members of this Court to consider overruling *Auer* altogether. See Pet. 18-20. If *Auer* is to remain in force, it should be applied in a way that respects the boundaries Congress has set.

*64 CONCLUSION

The decisions below should be reversed and the preliminary injunction vacated.

Footnotes

1 *Obama Administration Commemorates 40 Years of Increasing Equality and Opportunity for Women in Education and Athletics,* White House, Office of the Press Sec'y (June 20, 2012).

2 When unsuccessfully introducing similar legislation the year before, Bayh observed that, by "provid ing] equal educational] access for women and men students … w]e are not requiring that intercollegiate football be desegregated, *nor that the men s locker room be desegregated.* 117 Cong. Rec. 30407 (emphasis added).

3 HEW's regulations were recodified in their present form after the reorganization that created the Department of Education in 1980. See United States Dep't of Educ, 45 Fed. Reg. 30802, 30960 (May 9, 1980). Additionally, because multiple agencies issue Title IX regulations, the section 106.33 exception appears verbatim in 25 other regulations. See, *e.g., 7* C.F.R. §15a.33 (Agriculture); 24 C.F.R. §3.410 (Housing & Urban Development); 29 C.F.R. §36.410 (Labor); 38 C.F.R. §23.410 (Veterans Affairs); 40 C.F.R. §5.410 (EPA).

4 These factual allegations are taken from G.G.'s complaint and declaration. JA61 79; App. 146a 152a.

5 G.G.'s brief opposing certiorari claimed that, "in June 2016, G. had chest reconstruction surgery. Opp. 5 6 n.5. Since certiorari was granted, G.G.'s counsel has informed the Board's counsel that the sex designation on G.G.'s Virginia birth certificate has been changed from "female to "male. These developments do not appear in the record before this Court, and thus are not proper grounds for decision. *Witters v. Wash. Dep t of Servs. for the Blind,* 474 U.S. 481, 486 n. 3 (1986).

6 The United States cited two other Department documents, but neither addresses whether schools must allow students into restrooms or locker rooms corresponding with their gender identity. See App. 170a 172a (citing United States Department of Education, *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014), and United States Department of Education, *Questions and Answers on Title IX and Single Sex Elementary and Secondary Classes and Extracurricular Activities*); see also *supra* at 15.

7 Judge Niemeyer dissented for many of the reasons given by the district court. App. 40a 60a.

8 On May 13, 2016, the Departments of Education and Justice issued a "Dear Colleague letter elaborating on the Ferg Cadima letter. See Pet. 14 15. Challenges to the Dear Colleague letter by numerous States, see *id.* at 15 16, have resulted in a nationwide preliminary injunction against the Departments. See *Texas v. United States,* F.Supp.3d , 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016), on appeal, *Texas v. United States,* No. 16 11534 (5th Cir.). A similar lawsuit in Nebraska has been stayed pending this case. See *Nebraska v. United States,* No. 4:16 cv 03117, ECF No. 24 (D. Neb. Nov. 23, 2016).
Separately, the Department of Health & Human Services issued Affordable Care Act regulations interpreting Title IX in the same way as the Ferg Cadima letter. Those regulations were preliminarily enjoined last week. See *Franciscan Alliance, Inc. v. Burwell,* No. 7:16 cv 00108, ECF No. 62 (N.D. Tex. Dec. 31, 2016) (enjoining aspects of 45 C.F.R. pt. 92).

9 The majority cited various circumstances where physiological sex is supposedly more difficult to settle, such as someone who had "sex reassignment surgery, an "intersex individual, someone "born with X X Y sex chromosomes, or someone "who

lost external genitalia in an accident. App. 20a. Regardless of how these particular cases would be settled under Title IX, none involves the situation where a person's perceived gender identity is determinative of sex, regardless of physiology.

10 Furthermore, even *Black s* primary definition of "sex turns on physiology. See App. 22a (noting *Black s* first definition as " t]he sum of the peculiarities of structure and function that distinguish a male from a female organism).

11 Moreover, even assuming the dictionary suggests that purely "behavioral peculiarities are an aspect of "sex in a linguistic sense, incorporating those "peculiarities into Title IX would *violate* the law. This Court's decision in *Price Waterhouse v. Hopkins* recognizes that discrimination on the basis of conformity with sex stereotypes is a form of sex discrimination. 490 U.S. at 250. Schools thus *cannot* consider "behavioral peculiarities in determining whether someone is male or female.

12 This Court has considered "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted as Title IX, to be "an authoritative guide to the statute's construction. *N. Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 526 27 (1982).

13 H.R. 4530 (111th Cong. 2010); S. 3390 (111th Cong. 2010); H.R. 998 (112th Cong. 2011); S. 555 (112th Cong. 2011); H.R. 1652 (113th Cong. 2013); S. 1088 (113th Cong. 2013); H.R. 846 (114th Cong. 2015); S. 439 (114th Cong. 2015).

14 S. 1858 (114th Cong. 2015); H.R. 3185 (114th Cong. 2015).

15 Lower courts have similarly concluded that federal prohibitions on "sex discrimination concern physiological distinctions between men and women. See, *e.g., Johnston v. Univ. of Pittsburgh of the Com. Sys. of Higher Educ.,* 97 F. Supp. 3d 657, 670, 676 (W.D. Pa. 2015), appeal dismissed (Mar. 30, 2016) (collecting decisions).

16 While the Ferg Cadima letter does not address this issue, the Department's Dear Colleague letter would also establish a "pure assertion standard: a student must be treated according to his or her gender identity once "the student … notifies the school of that gender identity, and without any requirement of a "medical diagnosis or treatment. App. 130a 131a.

17 See, *e.g.*, Brief of *Amici* McHugh and Mayer; Brief of *Amicus Curiae* Alliance Defending Freedom; Brief of *Amicus Curiae* Safe Spaces for Women; Brief of *Amici* Religious Colleges, Schools, and Educators; Brief of *Amici* Major Religious Organizations.

18 Lower courts have applied *Gonzales* in the same way. See *Fogo De Chao (Holdings) Inc. v. United States Dep t of Homeland Sec.,* 769 F.3d 1127, 1136 (D.C. Cir. 2014); *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund,* 724 F.3d 129, 139 41 (1st Cir. 2013); *In re Kaiser Aluminum Corp.,* 456 F.3d 328, 345 46 & n.12 (3d Cir. 2006).

19 As already discussed, the Fourth Circuit found ambiguity in the term "sex by misreading two 1970s era dictionaries. App. 21a 22a; *supra* at 26 32. But even assuming those sources showed "sex could have various shades of meaning, they do not show the ambiguity the Fourth Circuit discerned: *i.e.*, as applied to persons whose perceived gender "diverge s] from their physiological sex. App. 21a 23a. *None* of those definitions suggests that a person's perception of being male or female is a component of "sex. See *supra* at 26 32 (discussing definitions).

20 See Pet. 26 28 (collecting decisions). However, as noted in the petition, there is a circuit split on this issue. See *id.* at 29 (collecting contrary decisions).

2016 WL 491883 (U.S.) (Appellate Brief)
Supreme Court of the United States.

WHOLE WOMAN'S HEALTH, et al., Petitioners,
v.
John HELLERSTEDT, M.D., Commissioner of the Texas Department of State Health Services, et al., Respondents.

No. 15-274.
February 3, 2016.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief of Amicus Curiae Association of American Physicians and Surgeons, Inc. in Support of Respondents

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***1** Introduction and Interests of *Amicus Curiae*

This case involves a constitutional challenge to medical regulations that enhance the safety of one of the most common outpatient procedures in the United States. Like several other states, Texas requires (1) that outpatient abortion clinics meet safety standards for ambulatory surgical centers, and (2) that physicians performing abortions can admit patients to a hospital in the event of complications. Although lower courts have repeatedly found these kinds of regulations medically reasonable, the theme of petitioners and their *amici* is that they are nothing more than a pretext designed to shut down abortion altogether. That is quite mistaken. From a medical standpoint, it is perfectly reasonable to require outpatient abortion providers to meet the standards at issue here.

Whatever view one takes of abortion, one can hardly deny that it is a common outpatient surgical procedure. Ambulatory surgical center regulations maximize the safety of patients who undergo all kinds of outpatient procedures, including abortion, something that Medicare regulations squarely recognize. And however "safe" one thinks abortion is, one can hardly deny that it carries well-recognized risks that sometimes require admitting women to a hospital. By ensuring

providers can do so, states maximize the likelihood that women with potentially life-threatening complications get prompt and effective care. Not long ago, numerous ***2** medical organizations - including the American Medical Association - agreed that requiring outpatient surgical providers to have admitting privileges was a core principle of sound medicine. While some of those organizations apparently now make an exception for abortion, there is no medical reason to do so.

Amicus curiae Association of American Physicians & Surgeons, Inc. ("AAPS") is a not-for-profit membership organization incorporated under the laws of Indiana and headquartered in Tucson, Arizona. AAPS members include thousands of physicians nationwide in all practices and specialties. AAPS was founded in 1943 to preserve the practice of private medicine, ethical medicine, and the patient-physician relationship. In addition to participating at the legislative and administrative levels in national, state, and local debates on health issues, AAPS also participates in litigation, both as a party, [2] and as an *amicus curiae.* [3] AAPS *amicus* briefs have been cited by this Court. *See, e.g., Stenberg v. Carhart,* 530 U.S. 914, 933 (2000); *District of Columbia v. Heller,* 554 U.S. 570, 703 (2008) (Breyer, Stevens, Souter and Ginsburg, JJ., dissenting).

***3 Statement**

In 2013, Texas enacted House Bill 2 ("HB2") to strengthen the safety regulations that apply to outpatient abortion facilities. Two aspects of that law are relevant here. First, HB2 requires that abortion facilities meet standards equivalent to those governing ambulatory surgical centers ("ASCs"). Tex. Health & Safety Code § 245.010(a); 25 Tex. Admin. Code § 139.40, 38 Tex. Reg. 9577, 9577-93. Second, HB2 requires that abortion providers have "active admitting privileges" at a hospital within thirty miles from where they provide abortions. Tex. Health & Safety Code § 171.0031(a)(1)(A).

In two separate lawsuits, Texas abortion clinics challenged HB2 as imposing an undue burden under *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992). In the first case, the U.S. Fifth Circuit rejected a facial challenge to the privileges requirement. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 748 F.3d 583 (5th Cir. 2014) (*Abbott*). The court found that requirement medically reasonable because the evidence "easily supplied a connection between the … rule and the desirable protection of abortion patients' health." *Id.* at 594. In the second case, the Fifth Circuit rejected in large part facial and as-applied challenges to the ASC and privileges requirements. *See Whole Woman's Health v. Cole,* 790 F.3d 563 (5th Cir. 2015), *cert. granted,* 136 S. Ct. 499 (U.S. Nov. 13, 2015) (Mem.). The court affirmed the district court's conclusion that both requirements were "rationally related to a legitimate state interest" and that Texas had "supported the medical basis for both requirements ***4** with evidence at trial." *Id.* at 584. That second decision is now before this Court.

Summary of Argument

By requiring outpatient abortion providers to meet ASC and admitting privileges requirements, Texas is on solid medical ground. The Court should defer to the judgment of the Texas legislature that these requirements will protect the health and safety of women who choose to seek an abortion.

1. ASCs are outpatient surgical facilities regulated by state, federal, and private accrediting bodies to improve the quality and safety of patient care. A wide range of outpatient procedures of varying risk and complexity takes place in ASCs. Abortion, which is one of the most common outpatient surgical procedures in the United States, falls squarely within the kinds of procedures that typically occur in ASCs.

Moreover, ASC regulations address precisely the kinds of quality control and patient safety issues presented by abortion. The notion that it is medically unreasonable to require abortion providers to meet ASC standards is unfounded. One

need look no further than the federal Medicare system, which approves for reimbursement abortion and other similar gynecological procedures when performed in ASCs.

2. Admitting privileges refer to a physician's ability to admit patients to a hospital for treatment. If an outpatient surgical provider has privileges, she is in a better position to ensure prompt and effective care for her patients who experience complications. Moreover, a physician privileged to admit patients is thoroughly vetted for competence and ethical integrity. Thus, it ***5** makes medical sense to require any outpatient surgical provider to be able to admit patients at a local hospital.

Numerous medical organizations have endorsed this principle for all forms of outpatient surgery, and there is no medical reason to exempt abortion from that consensus. A woman whose abortion provider has privileges is more likely to receive prompt care in the event she experiences a complication. If that complication is excessive hemorrhaging, or a perforated uterus, or a missed ectopic pregnancy, then ensuring her rapid and effective treatment in a hospital may mean the difference between life and death.

3. As a general matter, this Court's precedents strongly defer to the kind of medical regulations represented by the Texas law at issue here. That principle of deference holds true in the abortion context as well. In numerous cases, the Court has deferred to legislative judgments about the licensing of outpatient abortion facilities, the qualifications of abortion providers, and the ethics and integrity of the abortion procedure. Petitioners' argument in this case would undermine all of those precedents by asking the Court to weigh the medical wisdom of abortion regulations. They would require this Court to put aside its judicial robes and assume the duties of a national medical board. The Court should decline that invitation, which would roll back abortion jurisprudence to the days before *Casey*.

***6 Argument**

I. It is medically reasonable to require outpatient abortion providers to abide by ASC and admitting privileges requirements.

Contrary to the arguments of petitioners and their *amici*, HB2 imposes medically reasonable safety measures that enhance the safety of a common outpatient procedure and reinforce the competence and integrity of the physicians who perform it.

A. ASC Requirements

1. *ASC regulations enhance patient safety for an array of outpatient procedures.*

An ASC refers to a health care facility that provides diagnostic and preventive procedures that do not typically require hospitalization. As the Ambulatory Surgical Center Association explains, ASCs are "modern health care facilities focused on providing same-day surgical care including diagnostic and preventive procedures." [4] The federal government, which certifies ASCs through Medicare, provides a similar definition: an ASC is "any distinct entity that operates exclusively for the purpose of providing surgical services to patients not requiring hospitalization and in which the expected duration of services would not exceed 24 hours following an admission." 42 C.F.R. § 416.2. [5]

***7** ASCs began to develop in the 1970s as a more convenient, cost-effective, and safer alternative to hospital-based surgery. [6] Over the past four decades ASCs have grown exponentially: one report estimates that in 2009 there were over 5,000 Medicare-certified ASCs operating around the country, accounting for about 6 million of Medicare's total volume of procedures, employing about 117,700 full-time workers, with an economic impact of some $90 billion. [7] A report from the federal Centers for Disease Control estimates that, in 2006, 14.9 million surgical and nonsurgical procedures took place in ASCs. NHS Report at 1, 5.

A wide range of procedures of varying risk and complexity are provided in ASCs. For instance, a 2010 analysis of federal CMS claims data reported ASC procedures in the fields of gastroenterology (31% of ***8** Medicare case volume), ophthalmology (28%), pain management (22%), orthopedics (8%), and dermatology (4%). *Positive Trend* at 3 (citing CMS Claims Data 2010). A 2006 survey reported a similar variety of ASC procedures, including significant numbers of gastroenterological, orthopedic, urologic, gynecological, ophthalmologic, and diagnostic procedures. *See* NHS Report at 6, 16-17 (Table 6); 18-20 (Table 7).[8] Additionally, CMS publishes a comprehensive list of "covered surgical procedures" certified as reimbursable under Medicare when performed in an ASC. See 42 C.F.R. § 416.65 (standards for covered procedures); 71 Fed. Reg. 68226, 68231-68384 (Addenda) (Nov. 26, 2006) (listing covered ASC procedures). The vast array of covered procedures varies widely in complexity and risk. Compare, *e.g.*, 71 Fed. Reg. at 68249 ("Treat spine fracture"); *id.* at 68259 ("Amputation of foot at ankle"), with *id.* at 68231 ("Smoking Cessation Services"); *id.* at 68235 ("Allergy Tests").

To enhance patient safety, ASCs are licensed by states, certified by the federal government, and accredited by private accrediting bodies.[9] *See, e.g.*, ***9** 42 C.F.R. § 416.1(b)(1) (listing "[t]he conditions that an ASC must meet in order to participate in the Medicare program"). Regulatory requirements generally address topics such as governance,[0] quality assessment, physical environment,[2] staff privileges,[3] personnel records,[4] nursing,[5] recordkeeping,[6] pharmaceutical ***10** and laboratory services,[7] radiology services,[8] patient rights,[9] infection control,[20] and patient assessment.[2]

The Texas ASC regulations at issue in this case cover the same range of topics.[22] These kinds of ***11** regulations seek to "ensure that the facility is operated in a manner that assures the safety of patients and the quality of services." *Positive Trend* at 5.

2. *It is medically reasonable to require outpatient abortion clinics to meet ASC standards.*

In insisting that outpatient abortion facilities met ASC standards, states are on solid medical ground.

1. For decades, induced abortion has been a common outpatient surgical procedure in the United States. The Guttmacher Institute reports that, in 2011 alone, 1.06 million abortions were performed in the United States, and that from 1973 through 2011, "nearly 53 million legal abortions occurred." Guttmacher Institute, Fact Sheet (July 2014) (citing Jones RK and Jerman J, "Abortion incidence and service availability in the United States, 2011," *Perspectives on Sexual and Reproductive Health,* 2014, 46(1):3-14) ("Jones"). The overwhelming majority of those abortions occurred in outpatient settings. See, *e.g.*, Jones, at 8, Table 3 (reporting that 94% of abortions in 2011 occurred either in abortion clinics or "other clinics"). And despite the availability of medication abortions (which, as noted below, carry their own risks), over 75% of abortions involve a surgical procedure. See, *e.g.*, Jones, at 8 (reporting that "early medication abortion" accounted for 23% of all nonhospital abortions in 2011).

***12** Abortion involves well-recognized patient risks, which are described by the National Abortion Federation's 2015 Clinical Policy Guidelines. See National Abortion Federation, 2015 Clinical Policy Guidelines ("NAF Guidelines"), http://prochoice.org/wp-content/uploads/2015 NAF CPGs.pdf. Risks include:

• infection (NAF Guidelines 4-8)

• missed ectopic pregnancy (*id.* at 20-22)

• risks and side-effects of anesthesia (*id.* at 31-37)

• incomplete abortion (*id.* at 40)

• excessive bleeding (*id.* at 43)

• uterine perforation (*id.* at 45-46).

The NAF Guidelines also advise that early medical abortion involves the risk of "excessive bleeding and infection," and the possibility of an incomplete abortion requiring uterine aspiration. *Id.* at 13 (6.2, 6.4). Finally, the Guidelines require abortion providers to inform patients of these risks and to provide emergency protocols for addressing them - protocols that may involve a patient's transfer and admission to a hospital. *Id.* at 21, 24, 28, 42, 45 (noting various concerns to be taken into account during a transfer).

ASC regulations target precisely the kinds of potential complications involved in outpatient abortion. As described above, ASC regulations commonly address matters such as infection control, quality assessment, anesthesia and laboratory protocols, informed consent, and patient monitoring, discharge, and follow-up. ASC regulations also require specific emergency protocols to respond to potential complications. See, *e.g.*, ***13** 42 C.F.R. § 416.41 (requiring ASC to "have an effective procedure for the immediate transfer, to a hospital, of patients requiring emergency medical care beyond the capabilities of the ASC"). More broadly, ASC regulations ensure that physicians performing surgical procedures are credentialed and qualified, are properly supervising facility employees, and are appropriately monitoring patients. See generally *supra* I.A.1.

It should thus be beyond dispute that it is reasonable to require outpatient abortion facilities to abide by ASC regulations. After all, it is common ground that abortion in most cases involves a surgical procedure, that abortions occur in large numbers in outpatient settings, and that abortion (including medication abortion) presents medical risks that ASC regulations seek to prevent, mitigate, or remedy.

2. The objections of petitioners and their *amici* to requiring outpatient abortion providers to meet ASC requirements cannot withstand scrutiny.

For instance, petitioners object that requiring a sterile surgical environment cannot enhance abortion safety because, unlike other surgeries, abortion does not involve "cutting into sterile body tissue." Pet. Br. at 18; see also Br. for *Amici Curiae* American College of Obstetricians and Gynecologists *et al.* in support of Petitioners ("ACOG Br.") at 11-13. That argument is misguided for many reasons.

First, other procedures often take place in ASCs that do not involve "cutting into sterile body tissue," such as any number of the gastroenterological, orthopedic, urologic, gynecological, ophthalmologic, and diagnostic procedures that widely occur in ASC ***14** settings. See *supra* I.A.1 (discussing NHS Report at 6, 16-17 (Table 6); 18-20 (Table 7)).

Second, as petitioners themselves admit, sterility *is* extremely important to abortion safety because "abortion providers must ensure that instruments that enter the uterus are sterile." Pet. Br. at 19; see also *Cole,* 790 F.3d at 579 (finding that "the State offered expert testimony that the sterile environment of an ASC was medically beneficial because surgical abortion involves invasive entry into the uterus, which is sterile").

Third, ASC regulations require more than just a sterile surgical environment. They broadly address any number of additional safety issues - such as infection control, patient supervision, anesthesia standards, and emergency protocols - that are directly relevant to the well-being of abortion patients. See *supra* I.A.1. Petitioners and their *amici* say nothing about whether these additional aspects of ASC regulation would enhance abortion patients' safety. Yet it is common sense that they would.

Instead, petitioners suggest only that ASC regulations are reserved for surgeries more "complex" than abortion. Pet. Br. at 39. But this ignores that the surgical and nonsurgical procedures that occur in ASCs vary widely in terms of complexity. See *supra* I.A.1. Contrary to petitioners' shortsighted view, abortion need not present the complexity or risk of heart, brain, or bowel surgery for abortion patients to benefit from - or need - the protections afforded by ASC regulations.

***15** Finally, petitioners note that Medicare discourages the performance in an ASC of procedures "safely and commonly performed in an office-based setting" - and from this they suggest it is unreasonable to require abortions to be performed in an ASC. See Pet. Br. at 17 (citing 71 Fed. Reg. 49506, 49639 (Aug. 23, 2006); 42 C.F.R. § 416.171(d)). Petitioners are quite mistaken. It is true that Medicare does not reimburse ASC procedures that "[a]re not of a type that are commonly performed, or that may be safely performed, in physicians' offices." 42 C.F.R. § 416.65(a)(2). But this does not imply that Medicare discourages performing abortions in an ASC. To the contrary, the official list of ASC procedures that Medicare reimburses plainly includes "abortion" (71 Fed. Reg. at 68277), as well as other gynecological procedures analogous to abortion. See *id.* at 68233, 68277 (covering "Dilation and Curettage" and "Treatment of Miscarriage"). Thus, contrary to petitioners' suggestion, the federal Medicare system squarely recognizes that abortion and similar procedures are properly performed in a setting subject to ASC regulations.

B. Admitting Privileges Requirement

1. *Physician admitting privileges enhance patient safety and reinforce physician competence.*

In addition to the broad requirement that abortion clinics meet ASC standards, Texas has also imposed the specific requirement that physicians at those clinics have "admitting privileges" at a hospital within thirty miles of the clinic. Tex. Health & Safety Code § 171.0031(a)(1)(A). Hospitals generally determine whether to grant physicians privileges to admit and ***16** treat patients through a process known as "credentialing" and "privileging." [23] A hospital credentials physicians by assessing their qualifications to become a member of the medical staff. [24] Based on that assessment, physicians are "privileged" to provide delineated care to patients at the hospital. *Id.* at GL-33. "Admitting" privileges refers to a physician's ability to admit patients for treatment by virtue of his membership on the hospital's medical staff. See, *e.g.,* J.C. Segen, The Dictionary of Modern Medicine 691 (1992). "Clinical" privileges refers to specific care a physician may provide to patients at the hospital. See *JC Standards* at MS-9 (noting that "[e]ach member of the medical staff is to have specific clinical privileges to provide care, treatment, and services authorized through the [credentialing and privileging] processes").

By granting privileges to a physician, a hospital seeks to improve patient care in several ways - all of which are promoted by Texas' admitting privileges requirement.

First, at the most basic level, a physician with admitting privileges can continue to care for a patient admitted to the hospital. After all, this is the physician ***17** who originally treated the patient, and it typically benefits the patient to have that physician continue to be personally involved in his care.

Second and relatedly, by having privileges, that physician is better able to communicate with other physicians at the hospital and coordinate patient care. See *JC Standards* at MS-18 (explaining "[t]he management and coordination of each patient's care … is the responsibility of a practitioner with appropriate privileges").

Third, the closer connection between physician and hospital created by privileging helps ensure that all physicians involved in the patient's care have the best information about the patient's health status and ready access to medical records. See *JC Standards* at MS-17 (requiring that a practitioner "who has been granted privileges … to do so performs a patient's medical history … and required updates"); *id.* MS-18 (explaining that "[c]ommunication among all practitioners and staff involved in a patient's care … is vital to ensuring coordinated, high-quality care"). Improved information flow

improves patient diagnosis and reduces miscommunication. See *id.* MS-19 (noting importance of "coordination of the care, treatment, and services among the practitioners involved in a patient's care").

Fourth, at the level of medical ethics, this closer connection between the physician and the hospital where a patient is admitted reinforces the physician's ***18** ethical obligation never to abandon care of his patient. [25]

Fifth, the credentialing and privileging process is also an effective means of ensuring physician competence and integrity. See *JC Standards* at MS-23 (noting the process "involves a series of activities designed to collect, verify, and evaluate data relevant to a practitioner's professional performance."). In credentialing a physician, a hospital verifies items such as her licensure, education, and training. *Id.* at MS-25-MS-26. This allows a hospital to assess basic matters such as whether the applicant is who she claims to be, whether her medical license is current, and whether she has maintained competence to performed the requested privileges. *Id.* at MS-27-MS-28. Similarly, in deciding which privileges to grant, a hospital engages in a "clearly defined procedure" that considers sources such as the National Practitioner Data Bank, a physician's own health records, any clinical data bearing on the physician's performance record, and peer recommendations. See *id.* at MS-29-MS-32.

In sum, credentialing and privileging enhance both the safety of patients and the integrity of the medical profession. The process ensures that "[p]ractitioners have privileges that correspond to the care, treatment ***19** and services needed by individual patients." *Id.* at MS-18. It maximizes a physician's ability to communicate with other physicians and coordinate all necessary care for the benefit of the patient. At the same time, the process allows "an overview of each applicant's licensure, education, training, current competence, and physical ability to discharge patient care responsibilities." *Id.* at MS-23. Put simply, an outpatient surgical provider with the ability to admit his patients to a hospital is more likely to be a physician with the experience, integrity and ability to provide his patients with the care they need, especially in the event of unforeseen emergencies.

2. *It is medically reasonable and responsible to require outpatient abortion providers to have admitting privileges at local hospitals.*

By requiring outpatient abortion providers to have admitting privileges at local hospitals, states like Texas have adopted a reasonable means of safeguarding patient safety and reinforcing physician competence and integrity.

1. As already discussed, abortion is a procedure that occurs in large numbers in outpatient settings and carries specific risks to patients. See *supra* I.A.2. Inevitably, some patients who experience complications from abortion will be admitted to a hospital for care. Indeed, the clinical guidelines of one of the nation's leading abortion groups require emergency protocols for transferring women to hospitals in the event of complications. *See* NAF Guidelines at 42. The evidence in this case indicates that over 200 women per year in Texas are hospitalized as a result of complications from ***20** abortion. See *Abbott,* 748 F.3d at 595 (noting that "Planned Parenthood conceded that at least 210 women in Texas annually must be hospitalized after seeking an abortion")-Regardless of the numbers, however, it is perfectly reasonable to conclude that any woman who requires hospital treatment because of an abortion complication will benefit if her abortion provider has the ability to admit her to a local hospital.

That woman, for example, will be assured that her physician, who originally provided the abortion, can continue to be personally involved in her care at the hospital. Her provider will be in a better position to communicate with the hospital about the details of her complications and to transfer her medical records. This improved information flow will enable her to receive a more timely and accurate diagnosis, which will in turn help her receive the targeted care she needs to resolve the complication. That may literally mean the difference between life and death since certain abortion complications can require rapid surgical intervention. See, *e.g.*, NAF Guidelines at 20 (warning against undiagnosed ectopic pregnancy).

Furthermore, because the woman's abortion provider will have undergone the credentialing and privileging process at a local hospital, she is more likely to have a physician who can perform the procedure in a safe and ethical manner. She can be more assured that her provider is currently licensed to practice medicine, has the requisite training and experience, and has been recommended by his peers in the medical profession.

Most importantly, she can be assured that her provider has a professional relationship with a local ***21** hospital that enables him to personally admit her in the event that she has a complication requiring the resources of a hospital. Anyone undergoing an outpatient surgical procedure like abortion would want such an assurance, no matter the frequency of serious complications. This explains why a federal circuit court observed in 2002 that requiring abortion providers to have admitting privileges at local hospitals is "obviously beneficial to patients." *Greenville Women's Clinic v. Comm'r,* 317 F.3d 357, 363 (4th Cir. 2002).

2. Indeed, long before the current controversy, numerous medical organizations strongly recommended that outpatient surgical providers have admitting privileges to ensure complication care and provider competency. In 2004, the American Medical Association ("AMA") and American College of Surgeons ("ACS") coordinated a "consensus meeting" that produced a set of "Core Principles" on patient safety for office-based surgery. [26] Core Principle #4 provided:

Physicians performing office-based surgery must have *admitting privileges at a nearby hospital*, a transfer agreement with another physician who has admitting privileges at a nearby hospital, or maintain an emergency transfer agreement with a nearby hospital.

ACS Statement at 33 (emphasis added). Similarly, Core Principle #8 provided:

> ***22** Physicians performing office-based surgery may show competency by *maintaining core privileges at an accredited or licensed hospital or ambulatory surgical center*, for the procedures they perform in the office setting.

ACS Statement at 34 (emphasis added). These principles were meant to encourage development of "model state legislation for use by state regulatory authorities to assure quality of office based procedures." *Id.* at 32.

To be sure, admitting privileges were not the only means identified to address complications and competency. But these medical organizations plainly considered privileges one effective means of achieving those goals.

The depth of the consensus was likewise remarkable. *Thirty-two* medical organizations, ranging across a variety of specializations, agreed to the Core Principles, including:

• Accreditation Association for Ambulatory Health Care

• American Academy of Ophthalmology

• American Academy of Orthopedic Surgeons

• American Academy of Otolaryngology-Head and Neck Surgery

• American Academy of Pediatrics

• American Association for Accreditation of Ambulatory Surgery Facilities

***23** • American College of Obstetricians and Gynecologists

• American College of Surgeons

• American Medical Association

• American Osteopathic Association

• American Society for Reproductive Medicine

• American Society of Anesthesiologists

• American Society of General Surgeons

• American Society of Plastic Surgeons

• American Urological Association

• Federation of State Medical Boards

• Joint Commission on Accreditation of Healthcare Organizations

• National Committee for Quality Assurance

ACS Statement at 33. [27]

Four of those groups now say they no longer recommend requiring privileges for abortion providers, ***24** see ACOG Br. at 17 (claiming privileges are "inconsistent with prevailing medical practices"), but their apparent repudiation of the 2004 ACS Statement is unpersuasive. In a footnote, their brief points out that the 2004 statement identified *both* privileges *and* transfer agreements as "core principles" for safe outpatient surgery. *Id.* at 21 n. 50. But this merely confirms that, in 2004, numerous medical organizations thought privileges were one critical means of ensuring prompt care for patient complications. The same footnote also tries to justify the revised view by referring vaguely to "advances in accepted medical practices," *id.*, but never says what those "advances" are. In any event, these four groups make no attempt to explain why admitting privileges - identified as a "core" safety principle for all outpatient surgery in 2004 - have over the past few years somehow become medically unreasonable for one particular kind of outpatient procedure.

3. Petitioners' objections to the privileges requirement cannot withstand scrutiny. For example, they claim privileges are unnecessary because, if complications arise at the clinic, patients can be transported to a hospital by ambulance and the abortion provider can simply inform the emergency room about the patient's condition by telephone. Pet. Br. at 19. That entirely misses the point. States like Texas have determined that privileges are a *more effective* way of ensuring prompt complication care than other arrangements, such as telephoning ahead to the ER.

That judgment is perfectly reasonable. For instance, none of the regulations governing ambulatory surgical ***25** centers - including Medicare rules - would allow complications to be addressed by sending a patient to the ER by ambulance and transmitting her medical condition by telephone. They would instead require either the provider to have privileges or the clinic to have a transfer agreement, as would the 2004 ACS Statement discussed above. See, *e.g.*, 42 C.F.R. § 416.41; ACS Statement at 33. [28] The fact that a state like Texas requires privileges instead of a transfer agreement does not mean Texas is unreasonable. It means that Texas has chosen the more patient-protective alternative. [29]

Furthermore, petitioners (and some of their *amici*) claim that privileges do not adequately ensure physician competence because privileges are sometimes denied based on considerations other than competence. ***26** See Pet. Br. at 22; ACOG Br. at 16-17. But this objection ignores that the widely-accepted standards for credentialing and privileging are overwhelmingly focused on ensuring physician competence. See *supra* I.B.1 (discussing Joint Commission standards). As the Joint Commission explains, one of the key goals of credentialing and privileging is to "[d]etermin[e] the competency of practitioners to provide high quality, safe patient care." *JC Standards* at MS-23. To that end, the Joint Commission standards establish an "objective, evidence-based" process for assessing a physician's "licensure, education, training, current competence, and physical ability to discharge patient care responsibilities." *Id.*; see also *id.* at MS-25-MS-33 (setting out credentialing and privileging standards). Moreover, those standards discourage the use of privileging criteria unrelated to the quality of patient care or physician competence: if a hospital uses such criteria, it must provide evidence evaluating "the impact of resulting decisions on the quality of care, treatment, and services." *Id.* at MS-32.

One of petitioners' *amici* goes so far as to claim it is impossible for abortion providers to obtain privileges under the Joint Commission standards. See Br. of *Amici Curiae* Medical Staff Professionals in support of Petitioners ("MSP Br."), at 13 (referring to Joint Commission standards). The *amicus* misreads the standards. Principally, they claim that the Joint Commission inflexibly requires clinical data from inpatient procedures to verify an applicant's competence, which outpatient abortion providers cannot provide because they rarely perform inpatient procedures. MSP Br. at 19-22. But the Joint Commission standards do not limit assessment of ***27** physician competence to inpatient clinical data. To the contrary, they require consideration of peer recommendations, including "written peer evaluation of practitioner-specific data collected from various sources for the purpose of validating current competence." See *JC Standards*, MS.06.01.03 (Introduction) at MS-26; *id.*, MS-06.01.05 (EP8), at MS-31. [30]

The same *amici* also suggest that an abortion provider could not *maintain* privileges because the Joint Commission standards demand "ongoing" professional evaluation that requires repeated hospital contacts. MSP Br. at 32-33. They again read the standards too rigidly. The ongoing evaluation required by the standards - known as the "Ongoing Professional Practice Evaluation" - allows assessment of physicians through a variety of materials, including periodic chart review, direct observation, monitoring, and discussion of provider competence with others involved in patient care. See *JC Standards,* MS.08.01.01 (Introduction), at MS-40. *Amici* do not explain why these kinds of evaluation methods make maintaining privileges impossible for outpatient abortion providers. Nor do the ***28** Joint Commission standards anywhere require physicians to have some required minimum of hospital admissions to maintain privileges. *Cf.* MSP Br. at 33 (claiming minimum admission requirements prevent abortion providers from maintaining privileges). Indeed, the AMA strongly discourages minimum admissions requirements as a prerequisite to granting or maintaining privileges. See Code of Medical Ethics of the American Medical Association Opinion 4:07 - Staff Privileges (2014-2015 ed.) ("Privileges should not be based on numbers of patients admitted to the facility or the economic or insurance status of the patient.").

In short, requiring admitting privileges for outpatient abortion providers is a commonsense measure designed to maximize the prompt and competent care of patients who experience complications. This is true of any outpatient surgical procedure, as scores of medical organizations have recognized in the past decade. There is no medical reason to think it is any less true of abortion, one of the most common outpatient surgical procedures in the United States.

II. This Court's precedents require deference to state medical regulations such as those in HB2.

Petitioners urge the Court to weigh Texas's interests in the medical regulations at issue against any reduction in abortion access they may cause. Pet. Br. at 33, 38-40. But that analysis has no basis in the Court's jurisprudence. Longstanding principles both inside and outside the abortion context require strong deference to state regulation of medical practice. And ***29** accepting petitioners' suggestion to balance medical interests against abortion access would call into question numerous abortion decisions over the past three decades.

1. The Constitution's federal structure requires deference to the states in many areas of law, especially the regulation of medicine. "It is established that a state may regulate the practice of medicine," *McNaughton v. Johnson,* 242 U.S. 344, 348-49 (1917), because states "exercise[] their police powers to protect the health and safety of their citizens." *Medtronic, Inc. v. Lohr* 518 U.S. 470, 475 (1996); see also, *e.g., Gonzales v. Oregon,* 546 U.S. 243, 270 (2006) ("*Gonzales I*") (the "structures and limitations of federalism" give states " 'great latitude … to legislate as to the protection of lives, limbs, health, comfort, and quiet of all persons' ") (quoting *Medtronic,* 518 U.S. at 475). Among other benefits, this deference affords state legislatures the necessary latitude to make judgments based on conflicting medical evidence. See, *e.g., Kansas v. Hendricks,* 521 U.S. 346, 360 n.3 (1997).

2. This principle of deference fully applies to this Court's abortion jurisprudence.

For instance, it is settled that state legislatures may legitimately take sides in medical debates about abortion given their "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart,* 550 U.S. 127, 163 (2007) ("*Gonzales II*"); see also *Stenberg,* 530 U.S. at 970-72 (Kennedy, J., dissenting) (collecting cases). Indeed, deference to state medical regulation was a key reason why the Court abandoned the *Roe* trimester framework. That framework had inappropriately made ***30** the Court " 'the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.' " *Gonzales II,* 550 U.S. at 163-64 (quoting *Webster v. Reproductive Health Services,* 492 U.S. 490, 518-19 (plurality op.)).

Several of this Court's abortion decisions illustrate the deference principle in operation. In *Simopoulos v. Virginia,* the Court held that, given its "considerable discretion in determining standards for the licensing of medical facilities," Virginia could require all second-trimester abortions to be performed in facilities licensed as "outpatient surgical hospitals." 462 U.S. 506, 516, 519 (1983). (Indeed, Justice O'Connor would have upheld the regulation regardless of the trimester. *Id.* at 520 (O'Connor, J., concurring)). Likewise, in *Mazurek v. Armstrong,* the Court upheld a Montana law allowing abortions to be performed only by physicians and not physicians' assistants. See 520 U.S. 968, 969-71 (1997). Responding to the claim that the law's distinction was undermined by all available medical evidence, the Court simply observed that "the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals." *Id.* at 973 (quoting *Casey,* 505 U.S. at 885). Finally, in *Gonzales v. Carhart,* the Court upheld a ban on one second-trimester abortion technique, despite medical disagreement about the technique's health benefits. See 550 U.S. at 163. The Court noted that "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." *Id.* at 164 (citing *Hendricks,* 521 U.S. at 360 n.3).

***31** 3. Petitioners' suggested balancing test is a stark departure from this Court's previous approach, and it would effectively overrule numerous precedents.

Indeed, the standard urged by petitioners is the polar opposite of deference to state legislative judgments in the medical realm. In petitioners' view, this Court has an obligation to "confirm" the legislature's medical judgments, to review "[t]he great weight of the [medical] evidence," and to "strike a careful balance" between abortion safety and access. Pet. Br. 31, 39, 44. This standard is unheard of, either inside or outside the abortion context. It would reinstitute, with a vengeance, the discredited regime that transformed the Court into "the country's *ex officio* medical board." *Gonzales II,* 550 U.S. at 163-64 (internal quotation marks omitted).

Petitioners' novel standard would also provoke immediate reconsideration of many of this Court's abortion decisions, before and after *Casey.* Most obviously, it would overturn *Simopoulos* by requiring the Court to adjudge the wisdom and efficacy of ambulatory surgical center regulations. See Resp. Br. at 28, 37-38, 45 (discussing *Simopoulos*). It would require, contrary to *Mazurek,* that the Court assess whether abortions provided by physicians are medically safer than those provided by non-physicians. And it would call *Gonzales v. Carhart* into question by requiring the Court to take sides in contested issues of medical ethics. See *Gonzales II,* 550 U.S. at 158 (deferring to Congress's judgment that the abortion procedure at issue "requires specific regulation because it implicates additional ethical and moral concerns").

***32** The Court should decline petitioners' invitation to begin writing this new and unpredictable chapter in its abortion jurisprudence. Instead, the Court should continue to apply settled law, which requires deference to state judgments about the best means of protecting the health and safety of their citizens.

Conclusion

The Court should affirm the judgment of U.S. Fifth Circuit.

Footnotes

1 Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part. No party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for petitioners and respondents have consented to the filing of this brief.

2 *See, e.g., Ass n of Am. Physicians & Surgeons v. Sebelius,* 113 A.F.T.R.2d (RIA) 1196 (D.C. Cir. 2014); *Ass n of Am. Physicians & Surgeons v. Clinton,* 997 F.2d 898 (D.C. Cir. 1993).

3 *See, e.g., Springer v. Henry,* 435 F.3d 268, 271 (3d Cir. 2006) (citing and relying on AAPS argument); *United States v. Rutgard,* 116 F.3d 1270, 1275 (9th Cir. 1997) (noting AAPS as *amicus curiae*).

4 *What is an ASC?,* Ambulatory Surgical Center Association ("ASCA "), http://www.advancingsurgicalcare.com/whatisanasc (last visited Jan. 21, 2016).

5 See also, *e.g., Ambulatory Surgery in the United States, 2006,* National Health Statistics Reports (Centers for Disease Control and Prevention Sept. 4, 2009) ("NHS Report ") at 1 (defining "ambulatory surgery as "surgical and nonsurgical procedures performed on an ambulatory (outpatient) basis in a variety of settings, including a "freestanding center's general operating rooms, dedicated ambulatory surgery rooms, and other specialized rooms, such as endoscopy units and cardiac catheterization laboratories "), http://www.cdc.gov/nchs/data/nhsr/nhsr011.pdf.

6 See *Ambulatory Surgical Centers: A Positive Trend in Health Care* at 1, Ambulatory Surgical Center Association ("*Positive Trend* "), http://www.ascassociation.org/advancingsurgicalcare/aboutascs/industryoverview/apositivetrendinhealthcare (last visited Jan. 21, 2016); *see also* NHS Report at 2 (noting " a]mbulatory surgery has been increasing in the United States since the early 1980s ").

7 *Positive Trend* at 1 (citing Centers for Medicare & Medicaid Services ("CMS "), Medicare Claims Data 2005 2010; Oxford Outcomes ASC Impact Analysis 2010).

8 Specialists who commonly utilize ASC facilities include ENTs, general surgeons, OB/GYNs, oral surgeons, plastic surgeons and podiatrists. See *Establishing and Ambulatory Surgery Center: A Primer from A to Z,* Beckersasc.com, http://www.beckersasc.com/news analysis/establishing an ambulatory surgery center a primer from a to z.html (last visited Jan. 27, 2016).

9 See, *e.g., Positive Trend* at 4 (noting " t]he safety and quality of ASC] care evaluated by "state licensure, Medicare certification and voluntary accreditation "). The principal accrediting bodies are the Joint Commission, the Accreditation Association for Ambulatory Health Care (AAAHC), the American Association for the Accreditation of Ambulatory Surgical Facilities (AAAASF), and the American Osteopathic Association (AOA). *Id.*

10 See, *e.g.*, 42 C.F.R. § 416.41 (requiring ASC to "have a governing body that assumes full legal responsibility for determining, implementing, and monitoring policies "); Wash. Admin. Code § 246 330 115 (same).

11 See, *e.g.*, 42 C.F.R. § 416.43 (requiring ASC to implement "an ongoing, data driven quality assessment and performance improvement … program "); Ala. Admin. Code Reg. 420 5 2 .02(2)(d) (requiring ASC to "seek consultation … for the improvement of efficiency of operation and the quality of patient care ").

12 See, *e.g.*, 42 C.F.R. § 416.44(a)(1) (requiring operating rooms to be "designed and equipped so that surgery can be performed "in a manner that protects the lives and assures the physical safety of all individuals in the area "); *id.* § 416.44(a)(2) (requiring "a separate recovery room and waiting area) Utah Admin. Code Reg. 432 500 18(4)(c) (listing required equipment for "operating suite ").

13 See, *e.g.*, 42 C.F.R. § 416.45(a) (requiring "legally and professionally qualified staff and privileges "in accordance with recommendations from qualified medical personnel "); ch. 5 Wyo Gov't Reg. Health HQ § 6(a)(x) (requiring " m]edical and nursing staff to] be licensed, certified, or registered ").

14 See, *e.g.*, Nev. Admin. Code § 449.9855 (ASC must "maintain employee health records); ch. 5 Wyo Gov't Reg. Health HQ § 4(e) (ASC governing body controls personnel policy).

15 See, *e.g.*, 42 C.F.R. § 416.46 (registered nurse must be "available for emergency treatment); Ala. Admin. Code Reg. 420 5 2 .02(3)(e)(1)(i) (operating room personnel must include "at least one … registered professional nurse).

16 See, *e.g.*, 42 C.F.R. § 416.47 (requiring "a system for the proper collection, storage, and use of patient records); Ala. Admin. Code Reg. 420 5 2 .02(6)(a) (requiring ASCs to "keep adequate records).

17 See, *e.g.*, 42 C.F.R. § 416.48(a) (requiring that " d]rugs must be prepared and administered according to established policies and acceptable standards of practice); Utah Admin. Code Reg. 432 500 19 (regulating pharmacy service).

18 See, *e.g.*, Utah Admin. Code Reg. 432 500 21 (listing requirements for radiation services); 42 25 Miss. Code Reg. § 1 (requiring a radiology technician be employed if services offered).

19 See, *e.g.*, 42 C.F.R. § 416.50(a) (g) (requiring notice to patient concerning physician's financial interests, advance directives, grievance procedures, anti discrimination rights, informed consent, privacy, and safety); 42 17 Miss. Code Reg. § 5 (requiring record of patient consent).

20 See, *e.g.*, 42 C.F.R. § 416.51(b) (requiring "an ongoing program designed to prevent, control, and investigate infections and communicable diseases); 42 18 Miss. Code Reg. § 8 (requiring written policy on infection control).

21 See, *e.g.*, 42 C.F.R. § 416.52 (requiring standards for "appropriate pre surgical and post surgical assessments); Ala. Admin. Code Reg. 420 5 2 .04(4)(d), (e) (requiring recovery rooms and, if patients admitted for more than twelve hours, observation rooms).

22 See 25 Tex. Admin. Code §§ 135.1 .29 (addressing operating requirements, such as patient rights, personnel, medical records, physical environment, anesthesia, radiology, drug and laboratory protocols, and inspections); *id.* at §§ 135.31 .43 (addressing fire prevention and safety requirements); *id.* at §§ 135.51 .56 (addressing physical plant, ventilation, and construction).

23 See Joint Commission Resources, 2016 Hospital Accreditation Standards ("*JC Standards*), Medical Staff ("MS) at MS 1 MS 2 (Overview). Criteria for credentialing and privileging are found in hospital bylaws, *id.* at MS 9, but most hospitals follow standards set by The Joint Commission, " a]n independent, not for profit organization that "accredits and certifies more than 20,000 health care organization and programs in the United States. *Id.* at GL 41.

24 *JC Standards* at GL 9 (defining "credentialing); GL 23 (noting different kinds of medical staff).

25 See, *e.g.*, Code of Medical Ethics of the American Medical Association, Opinion 8.115 (2014 2015 ed.) ("Physicians have an obligation to support continuity of care for their patients.); *id.*, Opinion 10.01(5) (providing that " t]he physician may not discontinue treatment of a patient as long as further treatment is medically indicated, without giving the patient reasonable assistance and sufficient opportunity to make alternative arrangements for care).

26 See *Statement on patient safety principles for office based surgery utilizing moderate sedation / analgesia, deep sedation / analgesia, or general anesthesia,* Bulletin of the American College of Surgeons, Vol. 89, No. 4, at 32 24 (Apr. 2004) ("*ACS Statement*), https://www.facs.org/°/media/files/publications/bulletin/2004/2004%20april%20bulletin.ashx.

27 Additional signatures included: American Academy of Cosmetic Surgery; American Academy of Dermatology; American Academy of Facial Plastic and Reconstructive Surgery; American Society for Dermatologic Surgery; American Society of Cataract and Refractive Surgery; Indiana State Medical Society; Institute for Medical Quality California Medical Association; Kansas Medical Society; Massachusetts Medical Society; Medical Association of the State of Alabama; Medical Society of the State of New York; Missouri State Medical Association; Pennsylvania Medical Society; and the Society of Interventional Radiology. *Id.*

28 See also, *e.g.*, American Association for Accreditation of Ambulatory Surgery Facilities, Regular Standards and Checklist for Accreditation of Ambulatory Surgery Facilities § 400.012.010 (2014) (requiring that the facility have "a written transfer agreement or that "the operating surgeon has privileges to admit patients to a hospital within 30 minutes of the facility), http://www.aaaasf.org/Surveyor/asf web/PDF%20FILES/Standards%20and%C20Checklist%C20Manual%20V14.pdf.

29 Petitioners also argue that, if complications arise when the patient returns home, the patient would "be instructed to seek care at an emergency room near her] home. Pet. Br. at 19. That also misses the point. The fact that a privileges requirement may not directly assist a patient in *every* scenario does not mean that it is unreasonable. The same thing could be said for any outpatient surgical procedure performed in an ASC, where complications could arise either in the surgical center or after the patient returns home. Furthermore, the competency ensuring function of the privileging process benefits *all* patients by raising the standard of care and reducing the likelihood of complications to begin with.

30 Furthermore, the standards envision a separate process designed to evaluate applicants who lack "documented evidence of performing requested procedures at the hospital. See *id.*, MS.08.01.01 (Introduction), at MS 37 (discussing "Focused Professional Practice Evaluation). That process is likewise not limited to inpatient clinical data; rather, it considers various indicators of current competence readily available to outpatient abortion providers. See *id.* at MS 38 (allowing consideration

of "chart review, monitoring clinical practice patterns, simulation, proctoring, external peer review, and discussion with other individuals involved in the care of each patient).

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2015 WL 9412868 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

V.L., Petitioner,
v.
E.L., and Guardian Ad Litem, as Representative of Minor Children, Respondents.

No. 15-648.
December 21, 2015.

On Petition for Writ of Certiorari to the Alabama Supreme Court

Respondent E.L.'s Brief in Opposition

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***i** COUNTERSTATEMENT OF QUESTIONS PRESENTED

A "second parent" adoption is one granted to a third party without severing the rights of the child's living parent. V.L. and E.L. were an unmarried couple living in Alabama. A Georgia court granted V.L. a second parent adoption of E.L.'s three biological children, while leaving intact E.L.'s parental rights. Georgia law, however, provides that children may be adopted by a third party "only if [the children's] living parent … has voluntarily and in writing surrendered all of his or her rights to such child[ren]." Ga. Code Ann. § 19-8-5(a).

When the couple subsequently split up, V.L. sought to enforce the Georgia adoption in Alabama under the federal Full Faith and Credit Clause. The Alabama Supreme Court ruled that the Georgia adoption was not entitled to full faith and credit because the Georgia court lacked authority - and hence, jurisdiction - to award a second parent adoption under Georgia law.

The questions presented are:

1. Does a state court owe full faith and credit to a sister state's "second parent" adoption, when the sister state's law expressly prohibits "second parent" adoptions?

2. Does a state court owe full faith and credit to a sister state's adoption, when the undisputed evidence shows that the adoptive parent went to the sister state solely for the purpose of obtaining the adoption?

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CASES

***1** INTRODUCTION

This case concerns a "second parent" adoption, meaning an adoption granted to a member of an unmarried couple that simultaneously preserves the rights of the biological parent. Such unusual adoptions are not authorized by the laws of most states and, in Georgia, they are expressly prohibited by statute. Nonetheless, a Georgia court granted a second parent adoption to the petitioner, who at the time was living with the respondent in Alabama. When the couple subsequently split up, the petitioner sought to enforce the Georgia adoption in Alabama under the Full Faith and Credit Clause. The Alabama Supreme Court declined, applying the settled rule that a sister state judgment does not merit full faith and credit if the issuing court lacked the power to render it. *See, e.g., Williams v. North Carolina,* 325 U.S. 226,229 (1945) (a judgment merits full faith and credit "only if the court of the first State had power to pass on the merits - had jurisdiction, that is, to render the judgment").

The petition seeks review of the Alabama Supreme Court's decision, but it fails to clear the first hurdle of certworthiness. It does not show - and does not even try to show - that the full faith and credit question actually presented by the decision implicates a split of authority among lower courts. Instead, the petition merely claims the Alabama Supreme Court was wrong. But correcting purported errors from lower courts is hardly the purpose of this Court's certiorari jurisdiction. That is all the petitioner asks the Court to do, and her petition should be denied for that reason alone.

***2** Beyond that, there is another reason to deny the petition. If the issue is as important as the petitioner believes, then this Court would be well served to allow it to percolate further in the lower courts before settling it. To date, there has been no percolation at all - indeed, the court below appears to be the only one ever to have squarely addressed the issue. It has been a century since the last time this Court addressed how the full faith and credit obligation applies to an adoption decree. *See Hood v. McGehee,* 237 U.S. 611, 615 (1915). And the adoption here is not just *any* adoption; it is a singular kind of adoption whose legality is contested in the states and which is plainly forbidden by the law of the state whose court issued it. Before wading into these waters, the Court should allow other courts to weigh in. Given the petitioner's assurances that similar adoptions have been granted in many states, the full faith and credit issue is likely to come up in future cases. When there is an actual split of authority on the issue - something manifestly absent at present - the Court could then choose to intervene.

The final reason not to grant the petition is that the lower court's decision was correct. The Alabama Supreme Court repeatedly invoked the settled principle that full faith and credit permits re-examination of the jurisdiction, but not the merits, of a sister state judgment. Carefully applying that principle, the Alabama court determined that the Georgia court simply lacked power - and hence, jurisdiction - to award a second parent adoption. This was not, the court explained, a mere technical defect nor an issue that went to the adoption's "merits." Instead, the Georgia decree facially violated

a basic condition for adoptions plainly set forth in the Georgia statute. In ***3** short, this was not an adoption that the Georgia court *should not* have granted; it was one the Georgia court *could not* have granted under Georgia law. That is a jurisdictional defect under the Full Faith and Credit Clause. *See Fauntleroy v. Lum,* 210 U.S. 230, 234-35 (1908) (a merits issue pertains to "the duty of the court," whereas a jurisdictional issue pertains to "[the court's] power"). The Alabama Supreme Court thus correctly determined that the Georgia adoption was not entitled to recognition in Alabama.

STATEMENT

A. Factual Background

Respondent E.L., a lifelong resident of Alabama, is the biological mother of three children through artificial insemination. In XX/XX/2002 she gave birth to S.L., and, in XX/XX/2004, to twins, N.L. and H.L. At the time, E.L. was living in Hoover, Alabama with petitioner V.L, a woman with whom she had been in a relationship since 1995. V.L. acted as the children's parent along with E.L. *See generally* Pet. App. 5a; E.L. Aff. ¶ 2, Mar. 11, 2014.

In 2006, V.L. and E.L. decided they wanted V.L. to adopt the children and make both women legal parents. According to V.L.'s affidavit, they began researching which jurisdictions might be "receptive" to that arrangement. Pet. App. 5a-6a. An attorney advised them that Georgia was a hospitable jurisdiction, but that V.L. "needed to be a resident of … Georgia, specifically Fulton County, for at least six (6) months to petition for adoption[.]" *Id.* at 6a. In October 2006, V.L. and E.L. leased a house in Alpharetta, Georgia from the mother of E.L.'s college friend and subsequently ***4** began the adoption process. According to V.L.'s affidavit, "a background check request was submitted using the Alpharetta address," and "[o]n March 26, 2007, a home study was done at the address in Georgia; per my attorney this was a requirement for petitioning for adoption." *Id.* Throughout this period, however, the couple continued to live and work in Alabama, and spent only two nights in the Georgia house, as explained in E.L.'s affidavit:

> We never moved in [to the Georgia house]. We never lived there. We spent approximately two nights there, one before the "home study." That night, we packed up the kids in the SUV along with toys, photographs, refrigerator magnets, etc. and put these things around our friend's house. We hung a bird feeder the children had made in the backyard. This was done so it would appear to the home inspector that we lived there. After the "home study" was done, we packed up and returned to our home in Hoover, Alabama. The other night we spent [in Georgia] was the night before the adoption hearing.

E.L. Aff. ¶ 5, Mar. 11, 2014; *see also* Pet. App. 6a-7a (noting E.L.'s testimony the women "never spent more than approximately two nights in [the Georgia house], instead continuing to live and work at their jobs in Alabama")

On April 10, 2007, V.L petitioned to adopt the three children in Fulton County, Georgia. Pet. App. 7a. E.L. consented to the adoption, but asserted that she did not "relinquish or surrender any parental rights to the children." Parental Consent to Adoption (Apr. 9, 2007), at 1; Pet. App. 7a. On May 30, 2007, the Georgia court ***5** entered a final decree granting V.L.'s petition. Pet. App. 7a, 64a. The decree specified that V.L. would be recognized as the children's "second parent" but that E.L.'s parental rights as the "legal and biological mother" were "preserved intact." *Id.* at 64a. While stating generally that V.L. had "complied with all relevant and applicable formalities regarding the [adoption]," *Id.* at 63a, the court's order did not address whether Georgia law authorized granting an adoption to V.L. (who was not married to E.L.) while simultaneously leaving E.L.'s parental rights intact. Nor did the court's order address whether V.L. was a bona fide domiciliary of Georgia.

In November 2011, V.L. and E.L.'s relationship ended, and, in January 2012, V.L. moved out of the house the women had shared in Alabama. *Id.* at 7a.

B. Procedural Background

On October 31, 2013, V.L. filed a petition in a Jefferson County, Alabama circuit court alleging that E.L. was refusing her access to the children. She sought to have the Georgia adoption decree registered as a foreign judgment, to be declared a legal parent, and to be awarded custody or visitation. Pet. App. 7a8a. The case was transferred to the Jefferson County Family Court, and E.L. moved to dismiss, *inter alia,* on the ground that the Georgia decree did not merit full faith and credit because the Georgia court lacked jurisdiction to award the adoption to V.L. *Id.* at 8a. Without holding a hearing, the family court denied E.L.'s motion to dismiss and simultaneously granted V.L. visitation rights. *Id.* E.L. timely appealed to the Alabama Court of Civil Appeals.

***6** Initially, the appeals court agreed with E.L. that the Georgia court lacked jurisdiction to award an adoption to a non-spouse without first terminating the rights of the current parent, and that the Georgia decree was consequently not entitled to full faith and credit. *E.L. v. V.L.,* No. 2130683, slip op. at 9-13 (Ala. Civ. App. Oct. 24, 2014). The court reversed itself on rehearing, however. Pet. App. 45a. It decided that any defect in the Georgia adoption went to the merits and not to jurisdiction, and that the adoption therefore merited full faith and credit. *Id.* at 52a-57a, 59a-60a. However, the court reversed the family court's award of visitation to V.L. The court explained that, before visitation could be awarded, due process required that E.L. be "entitled to due notice and an opportunity to be heard on the matter." *Id.* at 61a. The court thus remanded for "an evidentiary hearing to decide the visitation issue." Pet. App. 61a.

E.L. successfully sought certiorari from the Alabama Supreme Court, which reversed. *Id.* at 5a. The supreme court acknowledged that, in determining whether an out-of-state judgment merits full faith and credit, the court's "review … does not extend to a review of the legal merits of [that] judgment," but is instead "limit[ed] … to whether the rendering court had jurisdiction to enter the judgment sought to be domesticated." *Id.* at 11a, 13a. Disagreeing with the court of appeals, however, the supreme court found that the defect in the adoption implicated the Georgia court's subject matter jurisdiction. After canvassing the ***7** Georgia adoption statutes and jurisprudence, the court agreed with E.L. that Georgia law "makes no provision for a non-spouse to adopt a child without first terminating the parental rights of the current parents." *Id.* at 27a (citing *Wheeler v. Wheeler,* 642 S.E.2d 103, 104 (Ga. 2007) (Carley, J., dissenting from denial of certiorari); *Bates v. Bates,* 730 S.E.2d 482, 484 (Ga. Ct. App. 2012)). As the court explained, Georgia law makes termination of the current parent's rights a necessary "condition" before an adoption may be granted to a nonspouse. Pet. App. 30a (citing Ga. Code Ann. § 19-85(a)). Consequently, the undisputed failure of E.L. to surrender her parental rights resulted in a "void" adoption that the Georgia court "was not empowered to enter." Pet. App. 30a.

Because it resolved the case on those grounds, the Alabama Supreme Court did not reach E.L.'s alternative argument that the Georgia court lacked jurisdiction to award an adoption to V.L. because she never established a bona fide domicile in Georgia. *Id.* at 30a n.10; *see* Ga. Code Ann. § 19-8-3(a)(3) (to petition for adoption a person must, *inter alia,* have "been a bona fide resident of [Georgia] for at least six months immediately preceding the filing of the petition").

On November 16, 2015, V.L. timely petitioned this Court for a writ of certiorari. On December 14, 2015, this Court granted V.L.'s application to recall and stay the Alabama Supreme Court's certificate of judgment. Order in Nos. 15A522, 15A532 (U.S. Dec. 14, 2015).

***8 REASONS FOR DENYING THE PETITION**

I. V.L.'s petition is not certworthy.

A. There is no split of lower court authority on the question presented in this case.

V.L's petition does not even attempt to argue that the decision below implicates a split among lower courts, thus failing the most elementary test of certworthiness. *See, e.g., Braxton v. U.S.,* 500 U.S. 344, 347 (1991) (explaining a "principal

purpose" of certiorari jurisdiction is "to resolve conflicts among the United States courts of appeals and state courts"). She claims only that the Alabama Supreme Court misapplied settled law. *See* Pet. 28 (asserting the decision is an "unprecedented application of the Full Faith and Credit Clause"). Even if she were right about that (and she is not, *see infra* II), the fact remains that error-correction is the weakest basis for granting certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law."); *Tolan v. Cotton,* 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring) (noting " 'error correction … is outside the mainstream of the Court's functions and … not among the 'compelling reasons' … that govern the grant of certiorari' ") (quoting S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013)) (brackets omitted).

While V.L.'s petition never accurately states it, the issue in this case is whether a state court owes full faith and credit to a sister-state adoption decree that was not merely erroneous but *void* under the sister- ***9** state's adoption law. *See infra* II. As the Alabama Supreme Court found, the Georgia court purported to award an "adoption" to V.L. that, on its face, negated the fundamental condition for a Georgia adoption - it expressly refused to terminate the existing rights of the children's current parent. *See* Pet. App. 30a (noting that Georgia Code § 19-8-5(a) "defines the condition that must exist before such superior courts can grant adoptions to third parties such as V.L."). That defect, the court reasoned, went not to whether the Georgia court *should* have granted the adoption, but whether it had the *power* to grant such an adoption at all. Pet. App. 30a The court therefore concluded that the defect implicated the Georgia court's subject matter jurisdiction, thus depriving the adoption of full faith and credit under settled law. *Id.*

V.L. cites no case, state or federal, that reaches a different conclusion on a remotely comparable set of facts. She does not even try. Instead, V.L extravagantly claims that the Alabama Supreme Court's decision is a "gross deviation" from this Court's (and other courts') full faith and credit jurisprudence. Pet. 28. She is mistaken, *see infra* II, but the more salient point is that she avoids asserting that the Alabama decision *conflicts* with any decision from this Court or from any lower court, state or federal. There is good reason for that. The Alabama Supreme Court simply applied the settled principle that a judgment merits full faith and credit "only if the court of the first State had power to pass on the merits - had jurisdiction, that is, to render the judgment." *Williams v. North Carolina,* 325 U.S. 226, 229 (1945). Every case V.L. cites, *see* Pet. 28-29, recognizes that venerable limitation on the Full Faith and Credit Clause. *See, e.g.,* ***10** *Mack v. Mack,* 618 A.2d 744, 750 (Md. Ct. App. 1993) (because "[t]he mandate of [the Full Faith and Credit Clause] is not absolute, … [i]t is proper for a forum court to examine the jurisdiction of the deciding court to determine whether the foreign judgment must be accorded full faith and credit") (citing, *inter alia, Milliken v. Meyer,* 311 U.S. 457, 462 (1940)). In the decision below, the Alabama Supreme Court applied precisely that principle and found that the Georgia court lacked power to award the adoption at issue. *See* Pet. App. 24a (noting this Court's "distinction between a subject-matter jurisdiction challenge and a merits-based challenge" under the Full Faith and Credit Clause) (and discussing *Fauntleroy v. hum,* 210 U.S. 230, 234-35 (1908)).

V.L. also mistakenly claims that the Alabama Supreme Court's decision is a "stark departure" from how other state courts have addressed the full faith and credit due sister-state adoptions. Pet. 30. To the contrary, the state decisions V.L. cites recognize exactly the same limitation on full faith and credit as the one applied by below. [2] And, again, V.L. avoids ***11** claiming that the lower court's decision conflicts with any of those cases. In fact, the closest case she cites, *Russell v. Bridgens,* 647 N.W.2d 56 (Neb. 2002), may *support* the Alabama Supreme Court's analysis. In *Russell,* the Nebraska Supreme Court suggested that a Pennsylvania court may have lacked jurisdiction to award a non-spousal adoption where the child's parent had retained her rights. *See id.* at 59-60 (considering whether, due to alleged lack of termination of parental rights, parent may "collaterally attack the judgment on the basis that the Pennsylvania court lacked subject matter jurisdiction"). [3] Thus, far from showing that the Alabama Supreme Court's decision "starkly departs" from other state courts, V.L.'s cases show it is consistent with those courts' treatment of full faith and credit and adoptions.

Finally, V.L. persistently mischaracterizes the reasoning of the Alabama Supreme Court's decision, seeking to create the impression that it would deny full faith and credit to a wide array of sister-state adoptions. Principally, she claims the

court "adopt[ed] a new understanding of 'jurisdiction,' " that would authorize collateral attacks on sister-state adoptions ***12** "*whenever* the issuing court allegedly failed to strictly comply with a statutory provision." Pet. 32, 31 (emphasis in original). That is false. In its decision, the Alabama Supreme Court merely referenced the common interpretive principle that adoption statutes, because they are in derogation of common law, should be strictly construed in favor of the rights of natural parents. Pet. App. 29a (citing *In re Marks,* 684 S.E.2d 364, 367 (Ga. 2009)); *see also, e.g., Matter of Adoption of Robert Paul P.,* 471 N.E.2d 424, 426 (N.Y. Ct. App. 1984) (explaining that, "because adoption is entirely statutory and is in derogation of common law, the legislative purposes and mandates must be strictly observed") (citations omitted). The court correctly applied this principle to determine whether Georgia law authorized an adoption in favor of a non-spouse without terminating the existing parent's rights. *See* Pet. App. 30a (interpreting Ga. Code Ann. § 19-8-5(a)). But the court never suggested that any and every flaw in an adoption qualifies as jurisdictional. To the contrary, after identifying the specific defect in this case, the court remarked that "[o]ur inquiry does not end here, however, as that error is ultimately of no effect unless it implicates the subject-matter jurisdiction of the Georgia court." Pet. App. 28a.

B. V.L.'s overstated and speculative "harm" argument does not justify granting certiorari.

V.L. claims that the decision below will "harm Alabama families" by broadly negating adoptive rights granted in other states if there is *any* defect in the adoption, no matter how minor. Pet. 32. More narrowly, she also predicts that the decision will harm ***13** others in her situation because Georgia and other states grant adoptions that "allow[] an unmarried second parent to adopt without terminating the existing parent's rights." *Id.* Neither argument justifies granting certiorari in this case.

V.L.'s broader harm argument depends on her distortion of the decision below to mean that "*any* Georgia adoption that deviates from statutory requirements can be collaterally attacked in Alabama." Pet. 34 (emphasis in original). As already explained, that caricatures the Alabama Supreme Court's decision. *Supra* LA. Far from holding that "any" defect opens a sister-state adoption to collateral attack, the lower court held only that a particular defect would do so - namely, when the decree defies the plain statutory requirement that the current parent relinquish her rights. Pet. App. 23a, 28a-30a. That defect, the court explained, did not result merely in an adoption that *should not* have been granted; it resulted in one that *could not* have been granted under Georgia law. *Id.* at 30a (concluding "the Georgia court was not empowered to enter the Georgia judgment declaring V.L. to be an adoptive parent of the children"). Contrary to V.L.'s argument, then, the Alabama Supreme Court's decision authorizes collateral attacks on adoptions only for a defect that implicates the issuing court's jurisdiction, which is a settled rule in full faith and credit jurisprudence.

V.L.'s more specific harm argument focuses on the wrong thing. How often "second parent" adoptions are granted to unmarried couples (in Georgia or elsewhere) ***14** is not the relevant question for certiorari purposes.[4] Instead, the relevant question is whether the granting of such adoptions has led to lower court decisions exploring whether they merit full faith and credit in other states. Yet V.L. cites only one such decision, *Russell v. Bridgens,* which, as explained above, may support the Alabama Supreme Court's decision but ultimately did not resolve the issue. *See Russell,* 647 N.W.2d at 59-60. If this full faith and credit question arises in future cases, a division of authority may develop justifying certiorari. V.L.'s inability to cite any significant number of lower court decisions on this issue, much less a split of authority, shows that the moment has not arrived.

Moreover, the Court's usual practice of allowing an issue to percolate in lower courts has special force here. *See, e.g., California v. Carney,* 471 U.S. 386, 401 n.11 (1985) (Stevens, J., dissenting) (observing that "percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule' ") (internal quotations and citation omitted). This Court has never considered whether an adoption merits the "exacting" level of full faith and credit that adversarial judgments do. ***15** *Baker by Thomas v. General Motors Corp.,* 522 U.S. 222, 233 (1998). In *Hood v. McGehee,* 237 U.S. 611, 615 (1915), the Court decided only that full faith and credit did not prohibit Alabama from excluding out-of-state adoptees from its inheritance laws. Since *Hood,* decided a century ago, the Court has never again explored how full faith and credit applies to adoptions.

The nature of adoption decrees raises difficult issues under the Full Faith and Credit Clause. Most full faith and credit jurisprudence addresses judgments (typically money judgments) that are the product of adversarial proceedings and that can be readily enforced by another state regardless of the nature of the underlying claim. *See, e.g., Mills v. Duryee,* 11 U.S. (7 Cranch.) 481, 483-84 (1813) (addressing credit owed to a New York debt judgment in District of Columbia courts); *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, 439 (1943) (discussing full faith and credit obligation requiring enforcement of sister-state judgments "for … taxes, or for a gambling debt, or for damages for wrongful death"). By contrast, an adoption decree is typically the product of a non-adversarial proceeding; and, unlike a money judgment, it is largely a forward-looking decree, forging new relationships that seek integration into a new state's family laws. These characteristics of adoptions may present full faith and credit issues not encountered with other kinds of judgments. *See, e.g., New York ex rel. Halvey v. Halvey,* 330 U.S. 610, 616 (1947) (Frankfurter, J., concurring) (in full faith and credit context, "[c]onflicts arising out of family relations raise problems and involve considerations very different from controversies to which debtor-creditor relations give rise"). For instance, they may implicate problems like those long ***16** experienced by federal courts when adjudicating interstate recognition of child custody decrees. *See Thompson v. Thompson,* 484 U.S. 174, 180-81 (1988) (describing difficulties in applying full faith and credit doctrine to child custody decrees, leading to enactment of federal Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A).

Furthermore, the specific kind of adoption at issue in this case - a "second parent" adoption - presents peculiar difficulties that counsel in favor of awaiting further percolation. V.L.'s petition asserts that trial courts "in numerous other states" have granted second parent adoptions to unmarried couples "without any appellate authority expressly affirming the validity of such adoptions." Pet. 36. A footnote adds that, while a "majority of states" grant these adoptions to unmarried couples, "only about ten states have expressly authorized such adoptions either by statute or case law." *Id.* n.10. What V.L. appears to concede here is that a significant share of the second parent adoptions granted to unmarried couples in the United States - including the one granted by the Georgia court in this case - are not authorized by state law. Yet she candidly asks this Court to grant her petition and force every state to recognize these unauthorized adoptions under the Full Faith and Credit Clause, despite the fact that, by her own admission, the laws of "only about ten states" permit them. *Id.* Given the uncertain legality of second parent adoptions - which V.L.'s own petition admits - the Court should await further percolation on the full faith and credit question before wading into this complex and uncertain area.

***17 II. The Alabama Supreme Court correctly refused to accord full faith and credit to the Georgia decree.**

Instead of identifying any split on the underlying question, V.L.'s petition argues only that the Alabama Supreme Court's decision was erroneous. She claims the decision: (1) examined the *merits* of the Georgia adoption, in violation the full faith and credit principle authorizing examination only of the court's *jurisdiction* (Pet. 13-15, 16-18); (2) failed to apply the presumption that the Georgia court, as a court with subject matter jurisdiction over adoptions, had jurisdiction to grant the adoption in this case (*id.* at 15, 18-20); and (3) ignored the rule that even jurisdictional collateral attacks are barred if the issuing court made its own "jurisdictional determination" (*id.* at 15-16,24-26). V.L. is mistaken on all three grounds.

A. The Alabama Supreme Court correctly found that the defect in the Georgia adoption was jurisdictional.

Contrary to V.L.'s argument, the Alabama Supreme Court recognized and applied the settled rule denying full faith and credit to a sister-state judgment on the basis of the judgment's jurisdictional defects. [5] Drawing ***18** on Justice Holmes' seminal discussion from *Fauntleroy v. hum,* the Alabama court observed that the sometimes "difficult" distinction between jurisdiction and merits - or as Justice Holmes put it, the question of whether a statutory requirement is framed in terms of a court's "power" or "duty" - ultimately comes down to "a question of construction and common sense." Pet. App. 24a (quoting *Fauntleroy,* 210 U.S. at 234-25).

Applying that framework, the Alabama Supreme Court correctly determined that the Georgia court lacked power to award the kind of adoption at issue and that the defect in the adoption was therefore jurisdictional. The court concluded that the Georgia adoption statutes "*make no provision* for a non-spouse to adopt a child without first terminating the parental rights of the current parents." Pet. App. 27a (emphasis added). Thus, the decree purporting to grant parental rights to V.L., while expressly preserving the parental rights of E.L., was "void" because it contravened the basic "condition that must exist before [Georgia] courts can grant adoptions to third parties such as V.L." - namely the surrender of rights by all living parents of the children. *Id.* at 30a (citing Ga. Code Ann. § 19-8-5(a)). The court properly concluded that this flaw in the decree was jurisdictional because it went not merely to the Georgia's court's "duty," but rather to its "power" to grant the adoption at all. See Pet. App. 30a (concluding "the Georgia court *was not empowered* to enter the Georgia judgment declaring V.L. to be an adoptive parent of the children") (emphasis added). In ***19** other words, instead of resulting in an adoption that *should not* have been entered by the Georgia court, the defect in this case resulted in an adoption that *could not* have been entered under Georgia law. That is a jurisdictional flaw for purposes of full faith and credit. *See id.* at 24a (a merits-based requirement only "define[s] the duty of the court," whereas a jurisdictional requirement "is meant to limit its power") (quoting *Fauntleroy,* 210 U.S. at 234-35).

V.L. completely fails to engage the Alabama Supreme Court's conclusion that the adoption in this case was void under Georgia law. Instead, she merely points out that the Georgia court in question had exclusive jurisdiction over adoptions and says that "should have been the end of the matter for purposes of the Full Faith and Credit Clause." Pet. 16-17 (citing Ga. Code Ann. § 19-8-2(a)). That begs the question. The fact that the court had jurisdiction over adoptions in general says nothing about whether the adoption granted here was within the authority conferred by Georgia law. As this Court has explained, a general statutory grant of jurisdiction does not foreclose reexamining jurisdiction in a particular case if jurisdiction is "disproved by extrinsic evidence, or by the record itself." *Adam v. Saenger,* 303 U.S. 59, 62 (1938). Here the record shows that the adoption granted to V.L. contravened a basic condition of an adoption under Georgia law. Pet. App. 30a. The fact that the court that granted this void adoption had exclusive jurisdiction over adoptions as a class of cases cannot create authority where there is none to begin with.

***20** Notably, V.L. does not cite a single decision from a Georgia court standing for the proposition that the flaw in the Georgia decree goes only to the merits and not to jurisdiction. She dismisses statements from a Georgia Supreme Court Justice and the Georgia court of appeals strongly suggesting that the Alabama Supreme Court was right: Georgia courts lack the power to grant the kind of adoption granted in this case, which is therefore void. *See Wheeler,* 642 S.E.2d at 104 (Carley, J., dissenting from denial of certiorari) (stating that Georgia law "specifically proscribes" a second parent adoption in favor of a non-spouse and questioning whether courts have " 'the power to grant such an adoption under the existing adoption statutes' ") (quoting *In the Interest of Angel Lace M.,* 516 N.W.2d 678, 681 (Wis. 1994))[6]; *Bates,* 730 S.E.2d at 484 (noting in *dicta* that "[t]he idea that Georgia law permits a 'second parent' adoption is a doubtful one") (citing *Wheeler,* 642 S.E.2d at 103 (Carley, J., dissenting from denial of certiorari). And she fails to address decisions from other jurisdictions questioning the power of state courts to grant second-parent adoptions to persons not ***21** married to the child's living parent. *See S.J.L.S. v. T.L.S.,* 265 S.W.3d 804, 823 & n. 13 (Ky. App. Ct. 2008) (collecting cases); *see also Boseman,* 704 N.E.2d at 501 (holding North Carolina courts lacked subject-matter jurisdiction to grant such adoptions).

Instead of discussing any cases about state jurisdiction to award second-parent adoptions, V.L. relies on inapposite federal cases that find nonjurisdictional such requirements as the Title VII employee threshold (*Arbaugh v. Y&H Corp.,* 546 U.S. 500 (2006)), a territorial requirement in the securities fraud statute (*Morrison v. Nat'l Australia Bank, Ltd.,* 561 U.S. 247 (2010)), and the requirement of finding undue hardship before discharging student loan debt in bankruptcy (*United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260 (2010)). Pet. 17. The statutory prerequisites in those cases, however, did not go to the "tribunal's power" but only to "whether the allegations the plaintiff makes entitle him to relief." *Morrison,* 561 U.S. at 247 (quotations omitted). By contrast, the surrender of parental rights goes to the *power* of Georgia courts to enter an adoption at all. As the lower court found, an adoption that fails to sever the current parent's rights is a legal impossibility under Georgia law and is therefore void.[7]

***22** In sum, the Alabama Supreme Court correctly determined that the defect in the Georgia decree implicated, not (or not only) the *merits* of the adoption, but rather the court's *power* to award it in the first place. Thus, the lower court properly recognized that the Georgia adoption is not entitled to full faith and credit. *See, e.g., Williams,* 325 U.S. at 229 (explaining that, under the Full Faith and Credit Clause, "[a] judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits - had jurisdiction, that is, to render the judgment").

B. Any presumption of jurisdiction is defeated by the undisputed fact that E.L. did not surrender her rights.

Alternatively, V.L. argues that the Alabama Supreme Court was required to apply a "presumption" that the Georgia court had jurisdiction to award the adoption to V.L. because, as "a court of general jurisdiction," it has subject-matter jurisdiction over adoptions. Pet. 15. V.L. misunderstands the law. As she recognizes, this "presumption" of jurisdiction applies "unless disproved by extrinsic evidence, or by the record itself." *Id.* (quoting *Milliken,* 311 U.S. at 462). In this case, the Georgia court's lack of jurisdiction to award the adoption to V.L. is amply displayed by "the record itself": it was "undisputed" that E.L. did not surrender her parental rights. Pet. App. 30a. As the Alabama Supreme Court explained, E.L.'s failure to surrender her parental rights defeats ***23** the basic "condition that must exist" before a Georgia court can grant an adoption. *Id.* The undisputed record thus overcomes whatever presumption may operate in favor of the Georgia court's jurisdiction.

C. The Alabama Supreme Court's examination of jurisdiction is not foreclosed by *res judicata.*

Alternatively, V.L. argues that the Georgia court's jurisdiction is *res judicata* because the Georgia court made a "determination" that it had jurisdiction to award the adoption without terminating E.L.'s parental rights. Pet. 15, 24. V.L. is again mistaken.

The rule to which V.L. refers demands, as she concedes, that the issuing court have "made a jurisdictional determination that is itself entitled to *res judicata." Id.* at 15. This means that jurisdictional questions must " 'have been fully and fairly litigated and finally decided in the court which rendered the original judgment'." *Underwriters Nat'l Assur. Co. v. N.C. Life & Ace. & Health Ins. Guar. Ass'n,* 455 U.S. 691, 706 (1982) (quoting *Durfee v. Duke,* 375 U.S. 106, 111 (1963)). With respect to this case, then, the question is whether the Georgia court "fully and fairly litigated" its authority to grant an adoption to a nonspouse without terminating the parental rights of the current parents.

The answer is obviously no. Nothing in the adoption proceedings, or in the decree itself, suggests that the question of whether Georgia law authorizes the kind of adoption at issue was even considered, much less "fully and fairly litigated." Anticipating this problem, V.L. struggles to argue that the Georgia court "specifically ***24** addressed" jurisdiction in its conclusion of law that declined to terminate E.L.'s parental rights. Pet. 24. But that legal conclusion did not address, nor even mention, the court's statutory authority to grant the adoption. Rather, it stated only that it would be "contrary to the children's best interests" not to recognize both women as their legal parents. *Id.* [8] Whether an adoption is in a child's best interests, however, is distinct from the prior question of the court's authority to grant the adoption in the first place. *See, e.g., Angel Lace M.,* 516 N.W.2d at 681 ("[T]he fact that an adoption - or any other action affecting a child - is in the child's best interests, by itself, does not authorize a court to grant the adoption."). Moreover, the Alabama Supreme Court did not question whether the adoption was in the children's best interests - which would indeed be a "merits" determination not re-examinable under full faith and credit. Rather, the Alabama court questioned whether the adoption was void because the Georgia court had no authority to enter it. [9]

***25** In sum, the Georgia court did not address whether it had jurisdiction to grant the adoption in this case. Therefore, that court's jurisdiction was not *res judicata* and the Alabama Supreme Court could properly examine it.

D. Alternatively, the Georgia decree was not entitled to full faith and credit because V.L. never had a genuine domicile in Georgia.

The Alabama Supreme Court's decision could be upheld on the alternative ground that the undisputed record shows V.L. never established a bona fide Georgia domicile as required by Georgia adoption law. *See* Ga. Code Ann. § 19-8-3(a)(3) (to petition for adoption a person must have "been a bona fide resident of [Georgia] for at least six months immediately preceding the filing of the petition"); *see also, e.g., Sastre v. McDaniel,* 667 S.E.2d 896, 898 (Ga. App. 2008) (discussing residency requirement for adoptions). Although E.L. raised this issue, the Alabama Supreme Court resolved the full faith and credit issue on other grounds. *See* Pet. App. 30a n.10 (declining to consider E.L's alternative argument that "the Georgia judgment is also void because E.L. was not a bona fide resident of Georgia").

A party's failure to establish a domicile supporting a sister state judgment is a ground for denying full faith and credit to that judgment. *See, e.g., Williams,* 325 U.S. at 237 (North Carolina properly resisted full ***26** faith and credit to Nevada divorce where "the evidence demonstrated that petitioners went to Nevada solely for the purpose of obtaining a divorce and intended all along to return to North Carolina"); *Estin v. Estin,* 334 U.S. 541,543 (1948) (explaining that "while the finding of domicile by the court that granted the [divorce] decree is entitled to prima facie weight, it is not conclusive in a sister State but might be relitigated there"); *Armstrong v. Armstrong,* 350 U.S. 568, 578 (1956) (allowing Ohio challenge to Florida divorce judgment on basis of lack of domicile).

Here, the record shows without contradiction that V.L. never established a bona fide domicile in Georgia. Instead, she and E.L. leased a Georgia home solely to provide a temporary setting for the "home study" required by the adoption process. *See supra* A. All the while, however, V.L. continued to live and work in Alabama and never intended to live in Georgia. Pet. App. 6a-7a; *see also, e.g., Sastre,* 667 S.E.2d at 673 ("bona fide resident" in Georgia adoption statutes means having "a single fixed place of abode with the intention of remaining there indefinitely") (quotations and citations omitted). Because "the evidence demonstrate [s] that [V.L.] went to [Georgia] solely for the purpose of obtaining [the adoption] and intended all along to return to [Alabama]," Alabama courts would have been justified in denying full faith and credit to the Georgia adoption. *Williams,* 325 U.S. at 237 (brackets added).

It is true that this Court has held, in the divorce context, that a party to the divorce cannot thereafter collaterally challenge the original court's "finding of jurisdictional facts … made in proceedings in which the ***27** [challenger] appeared and participated." *Sherrer v. Sherrer,* 334 U.S. 343, 349 (1948). That principle, however, would not preclude a court from denying full faith and credit to the adoption decree in this case on the basis of V.L.'s lack of domicile. The rule barring collateral attacks on jurisdictional facts is triggered only if the court issuing the original judgment actually *adjudicated* the jurisdictional question at issue. *See, e.g., Durfree,* 375 U.S. at 112 (where "the question of subject-matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in a subsequent action between the parties") (citing *Davis v. Davis,* 305 U.S. 32 (1938); *Stoll v. Gottleib,* 305 U.S. 165 (1938); *Treines v. Sunshine Mining Co.,* 308 U.S. 66 (1939)); *see also, e.g., Sherrer,* 334 U.S. at 356 (full faith and credit bars re-litigating "findings of jurisdictional fact made by a competent court"). In this case, nothing in the Georgia adoption proceedings or the decree itself suggests the issue of V.L.'s domicile was litigated at all. Furthermore, the Georgia decree makes no findings regarding V.L.'s domicile.

In sum, because V.L.'s Georgia domicile was not litigated in the Georgia proceedings, no full faith and credit principle would prevent Alabama courts from examining whether V.L. actually established a bona fide domicile sufficient to support the adoption. The record in this case provides only one possible answer to that question: V.L. "went to [Georgia] solely for the purpose of obtaining [the adoption] and intended all along to return to [Alabama]." *Williams,* 325 U.S. at 237 (brackets added). The Full Faith and Credit Clause does not require Alabama courts to recognize an adoption obtained by such jurisdictional gamesmanship.

***28 CONCLUSION**

The petition for writ of certiorari should be denied.

Footnotes

1 This opinion has been withdrawn and is unavailable on Westlaw. *See E.L. v. V.L.,* 2014 WL 5394513 (Ala. Civ. App. Oct. 24, 2014) (withdrawing opinion).

2 *See, e.g., In re Trust Created by Nixon,* 763 N. W.2d 404,409 (Neb. 2009) (noting that while "the U.S. Constitution prohibits a Nebraska court from reviewing the merits of a judgment rendered in a sister state,… a foreign judgment can be collaterally attacked by evidence that the rendering court was without jurisdiction over the parties or the subject matter); *Giancaspro v. Congleton,* 2009 WL 416301, at *2 (Mich. Ct. App. Feb. 19, 2009) (observing that " a] state need not give full faith and credit to a judgment issued by a court that lacked subject matter jurisdiction over the litigation or jurisdiction over the parties); *Hersey v. Hersey,* 171 N.E. 815, 819 (Mass. 1930) (explaining that, with respect to recognizing an out of state adoption, " c]omplete inquiry is permissible into the circumstances of a judgment of a sister state to determine whether it binds the person against whom it is invoked, and confirming that " t]here may be searching investigation into the jurisdiction of the court in which the judgment is rendered, over the subject matter, or the parties affected by it, or into the facts necessary to give such jurisdiction) (quotations omitted).

3 The court did not reach the issue, however, because no evidence showed the parent's failure to surrender her rights. *Id.* In the present case, of course, "it is undisputed that E.L. did not surrender her parental rights .] Pet App. 30a.

4 Such adoptions are evidently granted in some states, but the reported appellate decisions diverge on whether they are authorized by state law. *Compare, e.g., Boseman v. Jarrell,* 704 N.E.2d 494, 501 (N.C. 2010) (concluding North Carolina courts lacked subject matter jurisdiction to award a non spousal adoption that failed to terminate the rights of the child's biological parent), *with In re Adoption of M.A.,* 930 A.2d 1088, 1098 (Me. 2007) (interpreting "ambiguous Maine adoption statute to allow joint adoption by unmarried couple).

5 See Pet. App. 11a ("emphasiz ing] that "our review does not extend to a review of the legal merits of the Georgia judgment … because we are prohibited from making any inquiry into the merits … by Art. IV, § 1, of the United States Constitution); *id.* at 13a (observing "the question of a court's jurisdiction over the subject matter or parties is one of the few grounds upon which a judgment may be challenged); *id.* at 28a (any error in Georgia decree "is ultimately of no effect unless it implicates the subject matter jurisdiction of the Georgia court).

6 V.L. argues that Justice Carley would have found that the defect goes to the merits and not to jurisdiction because he identified it as a "nonamendable defect under Georgia Code § 9 11 60(d)(3), instead of § 9 11 60(d)(1) (addressing lack of jurisdiction over "the person or the subject matter). Pet. 19 20. V.L. is mistaken. First, the section referenced by Justice Carley refers, not merely to a failure to state a claim, but rather to a defect that "affirmatively show s] no claim in fact existed. Ga. Code Ann. § 9 11 60(d)(3). Second, Justice Carley's opinion emphasized that the defect in question was not a "technical flaw in the adoption but rather an indication that the adoption was "unauthorized and "specifically proscribe d] by Georgia law. *Wheeler,* 642 S.E.2d at 104 05 (Carley, J., dissenting from denial of certiorari).

7 V.L. also relies on her erroneous claim that the Alabama Supreme Court held that *any* statutory error in an adoption proceeding would leave an adoption open to collateral attack in other states, thereby "creat ing] a massive loophole in the Full Faith and Credit Clause. Pet. 22. As explained above, however, *supra* I.A, the Alabama Supreme Court limited its holding to jurisdictional defects and recognized that any error in a sister state adoption "is ultimately of no effect unless it implicates the subject matter jurisdiction of the Georgia court. Pet. App. 28a.

8 V.L. also attempts to rely on the Georgia court's finding that she "complied with all relevant and applicable formalities for the adoption petition. Pet. 24. But that boilerplate recitation does not even mention the court's authority to grant the adoption; *a fortiori,* it cannot amount to a "full and fair litigation of jurisdiction for full faith and credit purposes.

9 V.L. incorrectly claims that Georgia law forecloses a jurisdictional challenge to a court's determination of parental rights by a parent who participated in prior litigation. Pet. 25. The cases she cites, however, fail to support that assertion. *Amerison v. Vandiver,* 673 S.E.2d 850, 851 (Ga. 2009), holds only that under some circumstances laches may bar a parent's jurisdictional challenge to a termination of rights. To the extent *Marshall v. Marshall,* 360 S.E.2d 572 (Ga. 1987), ever supported the proposition V.L. asserts, the decision is no longer good law. *See Scott v. Scott,* 644 S.E.2d 842, 844 (Ga. 2007) (overruling *Marshall*).

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2016 WL 212599 (U.S.) (Appellate Brief)
Supreme Court of the United States.

David A. ZUBIK, et al., Petitioners,
v.
Sylvia BURWELL, et al., Respondents.

Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191.
January 11, 2016.

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth and D.C. Circuits

Brief of Amicus Curiae Eternal Word Television Network in Support of Petitioners

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*1 BRIEF OF *AMICUS CURIAE* ETERNAL WORD TELEVISION NETWORK

Interest of *Amicus Curiae* [1]

The Eternal Word Television Network ("EWTN") is a nonprofit corporation located in Irondale, Alabama. Founded in 1980 by a cloistered nun, Mother M. Angelica, EWTN has since become the largest Catholic media network in the world. Via television, radio, and the internet, EWTN transmits religious programming twenty-four hours a day to more than 258 million homes in 144 countries and territories. While EWTN is not formally affiliated with the Catholic Church or any Catholic diocese, a deep devotion to proclaiming authentic Catholic teaching defines EWTN's mission.

EWTN shares the religious conviction, formed by careful and prayerful reflection on the moral teachings of the Catholic Church, that it may not provide insurance coverage for contraception, sterilization, or abortion-causing drugs. According to this belief, providing such coverage would make EWTN complicit in others' wrongdoing. Consequently,

EWTN has had no choice but to resist the federal mandate - in both its original and its alternative forms - that would require EWTN to provide coverage through its health plan for such objectionable services. EWTN has done so by filing comments with the respondent Department of ***2** Health and Human Services ("HHS") and also by suing HHS twice in federal court in EWTN's home State of Alabama. See *Eternal Word Television Network, Inc. v. Sebelius,* 935 F.Supp.2d 1196 (N.D. Ala. 2013) (*"EWTN"*); *Eternal Word Television Network, Inc. v. Secretary, U.S. Dep't. of Health & Human Servs.,* 756 F.3d 1339 (11th Cir. 2014) (*"EWTN II"*) (granting injunction pending appeal).

Introduction and Summary of Argument

Ever since it was issued in 2011, EWTN has vigorously contested the federal mandate (the "Mandate") requiring its self-insured health plan to cover contraception, sterilization, and abortioninducing drugs. *See EWTN I,* 935 F.Supp.2d at 1225 (dismissing EWTN's original challenge to Mandate as unripe). When HHS offered an alternative mechanism for complying with the Mandate in 2013, EWTN continued to resist. In renewed litigation, EWTN protested that this so-called "accommodation" was an empty bureaucratic gesture that continued to coerce EWTN into complicity with the same objectionable practices as before. *See EWTN II,* 756 F.3d at 1347 (Pryor, J., concurring) (finding it "undeniable" that the accommodation still "compel [s] [EWTN] to participate in the mandate scheme").

In *Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751 (2014), this Court held that HHS cannot coerce religious objectors into providing insurance coverage for services their faith considers immoral. The Court should reach the same result in these cases, and for the same reasons. The ersatz "accommodation" now offered by HHS, far from allowing objectors to avoid the Mandate, merely gives them another way of complying ***3** with it. Essentially, the "accommodation" is the federal government's competing judgment about complicity - its assurance to objectors that *this* ought to be an acceptable degree of involvement in practices they believe immoral. But if *Hobby Lobby* teaches anything, it is that the government cannot impose its own answer to this "difficult and important question of religion and moral philosophy." *Hobby Lobby,* 134 S. Ct. at 2778. To the contrary, religious believers may answer that question for themselves alone.

EWTN has a unique perspective on the Mandate and the "accommodation" that will help the Court resolve these cases. Long before the Mandate, EWTN had walled off its health plan from covering contraception, sterilization, or abortion. Crucially, it did so - not to save money or to avoid inconvenience - but rather in a careful, informed exercise of its moral judgment. According to Catholic teaching that EWTN considers binding, covering such practices through its health plan means becoming complicit in them. The so-called "accommodation" - no less than the original Mandate - continues to coerce EWTN into exactly such complicity with wrongdoing. Giving in would not only violate EWTN's conscience, but would destroy EWTN's credibility as a witness to the Catholic faith it proclaims every day to a worldwide audience.

***4 Argument**

I. The religious exercise at issue is avoiding complicity in someone else's wrongdoing.

1. Complicity refers to "the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby,* 134 S. Ct. at 2778. In *Hobby Lobby,* complicity was the key to understanding why the Mandate violated the plaintiffs' religious freedom: it coerced the plaintiffs into "providing … coverage" for objectionable drugs and services and thus made them complicit in practices they believed immoral. *Id.* In the current round of Mandate cases, too few judges have recognized that complicity remains essential to grasping why the so-called "accommodation" *continues* to violate objectors' religious freedom. [2] Before addressing the "accommodation," *see infra* II, EWTN offers the following reflections on complicity.

***5** 2. Long before the Mandate was issued, EWTN had to consider the moral implications of the coverage provided through its health plan. To do so, it drew on the rich tradition of Catholic moral reasoning. [3] That tradition identifies

certain practices as gravely immoral, such as abortion, contraception, and sterilization. *See generally EWTN II,* 756 F.3d at 1341 (Pryor, J., concurring) (describing EWTN's religious beliefs). Whether EWTN could include such services in its plan raised the question of complicity.

Like many moral questions, this one demanded careful and nuanced judgment. After all, EWTN was not contemplating whether it could engage in those practices *itself,* something plainly forbidden by its faith. Rather, EWTN was contemplating whether, by providing such coverage through its plan, it was culpably facilitating the immoral actions of others. To make that judgment, EWTN had to consider the gravity of the practices at issue, the role of insurance in facilitating them, and whether providing the coverage was nonetheless necessary to some countervailing good.

Such judgments inevitably involve questions of degree. The Catholic Church is keenly aware that Catholics must (and should) work alongside others who may not share their beliefs. Sometimes a Catholic may have to cooperate, at some level, with persons who engage in bad acts. For instance, to support his family ***6** a Catholic might take a job as a parking attendant at a hospital where abortions sometimes take place. The attendant could reasonably conclude that his work at the hospital would not involve him culpably in the abortions performed there. By contrast, a Catholic anesthesiologist could not continue to work at the same hospital - even to support her family - if she were required to participate in abortions. From the perspective of complicity, the anesthesiologist's involvement in abortion would be morally different from the parking attendant's.

With those considerations in mind, EWTN long ago reached the moral judgment that it could not provide insurance coverage for practices considered gravely immoral by the Catholic Church, such as abortion, contraception, and sterilization. To cover such practices in its health plan would have meant that EWTN itself was, in an immediate and material way, facilitating them. Given the gravity of those practices, this was not a step EWTN could innocently take. Nor would EWTN achieve any countervailing good by providing such coverage. To the contrary, because EWTN controlled the coverage in its self-insured plan, it could still provide generous benefits to employees while honoring its conscience.

3. Thus, when the Mandate was issued in 2011, it was immediately obvious to EWTN that compliance was not an option. The Mandate and its implementing regulations plainly required EWTN's "group health plan" to "provide coverage for" all FDA-approved contraceptive and sterilization methods, including methods that could cause pre-implantation abortions. 42 U.S.C. § 300gg-13(a)(4); 77 Fed. Reg. 8725; *see also* ***7** *Hobby Lobby,* 134 S. Ct. at 2762-63 (describing coverage requirement). HHS did offer an exemption for churches, their auxiliaries, and religious orders, *see* 45 C.F.R. § 147.131(a), but this did not help EWTN: while EWTN is dedicated to proclaiming Catholic teaching, it is not an arm of the Catholic Church, and while EWTN was founded by the head of an order of nuns, it is not a religious order. *See EWTN II,* 756 F.3d at 1341 (Pryor, J., concurring) (noting "[t]he law exempts religious employers from th[e] mandate[,] … [b]ut the Network does not qualify as a religious employer") (citing 45 C.F.R. § 147.131(a); 26 U.S.C. § 6033(a)(3)(A)(i), (hi)). Thus, the Mandate's coverage requirement squarely applied to EWTN, raising all the red flags of complicity that EWTN had already weighed when crafting its insurance. The Mandate would convert EWTN's health plan into a vehicle for delivering precisely the services that EWTN had excluded.

4. Of course, this Court has since ruled that, under the Religious Freedom Restoration Act, those with EWTN's religious beliefs cannot be coerced into complying with the Mandate. *See Hobby Lobby,* 134 S. Ct. at 2785; 42 U.S.C. § 2000bb *et seq.* But the salient point here is that the religious belief at issue, precisely identified, is one's obligation to avoid complicity with another's wrongdoing. As the Court correctly explained, that is a "difficult and important question of religion and moral philosophy," a question that "the federal courts have no business addressing." *Id.* at 2778. For its part, EWTN answered that question - not by blind faith or intuition - but instead through careful deliberation on the rich tradition of Catholic moral theology.

***8 II. The so-called "accommodation" does nothing to diminish complicity.**

Following its loss in *Hobby Lobby,* HHS could have simply expanded the existing exemption to cover religious objectors like EWTN. Instead of that elegant solution, HHS has merely offered such objectors alternative ways of complying with the Mandate. By executing and submitting either of two forms, an objector may authorize its insurer or plan administrator to make payments for contraceptive services to the objector's own plan beneficiaries.[4] HHS refers to these alternative compliance mechanisms, euphemistically, as an "accommodation" or "opt-out." Regardless of what one calls them, the question is whether those mechanisms have resolved the problem of complicity from the viewpoint of objectors' religious beliefs.

The petitioners' briefs carefully explain why the answer is resoundingly no. *See generally Zubik* Br. at 36-37,41-52; *ETBU* Br. at 41-56; *see also EWTN II,* 756 F.3d at 1342-43 (Pryor, J., concurring) (describing why EWTN continues to object to the "accommodation"). EWTN offers these additional reflections on why the "accommodation" utterly fails to remedy - and indeed exacerbates - the problem of complicity created by the Mandate's obligation to cover contraceptive services.

***9** 1. First, the "accommodation" does not alter by one iota the Mandate's bottom-line obligation to cover the mandated services. Before the "accommodation," EWTN's group health plan was obligated to "provide coverage for" contraceptive and sterilization methods. 42 U.S.C. § 300gg-13(a)(4); 77 Fed. Reg. 8725. After the "accommodation," EWTN's group health plan has precisely the same coverage obligation. Indeed that is the whole premise of the "accommodation." It offers objectors - not a way *out* of the Mandate - but an alternative way to "*compl[y]*" with the Mandate's "requirement" to "provide contraceptive coverage." 26 C.F.R. §§ 54.9815-2713A(b)(1), (c)(1) (emphasis added).

The "accommodation" thus entirely misses the point of EWTN's objection. EWTN does not seek a different way to comply with the Mandate; it seeks to *avoid* the Mandate altogether, just as "exempted" religious organizations have been allowed to avoid it. The fact that EWTN's plan must cover contraceptive services is what, according to EWTN's beliefs, makes it complicit in wrongdoing. But the "accommodation," by its own terms, leaves the Mandate's coverage obligation pristine and intact. In other words, HHS has attempted to assuage EWTN's conscience by offering EWTN a more complicated way of violating its conscience. That is not an "accommodation," but a temptation.

2. Second, under the "accommodation" the mandated contraceptive coverage continues to be provided as *part of EWTN's group health plan.* Payments for contraceptive services are made only to EWTN's "plan participants and beneficiaries," and only "for so long as [they] are enrolled in [EWTN's] group health plan." 26 C.F.R. §§ 54.9815-2713A(b)(2)(i), (d). ***10** The form EWTN must sign to trigger those payments, *see infra* II.3, becomes "one of the 'instruments under which the [health insurance] plan is operated.' " *EWTN II,* 756 F.3d at 1342 (Pryor, J., concurring) (quoting 78 Fed. Reg. 39,870, 39,880). Indeed, for a self-insured employer like EWTN, HHS has conceded that the contraceptive coverage is "part of the same ERISA plan as the coverage provided by the employer." Brief in Opposition at 19, *East Tex. Baptist Univ. v. Burwell,* No. 15-35 (U.S. Sept. 9, 2015); *see also Roman Catholic Archbishop of Washington v. Sebelius,* 19 F.Supp.3d 48, 80 (D.D.C. 2013) (repeating government's concession that " '[i]n the self-insured case, technically, the contraceptive coverage is part of the plan' ") (quoting Mot. Hr'g Tr. 18).

Thus, peeling back the regulatory layers of the "accommodation" unveils … nothing. Not only does it leave intact the Mandate's basic obligation to cover contraceptives, but the "accommodation" continues to route that coverage through EWTN's plan. This sleightof-hand does not remotely "accommodate" EWTN's objection to being complicit in providing contraceptive coverage. The notion that it does is, as Judge Pryor concisely put it, "[r]ubbish" *EWTN II,* 756 F.3d at 1347 (Pryor, J., concurring).

3. Third, the "accommodation" requires EWTN to undertake specific actions that compound its involvement in the objectionable services.

a. EWTN must either submit a "self-certification" form to the third-party administrator of its self-insured plan or a "notice" to HHS. 26 C.F.R. §§ 54.9815-2713A(a)(3), (b)(1), (c)(1). The effect of submitting either document is to authorize

EWTN's plan ***11** administrator to "provide or arrange payments for contraceptive services" to its plan participants and beneficiaries. *Id.* § 54.9815-2713A(b)(2). And the effects do not stop there. If EWTN submits either document, it triggers a government reimbursement to the plan administrator of 115% of the costs of the contraceptive coverage. *See id.* § 54.9815-2713A(b)(3); 45 C.F.R. 156.50(d)(3); 79 Fed. Reg. 13,744, 13,809. Thus, by submitting either document required to trigger the "accommodation," EWTN undertakes action that both authorizes and incentivizes a third party to deliver the contraceptive coverage.

b. Paradoxically, some lower courts have found that these triggering documents shift responsibility for the coverage *away* from the objector to the insurer or plan administrator, and thereby *eliminate* the objector's complicity. [5] Those courts are "clearly and gravely wrong." *Little Sisters of the Poor Home for the Aged v. Burwell,* 799 F.3d 1315, 1316 (10th Cir. 2015) (*"Little Sisters II"*) (Hartz, J., dissenting from denial *of en banc* review). The petitioners have explained why those courts have wrongly questioned, not the objectors' legal judgment about how the "accommodation" works, but instead their theological judgment about what constitutes complicity. *See Zubik* Br. at 41-52; *ETBU* ***12** Br. at 46-51; *see also, e.g., EWTN,* 756 F.3d at 1347 (Pryor, J., concurring) (concluding, "[e]ven if the [selfcertification] form alone does not 'trigger' coverage - whatever that means - it is undeniable that the United States has compelled [EWTN] to participate in the mandate scheme"). EWTN offers the following additional considerations to explain why accepting the proffered "accommodation" is forbidden by its Catholic faith.

c. In considering the moral ramifications of the "accommodation," EWTN drew on a recent situation from Germany that posed the issue of complicity for Catholic entities. *See generally EWTN II,* 756 F.3d at 1343 (Pryor, J., concurring) (discussing German analogy). Under the Pregnancy and Family Assistance Act of 1995, German law allowed certain abortions up to 12 weeks, provided the pregnant woman had received state-mandated counseling about alternatives. The German government authorized Catholic agencies, among others, to provide this counseling. The Catholic agencies took part hoping that its counselors could persuade women to choose alternatives to abortion. This gave rise to serious debate in the Church, however, over whether their well-intentioned involvement nonetheless amounted to cooperation in abortion. The problem was that, once the counseling was provided, German law required the Catholic agency to issue a certificate indicating the woman had received the counseling. If the woman rejected the agency's counsel and still wanted to have the abortion, she could present the certificate that would legally authorize the abortion.

***13** Struggling with the moral implications of the practice, the German Bishops submitted the matter to the Vatican. After thorough consideration, the Vatican made the judgment that Catholic agencies could not issue the certificate because it legally authorized abortions to take place. A January 1998 letter from Pope John Paul II candidly admitted the nature of the dilemma. "[T]he certificate," he wrote, "attests that counseling has been given in the defence of life, but it remains a necessary condition for having an abortion performed with impunity, even though it certainly is not the decisive cause." [6] The Pope concluded that, "after careful consideration of all the arguments, I cannot avoid the conclusion that there is an ambiguity here which obscures the clear and uncompromising witness of the Church and her counseling centres." *Id.* The Pope therefore "urgently ask[ed]" the German bishops "to find a way so that a certificate of this kind will no longer be issued at Church counseling centers or those connected with the Church," while at the same time "ensur[ing] … that the Church maintains an effective presence in the counseling of women seeking help." *Id.* [7] In a subsequent letter on the same subject, the Pope reiterated the fundamental moral principle that prohibited Catholic agencies from issuing the ***14** triggering certificate: "The unconditional commitment to every unborn life, to which the Church feels bound from the very beginning, permits no ambiguity or compromise." [8]

This analogous situation helped EWTN judge whether it could participate in the "accommodation" scheme. By signing the form, EWTN would not *intend* to facilitate immoral practices. Indeed, EWTN could simultaneously declare that it continues to object to each and every one of those practices. The overriding consideration, however, was the *effect* of EWTN's actions in executing the form, and that effect was plain: EWTN would thereby authorize and incentivize a third party to provide the same objectionable services - and not just any third party, but the party selected and retained by

EWTN to administer EWTN's plan. By this action, EWTN would become "guilty of immoral cooperation with evil." *EWTN II,* 756 F.3d at 1343 (Pryor, J., concurring).

d. Filling out a form may not seem like much to ask. *See, e.g., Notre Dame,* 786 F.3d at 621-22 (Hamilton, J., concurring) (observing that, "[t]o take advantage of the accommodation," an objector "must only fill out a simple form"). But that depends on the form: ask anyone who has signed a mortgage application, a wedding license, a tax return, or a death warrant. True, some lower courts have taken the view that, because the Mandate guarantees coverage ***15** anyway, signing the form plays a *de minimis* role in the overall scheme.[9] Against that view, the Court should ask Judge Edith Jones' straightforward question: "[W]hy does the government insist on requiring [the forms]?" *East Tex. Baptist Univ. v. Burwell,* 807 F.3d 630, 635 (5th Cir. 2015) (Jones, J., dissenting from denial of rehearing *en banc*) (*"ETBU II"*). Here is the answer:

[W]hy *must* [EWTN] provide Form 700 to its administrator? Because without the form, the administrator has no legal authority to step into the shoes of the Network and provide contraceptive coverage to the employees and beneficiaries of the Network.

EWTN II, 756 F.3d at 1347 (Pryor, J., concurring) (citing 78 Fed. Reg. at 39,879-80) (emphasis in original).[0]

***16** Admittedly, the form EWTN must sign is but one cog in an elaborate administrative machinery. But EWTN's religious freedom does not turn on how many angels can dance on the subparts of the Code of Federal Regulations. What matters ultimately is that the "accommodation" - in stark contrast to the "exemption" - requires EWTN's participation in a regulatory process whose purpose is to deliver contraceptive coverage to EWTN's plan beneficiaries. Whatever words one uses to describe the the form's regulatory function, "it is undeniable that the United States has compelled the Network to participate in the mandate scheme[.]" *Id.* (Pryor, J., concurring). EWTN's belief, which the government has never challenged, is that such participation makes it complicit in wrongdoing.

For a Catholic organization like EWTN, it is ironic that its conscience hinges on its inability to sign a piece of paper. The best known Catholic martyr for conscience, St. Thomas More, "went to the scaffold rather than sign a little paper for the King." *ETBU II,* 807 F.3d at 635 (Jones, J., dissenting). Admittedly, the penalties for not signing the Oath of Supremacy were more stringent than those for not signing Form 700. *See* Treason Act, 1351, 25 Edw. 3 Stat. 5 (Eng.) (prescribing hanging, drawing, and quartering). But the risk of signing - that is, the risk to one's conscience of doing what one knows to be wrong - is the same. EWTN therefore cannot sign.

***17 Conclusion**

The Court should reverse the judgments of the Third, Fifth, Tenth, and D.C. Circuits.

Footnotes

1 No counsel for any party authored this brief in whole or in part. No party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners and respondents have filed blanket consents to the filing *of amicus curiae* briefs, as noted on the docket.

2 *See, e.g., Sharpe Holdings, Inc. v. U.S. Dep t of Health & Human Servs.,* 801 F.3d 927, 941 (8th Cir. 2015) (concluding the "accommodation process … compels objectors] to act in a manner that they sincerely believe would make them *complicit* in a grave moral wrong); *Priests for Life v. U.S. Dep t of Health & Human Servs.,* 808 F.3d 1, 15 (D.C. Cir. 2015)(Kavanaugh, J., dissenting from denial of rehearing *en banc*) (observing " 'the problem of *complicity* … is the key to understanding this case) (quoting *Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114, 1152 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring)); *University of Notre Dame v. Burwell,* 786 F.3d 606, 627 (7th Cir. 2015) (Manion, J., dissenting) ("In Notre Dame's view, the

ACA alters its relationships with both insurers] in a way that renders Notre Dame morally *complicit* in the provision of contraception.) (emphases added).

3 *See, e.g.,* Pope John Paul II, Encyclical *Evangelium Vitae* 1 91 (1995); Pope John Paul II, Encyclical *Veritatis Splendor* ¶¶ 28 83 (1993); Pope Paul VI, Encyclical *Humanae Vitae* ¶ 14 (1968); Catechism of the Catholic Church, ¶¶ 1749 56, 1776 94, 2270 75, 2366 79 (2nd ed. 1997).

4 *See* 26 C.F.R. § 54.9815 2713A(b) (c); 29 C.F.R. § 2590.715 2713A(b) (c); 45 C.F.R. § 147.131(c); *see also generally* Brief for Petitioners at 9 14, *Zubik v. Burwell et al.,* Nos. 14 1418 *et al.* (U.S. Jan. 4, 2016) ("*Zubik* Br.); Brief for Petitioners at 13 24, *East Texas Baptist Univ. v. Burwell et al.,* Nos. 15 35 *et al.* (U.S. Jan. 4, 2016) ("*ETBU* Br.) (describing new mechanisms).

5 *See, e.g., Little Sisters of the Poor Home for the Aged v. Burwell,* 794 F.3d 1151, 1186 (10th Cir. 2015) (*"Little Sisters I*) (asserting the form's "effect is to shift legal responsibility from the selfinsured plaintiff to its TPA and relieve the plaintiff of the duty it considers objectionable); *Notre Dame,* 786 F.3d at 613 (asserting the "effect of signing the forms is to "throw the entire … burden of providing contraception on the health insurer and third party administrator and to "lift a burden from Notre Dame's] shoulders).

6 Letter of His Holiness Pope John Paul II to the Bishops of the German Episcopal Conference, at ¶ (January, 11,1998), *available at* https://w2.vatican.va/content/john paul ii/en/letters/1998/documents/hf jp ii let 19980111 bishop germany.html.

7 *See also* Alan Cowell, "Obeying Pope, German Bishops End Role in Abortion System, N.Y. Times (Jan. 28, 1998), *available at* http://www.nytimes.com/1998/01/28/world/obeying pope german bishops end role in abortion system.html.

8 Letter of John Paul II to the German Bishops, at 113 (June 3, 1999), *available at* https://w2.vatican.va/content/john paul ii/en/letters/1999/documents/hf jp ii let 03061999 german bishops.html.

9 *See, e.g., Little Sisters I,* 794 F.3d at 1186 (asserting that, under the "accommodation, "the TPA's responsibility to provide coverage in the objector's] stead stems from federal law); *Notre Dame,* 786 F.3d at 614 (asserting " i]t is federal law, rather than the religious organization's signing and mailing the form, that requires insurers or administrators] to cover contraceptive services); *East Tex. Baptist Univ. v. Burwell,* 793 F.3d 449, 459 (5th Cir. 2015) (*"ETBU I*) (asserting that executing the forms "does not authorize or trigger payments for contraceptives because insurers or administrators "are already required by law to do so).

10 *See also ETBU II,* 807 F.3d at 635 (Jones, J., dissenting) (explaining that "the filing of the forms … is the *sine qua non,* the but for cause, the indisputable link to the provision of contraceptive coverage to religious objectors'] employees) (citing *Sharpe Holdings,* 801 F.3d 927; *Grace Sch. v. Burwell,* 801 F.3d 788, 807 08 (7th Cir. 2015) (Manion, J., dissenting)).

2014 WL 6847195 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Jonathan P. ROBICHEAUX, et al., Petitioners,
v.
Devin GEORGE, in his official capacity as Louisiana State Registrar and Center Director at Louisiana Department of Health and Hospitals, et al., Respondents.

No. 14-596.
December 2, 2014.

On Petition for a Writ of Certiorari Before Judgment to the U.S. Court of Appeals for the Fifth Circuit

Respondents' Brief in Support of Petition for Writ of Certiorari Before Judgment

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***i** Question Presented

Does the Fourteenth Amendment require the States to license or recognize same-sex marriages?

***ii Parties to the Proceeding**

Petitioners are Jonathan P. Robicheaux, Derek Penton, Courtney Blanchard, Nadine Blanchard, Robert Welles, Garth Beauregard, Jacqueline M. Brettner, M. Lauren Brettner, Nicholas J. Van Sickels, Andrew S. Bond, Henry Lambert, R. Carey Bond, L. Havard Scott, III, Sergio March Prieto, and Forum for Equality Louisiana, Inc. Petitioners were plaintiffs in the district court and appellants in the court of appeals.

Respondents are Timothy A. Barfield, Jr., in his official capacity as Secretary of the Louisiana Department of Revenue, Kathy Kliebert, in her official capacity as Secretary of the Louisiana Department of Health and Hospitals, and Devin George, in his official capacity as Louisiana State Registrar. Respondents were defendants in the district court and appellees in the court of appeals.

James D. Caldwell, in his official capacity as Louisiana Attorney General, was originally named as a defendant but was dismissed on Eleventh Amendment grounds by the district court. As petitioners did not appeal his dismissal, he is no longer a party.

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***1** Introduction

Petitioners seek certiorari before judgment to review whether the Fourteenth Amendment compels Louisiana to adopt same-sex marriage. The district court correctly ruled it does not: our Constitution leaves this matter up to state citizens, who retain their "historic and essential authority to define the marital relation." *United States v. Windsor,* 133 S. Ct. 2675, 2692 (2013); App. al. The case has been fully briefed in the Fifth Circuit and will be argued on January 9, 2015, alongside an appeal from Texas. *See Robicheaux v. Caldwell,* No. 14-31037 (5th Cir. Sept. 4 & 5, 2014); *De Leon v. Perry,* No. 14-50196 (5th Cir. Feb. 27, 2014).

Petitioners are right that the extraordinary mechanism of cert-before-judgment is appropriate here, however. Pet. 20; Sup. Ct. R. 11. Louisiana's case squarely implicates a spiraling national controversy that has already nullified the marriage laws of over twenty States and spawned a four-to-one circuit split. Multiple petitions are pending before this Court, presenting the same issue in various forms. The ***2** *Robicheaux* decision was the first federal ruling since *Windsor* to uphold a State's marriage laws; only the Sixth Circuit's *DeBoer* decision has joined it. *DeBoer v. Snyder,* F.3d , 2014 WL 5748990 (6th Cir. Nov. 6, 2014). *Robicheaux* and *DeBoer* are the sole counterweights to a flood of decisions condemning the view that marriage is limited to male-female couples - a view that "until recent years … had been thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization." *Windsor,* 133 S. Ct. at 2689. If the Court elects to resolve this conflict now, Louisiana agrees with petitioners that the Court should review the decision in *Robicheaux* along with the Sixth Circuit's decision in *DeBoer.* Pet. 20.

Louisiana also agrees that this case is an ideal vehicle for deciding the issues. Pet. 20-25. The decision below resolved both the licensing and recognition issues. It is a final judgment. It has no standing defects. It properly resolved the issues on the basis of law, not facts. Louisiana's marriage laws present a clear choice for the traditional definition of marriage that is reflected consistently across Louisiana's family laws. And reviewing the Louisiana case along with one or more petitions from the Sixth Circuit will allow the Court to consider a wider range of marriage laws, defended by a wider array of legal arguments Louisiana thus agrees with petitioners that - assuming the Court wishes to resolve the conflict now - "the decision below is uniquely appropriate for certiorari before judgment and consideration along with the Sixth Circuit ruling." Pet. 20.

On the merits, of course, the two sides part company. As the court below correctly concluded, nothing in the Fourteenth Amendment - and nothing in any of this Court's decisions - compels the States to adopt same-sex marriage. To the contrary, state citizens legitimately "address[] the ***3** meaning of marriage through the democratic process." App. al. In reaching that decision, the lower court simply followed the plain tracks laid down in *Windsor*, which praised "a statewide deliberative process that enabled … citizens to discuss and weigh arguments for and against same-sex marriage," and which taught that federal power cannot "influence or interfere with state sovereign choices about who may be married." 133 S. Ct. at 2692, 2693; App. a11. Paradoxically, however, an increasing number of federal courts have relied on *Windsor*, not to safeguard state sovereignty, but to override it. Those decisions are uniformly wrong. They interfere with state authority over marriage far more effectively than the federal law struck down by *Windsor* scarcely eighteen months ago. Consequently, those decisions do not apply *Windsor;* they subvert it. They do not enforce the Fourteenth

Amendment; they "demean[ ] … the democratic process." *Schuette v. Coalition to Defend Affirmative Action,* 134 S. Ct. 1623, 1637 (2014) (plurality op. of Kennedy, J.).

This Court alone determines whether the time is ripe to settle this issue nationally. If it elects to do so now, Louisiana agrees with petitioners that it should grant certiorari before judgment in this case.

Statement

A. Louisiana's marriage laws

1. Since its admission into the United States, Louisiana has always defined civil marriage as the union of a man and a woman. *See Lynch v. Knoop,* 43 So. 252, 253 (La. 1907) ("In this state marriage is a formal declaration or contract by which a man and woman join in wedlock."); *LeBlanc v. Landry,* 7 Mart, (n.s.) 665, 666 (La. 1829) (marriage involves a "man" and a "woman"); La. Civ. Code art. 86 (providing that "[m]arriage is a legal relationship between a man and a ***4** woman that is created by civil contract"). Consequently, Louisiana has never recognized marriage between persons of the same sex and does not accord such a marriage any civil effects. *See* La. Civ. Code art. 89 (providing "[p]ersons of the same sex may not contract marriage with each other"); *id.* art. 96 (providing "[a] purported marriage between parties of the same sex does not produce any civil effects").

2. Louisiana's definition of marriage is, of course, not unique. As this Court recently observed, "until recent years … marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor,* 133 S. Ct. at 2689. This consensus began to shift in certain States two decades ago, partly as the result of decisions construing state constitutions to require same-sex marriage. *See Baehr v. Lewin,* 852 P.2d 44, 67 (Haw. 1993) (applying strict scrutiny to marriage laws under Hawaii Constitution); *Goodridge v. Dep't of Pub. Health,* 798 N.E.2d 941, 968 (Mass. 2003) (defining marriage in man-woman terms violates Massachusetts Constitution). Louisiana citizens responded to this movement, as the citizens of many other States did, by reaffirming their convictions about the nature of marriage. *See Windsor,* 133 S. Ct. at 2689 ("That belief [in man-woman marriage], for many who long have held it, became even more urgent, more cherished when challenged.").

3. In 1999 Louisiana clarified that same-sex marriage violates its "strong public policy," and "such a marriage contracted in another state shall not be recognized in this state for any purpose, including any right or claim as a result of the purported marriage." La. Civ. Code art. 3520(B). In 2004, by wide margins, Louisiana voters amended the state constitution to provide that:

> ***5** Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

La. Const. art. XII, § 15.

4. In 2005, the Louisiana Supreme Court unanimously upheld this amendment against a state constitutional challenge. *Forum for Equality Louisiana PAC v. McKeithen,* No. 2004-2477 (La. 1/19/05); 893 So.2d 715 (upholding amendment under "single object" rule of La. Const, art. XIII, § 1). After surveying its legislative history, the court found that the amendment's object was not to effect a narrow "same-sex marriage ban," but instead to ensure that Louisiana's

longstanding marriage definition was not vulnerable to challenge under the state constitution. *See id.* at 733-34 (reviewing concerns expressed to legislative committees that Louisiana's definition "would yield to provisions of the state constitution that might be found in conflict with it"). The court noted that the amendment left unmarried couples, whether same- or opposite-sex, free to arrange their affairs by contract: they could co-own property, leave their estates to each other, and designate each other to ***6** "mak[e] critical life decisions … in cases of medical emergencies." *Id.* at 736 n.31.

5. Finally, in 2013 the Louisiana Department of Revenue clarified its tax policies on same-sex marriage in response to IRS Revenue Ruling 2013-17. In that ruling, the IRS announced it would consider a validly-married same-sex couple to be married for federal tax purposes regardless of the couple's state of domicile. IRS Rev. Ruling 2013-17, at 10. In response, Louisiana issued Revenue Bulletin No. 13-024. The bulletin explained that, because Louisiana law prohibits recognition of same-sex marriages, persons in a same-sex marriage, regardless of their federal filing status, "may not file a Louisiana state income tax return as married filing jointly, married filing separately or qualifying widow." La. Rev. Bull. No. 13-024. Instead, each taxpayer "must file a separate Louisiana return as single, head of household, or qualifying widow, as applicable." *Id.*

This brief refers collectively to these provisions as "Louisiana's marriage laws."

B. Procedural history

1. Petitioners are seven same-sex couples who wish to be married in Louisiana or who wish Louisiana to recognize their out-of-state marriages. They filed two separate lawsuits in the federal district court for the Eastern District of Louisiana, claiming that Louisiana's marriage laws violate their rights under the Equal Protection Clause and the Due ***7** Process Clause of the Fourteenth Amendment. Specifically, they challenged (1) Louisiana's refusal to issue one of the couples a marriage license; (2) Louisiana's policy requiring persons in an out-of-state same-sex marriage to file Louisiana tax returns as single persons, and not jointly as married persons; and (3) Louisiana's refusal to allow both parties of a same-sex marriage to appear as parents on an amended Louisiana birth certificate. *See* Pet. 10; App. a2. [2] They named as defendants (respondents here) the state officials charged with administering the challenged laws, namely the Secretary of the Louisiana Department of Revenue, the Secretary of the Department of Health and Hospitals, and the Louisiana State Registrar (collectively, the "State" or "Louisiana"). App. a4.

2. The district court consolidated the lawsuits and the parties filed cross-motions for summary judgment. After oral argument and subsequent briefing, the district court rendered a final judgment on September 3, 2014. The court granted Louisiana's motion for summary judgment and denied petitioners' motion for summary judgment. App. a1, a32, a34-a35.

3. On September 4 and 5, petitioners timely appealed to the U.S. Fifth Circuit, App. a36-a47, where their appeals were docketed as *Robicheaux et al. v. Caldwell et al.,* No. 14-31037. The court granted Louisiana's motion for expedited briefing and set the case for argument before the same panel that would hear Texas's appeal in *De Leon v. Perry,* No. 14-51096. The two cases will be argued on January 9, 2015.

***8 C. Lower court decision**

1. In his opinion upholding Louisiana's marriage laws, Judge Martin Feldman drew on *Windsor*'s "powerful reminder" that " '[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations[.]' " App. a11 (quoting *Windsor,* 133 S. Ct. at 2691). The court noted that *Windsor* "repeatedly and emphatically reaffirmed the longstanding principle" that the authority to define marriage "belongs to the states," App. a18, and analyzed petitioners' claims in light of that principle.

2. a. The court applied rational basis review to petitioners' equal protection claims. It reasoned that *Windsor* had "starkly avoid[ed]" applying heightened scrutiny, and, further, that "neither the Supreme Court nor the Fifth Circuit has ever before defined sexual orientation as a suspect class, despite opportunities to do so." App. a10 (citing *Windsor, supra; Romer v. Evans,* 517 U.S. 620 (1996); *Johnson v. Johnson,* 385 F.3d 503 (5th Cir. 2004)). The court also found that Louisiana's marriage laws did not constitute sex discrimination, noting "the plain reality that Louisiana's laws apply evenhandedly to both genders[.]" App. a15.

b. The court ruled that Louisiana's marriage laws rationally further two government interests. First, it found the laws were "directly related to achieving marriage's historically preeminent purpose of linking children to their biological parents." App. a16. Second, it found the laws further a legitimate interest in "ensuring that fundamental social change occurs by social consensus through democratic processes." App. a8-a9, a16-a17. Finally, the court found that Louisiana's laws were not inspired by "unconstitutional animus" against gays and lesbians, observing that "Louisiana unquestionably respected 'a statewide deliberative process that allowed its citizens to discuss and weigh arguments for ***9** and against same-sex marriage.' " App. a17 & n.11 (quoting *Windsor,* 133 S. Ct. at 2689).

3. On due process, the court relied on the settled rule that a claimant must "provide a 'careful description' of the asserted fundamental right," and "establish it as 'deeply rooted in this Nation's history and tradition." App. a20 (quoting *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997); *Malagon de Fuentes v. Gonzales,* 462 F.3d 498, 505 (5th Cir. 2006)). Again relying on *Windsor,* the court concluded that a "right to same-sex marriage" was not deeply rooted in our national history since "[t]he concept of same-sex marriage is 'a new perspective, a new insight,' nonexistent and even inconceivable until very recently." App. a21-22 (quoting *Windsor,* 133 S. Ct. at 2689). The court also ruled that Louisiana's laws did not infringe plaintiffs' right to intimate association, because that right does " 'not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.' " App. a24 (quoting *Lawrence v. Texas,* 539 U.S. 558, 578 (2003)).

4. The court conceded that its decision diverged from nearly all federal rulings since *Windsor.* App. a15 n.9. That was true at the time. [3] Nonetheless, the court concluded the Constitution gave it no authority to "resolve the wisdom of same-sex marriage," but required leaving this issue to "the arena of the democratic process." App. a33.

***10 Reasons for Granting the Petition**

I. The Louisiana decision provides a crucial counterpoint to the many erroneous decisions usurping state authority to define marriage.

1. As petitioners correctly point out, Pet. 4, the issues presented in Louisiana's case are already the subject of a four-to-one split among the circuits. Panels of the Fourth, Seventh, Ninth, and Tenth Circuits have struck down the marriage laws of seven States under a variety of due process and equal protection theories. [4] Diverging from those circuits, a Sixth Circuit panel upheld the marriage laws of four States against similar constitutional challenges. *DeBoer,* 2014 WL 5748990, at * 1, *26-*27. The disagreement among lower courts will deepen in coming months: appeals are pending in the First, Fifth, and Eleventh Circuits, and in the Arkansas and Louisiana Supreme Courts. *Lopez-Aviles, supra; Robicheaux v. Caldwell,* No. 14-31037 (5th Cir. Sept. 4 & 5, 2014); *De Leon v. Perry,* No. 14-50196 (5th Cir. Feb. 27, 2014); *Brenner v. Sec'y, Fla. Dept. of Health,* No. 14-14061 (11th Cir. Sept. 4, 2014); *Smith v. Wright,* No. 14-427 (Ark. Sup. Ct., May 12, 2014); *Costanza v. Caldwell,* No. 2014-CA-2090 (La. Sup. Ct. Oct. 31, 2014). [5]

***11** 2. If the Court determines the time is ripe to settle this issue, Louisiana agrees with petitioners that "the decision below is uniquely appropriate for certiorari before judgment and consideration along with the Sixth Circuit ruling." Pet. 20. Judge Feldman's decision in *Robicheaux* was the first post-*Windsor* federal ruling to uphold state marriage laws against constitutional attack. It now stands with the Sixth Circuit's decision in *DeBoer* as one of the only two

post-*Windsor* rulings to conclude that the Constitution does not compel adoption of same-sex marriage but instead leaves the matter up to the democratic process of each State. *See* App. al (concluding that Louisiana legitimately "address[ed] the meaning of marriage through the democratic process"); *DeBoer,* 2014 WL 5748990, at *22 (urging deference to "democratic majorities deciding within reasonable bounds when and whether to embrace an evolving … societal norm"). [6] If the Court chooses to review one of those decisions now, it should review both.

3. Petitioners are also correct that both *Robicheaux* and *DeBoer* emphasize that judges should defer to the democratic process on this issue. Pet. 19 (highlighting this common "theme"). Petitioners are wrong, however, to claim that *Robicheaux* "elevat[es] deference to democratic processes over judicial responsibility to protect the minority's constitutional rights." *Id.* To the contrary, Judge Feldman correctly found that the Constitution contains no "right" to enter into a same-sex marriage, and therefore his "judicial responsibility" was to defer to Louisianans' views about the nature of marriage. *See, e.g.,* App. a22 (concluding "[t]here is ***12** simply no fundamental right, historically or traditionally, to same-sex marriage"); App. a32 (right to enter into a same-sex marriage is a "new right" that "may or may not be affirmed by the democratic process"). Nor did Judge Feldman rely "primarily on dissents," as petitioners claim. Pet. 19. Rather, he relied primarily on *Windsor* itself, which gave the "powerful reminder" that " '[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations.' " App. a11 (quoting *Windsor,* 133 S. Ct. at 2691).

These merits disagreements aside, however, petitioners are correct that *Robicheaux* is an instructive "counter-balance" to the numerous decisions going the other way. Pet. 19. The Court's resolution of the conflict may well hinge on the degree to which *Windsor* affirmed the authority of States to decide whether to adopt same-sex marriage. *Robicheaux* powerfully suggests that the contrary federal rulings get *Windsor*'s teaching exactly backwards. *See, e.g.*, App. a10 (reasoning that *Windsor* required "careful consideration" of DOMA "because of Congress' odd intrusion on what the Court repeatedly emphasized was historical and essential state authority to define marriage") (citing *Windsor,* 133 S. Ct. at 2693)); App. a18 (reasoning that "*Windsor* repeatedly and emphatically reaffirmed" States' authority over domestic relations," including their "sovereign authority" to define marriage); *see also Windsor,* 133 S. Ct. at 2693 (condemning DOMA's "purpose to influence or interfere with state sovereign choices about who may be married"). *DeBoer* relied on a similar view of *Windsor. See* 2014 WL 5748990, at *20 (reading *Windsor* to override state authority "would require us to subtract key passages from the opinion and add an inverted holding"). Again, if the Court reviews one of those decisions now, it should review both.

***13** 4. a. Whether the Court should intervene now or await further development in the lower courts is a close question. Petitioners say more percolation would have "limited" value. Pet. 19. Admittedly, five circuits and twenty-one district courts have already weighed in. On the other hand, coming months will add the views of three circuits (the First, Fifth, and Eleventh) and two state supreme courts (Arkansas and Louisiana). The mix of lower court decisions may look quite different in six months. In any event, if the Court decides to act now, it makes sense to review more than one lower court decision, together with the widest possible range of state marriage laws. *See* III, *infra.* It could accomplish that by reviewing *Robicheaux* alongside *DeBoer.*

b. Louisiana is in a unique position with respect to the timing of review. Three weeks after Judge Feldman upheld Louisiana's marriage laws in *Robicheaux*, a Louisiana trial court invalidated those laws in *Costanza v. Caldwell,* No. 2013-0052 (La. 15th Jud. Dist. Ct. Sept. 24, 2014). Thus, the same Louisiana officials are *now* caught between the Scylla and Charybdis of conflicting state and federal rulings. [7] Louisiana thus has particular urgency in seeing this issue resolved. If the Court decides to intervene now, Louisiana would naturally want to defend *Robicheaux* in this Court on the strength of its own arguments. If the Court wants further percolation, however, Louisiana could proceed to vindicate its laws before the Fifth Circuit and the state supreme court. Decisions from those courts would provide the insights of ten additional judges. And if those courts issue conflicting decisions, that would create an additional reason for this ***14** Court to step in. *See, e.g., Hagen v. Utah,* 510 U.S. 399, 409 (1994) (granting certiorari "to resolve the direct conflict between … decisions of the Tenth Circuit and the Utah Supreme Court"); *State of Cal. v. Taylor,* 353 U.S. 553, 556 (1957)

(granting certiorari "to resolve the conflict between the United States Court of Appeals and the California Supreme Court"). In any event, whether this Court intervenes now or later, Louisiana's case presents a "uniquely appropriate" vehicle for deciding the validity of state marriage laws. Pet. 20.

II. This case is an ideal vehicle.

Petitioners are right that this case presents a "strong vehicle" for definitively settling the marriage challenges being litigated across the country. Pet. 20. If the Court intervenes now, the particular features of Louisiana's case make it an ideal vehicle for deciding whether state citizens can continue to make "sovereign choices about who may be married," *Windsor,* 133 S. Ct. at 2693, or whether the Constitution has already made those choices for them.

1. As petitioners point out, Judge Feldman's decision addresses both sides of the question: whether a State must license same-sex marriages and whether it must recognize out-of-state same-sex marriages. Pet. 17; App. a2 (addressing claims of "six same-sex couples who live in Louisiana and are validly married under the law of another state, [and] one same-sex couple who seeks the right to marry in Louisiana"). Of the other cases pending on certiorari, only the Kentucky case addresses both issues.[8] The Michigan case addresses ***15** only licensing, whereas the Ohio and Tennessee cases address only recognition.[9]

2. Procedurally, this case is also ideal for cleanly resolving the issues.

a. There are no standing problems, either at the trial or appellate level, because petitioners properly sued the Louisiana officials who enforce the challenged laws, App. a4, and those officials have actively defended those laws at all stages. *Cf. Hollingsworth v. Perry,* 133 S. Ct. 2652, 2662 (2013) (no appellate standing because defendant state officials did not appeal and initiative proponents had no Article III injury). Furthermore, the district court's ruling is a final judgment, not a preliminary ruling. App. a1 (ruling on cross-motions for summary judgment); *cf. Tanco,* 7 F.Supp.3d at 772 (granting motion for preliminary injunction but declining to "make a final ruling on the plaintiffs' claims").

b. The lower court properly resolved the issues as a matter of law, not facts. App. a4-a5 (finding issues appropriate for resolution on cross-motions for summary judgment). The record thus presents no thorny rabbit trails such as whether the lower court abused its discretion in ***16** weighing expert evidence or assessing witness credibility.[0] The questions at issue here are not properly resolved by courtroom factfinding. *See, e.g., Heller v. Doe,* 509 U.S. 312, 320 (1993) (explaining that "[a] legislative choice is not subject to courtroom factfinding") (quotes omitted). Nor are they properly resolved by a court selecting among competing opinions of social scientists. Judge Feldman correctly rejected this approach. *See* App. a17 n.10 ("The contentious debate in social science literature about what is 'marriage' in today's world does not drive or inform the Court's decision."); *cf. DeBoer,* 973 F.Supp.2d at 761-768 (weighing methodology and credibility of competing social science experts). The record in *Robicheaux*, then, is particularly well-suited to deciding the broad questions of state sovereignty presented here.

3. On the merits, Louisiana's marriage and family laws cleanly pose the question whether a State may validly define marriage in terms of man-woman relationships.

a. The man-woman definition of marriage is reflected consistently and concretely across Louisiana law. Louisiana's family law rests on an array of presumptions linking man-woman marriage, parentage, and child protection. ***17** Louisiana's adoption laws reinforce its marriage laws by allowing only validly married couples to adopt a child jointly.[2] Louisiana's regulation of reproductive technology does the same, providing, for instance, that a husband "may not disavow a child born to his wife as a result of an assisted conception to which he consented." La. Civ. Code art. 188.[3] Louisiana's laws thus present a clear and comprehensive policy choice in favor of man-woman marriage, evidencing its

citizens' conviction that marriage is an institution whose shape and stability have profound social effects. *See, e.g., id.* art. 86 cmt (c) (the marriage contract "creates a social status that affects not only the contracting parties, but also their posterity and the good order of society"); *Windsor,* 133 S. Ct. at 2693 (state domestic relations laws have a "substantial societal impact … in the daily lives and customs of its people").

b. Additionally, what motivated Louisiana's marriage amendment is not in serious dispute. Two courts have found that Louisiana's citizens constitutionally defined marriage in 2004 - not out of animus towards gays and lesbians - but instead to prevent alteration of the marriage definition by ***18** state courts. *See Forum for Equality PAC,* 893 So.2d at 733-34 (marriage amendment's "main purpose" was not to effect a "same-sex marriage ban," but to prevent judicial alteration of marriage under state due process clause); App. a17 & n.11 (declining to find "animus" or "illicit motive on the basis of this record"). [4] Furthermore, because the state supreme court has authoritatively interpreted the amendment's history, this Court need not enter into murky debates about what motivated the amendment. *Cf. Bourke,* 996 F.Supp.2d at 550-551 & n.15 (finding it "debatable" whether Kentucky legislative history "demonstrates an obvious animus against same-sex couples"); *Obergefell,* 962 F.Supp.2d at 975, 992-93 (reviewing legislative history and concluding Ohio provisions were motivated by animus).

III. Granting multiple petitions will provide the broad scope necessary to properly resolve an issue that impacts all fifty States.

Petitioners assert that reviewing this case along with others would allow the Court to address a "geographic range" of state marriage laws. Pet. 25. Louisiana agrees. The issue plainly demands consideration "in a wider range of circumstances" than those presented in any one case. *Gratz v. Bollinger,* 539 U.S. 244, 260 (2003). [5] Any decision will ***19** impact how two-thirds of the States define marriage, which is the "foundation" of their "broader authority to regulate the subject of domestic relations." *Windsor,* 133 S. Ct. at 2691. In light of that, granting multiple petitions makes good sense.

1. The variety of state approaches to this issue suggests that the Court should bring before it an array of marriage laws. The States have approached the question of same-sex partnerships in various ways that reflect "the beauty of federalism." *Bostic,* 760 F.3d 352, 398 (Niemeyer, J., dissenting). Some - like Louisiana - have declined to adopt either same-sex marriage or civil unions, others have adopted civil unions only, and others have defined marriage in their constitutions while leaving civil unions up to the legislative process. [6] Some have first declined same-sex marriage, only to accept it shortly afterwards. [7] Some have dealt with the issues through constitutional amendment, others through ***20** statute, and others through a combination. [8] This diversity is exactly what one should expect. As this Court has explained, "[t]he dynamics of state government in the federal system are to allow the formation of consensus" on this emerging issue, one that "reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." *Windsor,* 133 S. Ct. at 2692, 2693.

2. The magnitude of the issues also counsels granting multiple petitions. The profoundly mistaken idea that the Constitution compels recognition of same-sex marriage would nullify the marriage laws of two-thirds of the States, and its effects would not stop even there. As this Court recently observed, "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' " *Windsor,* 133 S. Ct. at 2692 (quoting *Williams v. North Carolina,* 317 U.S. 287, 298 (1942)). In other words, a decision constitutionalizing same-sex marriage would inevitably ripple out into state laws concerning: adoption, child custody, spousal privilege, taxation, inheritance, wills, health care directives, reproductive technology, employer benefits, divorce, alimony, and the division of marital assets. To adequately explore a question with this sweeping impact, the Court should have before it a range of state marriage laws, as well as counsel presenting a range of arguments in their defense.

***21** 3. Finally, the sheer number of issues counsels taking multiple petitions. The pending petitions ask: (1) whether States are compelled to license same-sex marriages by (a) the Equal Protection Clause or (b) the Due Process Clause; and (2) whether States are compelled to recognize out-of-state same-sex marriages by (a) Equal Protection Clause, (b) the Due Process Clause, (c) the Full Faith and Credit Clause, or (d) the constitutional right to travel. Those issues spawn numerous sub-issues, such as (1) whether the "right to marry" encompasses marrying someone of the same sex, and (2) whether man-woman marriage laws trigger heightened scrutiny because they (a) discriminate by sexual orientation, (b) discriminate by gender, or (c) express animus against gays and lesbians. This swath of issues may require separate briefing and argument. [9] In that event, it would make sense to have a range of experienced counsel with a variety of approaches, which granting multiple petitions would accomplish.

Conclusion

The petition for certiorari before judgment should be granted.

Footnotes

1 *See also id.* at 737 (Calogero, C.J., concurring) ("Nothing in the majority opinion would prohibit an unmarried couple from contracting to be co owners of property, from designating each other agents authorized to make critical end of life decisions, or from leaving property to each other through wills. The majority opinion does not disturb or impair the fundamental contract and property rights possessed by all individuals, be they homosexual or heterosexual, married or unmarried.).

2 Petitioners also brought a First Amendment challenge to Louisiana Revenue Information Bulletin No. 13 024. App. a24. The district court rejected that claim, *id.*, and petitioners did not appeal.

3 *But see DeBoer,* 2014 WL 5748990 (upholding marriage laws of Kentucky, Michigan, Ohio, and Tennessee), *pet ns for cert. filed sub nom. Henry v. Hodges,* No. 14 556 (U.S. Nov. 14, 2014); *Tanco v. Haslam,* No. 14 562 (U.S. Nov. 14, 2014); *DeBoer v. Snyder,* No. 14 571 (U.S. Nov. 16, 2014); *Love v. Beshear,* No. 14 574 (U.S. Nov. 16, 2014); *Conde Vidal v. Garcia Padilla,* F.Supp.3d , 2014 WL 5361987 (D. Puerto Rico Oct. 21, 2014) (concluding "*Windsor* … reaffirms the States' authority over marriage), *appeal docketed sub nom. Lopez Aviles v. Rius Armendariz,* No. 14 2184 (1st Cir. Nov. 13, 2014).

4 *See Latta v. Otter,* F.3d 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (sexual orientation discrimination); *id.* at *11 (Reinhardt, J., concurring) (fundamental rights); *id.* at * 14 (Berzon, J., concurring) (sex discrimination); *Baskin v. Bogan,* 766 F.3d 648 (7th Cir.) (sexual orientation discrimination), *cert. denied,* 135 S. Ct. 316 (2014); *Bostic v. Schaefer,* 760 F.3d 352 (4th Cir.) (fundamental rights), *cert denied sub nom. Rainey v. Bostic,* 135 S. Ct. 308(2014); *Kitchen v. Herbert,* 755 F.3d 1193 (10th Cir.) (fundamental rights), *cert. denied,* 135 S. Ct. 265 (2014).

5 The Arkansas Supreme Court heard arguments in *Smith* on November 20, 2014. The Fifth Circuit has scheduled arguments in *Robicheaux* and *De Leon* for January 9, 2015. The Louisiana Supreme Court will likely schedule arguments in *Costanza* in the final week of January 2015.

6 The decision upholding Puerto Rico's marriage laws in *Conde Vidal* was not based on the merits but on the precedential force of *Baker v. Nelson,* 409 U.S. 810 (1972). *Conde Vidal,* 2014 WL 5361987, at *10.

7 No same sex marriage licenses have been issued in Louisiana, however, because the *Costanza* decision was immediately stayed pending direct appellate review by the Louisiana Supreme Court. *See Costanza v. Caldwell,* No. 2014 2016 (La. 10/31/14); 2014 WL 5825169 (granting application for review).

8 *See Bourke v. Beshear,* 996 F.Supp.2d 542, 543 (W.D. Ky. 2014) (addressing whether Kentucky may decline to recognize marriages of " f]our same sex couples validly married outside Kentucky); *Love v. Beshear,* 989 F.Supp.2d 536, 539 (W.D. Ky. 2014) (addressing whether Kentucky may decline to issue marriage licenses to " t]wo same sex couples who wish to marry in Kentucky).

9 *See DeBoer v. Snyder,* 973 F.Supp.2d 757, 759 (E.D. Mich. 2014) (addressing right to marry of "an unmarried same sex couple residing in … Michigan); *Henry v. Himes,* 14 F.Supp.3d 1036, 1041 42 (S.D. Ohio 2014) (addressing whether Ohio must recognize same sex marriages contracted in New York, California, and Massachusetts); *Obergefell v. Wymyslo,* 962 F.Supp.2d 968, 973 (S.D. Ohio 2013) (addressing whether "Ohio must recognize out of state marriages between same sex couples on Ohio death certificates); *Tanco v. Haslam,* 7 F.Supp.3d 759, 762 (M.D. Tenn. 2014) (addressing whether Tennessee must recognize marriages of "three, same sex couples who lived and were legally married in other states before moving to Tennessee).

10 *Cf. DeBoer,* 973 F.Supp.2d at 761 768 (finding plaintiffs' experts "fully credible and "highly credible and according their testimony "great weight, while dismissing State's experts as "entirely unbelievable, "not worthy of serious consideration, and declining to accord their testimony "any significant weight); *DeBoer,* 2014 WL 5748990, at *30 33 (Daughtrey, J., dissenting) (emphasizing competing expert testimony and district court's weighing of witness credibility); *see generally, e.g., General Elec. Co. v. Joiner,* 522 U.S. 136, 139 (1997) (abuse of discretion is proper appellate standard for reviewing "trial court's decision to admit or exclude expert testimony).

11 *See, e.g.,* La. Civ. Code art. 185 & cmt. (b) (presumption that "husband of the mother is the father of a child born during marriage is "among the strongest in the law); *id.* art. 195 (similarly strong presumption where man marries child's mother and acknowledges child); *and see, e.g., Gallo v. Gallo,* 2003 0794, p. 7 (La. 12/3/03); 861 So.2d 168, 173 74 (observing Louisiana courts have "zealously guard ed] and enforce d] these presumptions to achieve the "fundamental ends of "preservation of the family unit and] avoidance of the stigma of illegitimacy).

12 *See* La. Child. Code art. 1198 (single person "or a married couple jointly may petition for agency adoption); *id.* art. 1221 (same for private adoption); *id.* art. 1243 (same for stepparent adoption); *see also, e.g., Adar v. Smith,* 639 F.3d 146, 162 (5th Cir. 2011) (en banc) (equal protection not violated by Louisiana's requiring adoption laws to track its marriage laws).

13 *See also* La. Rev. Stat. 9:130 (parents may renounce rights to an IVF conceived embryo only "in favor of another married couple).

14 Petitioners suggest animus may have been at work because the Louisiana Supreme Court said the amendment meant to guard marriage from "contemporary threats. Pet. 22. But the court explained that the perceived "threats arose, not from gays and lesbians, but from expansive judicial interpretation of state constitutions. *See Forum for Equality PAC,* 893 So.2d at 733 34 (recounting legislative committee testimony).

15 *See also, e.g., Roe v. Wade,* 410 U.S. 113 (1973) (decided with *Doe v. Bolton,* 410 U.S. 179 (1973)); *Van Orden v. Perry,* 545 U.S. 677 (2005) (decided with *McCreary County v. ACLU,* 545 U.S. 844 (2005); *Lemon v. Kurtzman,* 403 U.S. 602 (1971) (granting petitions to review both Pennsylvania and Rhode Island statutes); *Carter v. Carter Coal Co.,* 298 U.S. 238 (1936) (granting multiple cert before judgment petitions); *Rickert Rice Mills v. Fontenot,* 297 U.S. 110 (1936) (same); *Taylor v. McElroy,* 360 U.S. 709, 710 (1958) (granting cert before judgment during "pendency of similar case); *Porter v. Dicken,* 328 U.S. 252, 254 (1946) (granting cert before judgment due to "close relationship to pending case); *Norman v. Baltimore & O.R. Co.,* 294 U.S. 240 (1935) (granting certiorari and cert before judgment petitions).

16 *See, e.g.*, Ohio Const. art. 15, § 11 (declining to adopt both same sex marriage and civil unions); Nev. Const. art I, § 221; Nev. Rev. Stat. § 122A.010 *et seq.* (adopting civil unions but not same sex marriage); Ariz. Const. Art. XXX (declining to adopt same sex marriage but leaving civil unions to legislative progress)

17 For example, Maine rejected same sex marriage by a popular vote of 53% to 47% in November 2009, only to accept it three years later by exactly the reverse popular vote. *See* Maine Bureau of Elections, Nov. 3, 2009, Referendum Tabulation (Question 1), *available at:* http:// www.maine.gov/sos/cec/elec/2009/referendumbycounty.html; Maine Bureau of Elections, Nov. 6, 2012, Referendum Election Tabulations (Question 1), *available at:* http://www.maine.gov/sos/cec/elec/2012/tab ref 2012.html.

18 *See* Mich. Const. Art. I, § 25 (addressing marriage and civil unions through constitutional amendment); Ind. Stat. 31 11 1 1 (addressing both through statute); Tenn. Const. art XI, § 18 (addressing marriage through constitutional amendment but leaving civil unions to be addressed through statute); Haw. Const. Art. I, §23 (affirming legislative authority to enact or reject same sex marriage).

19 *Cf., e.g., United States v. Windsor,* 133 S. Ct. 786 (2012) (mem.) (additional briefing and argument); *Hollingsworth v. Perry* 133 S. Ct 786 (2012) (mem.) (same); *United States v. Windsor,* 133 S. Ct. 815, 815 16 (2012) (mem.) (separate briefing schedules); *Nat l Fed. of Indep. Bus. v. Sebelius,* 132 S. Ct 1618 (2012) (mem.) (allotting separate argument).

2015 WL 1608213 (U.S.) (Appellate Brief)
Supreme Court of the United States.

James OBERGEFELL, et al., Petitioners,
v.
Richard HODGES, Director, Ohio Department of Health, et al., Respondents.
Valeria TANCO, et al., Petitioners,
v.
Bill HASLAM, Governor of Tennessee, et al., Respondents.
April DEBOER, et al., Petitioners,
v.
Rick SNYDER, Governor of Michigan, et al., Respondents.
Gregory BOURKE, et al., Petitioners,
v.
Steve BESHEAR, Governor of Kentucky, et al., Respondents.

Nos. 14-556, 14-562, 14-571, 14-574.
April 2, 2015.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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***i** Questions Presented

1.

Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2.

Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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Cases

***1 Interest of *Amici* States**

The citizens of the *amici* States have always defined marriage as a man-woman institution. In choosing to retain that definition, they engaged in the most elementary form of self-government guaranteed by our Constitution. That authority will be lost irretrievably, however, if the Court accepts the plaintiffs' arguments in these cases. The *amici* States therefore have a keen interest in the outcome.

Introduction and Summary of the Argument

When state citizens determine the shape and meaning of civil marriage, they reflect as a community about an institution more fundamental to our civilization than any other. In recent years, some States have concluded that marriage should include couples of the same sex. Accordingly, they have altered their marriage laws through the democratic process. Others have come to the different conclusion that marriage has always been, and should remain, intrinsically a man-woman relationship. They have accordingly declined to alter their marriage laws. Whether taking one path or the other, these citizens have acted upon their "considered perspective on the historical roots of the institution of marriage." *United States v. Windsor,* 133 S. Ct. 2675, 2692-93 (2013). Our federal system peacefully accommodates Americans on both sides of this profound issue. This is why Justice Holmes wrote that our "Constitution … is made for people of fundamentally differing views." *Lochner v. New York,* 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

***2** These cases ask whether States and their citizens may continue to govern themselves on this issue. The plaintiffs, and even some States, assert that the Fourteenth Amendment removes same-sex marriage from democratic deliberation. They urge the Court to declare that the Constitution compels all fifty States to adopt this new form of marriage that did not exist in a single State twelve years ago. The Court should decline that invitation.

The Constitution takes no sides on same-sex marriage, and therefore leaves the issue up to the free deliberations of state citizens. The fact that Americans have reached different conclusions about this novel question is not a sign of a constitutional crisis that requires correction by this Court. It is rather a sign that our Constitution is working as it should. In our federal system, this issue must be resolved by the "formation of consensus" at the state level. *Windsor,* 133 S. Ct. at 2692. To resolve it instead through federal judicial decree would demean the democratic process, marginalize the views of millions of Americans, and do incalculable damage to our civic life in this country.

Argument

I. Determining the shape and meaning of marriage is a fundamental exercise of self-government by state citizens.

A. Our Constitution ensures that state citizens have the sovereign authority to govern themselves.

1. The structure of our Constitution is premised on the dignity of the sovereign States. Today, this is one of those "truths … so basic that, like the air ***3** around us, they are easily overlooked." *New York v. United States,* 505 U.S. 144, 187 (1992). It was not as obvious during the Constitution's drafting and ratification. In the ratification debates, James Madison explained that the people would approve the Constitution, "not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong." The Federalist No. 39, at 196 (Madison) (Gideon ed., 2001). Likewise, Alexander Hamilton assured his readers that "[t]he proposed constitution, so far from implying an abolition of the state governments, makes them constituent parts of the national sovereignty, … and leaves in their possession certain exclusive, and very important, portions of the sovereign power." The Federalist No. 9, at 41 (Hamilton). As Madison and Hamilton promised, the Constitution ultimately ratified by the people "specifically recognizes the States as sovereign entities." *Alden v. Maine,* 527 U.S. 706, 713 (1999) (internal quotations omitted).

2. To have any vital meaning at all, the state sovereignty recognized by the Constitution means that state citizens must retain the basic ability to govern themselves. This Court has explained that the Constitution "assume[s] the States' … active participation in the fundamental processes of governance." *Id.; see also Printz v. United States,* 521 U.S. 898, 935 (1997) (commanding state officers to administer a federal program is "fundamentally incompatible with our constitutional system of dual sovereignty"). "States are not mere political subdivisions of the United States," *New York,* 505 U.S. at 188, nor are they "relegated to the role of mere provinces or political corporations." ***4** *Alden,* 527 U.S. at 715. Rather, as this Court has correctly and consistently taught, States "retain the dignity … of sovereignty." *Id.*

3. The fact that the United States has multiple sovereigns means the American people have more freedom, not less. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.' " *Bond v. United States,* 131 S. Ct. 2355, 2364 (2011) (quoting *Alden,* 527 U.S. at 758). Federalism enhances collective freedom through "the diffusion of sovereign power." *New York,* 505 U.S. at 181. This diffusion enhances individual freedom by promoting self-government:

> Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.

Bond, 131 S. Ct. at 2364. Judge Friendly previously reached a similar insight: "We must stand in awe and admiration" of our federal republic, which "leav[es] to the states the final decision on the bulk of day-to-day matters that can be best be decided by those who are closest to them." Henry J. Friendly, *Federalism: A Foreword,* 86 Yale L.J. 1019, 1034 (1977).

4. By protecting state sovereignty, our Constitution reinforces the stability of an increasingly diverse Nation. A century ago, Justice Holmes rightly observed that our Constitution "is made for people of fundamentally differing views." ***5** *Lochner,* 198 U.S. at 75-76 (Holmes, J., dissenting). The Constitution remains such a document because of its federal structure. By allowing States to differ on important matters, the Constitution ensures the States' vital ability to serve as "laboratories for social and economic experiment." *Garcia v. San Antonio Metropolitan Transit Auth.,* 469 U.S. 528, 546 (1985) (citing *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Federalism thus "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society." *Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991).

B. The States' exercise of sovereign authority is at its apex in domestic relations law.

1. Numerous areas of law lie squarely within state sovereign authority. One thinks of laws on crime, property, contracts, education, and public health. *See, e.g., Bond v. United States,* 134 S. Ct. 2077, 2086 (2014) ("For nearly two centuries it has been 'clear' that, lacking a police power, 'Congress cannot punish felonies generally.' ") (quoting *Cohens v. Virginia,* 6 Wheat. 264, 428 (1821)); *Wos v. E.M.A.,* 133 S. Ct. 1391, 1400 (2013) ("In our federal system, there is no question that States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit.") (quoting *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248 (1984)). States are in the heartland of their authority, however, when they act in the realm of domestic relations.

2. This Court has long affirmed the centrality of domestic relations law to state sovereignty. Near the end of the twentieth century, the Court repeated this ***6** maxim from the end of the nineteenth: " 'The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' " *Ankenbrandt v. Richards,* 504 U.S. 689, 703 (1992) (quoting *In re Burrus,* 136 U.S. 586, 593-94 (1890)). That principle explains why federal courts avoid adjudicating marital status, even when they otherwise have jurisdiction. *Windsor,* 133 S. Ct. at 2691. It also explains why the diversity statute has been construed to "divest[] the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt,* 504 U.S. at 703; *see generally id.* at 695-704 (discussing

"domestic relations exception" incorporated into 28 U.S.C. § 1332); *Barber v. Barber,* 21 How. 582 (1859) (determining federal courts have no jurisdiction over divorce or alimony suits). These venerable limits on federal power reflect what the Court has called " 'the virtually exclusive primacy … of the States in the regulation of domestic relations.' " *Windsor,* 133 S. Ct. at 2691 (quoting *Ankenbrandt,* 504 U.S. at 714 (Blackmun, J., concurring in judgment)); *see also, e.g., Williams v. North Carolina,* 317 U.S. 287, 304 (1947) (Frankfurter, J., concurring) ("We are not authorized nor are we qualified to formulate a national code of domestic relations.").

3. a. Among the facets of domestic relations law, states have a keen interest in regulating marriage. *See, e.g., Haddock v. Haddock,* 201 U.S. 562, 575 (1906) (noting "the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce"). This is because "[t]he marriage relation creates problems of large social importance." *Williams,* 317 U.S. at 298. Such ***7** problems ripple across vital areas of law, including the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." *Id.* One could add to that list laws regulating adoption, taxation, inheritance, insurance, health care, reproductive technology, and employment.

b. Within marriage law States have a paramount interest in how the marital relation is *defined.* The Court has endorsed the broad statement from *Pennoyer v. Neff* that " '[t]he State … has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.' " *Sosna v. Iowa,* 419 U.S. 393, 404 (1975) (quoting *Pennoyer v. Neff,* 95 U.S. 714, 734-35 (1878)). More recently, the Court confirmed that "[t]he *definition of marriage* is the foundation of the State's broader authority to regulate the subject of domestic relations[.]" *Windsor,* 133 S. Ct. at 2691 (citing *Williams,* 317 U.S. at 298); *see also id.* (noting that "[t]he significance of state responsibilities for the *definition* and regulation of marriage dates to the Nation's beginning") (emphases added). *Windsor* called States' "authority to define the marital relation" not just important but "essential." *Id.* at 2692. This explains the outcome in *Windsor*: the Court struck down a broad federal marriage definition because it sought to "interfere with *state sovereign choices* about who may be married" and to " 'influence *a state's decision* as to how to shape its own marriage laws.' " *Id.* at 2693 (quoting *Massachusetts v. United States Dept. of Health and Human Servs.,* 682 F.3d 1, 12-13 (1st Cir. 2012)) (emphases added); *see infra* II.A.

***8** 4. None of this is to say that States' authority over marriage somehow immunizes marriage laws from constitutional constraints. Far from it: "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor,* 133 S. Ct. at 2691 (citing *Loving v. Virginia,* 388 U.S. 1 (1967)). For instance, it is settled that the Fourteenth Amendment forbids States from defining marriage or its incidents to perpetuate racial or gender discrimination. *See Loving,* 388 U.S. at 12 ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination."); *Kirchberg v. Feenstra,* 450 U.S. 455, 460 (1981) (Fourteenth Amendment violated by "express gender-based discrimination" in marital property law). Furthermore, the Full Faith and Credit Clause requires interstate recognition of a divorce decree, given that divorce (unlike marriage) arises from a judgment. *See Williams,* 317 U.S. at 303-04; *see generally Baker v. Gen. Motors Corp.,* 522 U.S. 222, 232-33 (1998) (explaining that the Clause "differentiates the credit owed to laws … and to judgments"). But the fact that constitutional guarantees apply to marriage laws - as they do to every other state law - does not dilute the States' particular authority to regulate and define marriage. If there were any doubt of that, this Court recently laid it to rest by confirming that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations." *Windsor,* 133 S. Ct. at 2691.

***9 C. In deciding whether to adopt same-sex marriage, state citizens exercise their sovereign authority to determine the meaning of marriage.**

1. The past decade has seen the rapid emergence of the idea that civil marriage should include couples of the same sex. *See, e.g., Sevcik v. Sandoval,* 911 F.Supp.2d 996, 1013 (D. Nev. 2012) (observing "[t]he States are in the midst of an intense democratic debate about the novel concept of same-sex marriage"), *rev'd by Latta v. Otter,* 771 F.3d 456 (9th Cir. 2014), *petition for cert. filed* (U.S. Dec. 30, 2014) (No. 14-765). When the Court decided *Windsor* in June 2013, twelve States

and the District of Columbia had democratically adopted same-sex marriage. *See Windsor,* 133 S. Ct. at 2689, 2690. Whether one sees this development as encouraging or alarming, it is obviously brand new. No State recognized same-sex marriage until Massachusetts in 2003; no country in the world did until the Netherlands in 2000. *See, e.g., Windsor,* 133 S. Ct. at 2715 (Alito, J., dissenting); *see also Goodridge v. Dept. of Public Health,* 798 N.E.2d 941 (Mass. 2003).

2. What should also be obvious is that the step from the older to the newer version of marriage is a momentous one, both culturally and legally. The concept of marriage as a man-woman institution is "measured in millennia, not centuries or decades," and "until recently [it] had been adopted by all governments and major religions of the world." *DeBoer v. Snyder,* 772 F.3d 388, 395-96 (6th Cir. 2014), *cert granted*, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-571). In *Windsor*, this Court made the similar observation that "marriage between a man ***10** and a woman had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor,* 133 S. Ct. at 2689.

3. Thus, when state citizens decide whether to adopt same-sex marriage, one thing appears inescapably true: those citizens are exercising sovereign authority over their domestic relations law.

This is perhaps self-evident. For confirmation, however, one need only read the Court's opinion *Windsor.* In 2006, the New York Court of Appeals ruled that the state constitution did not guarantee a right to same-sex marriage, but "express[ed] [its] hope that the participants in the controversy over same sex marriage will address their arguments to the Legislature." *Hernandez v. Robles,* 855 N.E.2d 1, 12 (2006). New Yorkers responded first by recognizing out-of-state same-sex marriages and then by amending New York law to adopt same-sex marriage. As the Court described this development, New Yorkers undertook "a statewide deliberative process that enabled [them] to discuss and weigh arguments for and against same-sex marriage." *Windsor,* 133 S. Ct. at 2689. Only then did they "act[] to enlarge the definition of marriage." *Id.* (citing Marriage Equality Act, 2011 N.Y. Laws 749 (codified at N.Y. Dom. Rel. Law Ann. §§ 10-a, 10-b, 13 (West 2013)). What New Yorkers did was "without doubt a proper exercise of … sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Windsor,* 133 S. Ct. at 2692.

***11 II. A decision constitutionalizing same-sex marriage would erase the sovereignty of state citizens to determine the meaning of marriage.**

1. The plaintiffs in these cases claim that the Fourteenth Amendment overrides the States' sovereign choices about same-sex marriage. In their view, the Fourteenth Amendment decrees that every State must recognize and adopt same-sex marriage, and that is the beginning and end of the matter. *See, e.g.*, Brief for Petitioners at 19, 21, *DeBoer v. Snyder,* No. 14-571 (U.S. Feb. 27, 2015) (asserting Michigan's laws "violate the Equal Protection Clause under any standard of scrutiny" and "den[y] the fundamental right to marry guaranteed by the Due Process Clause"). The plaintiffs are mistaken for the reasons set forth in the Sixth Circuit's majority opinion in *DeBoer* and in Judge Martin Feldman's opinion in *Robicheaux v. Caldwell,* 2 F.Supp.3d 910 (E.D. La. 2014), *appeal docketed*, No. 14-31037 (5th Cir. Sept. 4 & 5, 2014). The respondent States have argued these points at length, and the *amici* States will only briefly address them here:

a. Defining marriage in man-woman terms does not violate equal protection for two principal reasons.

i. First, States may rationally structure marriage around the biological reality that the sexual union of a man and a woman - unique among all human relationships - produces children. *See DeBoer,* 772 F.3d at 404-05 (man-woman marriage furthers society's "need to regulate male-female relationships and the unique procreative possibilities of them"); *Robicheaux,* 2 F.Supp.3d at 920 (man-woman marriage is "directly related to achieving marriage's ***12** historically preeminent purpose of linking children to their biological parents"). Many lower courts have dismissed this understanding of traditional marriage laws as not merely out-of-date but *irrational. See, e.g., Baskin v. Bogan,* 766 F.3d 648, 665 (7th Cir. 2014) (concluding Indiana's marriage law "flunks [the] undemanding test" of rational basis review), *cert. denied*, 135 S. Ct. 316 (2014). They are profoundly mistaken. "To fail to acknowledge even our most basic biological

differences … risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen v. I.N.S.,* 533 U.S. 53, 73 (2001).

ii. Second, States may rationally place the man-woman definition in their constitutions - as many States have done - to ensure that the definition of marriage is altered only through the consensus of their citizens, and not through judicial interpretation. *See DeBoer,* 772 F.3d at 408 (nineteen States placed the man-woman definition in their constitutions out of concern that "the courts would seize control over an issue that people of good faith care deeply about"); *Robicheaux,* 2 F.Supp.3d at 920 (States have "a legitimate … interest in safeguarding that fundamental social change … is better cultivated through democratic consensus"). Not only is this practice rational, but it has been commended by this Court. On this issue, *Windsor* taught that "[t]he dynamics of state government in our federal system are to allow the formation of consensus[.]" *Windsor,* 133 S. Ct. at 2692.

b. Defining marriage in man-woman terms does not violate due process because the right to marry someone of the same sex is not "objectively, deeply ***13** rooted in this Nation's history and tradition." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) (internal quotation marks omitted); *see DeBoer,* 772 F.3d at 410-13 (explaining this Court's marriage cases "did not redefine [marriage] but accepted its traditional meaning") (discussing *Loving,* 388 U.S. 1; *Zablocki v. Redhail,* 434 U.S. 374 (1978); *Turner v. Safley,* 482 U.S. 78 (1987)); *Robicheaux,* 2 F.Supp.3d at 923 (concluding that, "until recent years, [same-sex marriage] had no place at all in this nation's history and tradition"). As this Court has explained, marriage "between two persons of the same sex" began to arise only in a minority of States over the last decade and involves "a new perspective" on an institution that had been viewed across time and cultures as defined by man-woman relationships. *Windsor,* 133 S. Ct. at 2689.

2. Instead of duplicating the merits arguments on these points, the *amici* States will highlight the negative consequences that would flow from a decision that the Fourteenth Amendment compels recognition and adoption of same-sex marriage. Those consequences would be severe, unavoidable, and irreversible.

A. Such a decision would abandon the premise of *Windsor*.

The first casualty of a decision constitutionalizing same-sex marriage would be the coherence of this Court's precedent, which just last term emphatically reaffirmed the authority of States to decide this very question on the basis of democratic deliberation. Although they avoid saying so, the plaintiffs ask this Court to jettison the underpinnings of that precedent and the two centuries of historical practice that ***14** undergird it. The Court should decline that invitation.

1. In *Windsor*, this Court confirmed the States' "historic and essential authority to define the marital relation." 133 S. Ct. at 2692. "The definition of marriage," *Windsor* explained, is "the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' " *Id.* at 2691 (quoting *Williams,* 317 U.S. at 298). The Court traced this state authority "to the Nation's beginning." *See Windsor,* 133 S. Ct. at 2691 (observing that "[t]he significance of state responsibilities for the definition of marriage dates to the Nation's beginning") (citing *Ohio ex rel. Popovici v. Agler,* 280 U.S. 379, 383-84 (1930)); *see also Windsor,* 133 S. Ct. at 2691 (noting that " '[t]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce' ") (quoting *Haddock,* 201 U.S. at 575).

2. This longstanding state authority to define marriage was "of central relevance" to *Windsor*'s invalidation of the federal marriage definition in section 3 of the Defense of Marriage Act ("DOMA"), 110 Stat. 2419. *Windsor,* 133 S. Ct. at 2692. DOMA broadly defined marriage at the federal level, an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage." *Id.* at 2693. This intrusion on state authority marked DOMA as a "discrimination[] of unusual character," leading the Court to find that it infringed the rights of same-sex couples married under New York law. *Id.* (internal quotations ***15** omitted). DOMA's central flaw was that it undermined New York's sovereign authority to extend marriage to same-sex couples. As the Court put it, DOMA's illegitimate "purpose

[was] to influence or interfere with *state sovereign choices about who may be married*," and "to put a thumb on the scales and influence *a state's decision as to how to shape its own marriage laws.*" *Id.* at 2693 (emphasis added) (internal quotations omitted).

3. *Windsor* thus vindicated the rights of married same-sex couples against federal intrusion by affirming New York's authority "to allow same-sex marriages" in the first place. *Id.* at 2692. New York's decision was "without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Id.* Confirming its reliance on state authority, the Court limited its holding to those couples "joined in same-sex marriages *made lawful by the State.*" *Id.* at 2695 (emphasis added); *see also id.* ("This opinion and holding are confined to those lawful marriages.").

4. a. Ironically, the plaintiffs ground their arguments for overturning state marriage laws on *Windsor* itself. *See, e.g.*, Brief for Petitioners at 18, *Obergefell v. Hodges,* No. 14-556 (U.S. Feb. 27, 2015) (arguing that Ohio's marriage law "violate[s] the Fourteenth Amendment for all the reasons this Court struck down DOMA as unconstitutional in *Windsor*"). They can do so, however, only by maintaining a studied silence about *Windsor*'s affirmation of state authority over marriage - an authority this Court identified as "of central relevance" to its outcome. *See Windsor,* 133 S. Ct. at 2692 ("The State's power in ***16** defining the marital relation is of central relevance in this case quite apart from principles of federalism."); *see also id.* at 2691 (observing "it is necessary to discuss the extent of the state power and authority over marriage"). That plaintiffs avoid discussing what *Windsor* actually said about state authority is unsurprising, because "it takes inexplicable contortions of the mind … to interpret *Windsor*'s endorsement of the state control of marriage as eliminating the state control of marriage." *Conde-Vidal v. Garcia-Padilla,* F.Supp.3d , 2014 WL 5361987, at *8 (D. Puerto Rico Oct. 21, 2014), *appeal docketed*, No. 14-2184 (1st Cir. Nov. 13, 2014).

b. Several lower courts have also mistakenly discounted *Windsor*'s grounding in state authority. For instance, a split panel of the Tenth Circuit reduced *Windsor*'s reliance on state sovereignty to a "prudential concern[]" and "a mere preference that [the] arguments be settled elsewhere." *Kitchen v. Herbert,* 755 F.3d 1193, 1228 (10th Cir. 2014), *cert. denied*, 83 U.S.L.W. 3102 (U.S. Oct. 6, 2014). Judge Kelly's dissent rightly rejected this reading. "*Windsor* recognized the authority of the States to redefine marriage and stressed the need for popular ***17** consensus in making such change." *Id.* at 1235-36 (Kelly, J., dissenting) (citing *Windsor,* 133 S. Ct. at 2692). Ignoring that "the States are laboratories of democracy" on this issue would "turn[] the notion of a limited national government on its head." *Id.* at 1231 (Kelly, J., dissenting); *see also, e.g., Latta v. Otter,*, F.3d , 2015 WL 128117, at *9 (9th Cir. Jan. 9, 2015) (O'Scannlain, J., dissenting from denial of rehearing *en banc*) ("In the latest Supreme Court opinion addressing the issue of same-sex marriage, the Court gave a ringing endorsement of the central role of the states in fashioning their own marriage policy.") (citing *Windsor,* 133 S. Ct. at 2689-93).

5. Simply because *Windsor* required the *federal* government to recognize state marriage definitions, the decision does not mean that a *State* must recognize another State's same-sex marriage. That reading fundamentally misunderstands both *Windsor* and our federal system.

a. *Windsor*'s reasoning depended on the starkly different authority possessed by federal and state governments over the law of marriage. The federal government has limited authority in this area and, thus, has historically deferred to state marriage laws. By contrast, the States have always exercised virtually exclusive authority over marriage. *See, e.g., Windsor,* 133 S. Ct. at 2689-90 (while "Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges," nonetheless "[b]y history and tradition the definition and regulation of marriage … has been treated as being within the authority and realm of the separate States"). That dichotomy explains *Windsor*'s outcome - *i.e.*, that DOMA's federal marriage ***18** definition was an ahistorical intrusion on a State's authority to shape its own marriage laws. *See, e.g., id.* at 2692 (concluding that "DOMA, because of its reach and extent, departs from this [federal] history and tradition of reliance on state law to define marriage"). But *Windsor* never taught the simplistic and erroneous view that one sovereign must always and everywhere recognize another sovereign's marriage laws.

b. That view is foreclosed by basic principles of interstate comity. It is settled that the Full Faith and Credit Clause "does not compel a state to substitute the statutes of other states for its own statues dealing with a subject matter concerning which it is competent to legislate." *Baker,* 522 U.S. at 232-33 (internal quotations omitted). To be sure, the *judgments* of one State receive exacting credit in other States, *id.* at 233, but no one contends that marriages arise from judgments. One State may thus apply its own marriage laws to its domiciliaries. *See, e.g., Franchise Tax Bd. of Cal. v. Hyatt,* 538 U.S. 488, 494-95 (2003) (a State may apply its laws if it has "a significant contact or significant aggregation of contacts, such that choice of its law is neither arbitrary nor fundamentally unfair"); *DeBoer,* 772 F.3d at 418 ("If defining marriage as an opposite-sex relationship amounts to a legitimate public policy … the Full Faith and Credit Clause does not prevent a State from applying that policy to couples who move from one State to another.").

Nor is there anything unusual in one State refusing to recognize an out-of-state marriage on public policy grounds. The field of conflicts-of-laws is based on the premise that States have wide latitude ***19** in determining whether to apply their own or another sovereign's laws to legal disputes within their borders. *See, e.g., Sun Oil v. Wortman,* 486 U.S. 717, 727 (1988) (explaining "it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another"). It is established that States may refuse to enforce out-of-state rules on public policy grounds, and "[e]ven more telling, States in many instances have refused to recognize marriage performed in other States on the grounds that these marriages depart from cardinal principles of the States domestic-relations laws." *DeBoer,* 772 F.3d at 419 (citing Restatement (First) Conflict of Laws § 134; Restatement (Second) Conflict of Laws § 283)); *see also, e.g., Brinson v. Brinson,* 96 So.2d 653, 659 (La. 1957) (refusing to recognize fraudulent Mississippi common-law marriage). To be sure, States may decide to recognize out-of-state marriages as a matter of comity. *See, e.g., Bloom v. Willis,* 60 So.2d 415, 417 (La. 1952) (recognizing non-ceremonial marriage "out of comity"). But when States decide their public policy prevents them from doing so, they exercise the same domestic relations authority that empowers them to define marriage in the first place. *See, e.g., Nevada v. Hall,* 440 U.S. 410, 422 (1979) (full faith and credit "does not require a State to apply another State's law in violation of its own legitimate public policy").

***20 B. Such a decision would dilute the numerous democratic victories recently won in the States by proponents of same-sex marriage.**

A decision constitutionalizing this issue would sweep away not only *Windsor*'s affirmation of state authority, but also the value of the democratic process in those States whose citizens have recently decided to confer the benefits of marriage on same-sex couples.

1. Over the past decade, proponents of same-sex marriage have achieved a remarkable string of successes by convincing their fellow citizens that they have the better argument about the meaning of marriage. Despite numbering from 1.5% to 3.5% of the population, in the space of about five years they have used the political process to change the marriage laws in Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. [2] That is a stunning feat, given that the man-woman concept of marriage had been so deeply ingrained in American history and culture. *See, e.g., Windsor,* 133 S. Ct. at 2689 (noting that, "until recent years, many citizens had not even considered the possibility" of same-sex marriage).

***21** 2. One should not lightly conclude that these democratic victories arose merely from savvy politics or the movement of a few thousand voters from one side of the ledger to the other. To the contrary, the removal of the man-woman definition from marriage laws may well be the political outcome of a significant cultural shift towards a new vision of marriage in those States. This is evident in the Court's description of the process that led New Yorkers to alter their marriage definition in 2011.

Windsor taught that New Yorkers' decision to confer "acknowledgment" and "dignity" on a new form of marriage was a matter of epochal significance. *Windsor,* 133 S. Ct. at 2692. This was no mere technical alteration of statutory language. New Yorkers acted on "the understanding that marriage is more than a routine classification for the purposes of certain statutory benefits," but is instead a "far-reaching legal acknowledgment of the intimate relationship between two people." *Id.* The move represented a philosophical and cultural shift, as much as a legal one. What New Yorkers did, the Court explained, demanded "both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." *Id.* at 2692-93. This momentous step required the stamp of legitimacy conferred by citizen deliberation: "The dynamics of state government in the federal system," *Windsor* explained, "are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other." *Id.* at 2692.

***22** 3. A decision from this Court constitutionalizing the issue of same-sex marriage would obliterate the significance of those remarkable democratic victories by same-sex marriage proponents. This may seem paradoxical, but it is not.

Again, take New York as an example. *Windsor* emphasized that New Yorkers' "new insight" about marriage and equality led them to confer the dignity of marriage on same-sex couples. *Id.* at 2689, 2692. But if the Constitution itself dictates adoption of same-sex marriage, then New Yorkers' insights were beside the point. On that view, New Yorkers were not enacting a new perspective on marriage, but correcting an unconstitutional defect in their marriage laws. That view is, of course, utterly contrary to *Windsor*'s discussion of what New Yorkers were doing. New Yorkers enlarged their marriage definition "[a]fter a statewide deliberative process that enabled [them] to discuss and weigh arguments for and against same-sex marriage." *Windsor,* 133 S. Ct. at 2689. *Windsor* thus *praised* the democratic deliberation of New Yorkers as they pondered the profound issues set before them. A decision that the Constitution compelled them to reach only one result would make a mockery of those deliberations.

The same can be said for all the States that have adopted same-sex marriage through the political process. Those States altered their marriage laws based on their "considered perspective on the historical roots of the institution of marriage and [their] evolving understanding of the meaning of equality." *Id.* at 2692-93. But why should their citizens' perspectives matter, if the Constitution itself ***23** demanded the change? A decision that the Fourteenth Amendment compels what those States spent so much energy to accomplish would dissolve any democratic legitimacy they conferred on same-sex couples by granting them the status of marriage.

C. Such a decision would eliminate the States' role as laboratories of democracy in the realm of domestic relations.

A decision constitutionalizing this issue would damage a related and no less valuable aspect of our federal system: the ability of States to experiment in their traditional domain of domestic relations law.

1. Throughout our history, evolution in domestic relations laws has occurred in the laboratories of the States. For instance, in the past our federal system allowed the States to test the ramifications of a no-fault divorce regime. Today, States are in the midst of a similar experiment with same-sex marriage. Tomorrow, the question may be whether to recognize three-person relationships as marriage. [3] Evidently, we live in a time of rapid flux in this realm. Whatever the particular issue, however, decisions on these matters reflect deep cultural understandings about what marriage is, what societal benefits it achieves, and the extent to which evolving visions of marriage should shape the law. The consequences of ***24** a decision to take a particular road will not become apparent for decades. Different States have taken different positions on these issues over time, and they continue to learn as other States grapple with evolving perspectives on matters once thought so basic to law and culture.

2. These matters are the subject of real deliberations taking place now in homes, gathering places, the media, and legislatures. Those deliberations must be allowed to continue if the States and their citizens have any real value in our constitutional system of self-government. *See, e.g., New State Ice Co.,* 285 U.S. at 311 (Brandeis, J., dissenting)

("There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. … To say experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation."). Openness to debate on this issue should not be closed by the simple linguistic step of defining the "right" at issue as a fundamental right "to marry the person of their choice." *Kitchen,* 755 F.3d at 1200. That is a facile way to resolve a debate of profound complexity. It would bypass the nationwide conversation now taking place about the meaning of marriage. It would elevate a preordained conclusion over reasoned consideration. And it would inevitably override legitimate policy differences in other areas, such as how the institution is to be limited based on age, ***25** consanguinity, and number of participants. [4] A crucial and intended aspect of our federal system is that state citizens should vigorously debate matters like these. This Court should not ordain an abrupt end to that conversation.

D. Such a decision would announce that state citizens are incapable of resolving this issue through constructive civil discourse.

A decision constitutionalizing same-sex marriage would discount the democratic process in an even more troubling way. It would send the unmistakable message that state citizens are incapable of constructively resolving this issue, and that they instead require federal tutelage in a area that lies at the heart of state sovereignty. That would flout *Windsor*'s affirmation of democratic consensus, and it would be utterly false to the Court's recent teaching in *Schuette v. Coalition to Defend Affirmative Action,* 134 S. Ct. 1623 (2014).

1. In *Schuette*, the Court rejected an equal protection challenge to a Michigan constitutional amendment forbidding affirmative action in public universities. *Schuette* found that "Michigan voters [had] exercised their privilege to enact [the amendment] as a basic exercise of their democratic power." *Id.* at 1636 (plurality op.). Recognizing the amendment reflected "the national dialogue ***26** regarding the wisdom and practicality of [affirmative action]," *Schuette* held that "courts may not disempower the voters from choosing which path to follow." *Id.* at 1631, 1635 (plurality op.). "It is demeaning to the democratic process," *Schuette* explained, "to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds," and even if debates like these "may shade into rancor … that does not justify removing [them] from the voters' reach." *Id.* at 1637, 1638 (plurality op.).

2. What *Schuette* taught about affirmative action underscores the value of democratically resolving the similarly divisive question of same-sex marriage. As with affirmative action, there is an ongoing "national dialogue regarding … [same-sex marriage]," and "courts may not disempower the voters from choosing which path to follow." *Id.* at 1631, 1635 (plurality op.). As with affirmative action, it would be "demeaning to the democratic process to presume … voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* at 1637 (plurality op.). It is the responsibility of voters - not the courts - to decide sensitive issues like these, because "[f]reedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people." *Id.; cf. Windsor,* 133 S. Ct. at 2692 ("In acting first to recognize and then to allow same sex marriages, New York was responding 'to the initiative of those who [sought] a voice in shaping the destiny of their own times.' ") (quoting *Bond,* 131 S. Ct. at 2359).

***27** *Schuette* thus reinforced the premise, central to *Windsor*, that citizens' deliberation over whether to adopt same-sex marriage is "without doubt a proper exercise of [their] sovereign authority within our federal system." *Windsor,* 133 S. Ct. at 2692. Going further, *Schuette* taught that when courts override that sovereign authority, they damage the people's ability to govern themselves. If that was true in *Schuette* with respect to affirmative action, how much more is it true in these cases, involving as they do the "State[s'] … historic and essential authority to define the marital relation." *Windsor,* 133 S. Ct. at 2692.

3. a. Regrettably, *Schuette*'s warning that courts should avoid "demeaning … the democratic process," 134 S. Ct. at 1637 (plurality op.), has proven prophetic. In the wave of post-*Windsor* decisions striking down state marriage laws,

those citizens who do not support same-sex marriage have been called "barking crowds" (*Geiger v. Kitzhaber,* 994 F.Supp.2d 1128, 1147 (D. Ore. 2014)). They have been compared to those who "believed that racial mixing was just as unnatural and antithetical to marriage as … homosexuality" (*Wolf,* 986 F.Supp.2d at 1004). They have been told that their marriage laws "achieve[] the same result" as interracial marriage bans (*Kitchen v. Herbert,* 961 F.Supp.2d 1181, 1215 (D. Utah 2013)), or worse. *See Baskin,* 766 F.3d at 667 (asserting that under interracial marriage bans, people could "find[] a suitable marriage partner of the same race"). Their defense of marriage as grounded in the biological reality of procreation has been openly mocked. *See id.* at 662 ("Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to ***28** marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure."). They have been lectured that their views are "callous and cruel," *Latta,* 771 F.3d at 470, and should be "discard[ed] into the ash heap of history." *Whitewood v. Wolf,* 992 F.Supp.2d 410, 431 (M.D. Pa. 2014).

b. This unsettling trend is also reflected in the lower courts' frequent reliance on *Loving v. Virginia.* Courts have repeatedly drawn a direct analogy between the white supremacist laws correctly invalidated in *Loving* and the man-woman marriage laws challenged here. *See, e.g., Latta,* 771 F.3d at 478 (Reinhardt, J., concurring) (asserting that, of the Court's right-to-marry cases, "*Loving* is … the most directly on point"); *Baskin,* 766 F.3d at 666 (reasoning that "[t]he State's argument from tradition runs head on into *Loving v. Virginia*"). [5] Indeed, some lower courts have gone so far as to ***29** quote extrajudicial statements by one of the plaintiffs in *Loving* in order to link it directly to these cases. *See Wolf,* 986 F.Supp.2d at 1004 (observing that "Mildred Loving herself, one of the plaintiffs in *Loving*, saw the parallel between her situation and that of same-sex couples") (citing Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation and the Constitution* 140 (Oxford Univ. Press 2010)); *Bostic,* 970 F.Supp.2d at 460 (epigraph) (quoting Mildred Loving, *Loving for All*, Public Statement on the 40th Anniversary of *Loving v. Virginia* (June 12, 2007)).

That is a troubling misapplication of a landmark decision. *Loving* rightly invalidated anti-miscegenation laws - racist relics of slavery that violated "the clear and central purpose of the Fourteenth Amendment." *Loving,* 388 U.S at 6, 10. Those odious laws have nothing - *nothing* - to do with the issues in these cases. "[I]n commonsense and in a constitutional sense … 'there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.' " *DeBoer,* 772 F.3d at 400 (quoting *Baker v. Nelson,* 191 N.W.2d 185, 187 (Minn. 1971)). While the Fourteenth Amendment outlaws invidious racial discrimination, this Court in *Windsor* recognized that the Constitution leaves citizens free "to discuss and weigh arguments for and against same-sex marriage." *Windsor,* 133 S. Ct. at 2689. It is laughable to suppose that *Windsor* would have praised New Yorkers' deliberations for and against same-sex marriage if, unbeknownst to them, a refusal to recognize same-sex marriage was equivalent to racism. The two issues are worlds apart. That should be obvious given that, five short ***30** years after *Loving*, this Court summarily rejected "for want of a substantial federal question" the claim that the Fourteenth Amendment requires a State to recognize same-sex marriage. *Baker v. Nelson,* 409 U.S. 810 (1972). [6]

c. When state citizens decline to adopt the novel institution of same-sex marriage, they are not voting to roll back the achievements of the Civil Rights Movement. That insinuation is degrading to millions of Americans, who simply wish to retain a definition of marriage "thought of by most people as essential to … [marriage's] role and function throughout the history of civilization." *Windsor,* 133 S. Ct. at 2689. This Court "should not lightly conclude that everyone who [holds] this belief [is] irrational, ignorant or bigoted." *Hernandez,* 855 N.E.2d at 8. To the contrary, this Court should roundly denounce any such notion.

And yet that is the corrosive premise so many lower court opinions have eagerly adopted over the past eighteen months. Those decisions, both in their rhetoric and their reasoning, forget that our "Constitution … is made for people of fundamentally differing views." *Lochner,* 198 U.S. at 75-76 (Holmes, J., dissenting). Many Americans believe in a new conception of marriage that would extend to same- ***31** sex relationships. Many do not. This Court has treated *both* sides of that debate as deserving respect, not derision. Of those Americans who hold that the man-woman aspect of marriage is "essential to the very definition of that term," the Court has observed that their "belief … became even more

urgent, more cherished, when challenged." *Windsor,* 133 S. Ct. at 2689. Of those who advocate for same-sex marriage, the Court has said they are sincerely acting on a "new perspective" about marriage. *Id.* Accordingly, this Court has held up as a model for resolving the issue a "statewide deliberative process that enable[s] [state] citizens to discuss and weigh arguments for and against same-sex marriage." *Id.* In other words, the Court has treated Americans holding opposing views on this question as honorable participants in a strenuous democratic debate over a question of profound civic importance.

A decision from this Court constitutionalizing the issue, however, would erase the benefits of that wise course. Inevitably, it would validate in the public mind the numerous decisions that have characterized this issue, not as a debate between good people on either side, but as a battle between those who love individual freedom and those who cling blindly to tradition. That would do incalculable damage to our civic life in this country. *See Schuette,* 134 S. Ct. at 1637 (plurality op.) (explaining that "[i]t is demeaning to the democratic process" to "insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate"). How much better for this issue to play out, state-by-state, with citizens locked in urgent conversation. That is precisely what was happening before the ***32** courts began to intervene two years ago. The Court should let that process of self-governance continue.

Conclusion

The Court should affirm the decision of the Sixth Circuit.

Footnotes

1 *See also, e.g., Bostic v. Schaefer,* 760 F.3d 352, 378 (4th Cir. 2014) (compelling recognition of same sex marriage, despite recognizing that "*Windsor* … rested in part on the Supreme Court's respect for states' supremacy in the domestic relations sphere), *cert denied*, 135 S. Ct. 308 (2014); *Wolf v. Walker,* 986 F.Supp.2d 982, 996 (W.D. Wis.), *aff'd sub nom. Baskin v. Bogan,* 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 83 U.S.L.W. 3127 (Oct. 6, 2014) (invalidating Wisconsin marriage law, despite admitting that *Windsor* "noted multiple times … that the regulation of marriage is a traditional concern of the states).

2 *See* Del. Stat. Tit. 13 § 101; Haw. Rev. Stat. § 572 1; Ill. St. Ch. 750 § 5/213.1; Me. Rev. Stat. Ann. tit. 19 A §650 A; Md. Fam. Law Code Ann. §2 201; 2013 Minn. Laws ch. 74; N. H. Rev. Stat. Ann. §457:1 a; N. Y. Dom. Rel. Law Ann. §10 a; 2013 R. I. Laws ch. 4; Vt. Stat. Ann., Tit. 15, §8; Wash. Rev. Code §26.04.010.

3 *See e.g.*, Fahima Haque, *Meet the "World's First Gay Married "Throuple,* N.Y. Post, Feb. 27, 2015, http://nypost.com/2015/02/27/thai throuple believed to be worlds first gay married trio/; Steven Hopkins, "*I Do, I Do, I Do : Three Men Tie the Knot in Thailand to Become the World's First Wedded Threesome*, The Mirror, Feb. 27, 2015, http://www.mirror.co.uk/news/uk news/i do do do three 5241726.

4 For instance, the issue of polygamy is pending in the Tenth Circuit, where the district court struck down Utah's laws restricting polygamy. *Brown v. Buhman,* 947 F.Supp.2d 1170 (D. Utah 2013), *appeal docketed*, No. 14 4117 (10th Cir. Sept. 25, 2014).

5 *See also, e.g., Rosenbrahn v. Daugaard,* F.Supp.3d , 2015 WL 144567, at *11 (D.S.D. Jan. 12, 2015) ("Little distinguishes this case from *Loving.*); *Campaign for Southern Equality v. Bryant,* F.Supp.3d , 2014 WL 6680570, at *13 (S.D. Miss. Nov. 25, 2014) ("Perhaps the most significant case demonstrating the evolving conception of the right to marry is *Loving v. Virginia.*), *appeal docketed,* No. 14 60837 (5th Cir. Nov. 26, 2014); *De Leon v. Perry,* 975 F.Supp.2d 632, 659 (W.D. Tx. 2014) ("Plaintiffs … seek to exercise the right to marry the partner of their choosing, just as the plaintiffs in *Loving* did, despite the State's purported moral disdain for their choice of partner.), *appeal docketed*, No. 14 50196 (5th Cir. Mar. 1, 2014); *Bostic v. Rainey,* 970 F.Supp.2d 456, 474 (E.D. Va. 2014) (rejecting defendants' arguments as asserting " n]early identical concerns about the significance of tradition that were "resolved by … the Supreme Court in its *Loving* decision).

6 Four of the Justices who decided *Loving* sat on the Court that decided *Baker* (Justices Douglas, Brennan, Stewart, and White), and Justice Marshall was nominated to the Court on June 13, 1967, the day after *Loving* was decided. It *Loving* had any relevance to the issues here, one surely would have expected to hear that view from these Justices. Instead, they joined a unanimous Court that summarily rejected any equivalence between the two.

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2014 WL 4216041 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

George E. SCHAEFER, III, in his official capacity as the Clerk of Court for Norfolk Circuit Court, Petitioner,
v.
Timothy B. BOSTIC, et al.

No. 14-225.
August 22, 2014.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for a Writ of Certiorari

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***i** Question Presented

In *United States v. Windsor,* this Court invalidated the federal marriage definition in the Defense of Marriage Act because it usurped the States' "historic and essential authority to define the marital relation," and sought to "influence or interfere with state sovereign choices about who may be married." 133 S. Ct. 2675, 2692, 2693 (2013). Like two-thirds of the States, Virginia defines marriage as a man-woman union. It neither licenses nor recognizes same-sex marriages. The lower courts ruled, however, that the Fourteenth Amendment compels Virginia to do both.

The question presented is:

Whether the Fourteenth Amendment compels Virginia to license and recognize same-sex marriages.

***ii Parties to the Proceedings**

Petitioner George E. Schaefer, III, in his official capacity as the Clerk of the Circuit Court of the City of Norfolk, Virginia, was a defendant in the district court and an appellant in the court of appeals.

Respondents Timothy B. Bostic, Tony C. London, Carol Schall, and Mary Townley were plaintiffs in the district court and appellees in the court of appeals.

Respondents Joanne Harris, Christy Berghoff, Victoria Kidd, and Jessica Duff, class-action plaintiffs in *Harris v. Rainey,* No. 5:13-cv-77, 2014 WL 352188 (W.D. Va. Jan. 31, 2014), intervened in the court of appeals to argue against the constitutionality of Virginia's marriage laws.

Michèle B. McQuigg, in her official capacity as the Clerk of the Circuit Court of Prince William County, Virginia, intervened in the district court to defend the constitutionality of Virginia's marriage laws and was an appellant in the court of appeals.

Janet M. Rainey was a defendant in the district court and an appellant in the court of appeals. She was sued in her official capacity as the State Registrar of Vital Records for the Commonwealth of Virginia. After litigation commenced, she reversed her position in the district court and argued against the constitutionality of Virginia's marriage laws.

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***v** TABLE OF AUTHORITIES

Cases

***1 Opinions Below**

The court of appeals' opinion (App. 1) is reported at 2014 WL 3702493 (4th Cir. July 28, 2014). The district court's opinion (App. 132) is reported at 970 F.Supp.2d 456 (E.D. Va. 2014).

Jurisdiction

The judgment of the court of appeals was entered on July 28, 2014. App. 129. This Court has jurisdiction under 28U.S.C. §§ 1254(1) and 2101(c).

Constitutional and Statutory Provisions Involved

The Tenth and Fourteenth Amendments to the U.S. Constitution provide in relevant part:

> ***2** 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.

> No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Article I of the Virginia Constitution provides in relevant part:
That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.

This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

Va. Const. art. I, § 15-A (2006)

Title 20 of the Virginia Code provides in relevant part:

> A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.

***3** Va. Code Ann. §20-45.2(1997)

> A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

Va. Code Ann. § 20-45.3 (2004).

***4 Introduction**

This petition arises from a spiraling national controversy only this Court can resolve. That controversy, however, does not concern the merits of same-sex marriage. It does not even concern whether we will have same-sex marriage in the United States. We already do: a minority of States have recently adopted it through the democratic process. Rather, the controversy concerns whether the issue will be decided by state citizens or by judges.

Since this Court's *Windsor* decision last year, a wave of courts has decreed that the Fourteenth Amendment compels States to recognize same-sex marriage. Yet *Windsor* itself taught that state citizens are free to make up their own minds about this issue by exercising their "historic and essential authority to define the marital relation." 133 S. Ct. at 2692. These decisions, then, have not applied *Windsor;* they have subverted it. They have not enforced the Fourteenth Amendment; they have "demean[ed] … the democratic process." *Schuette v. Coalition to Defend Affirmative Action,* 134 S. Ct. 1623, 1637 (2014) (op. of Kennedy, J.). They have not expanded freedom; they have reduced it.

Contrary to these mistaken decisions, the Fourteenth Amendment does not override "state sovereign choices" about whether to adopt same-sex marriage. *Windsor,* 133 S. Ct. at 2693. This petition is the right vehicle to settle that issue. The petitioner, George Schaefer, is a circuit court clerk responsible for issuing marriage licenses and has been at the center of this controversy in Virginia from the beginning. The case has no standing defects. Nor are there any prudential standing issues with Schaefer's petition. Unlike the Virginia Attorney General - who changed position mid-litigation and attacked Virginia's marriage laws - Schaefer consistently defended those laws in the ***5** district court and on appeal, and would continue to do so vigorously in this Court.

The Court should grant Schaefer's petition and rule that the decision of Virginia's citizens to retain the traditional definition of marriage was "without doubt a proper exercise of [their] sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Windsor,* 133 S. Ct. at 2692.

Statement of the Case

1. a. "The States are currently in the midst of an intense democratic debate over the novel concept of same-sex marriage[.]" *Sevcik v. Sandoval,* 911 F.Supp.2d 966, 1013 (D. Nev. 2012). Over the past five years, twelve States have expanded civil marriage through the democratic process to include same-sex couples. *See* App. 79 (Niemeyer, J., dissenting) (since 2009, twelve States have "enact[ed] legislation recognizing same-sex marriage"). A few others have acquiesced in court rulings requiring same-sex marriage. *Id.* (seven States). But nearly two-thirds of the States - representing about 200 million citizens - have adhered to the man-woman concept. That is unsurprising, for "until recent years … marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor,* 133 S. Ct. at 2689.

b. Virginia's citizens, like those of most States, have chosen to keep the man-woman definition. Virginia has always defined marriage this way.[2] Yet, as the concept of ***6** same-sex unions emerged, Virginia engaged more than once in a "deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage." *Windsor,* 133 S. Ct. at 2689. That process consistently reaffirmed the man-woman definition.

Thus, Virginia declined to recognize out-of-state same-sex marriages in 1997, and expanded that prohibition to same-sex civil unions and similar arrangements in 2004.[3] In 2006, Virginia's citizens amended their Constitution to define marriage as "only a union between one man and one woman," and to prohibit creation or recognition of "a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage." Va. Const. art. I, § 15-A. That provision, known as the Marshall-Newman Amendment, was initially

approved in 2005 and 2006 in separate legislative sessions on either side of a general election, as required by the Virginia Constitution. *See* Va. Const. art. XII, § 1; 2005 Va. Acts chs. 946, 949; 2006 Va. Acts chs. 944, 947. Virginians finally approved the amendment in November 2006 by a margin of 57-43%, with 1,328,537 votes in favor. [4]

***7** 2. Petitioner George Schaefer is the Clerk of the Circuit Court for the City of Norfolk, Virginia. As a court clerk, Schaefer is an independent constitutional officer with responsibility for issuing marriage licenses and for transmitting marriage records to the State Registrar. Va. Const. art. VII, § 4; Va. Code Ann. §§ 20-14, 20-16, 32.1-267(D). On July 1, 2013, Respondents Timothy Bostic and Tony London, a same-sex couple, applied for a marriage license from Schaefer's office. He declined to issue one, however, because Virginia law expressly prohibits him from issuing a marriage license to same-sex applicants. App. 39-41.

On July 18, 2013, Bostic and London sued Schaefer in federal court in his official capacity as the Norfolk Circuit Court Clerk, alleging that his enforcement of the Virginia marriage laws violated their equal protection and due process rights under the Fourteenth Amendment and 42 U.S.C § 1983. [5] On September 3, 2013, they filed an amended complaint adding as plaintiffs Respondents Carol Schall and Mary Townley, a same-sex couple married under California law. Schall and Townley alleged that the Fourteenth Amendment compels Virginia to recognize their marriage so that, among other things, they could jointly adopt Townley's biological child and both appear on the child's birth certificate. The amended complaint also added as a defendant Janet Rainey, the State Registrar of Vital Records. App. 40-41.

The parties filed cross-motions for summary judgment. On January 21, 2014, the district court allowed Michèle McQuigg - the Prince William County Circuit Court ***8** Clerk - to intervene as a defendant. Two days later the newly-elected Virginia Attorney General, Mark Herring, submitted a formal change in position on behalf of his client, Janet Rainey. Herring informed the court that he would no longer defend the Virginia marriage laws, although Virginia would continue enforcing them. Schaefer and McQuigg continued to defend the laws in order to obtain a final resolution from the courts. App. 41.

3. On February 13, 2014, the district court ruled that the Virginia marriage laws violate the equal protection and due process guarantees of the Fourteenth Amendment, App. 184-85, and on February 24 entered a final judgment enjoining Schaefer, McQuigg, and Rainey from enforcing them. App. 130-31.

The court first held Respondents had standing because they properly sued Schaefer and Rainey, the Virginia officials responsible for enforcing the challenged laws. App. 147-50. [6] Turning to the due process claim, the court held the Virginia laws burdened Respondents' fundamental right to marry, which the court defined as "the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." App. 158 (quoting *Kitchen v. Herbert,* 961 F.Supp.2d 1181, 1202-03 (D. Utah 2013)). The court therefore subjected the laws to strict scrutiny, which it found they did not meet. App. 160-75. Turning to the equal protection claim, the court held he Virginia laws "fail to display a rational relationship to a legitimate purpose." App. 179. Consequently, the court did ***9** not decide whether the laws triggered heightened scrutiny, although it suggested they would. App. 179 n. 16.

The court therefore granted summary judgment in favor of Respondents and enjoined Schaefer, McQuigg, and Rainey from enforcing the Virginia marriage laws. The court stayed the injunction pending appeal. App. 185.

4. A divided panel of the Fourth Circuit affirmed, holding that Respondents' fundamental right to marry included the right to marry someone of the same sex, and that the Virginia laws did not meet strict scrutiny. App. 37. [7] Judge Niemeyer dissented. App. 75.

a. Like the district court, the panel majority first found Respondents had standing. Specifically, the majority held Bostic and London "possess Article III standing with respect to Schaefer" because Schaefer's refusal to issue them a marriage license constituted an injury for standing purposes, and because "Schaefer bears the requisite connection to the enforcement of the Virginia Marriage Laws due to his role in granting and denying applications for marriage licenses." App. 44-45 & n.3. The majority also held that all Respondents had standing to sue Rainey because of her authority over marriage, birth certificate, and adoption forms. App. 46-48. [8]

On the merits, the majority held that "the fundamental right to marry encompasses the right to same-sex marriage." App. 55. The majority declined to apply *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) - which requires the ***10** asserted right to be "carefully described" and "deeply rooted" in our national history - because it found that the right to same-sex marriage was not a "new" right. App. 55. Instead, the majority read this Court's cases to establish "an expansive liberty interest that may stretch to accommodate changing societal norms," and a correspondingly "broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right." App. 56-57 (citing *Loving v. Virginia,* 388 U.S. 1 (1967); *Zablocki v. Redhail,* 434 U.S. 374 (1978); *Turner v. Safely,* 482 U.S. 78 (1987)).

Having found the fundamental right to marry already included same-sex marriage, the majority then found the Virginia laws did not meet strict scrutiny. It held that the laws could not be justified by Virginia's interests in exercising its historic authority over domestic relations law, in preventing the destabilization of its concept of marriage, or in connecting children to intact families formed by their biological parents. App. 59-73.

With regard to federalism - an argument Schaefer emphasized - the majority admitted "[t]he *Windsor* decision rested in part on the Supreme Court's respect for states' supremacy in the domestic relations sphere." App. 60. Nonetheless, the majority found *Windsor* "actually detrimental to [Virginia's] position" because the decision "reiterates *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees." App. 61 (citing *Windsor,* 133 S. Ct at 2691).

b. Judge Niemeyer dissented, arguing the majority "failed to conduct the necessary constitutional analysis." App. 76.

Judge Niemeyer primarily criticized the majority for "explicitly bypass[ing] the relevant constitutional analysis ***11** required by *Washington v. Glucksberg*" App. 77. He reasoned that none of this Court's right-to-marry cases includes "the new notion of 'same-sex marriage,' " because they all involved couples seeking to enter "a traditional marriage of the type that has always been recognized since the beginning of the Nation - a union between one man and one woman." App. 87.

The dissent emphasized that *Loving* provides no support for a right to same-sex marriage because it "simply held that race, which is completely unrelated to marriage, could not be the basis for marital restrictions." App. 91. Finally, the dissent cautioned that the "sweeping" right identified by the majority - *i.e.*, the "constitutional liberty to select the partner of one's choice" - would subject to strict scrutiny all manner of state marriage restrictions or regulations, including "laws prohibiting polygamous or incestuous marriages." App. 91-92.

Finding no fundamental right to same-sex marriage, Judge Niemeyer would have upheld the Virginia marriage laws under rational basis review. App. 93.

Specifically, he would have found Virginia's limitation of marriage to opposite-sex couples rationally furthers its interest in linking children to intact families formed by their biological parents. *See* App. 98 (reasoning that Virginia's laws "are grounded on the biological connection of men and women" and on "the potential for their having children"). He would have also found it reasonable for Virginia's citizens to believe that expanding marriage to include same-sex couples would not similarly further that interest. *See* App. 88 (observing that "[o]nly the union of a man and a woman has the capacity to produce children … [a]nd, more importantly, only such a union creates a biological family unit that gives rise to a traditionally stable political unit"). Finally, Judge Niemeyer would have found it reasonable for ***12** Virginia's citizens

to be concerned that making such a fundamental change to marriage "may have unforeseen social effects." App. 97. Under rational basis review, he would have ruled "the legislature 'is far better equipped than the judiciary' to make these evaluations and ultimately decide on a course of action based on its predictions." *Id.* (quoting *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 665 (1994) (plurality op.)). [9]

In sum, Judge Niemeyer would have held that the "U.S. Constitution does not … restrict the States' policy choices on this issue," and the federal judiciary therefore "must allow the States to enact legislation on the subject in accordance with their political processes." App. 104.

Reasons for Granting the Petition

I. The question presented is one of urgent national importance that only this Court can resolve.

1. This Court previously granted certiorari to review the question presented here in *Hollingsworth v. Perry,* 133 S. Ct. 786 (2012), and since then the need to resolve the issue has grown by orders of magnitude.

In the wake of last year's *Windsor* decision, federal district courts have invalidated the marriage laws of 14 States. [0] Split panels of two federal circuits - the Tenth and ***13** the Fourth - have subsequently upheld the invalidation of marriage laws in Virginia, Utah, and Oklahoma. *See Kitchen v. Herbert,* F.3d , 2014 WL 2868044 (10th Cir. June 25, 2014); *Bishop v. Smith,* F.3d , 2014 WL 3537847 (10th Cir. July 18, 2014). The Fourth Circuit's decision in this case will also affect the marriage laws of North Carolina, South Carolina, and West Virginia. This Court has already issued stays in this case and in two decisions from the Tenth Circuit to prevent Virginia and Utah from being required to issue same-sex marriage licenses during the appellate process. *See McQuigg v. Bostic,* 2014 WL 4096232 (U.S. Aug. 20, 2014) (Order); *Herbert v. Evans,* 2014 WL 3557112 (U.S. July 18, 2014) (Order); *Herbert v. Kitchen,* 134 S. Ct. 893 (2014) (Order). This remarkable outpouring of decisions has already resulted in a split among three federal circuits (the Fourth, Eighth, and Tenth), and a split with analogous state appellate decisions. Only this Court can bring order to this nationwide disarray, which will only worsen if the Court does not act immediately. *See, e.g.*, ***14** Rainey Petition at 15-17 (noting pendency of appeals in the Fifth, Sixth, Seventh, and Ninth Circuits).

2. Aside from the disorder in the lower courts, there is an even deeper reason for this Court's immediate intervention. The flood of post-*Windsor* decisions invalidating traditional marriage laws represents a complete subversion of *Windsor* itself, which was premised on the idea that the citizens of the *States* have "the historic and essential authority to define the marital relation," including whether to recognize same-sex marriage. *Windsor,* 133 S. Ct. at 2692; *see also id.* at 2697 (Roberts, C.J., dissenting) (noting "it is undeniable that [the majority's] judgment is based on federalism"); *infra* part III (discussing federalism premises of *Windsor*).

As *Windsor* emphasized, a major strike against DOMA § 3 was that its "purpose [was] to influence or interfere with *state sovereign choices about who may be married.*" *Id.* at 2693 (discussing Defense of Marriage Act, § 3, 110 Stat. 2419) (emphasis added). Yet numerous federal courts over the last year, including the courts below, have used *Windsor* to override precisely the same state sovereign choices *Windsor* sought to protect from federal interference. *See, e.g.*, App. 61 (explaining that "*Windsor* is actually detrimental to [defendants'] position"). Attempting to apply *Windsor,* these courts have effectively overruled it. Only this Court can correct this persistent and widespread misapplication of its own precedent.

II. This case provides an ideal vehicle to answer the question.

The Court should grant Schaefer's petition because the case presents an ideal vehicle for resolving the question whether States may continue to exercise their historic authority to define marriage or whether the Fourteenth Amendment compels them to adopt same-sex marriage.

***15** 1. This case squarely presents that question. Over the past two decades, Virginia's citizens have made a consistent choice in favor of the traditional concept of marriage. Just as New York's citizens undertook a "statewide deliberative process that enabled [them] to discuss and weigh arguments for and against same-sex marriage," *Windsor,* 133 S. Ct. at 2689, so too did Virginia's citizens weigh the same issue on multiple occasions. Virginians simply reached a different conclusion than New Yorkers. *Either choice*, however, is "without doubt a proper exercise of … sovereign authority within our federal system." *Id.* at 2692. Virginians' clear decision in favor of traditional marriage thus robustly poses the question whether a State's citizens may continue to make "sovereign choices about who may be married." *Windsor,* 133 S. Ct. at 2693.

2. Moreover, this case presents both aspects of that question. Respondents Bostic and London seek to be married in Virginia, whereas Respondents Schall and Townley seek to have their out-of-state same-sex marriage recognized in Virginia. App. 39-40. On the merits the issues are interrelated. *See, e.g., Kitchen,* 2014 WL 2868044 at *16 (agreeing with "multiple district courts" that the issues are interrelated) (collecting cases). But the presence of both claims will allow the Court to fully answer the question presented. *Cf., e.g., Bishop,* 2014 WL 3537847, at *15 (recognition issue not presented because named defendant "had no power to recognize the [same-sex] couple's out-of-state marriage").

3. This case has no standing problems. As both lower courts recognized, Respondents properly sued Schaefer and Rainey, the state officials charged with enforcing the challenged marriage laws. *See* App. 44-48, 147-50; *see also, e.g.*, Rainey Petition at 36 (agreeing that "Bostic and London correctly sued respondent Schaefer, the clerk who ***16** denied them a marriage license," and that "Schall and Townley correctly sued Rainey on their marital nonrecognition claim").

4. Additionally, this case has no appellate standing problems. Unlike in *Hollingsworth* - where no government official appealed the adverse lower court decision, *see Hollingsworth v. Perry,* 133 S. Ct. 2652, 2662 (2013) - here Schaefer appealed the district court's injunction against him and now seeks review of the decision affirming it. That injunction requires Schaefer to issue marriage licenses to same-sex couples, contrary to Virginia law. App. 131 (enjoining "the Clerk of the Circuit Court of the City of Norfolk" from enforcing Virginia's marriage laws). Schaefer therefore has appellate standing to seek review of the Fourth Circuit's decision in this Court. *Cf. Hollingsworth,* 133 S. Ct. at 2662 (ballot initiative proponents lacked appellate standing because district court "had not ordered them to do or refrain from doing anything"). [2]

5. There are also no prudential standing problems presented by Schaefer's petition. Despite the mid-litigation change of position by the Virginia Attorney General, Schaefer is represented by independent counsel, defended the Virginia laws in the district court and the Fourth Circuit, and will vigorously defend them in this Court. [3] Schaefer's ***17** presence as the government official charged with enforcing the challenged laws ensures " 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Windsor,* 133 S. Ct. at 2687 (quoting *Baker v. Carr,* 369 U.S. 186, 204 (1962)). Indeed, prudential standing is much clearer here than in *Windsor,* where the Court reached the merits despite the fact that the only party defending the law was an intervening legal advisory group. 133 S. Ct. at 2684, 2687-88. Here, by contrast, Schaefer was one of the originally named defendants, has defended Virginia law throughout the litigation, and is an independent constitutional officer with " 'the requisite connection to the enforcement of the Virginia Marriage Laws due to his role in granting and denying applications for marriage licenses." App. 45 n.3

6. Finally, Schaefer is the proper petitioner in this Court from the Fourth Circuit's decision. Schaefer was originally sued in the case because he refused to violate Virginia law by issuing a marriage license to Bostic and London. App. 39-41. As a government official charged with enforcing Virginia's marriage laws, Schaefer has defended the constitutionality of

those laws throughout this litigation. The district court's injunction runs directly against him. Moreover, this ruling will apply to other government officials across the Commonwealth and the remainder of the States within the Fourth Circuit. It is thus easy to grasp the logic of Schaefer's petition: he wishes to have the Fourth Circuit's decision fully reviewed by this Court to remove any question about the validity of Virginia's marriage laws ***18** and to clarify the responsibilities of similarly situated government officials across the nation.

By contrast, it is harder to grasp why the Virginia Attorney General has petitioned on behalf of Rainey. *See* Rainey Petition at 37 (asserting Rainey is a "proper petitioner here, despite that the Virginia Attorney General agrees with the *Bostic* and *Harris* respondents that Virginia's same-sex marriage ban violates the Fourteenth Amendment"). The newly-elected attorney general changed positions in the district court and attacked the constitutionality of Virginia's marriage laws. App. 41. Presumably, the attorney general is satisfied with the Fourth Circuit's decision - and is thus for all practical purposes a prevailing party - yet he rushed a certiorari petition to this Court eleven days after the Fourth Circuit's decision.

Even if the attorney general has standing to seek this Court's review because Rainey continues to enforce Virginia law, *see* Rainey Petition at 37, that does not mean granting his petition would be appropriate. "As a matter of practice and prudence, [this Court] ha[s] generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed [it] to do so." *Camreta v. Greene,* 131 S. Ct. 2020, 2029 (2011)); *see also, e.g., Bunting v. Mellen,* 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from denial of certiorari) ("[O]ur practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed" (quoting Stern & Gressman 79 (8th ed. 2002)). Moreover, using the attorney general's unorthodox petition as the vehicle for reviewing the decision below would raise a host of procedural questions, many of which troubled the Court in *Windsor. See* 133 S. Ct. at 2688 (noting the "procedural dilemma" created by "[t]he Executive's failure to defend the constitutionality ***19** of an Act of Congress based on a constitutional theory not yet established injudicial decisions").

There is no need to enter those troubled waters again here. Instead, the Court should grant Schaefer's more straightforward petition, which cleanly presents all the issues in the litigation. If the Court grants Schaefer's petition, the attorney general can still file briefs on Rainey's behalf, presumably aligned with Respondents. *See* Sup. Ct. R. 12.6 (providing that "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court"). Granting Schaefer's petition is a sensible option which avoids the need to address the attorney general's "unusual position" of petitioning to review a decision he openly believes to be correct. *Windsor,* 133 S. Ct. at 2687.

III. The Fourth Circuit's decision nullifies the authority of Virginia's citizens to determine the basic definition of marriage.

The Fourth Circuit's decision is wrong for two principal reasons. First, it subverts this Court's decision in *Windsor,* which was premised on the States' "historic and essential authority to define the marital relation." 133 S. Ct. at 2692. The majority misunderstood that teaching of *Windsor* and thus nullified Virginians' "sovereign choices about who may be married." *Id.* at 2693. Second, the decision below misapplies this Court's fundamental rights jurisprudence by failing to carefully describe the asserted right as a right to marry someone *of the same sex.* That new right may legitimately be conferred by the citizens of the States, as some States have done. But by no stretch of the imagination is that right "objectively, deeply rooted in this Nation's history and tradition." *Glucksberg,* 521 U.S. at 720-21.

***20 A. *Windsor* emphatically reaffirmed the States' "historic and essential authority to define the marital relation."**

1. *Windsor* invalidated under the Fifth Amendment section 3 of DOMA, which defined marriage as a man-woman union for federal purposes. 133 S. Ct. at 2683. The key to *Windsor*'s outcome was that DOMA subverted the principle that the " 'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the

States.' " *Id.* at 2691 (quoting *Sosna v. Iowa.* 419 U.S. 393, 404 (1975)). [4] "The definition of marriage,' " this Court explained, is "the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' " *Id.* (quoting *Williams v. North Carolina,* 317 U.S. 287, 298 (1942)). That historic allocation of domestic relations authority to the States was central to *Windsor*'s holding. *See id.* at 2692 (stating that "[t]he State's power in defining the marital relation [was] *of central relevance*" to the outcome) (emphasis added).

In this Court's view, DOMA's broad federal marriage definition usurped "state responsibilities for the definition and regulation of marriage." *Id.* at 2691. DOMA "depart[ed]" from the federal government's "history and tradition of reliance on state law to define marriage," *id.*, a conclusion which led to its invalidation. *See id.* (DOMA's "depart[ure]" from federal reliance on state marriage ***21** definitions showed a "[d]iscrimination[ ] of unusual character") (quoting *Romer v Evans,* 517 U.S. 620, 633 (1996)); *id.* at 2693 ("DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage" violated rights of same-sex married couples).

Windsor thus tightly linked individual rights to the States' traditional authority over domestic relations law. It vindicated the rights of same-sex married couples by affirming New York's authority "to recognize and then to allow same-sex marriages" in the first place. *Id.* at 2692; *see, e.g., Bond v. United States,* 131 S. Ct. 2355, 2364 (2011) (explaining that "[f]ederalism secures the freedom of the individual" by "allow[ing] States to respond … to the initiative of those who seek a voice in shaping the destiny of their own times"). New York's decision to define marriage was "without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Windsor,* 133 S. Ct. at 2692. DOMA fell precisely because it undermined that sovereign authority by diminishing the rights New York granted same-sex couples. Underlining this point, the Court expressly limited its holding to persons "joined in same-sex marriages *made lawful by the State.*' " *Id.* at 2695 (emphasis added).

2. a. The majority decision below fundamentally misunderstood the central role *Windsor* accorded state authority over defining marriage. Initially, the majority recognized that *Windsor* "rested in part on the Supreme Court's respect for states' supremacy in the domestic relations sphere." App. 60. But the majority then contradicted itself by concluding that the "foundation" for *Windsor*'s holding was actually the "injury to same-sex couples" caused by DOMA. App. 61. That dramatically truncates *Windsor*'s reasoning. It ignores that *Windsor*: (1) ***22** spent seven pages tracing the origins of "state responsibilities for the definition and regulation of marriage … to the Nation's beginning" (133 S. Ct. at 2691, 2689-96); (2) praised New York's "statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage" (*id.* at 2689); (3) emphasized that DOM A was "unusual" because it "depart[ed] from [the federal government's] history and tradition of reliance on state law to define marriage" (*id.* at 2692), and (4) limited its "opinion and holding" to "those persons who are joined in same-sex marriages made lawful by the State" (*id.* at 2695-96). In short. *Windsor* struck down DOMA - not simply because it discriminated against same-sex couples, as the majority below thought - but because DOMA's "purpose [was] to influence or interfere with *state sovereign choices* about who may be married." *Id.* at 2693 (emphasis added). To divorce *Windsor*'s holding about individual rights from its holding about state authority is to render the decision incoherent.

b. The majority attempted to minimize *Windsor*'s federalism rationale by invoking its statement that state marriage laws "must respect the constitutional rights of persons." App. 61 (noting *Windsor* "reiterates *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees"). This again misreads *Windsor.* The only case *Windsor* cited to illustrate that statement was *Loving v. Virginia.* But it is deeply implausible that this citation to *Loving* is, as some courts have said, a "disclaimer of enormous proportions," *Bishop v. United States ex rel. Holder,* 962 F.Supp.2d 1252, 1279 (N.D. Okla. 2014), portending the inevitable demise of man-woman marriage laws. After all, a mere five years after *Loving,* this Court summarily rejected a constitutional right to same-sex marriage as failing to present "a substantial federal question." *Baker v. Nelson,* 409 U.S. 810.

***23** Moreover, on its own terms *Loving* has nothing to do with this case. *Loving* involved anti-miscegenation laws - racist relics of slavery that violated "the clear and central purpose of the Fourteenth Amendment" and triggered strict scrutiny. 388 U.S. at 6, 10; *see also, e.g., Jackson v. Abercrombie,* 884 F.Supp.2d 1065, 1097 n.22 (D. Hawaii 2012) (analogy to *Loving* in the same-sex marriage context is "unpersuasive" because it "involved an invidious discrimination on the basis of race, a suspect classification"). While the Fourteenth Amendment plainly outlaws such invidious racial discrimination, *Windsor* recognized the Constitution leaves citizens free "to discuss and weigh arguments for and against same-sex marriage" because "[t]he dynamics of state government in our federal system are to allow the formation of consensus" on this foundational issue. *Windsor,* 133 S. Ct. at 2689, 2692.

The two issues - racism and same-sex marriage - are worlds apart. As the New York Court of Appeals eloquently explained in upholding New York's marriage laws in 2006:
[T]he historical background of *Loving* is different from the history underlying this case. Racism has been recognized for centuries - at first by a few people, and later by many more - as a revolting moral evil. This country fought a civil war to eliminate racism's worst manifestation, slavery, and passed three constitutional amendments to eliminate that curse and its vestiges. *Loving* was part of the civil rights revolution of the 1950's and 1960's, the triumph of a cause for which many heroes and many ordinary people had struggled since our nation began.

[…]

[T]he traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a ***24** different kind. The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude.

Hernandez v. Robles, 855 N.E.2d 1, 8 (N.Y. 2006).

3. The Fourth Circuit majority is by no means the only lower court to have subverted *Windsor*'s grounding in state authority. For instance, in *Kitchen v. Herbert* the Tenth Circuit reduced *Windsor*'s reliance on state sovereignty to a "prudential concern[ ]." 2014 WL 2868044, at *31. The two-judge majority dismissed arguments appealing to "the value of democratic decision-making and the benefits of federalism" as "a mere preference that [plaintiffs'] arguments be settled elsewhere." *Id.* And - remarkably - it said the choice between resolving this issue by federal decree or by the democratic process was merely a matter of "timing." *Id.*

Judge Kelly's dissent in *Kitchen* rightly rejected this reasoning as a basic misreading of *Windsor.* As he explained, "*Windsor* did not create a fundamental right to same-gender marriage. To the contrary, *Windsor* recognized the authority of the States to redefine marriage and stressed the need for popular consensus in making such change." *Id.* at *38 (Kelly, J., dissenting) (citing *Windsor,* 133 S. Ct. at 2692). Ignoring that "the States are laboratories of democracy" with respect to this basic issue would "turn [ ] the notion of a limited national government on its head." *Id.* ***25** at *33 (Kelly, J., dissenting) (citing *Bond,* 131 S. Ct. at 2364). [5]

4. Finally, this Court recently reinforced *Windsor*'s respect for state authority in *Schuette v. Coalition to Defend Affirmative Action,* which rejected an equal protection challenge to a Michigan constitutional amendment forbidding affirmative action in public universities. 134 S. Ct. 1623 (2014). *Schuette* found that "Michigan voters [had] exercised their privilege to enact [the amendment] as a basic exercise of their democratic power." *Id.* at 1636 (op. of Kennedy, J.). Recognizing the amendment reflected "the national dialogue regarding the wisdom and practicality of [affirmative action]," *Schuette* held that "courts may not disempower the voters from choosing which path to follow." *Id.* at 1631, 1635. "It is demeaning to the democratic process," *Schuette* said, "to presume that the voters are not capable of deciding

an issue of this sensitivity on decent and rational grounds," and even if debates like these "may shade into rancor … that does not justify removing [them] from the voters' reach." *Id.* at 1637, 1638.

Schuette speaks directly to the issue of state authority here. As with affirmative action, there is an ongoing "national dialogue regarding … [same-sex marriage]," and "courts may not disempower the voters from choosing which path to follow." *Id.* at 1631, 1635. As with affirmative action, it would be "demeaning to the democratic process to ***26** presume … voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* at 1637. Indeed, it is the responsibility of voters - not the courts - to decide the issue, because "[f]reedom embraces the right indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people." *Id; cf. Windsor,* 133 S. Ct. at 2692 ("In acting first to recognize and then to allow same sex marriages, New York was responding 'to the initiative of those who [sought] a voice in shaping the destiny of their own times.' ") (quoting *Bond,* 131 S. Ct. at 2359). *Schuette* thus reinforces *Windsor*'s point that a state's decision to recognize same-sex marriage, or not to, is "without doubt a proper exercise of its sovereign authority within our federal system." 133 S. Ct. at 2692. With respect to the validity of either sovereign decision, *Windsor* and *Schuette* speak in unison: "There is no authority in the Constitution of the United States or in [the Supreme] Court's precedents for the Judiciary to set aside [the] laws that commit this policy determination to the voters." *Schuette,* 134 S. Ct. at 1638.

5. In sum, the Court should grant this petition in order to reaffirm *Windsor*' s, holding that the decision whether to adopt same-sex marriage falls squarely within the States' "historical and essential authority to define the marital relation." 133 S. Ct. at 2692.

B. The right to marry someone of the same sex is not deeply rooted in our national history.

1. The majority's second major error was its decision to "explicitly bypass [ ] the relevant constitutional analysis required by *Washington v. Glucksberg.*" App. 77 (Niemeyer, J., dissenting). *Glucksberg* requires a plaintiff, first, to provide a " 'careful description' of the asserted fundamental liberty interest," and, second, to show that interest is ***27** "objectively, deeply rooted in this Nation's history and tradition." 521 U.S. at 720-21 (citations omitted). That analysis is vital in this case, because the asserted right to same-sex marriage is not encompassed by the right to personal privacy in matters of sex and procreation. *See Lawrence v. Texas,* 539 U.S. 558, 578 (2003) (emphasizing that it "d[id] not involve whether the government must give formal recognition to any relationship that homosexual persons may enter").

2. The Fourth Circuit majority did not apply *Glucksberg* at all. Reasoning that "*Glucksberg*'s analysis applies only when courts consider whether to recognize new fundamental rights," the majority found the right to marry someone of the same sex was not a "new" right but was instead included in the "right to marry" established by this Court's cases. *Id.* The majority was mistaken.

a. First, *Windsor* itself refutes the majority's premise for not applying *Glucksberg. Windsor* recognized that New York's adoption of same-sex marriage in 2011 involved - not the application of an old principle - but rather "a new perspective, a new insight." 133 S. Ct. at 2689. If that were not enough, the Court candidly observed that:

> … until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.

Id. These observations from *Windsor* refute the majority's insistence that the right to same-sex marriage is not a "new" ***28** right. Furthermore, as Judge Niemeyer noted, the majority itself "acknowledge[d] that same-sex marriage is a new

notion that has not been recognized 'for most of our country's history.' " App. 77 (quoting App. 55). Thus, the majority's reasoning was at war both with *Windsor* and with itself: the right to same-sex marriage cannot simultaneously be both a "new notion" and one deeply rooted in our national history.

b. Second, the majority misread the Court's right-to-marry cases. It thought cases like *Loving, Zablocki,* and *Turner* established a "broad right to many that is not circumscribed based on the characteristics of the individuals seeking to exercise that right." App. 56-57. The majority was wrong; this Court's right-to-marry cases establish no such sweeping proposition. Nor could they without invalidating large swaths of the marriage laws of all fifty states.

The cases the majority cited held that States cannot bar marriage based on a person's failure to pay child support (*Zablocki,* 434 U.S. at 385-87), incarceration (*Turner,* 482 U.S. at 95-98), and race (*Loving,* 388 U.S. at 11). But none of them established anything as open-ended as a "right to marry … not circumscribed based on the characteristics of the individuals seeking to exercise that right." App. 56-57. A holding of that nature would be truly revolutionary: it would vitiate the "incidents" and "prerequisites for marriage" applied by all fifty states. *Zablocki,* 434 U.S. at 386. For example: a right so broad would give someone the "fundamental right" to marry a 13-year-old or a first cousin. *Windsor* itself confirmed that state marriage laws may, and do, vary on such matters. *See* 133 S. Ct. at 2691-92 (noting that "the required minimum age is 16 in Vermont, but only 13 in New Hampshire," and that "most States permit first cousins to marry, but a handful … prohibit the practice"). ***29** And long before *Windsor, Zablocki* made the same point, cautioning that "reaffirming the fundamental character of the right to marry" does not call into question all state " 'incidents of or prerequisites for marriage." 434 U.S. at 386.

The majority simply read the right-to-marry cases far too broadly, a cardinal violation of the rule that an asserted due process right must be "carefully describ[ed]." *Glucksberg,* 520 U.S. at 720; *see also, e.g., Reno v. Flores,* 507 U.S. 292, 302 (1993) (" 'Substantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field' ") (quoting *Collins v. Harker Heights,* 503 U.S. 115, 123 (1992)). None of the Court's cases even hint that the right to marry is broad enough to encompass marrying someone of the same sex. As Judge Niemeyer observed in dissent, "[e]ach of those cases involves a couple asserting a right to enter into a traditional marriage of the type that has always been recognized since the beginning of the Nation - the union between one man and one woman." App. 87.

The majority was particularly misguided to use *Loving* to construct a right to same-sex marriage. *See* App. 56 (relying on *Loving*). A mere five years after *Loving,* this Court summarily rejected "for want of a substantial federal question" the claim that the Constitution requires a state to recognize same-sex marriage. *Baker,* 409 U.S. 810. Consequently, *Loving* cannot stand for the proposition that the right to marry extends to same-sex couples. *See, e.g.,* App. 90 (Niemeyer, J., dissenting) (explaining "nowhere in *Loving* did the Court suggest that the fundamental right to marry includes the unrestricted right to marry whomever one chooses," a "reading … fortified by the Court's summary dismissal in *Baker*").

***30** If any of this Court's right-to-marry cases encompassed same-sex marriage, *Windsor* surely would have said so. It did not. In fact, it suggested the opposite: *Windsor* explained that "marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." 133 S. Ct. at 2689. The other cases the majority below relied on applied similar reasoning. *Zablocki,* for example, said the right to marry involves the "decision to marry and raise a child in a traditional family setting" and "the right to procreate." 434 U.S. at 386. [6] These statements do not mean the Constitution contains its own definition of marriage. It does not. But they do foreclose the majority's conclusion that this Court has recognized a right to marry so broad it encompasses the right to marry someone of the same sex.

c. Third, the majority also misused the Court's right-to-privacy cases to support its analysis. It relied heavily on *Lawrence v. Texas,* 539 U.S. at 578, for the proposition that the sexual privacy right recognized there must extend to "the choice to marry someone of the same sex." App. 57-58. That misreads *Lawrence.* The line of privacy cases including *Lawrence*

protects certain private choices about sex and procreation. *See Lawrence,* 539 U.S. at 565 (discussing "the right to make certain decisions regarding sexual conduct"). They do not, however, establish a right to compel official, ***31** government recognition of relationships formed as a result of those private choices. [7] *Lawrence* itself explicitly noted this limitation. While recognizing that a state could not punish consensual same-sex relations, *Lawrence* underscored that it "d[id] not involve whether the government must give formal recognition to any relationship that homosexual persons may enter." 539 U.S. at 578. *Lawrence* thus disclaims the very reading the majority below sought to impose on it - namely, that the sexual privacy it protects compels public recognition of same-sex marriage.

3. In sum, the majority failed to apply the proper *Glucksberg* analysis to Respondents' due process claims. Under that analysis, Respondents would have had to demonstrate that a right to marry someone of the same sex is "deeply rooted in this Nation's history and tradition," as *Glucksberg* requires. 521 U.S. at 720-21. In light of *Windsor,* it is hard to see how Respondents could make that showing. *Windsor* itself explained same-sex marriage involves "a new perspective, a new insight," 133 S. Ct. at 2689, and until recently the man-woman aspect of marriage had been "thought of as essential to the very definition of that term." *Id.* Given that, the right to enter into a same-sex marriage cannot be one deeply rooted in our history. *See, e.g., Hernandez,* 855 N.E.2d at 9 ("The right to marry someone of the same sex … is not 'deeply rooted'; it has not even been asserted until relatively recent times.").

***32** That conclusion does not disparage same-sex couples who wish to marry. Their right to privacy in matters of sex and procreation remains undiminished. It is merely to say that courts should not impose one federal, uniform understanding of marriage on a nation in which conceptions of marriage and family life are rapidly changing. The holding of the court below would do precisely that. It would place marriage "outside the arena of public debate and legislative action" and consequently freeze in place one - quite new - definition of marriage for all time. *Id.* at 720 (quoting *Moore v. East Cleveland,* 431 U.S. 494, 502 (1977)).

4. The Court should grant Schaefer's petition and apply the proper fundamental rights analysis [8] to Respondents' claims. Under that analysis, Judge Niemeyer explained what the correct outcome should be:

Because there is no fundamental right to same-sex marriage and there are rational reasons for not recognizing it, just as there are rational reasons *for* recognizing it, I conclude that we, in the Third Branch, must allow the States to enact legislation on the subject in accordance with their political processes. The U.S. Constitution does not, in my judgment, restrict the States' policy choices on this issue. If given the choice, some States will surely ***33** recognize same-sex marriage and some will surely not. But that is, to be sure, the beauty of federalism.

App. 104.

Conclusion

The petition for certiorari should be granted.

Footnotes

1 The petition refers to these three provisions of Virginia law collectively as "the Virginia marriage laws or "the Virginia laws.

2 *See, e.g., Burke v. Shaver,* 92 Va. 345, 347 (1895) (observing " a] contract for marriage is the mutual agreement of a man and a woman to marry each other, or become husband and wife); Va. Code Ann. § 20 45.2 (1975) (providing " a] marriage between persons of the same sex is prohibited).

3 Va. Code Ann. § 20 45.2 (1997) (providing out of state same sex marriages "shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable); § 20 45.3 (2004) (extending that prohibition to

" a] civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage).

4 Virginia State Board of Elections, *Official Results, November 7th, 2006 General Election,* http:// www.sbe.virginia.gov/Files/ElectionResults/2006/Nov/htm/index.htm#141 (last visited August 20, 2014).

5 Respondents also sued Virginia Governor Robert McDonnell and Virginia Attorney General Kenneth Cuccinelli, but later dropped them from the lawsuit. App. 41.

6 The court also held that this Court's summary disposition in *Baker v. Nelson,* 409 U.S. 810 (1972), was no longer precedential because it had been undermined by "doctrinal developments. App. 151 54.

7 The court of appeals permitted intervention by the class action plaintiffs in *Harris v. Rainey,* No. 5:13 cv 77, 2014 WL 352188 (W.D. Va. Jan. 31, 2014), which presents the same issues as this case.

8 Like the district court, the majority also ruled that *Baker v. Nelson* was no longer precedential. App. 48 53.

9 Judge Niemeyer would have also ruled that (1) under this Court's equal protection cases, laws classifying on the basis of sexual orientation trigger rational basis review only (App. 100 03) (relying on *Romer v. Evans,* 517 U.S. 620 (1996); *Windsor,* 133 S. Ct. at 2693); and (2) retaining the man woman definition of marriage rationally furthers the same interests discussed in the fundamental rights section of his dissent (App. 103).

10 Those States are: Virginia, Utah, Oklahoma, Kentucky, Michigan, Ohio, Tennessee, Indiana, Wisconsin, Idaho, Oregon, Texas, Pennsylvania, and Florida. *See, e.g.*, Petition for Writ of Certiorari at 1517 & nn.7 17, *Rainey v. Bostic,* No. 14 153 (Aug. 8, 2014) ("Rainey Petition) (collecting decisions); *see also Brenner v. Scott,* No. 14 cv 107 (N.D. Fla. Aug. 21, 2014). Overall, challenges to marriage laws are ongoing in 30 States and Puerto Rico. *See* Petition for Writ of Certiorari at 12, *Herbert v. Kitchen,* No. 14 124 (Aug. 5, 2014) ("Herbert Petition) (listing challenges).

11 *See, e.g., Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 867 68 (8th Cir. 2006) (upholding Nebraska's man woman marriage law under rational basis review); *Hernandez v. Robles,* 855 N.E.2d 1, 9 12 (N.Y. 2006) (upholding New York's man woman marriage laws under identical state constitutional principles); *see also Anderson v. King Cnty,* 138 P.3d 963, 980 (Wash. 2006); *Jones v. Hallahan,* 501 S.W.2d 588, 590 (Ky. 1973); *Stanhardt v. Superior Court,* 77 P.3d 451 (Ariz. Ct. App. 2003), *rev. denied* (May 25, 2004); *Baker v. Nelson,* 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (same).

12 Nor is there any appellate standing problem as to the Respondents' recognition claims against Rainey. Despite the fact thai: Rainey agrees with the Fourth Circuit's ruling, she will continue to enforce Virginia's marriage laws during the appellate process. App. 41; *see, e.g., Windsor,* 133 S. Ct. at 2686 (holding that United States "retain ed] a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court where it continued to enforce DOMA § 3 despite its belief that the law was unconstitutional).

13 *See also* Rainey Petition at 35 (noting that Schaefer is "vigorously defending Virginia law and that under Virginia law Schaefer is represented, not by the attorney general, but by "qualified independent counsel).

14 *See also id.* (" ' t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States' (quoting *In re Burrus,* 136 U.S. 586, 593 94 (1890)); *id.* (" 'the virtually exclusive primacy … of the States in the regulation of domestic relations') (quoting *Ankenbrandt v. Richards,* 504 U.S. 689, 703 (1992)).

15 The *Bostic* and *Kitchen* majorities thus repeated the error of some district courts, who have also all but ignored *Windsor*'s explicit grounding in state authority. *See, e.g., Kitchen,* 961 F.Supp.2d at 1193 94 (finding *Windsor*'s "important federalism concerns are "insufficient to overcome plaintiffs' rights); *Wolf v. Walker,* 986 F.Supp.2d 982, 996 (W.D. Wis. 2014) (striking down Wisconsin marriage law, despite admitting that *Windsor* "noted multiple times … that the regulation of marriage is a traditional concern of the states).

16 *See also, e.g., Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) (" m]arriage and procreation are fundamental to the very existence and survival of the race); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923) (due process includes right "to marry, establish a home and bring up children); *Maynard v. Hill,* 125 U.S. 190, 211 (1888) (marriage "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress).

17 *See, e.g., Hernandez,* 855 N.E.2d at 10 ("Plaintiffs here do not, as the petitioners in *Lawrence* did, seek protection against state intrusion on intimate, private activity. They seek from the courts access to a state conferred benefit that the Legislature has rationally limited to opposite sex couples.).

18 Granting the petition would encompass Respondents' equal protection claims as well as their due process claims because the Fourth Circuit included both claims under fundamental rights analysis. App. 53 (explaining that " u]nder both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny); App. 73 (concluding that Virginia's laws "violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

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2014 WL 4704634 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

John B. CORR; John W. Grigsby, on behalf of themselves and all others similarly situated, Petitioners,
v.
METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, Respondent.

No. 13-1559.
September 18, 2014.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief of Amici Curiae American Highway Users Alliance, Recreation Vehicle Industry Association, Inc., and the Cato Institute in Support of Petitioners

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*i Questions Presented

1. Whether, as the United States implicitly conceded below, MWAA exercises sufficient federal power to mandate separation-of-powers scrutiny for purposes of a suit seeking injunctive relief and invoking the Little Tucker Act to seek monetary relief.

2. Whether the Transfer Act violates the separation of powers, including the Executive Vesting, Appointments, and Take Care Clauses of Article II, by depriving the President of control over MWAA, an entity exercising - as the United States admits - Executive Branch functions pursuant to federal law.

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*1 Interest of Amici Curiae [1]

The American Highway Users Alliance ("AHUA") is a non-profit coalition encompassing a diverse range of businesses who operate fleets of vehicles, including trucking, bus, RV, and motorcycling associations. AHUA members represent millions of highway users who pay the fuel taxes, tolls, and other fees and taxes that fund America's highways. AHUA supports robust highway and bridge *2 investments at all levels of government to keep America moving safely and efficiently.

AHUA supports the levy of user-fees and user-taxes to pay for roads and bridges. By the same token, AHUA believes those who are taxed and tolled deserve to have their contributions invested directly back into the roads they drive on. AHUA therefore strongly opposes diversion of tolls and other user-taxes. This case - addressing the unaccountable, insulated authority of the Metropolitan Washington Airports Authority ("MWAA") to raise tolls on Dulles Toll Road users by $2.8 billion to cover the costs of the Silver Line Metrorail project - is the most egregious example of highway robbery AHUA has ever seen. Not only are the toll increases diverted from the highway itself, but Dulles Toll Road users are held hostage to these escalating tolls with no ability to influence the rates through the political process. That is a textbook violation of the separation of powers which calls out for this Court's review.

The Recreation Vehicle Industry Association, Inc. ("RVIA") is the national trade association that represents the manufacturers of family camping vehicles, including motorhomes, travel trailers, fifth wheel trailers and truck campers (collectively known as "RVs"), along with component part suppliers. RVIA's members cumulatively manufactured approximately 321,100 units in 2013 (the most recent full year for which statistics are available), representing about 98 percent of all RVs produced in the United States.

RVIA is headquartered at 1896 Preston White Drive in Reston, Virginia. The majority of its *3 employees use the Dulles Toll Road on a daily basis for commuting to work. Moreover, millions of RVs are owned and used by American consumers on the nation's highways. Given the status held by the Washington, DC metropolitan area as a major tourist destination, these RV owners also frequently utilize the Dulles Toll Road. RVIA's employees and the consumers of the RV products made by its members have all been burdened by the steep and unprecedented increases in toll amounts on this vital road.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case centrally concerns Cato because checks-and-balances protect liberty in our constitutional scheme. MWAA's $2.8 billion toll hike on Dulles Toll Road users - who have no political recourse to challenge these charges, or the diversion of funds thus raised to an unrelated project - is a paradigmatic example of unaccountable and thus unchecked government power.

*4 Argument

I. The Petition Raises Critical Separation-of-Powers Issues.

This case involves a federally-created entity - the Metropolitan Washington Airports Authority or "MWAA" - which wields federal authority over the "largest and one of the most complex transportation projects in the United States." [2] Despite the fact that MWAA controls what the Deputy Secretary of the U.S. Department of Transportation has called "vitally important Federal assets," [3] Congress expressly divested the President of any means of controlling MWAA. *See* 49 U.S.C. § 49106(a)(2) (providing that MWAA "shall be … independent of … the United States Government").

That brazen separation-of-powers violation alone merits this Court's review. "[P]olicing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital ***5** functions of this Court.' " *N.L.R.B. v. Noel Canning,* 134 S. Ct. 2550, 2593 (2014) (Scalia, J., concurring in judgment) (quoting *Public Citizen v. Dep't of Justice,* 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment)). This Court has emphasized that it must assiduously correct violations of the Constitution's "checks and balances," which the Framers crafted as "the foundation of a structure of a government that would protect liberty." *Bowsher v. Synar,* 478 U.S. 714, 722 (1986).

The separation-of-powers violation presented here is not, as is often the case, "mask[ed] under complicated and indirect measures." *Metro. Wash. Airport Auth. v. Citizens for the Abatement of Airport Noise, Inc.,* 501 U.S. 252, 277 (1991) ("*CAAN*") (quoting The Federalist No. 48, at 334 (J. Cooke ed. 1961) (Madison)). Rather, the transgression is open and obvious: Congress has transferred power over the Nation's only two federally-owned airports to an ostensible interstate compact entity - including authority to levy billions in fees to support an ancillary metrorail project - while expressly insulating that entity from accountability to the President. See 49 U.S.C. § 49106(a)(2) (providing that MWAA "shall be … independent of Virginia and its local governments, the District of Columbia, and the United States Government"). Thus, "this wolf comes as a wolf." *Morrison v. Olson,* 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

As "[i]t is not every day that [the Court] encounter[s] a proper case or controversy requiring interpretation of the Constitution's structural provisions," the Court should therefore "take every ***6** opportunity to affirm the primacy of the Constitution's enduring principles over the politics of the moment." *Noel Canning,* 134 S. Ct. at 2617 (Scalia, J., concurring in judgment). The petition in this case presents a golden opportunity to do just that.

Moreover, this case comes as no stranger to the Court. This Court has already condemned the separation-of-powers violation presented by a previous configuration of the same entity. *See CAAN I,* 501 U.S. at 275-77 (concluding that the MWAA's "Board of Review" constituted an "impermissible encroachment" on separation of powers). And, following remand from this Court in *CAAN I*, the D.C. Circuit invalidated a subsequent re-structuring of the MWAA on the same grounds. *See Hechinger v. Metro. Wash. Airports Auth.,* 36 F.3d 97, 105 (D.C. Cir. 1994) ("*CAAN II*") (concluding that the restructured Board of Review "ha[s] not satisfied the concerns expressed [by this Court] in *CAAN [I]*"). Now, a third time up to bat, Congress has made the separation-of-powers problem *worse* by eliminating the Board of Review and thus further insulating MWAA's extensive exercise of federal authority from any meaningful political accountability.

Finally, while this Court typically does not wait for a split of authority before addressing separation-of-powers issues (as exemplified by its decision in *CAAN I*), the Federal Circuit's decision conflicts with this Court's separation-of-powers analysis in *CAAN I*, as well as with the D.C. Circuit's analysis in *CAAN II. See* Pet. at 16 (Federal Circuit's holding that MWAA was "immunized … from separation-of-powers scrutiny … squarely conflicts ***7** with this Court's decision in *CAAN* in multiple respects"); *CAAN II* at 100-05 (following this Court's analysis in *CAAN I* and concluding that restructured MWAA Board of Review "exercises [federal] power in violation of the doctrine of separation of powers").

II. This Case Shows the Practical Impacts of Ignoring the Constitution's Structural Safeguards.

The separation-of-powers violation in this case has already inflicted concrete and extensive harms on individuals. *See, e.g., Bond v. United* States, 131 S. Ct. 2355, 2365 (2011) (observing that "the claims of individuals - not of Government departments - have been the principal source of judicial decisions concerning separation of powers and checks and balances"). Moreover, a USDOT report (discussed further below) has found that MWAA's management of the vital federal properties entrusted to its care has been marred by "questionable procurement practices, mismanagement, and a lack of overall accountability." This case highlights both of these unfortunate, yet predictable, consequences of overstepping the Constitution's structural guarantees that help ensure both individual liberty and political accountability.

Since taking over operations of the Dulles Toll Road in 2005, MWAA has steadily increased exactions on Toll Road drivers to pay for the Silver Line Metrorail expansion, "which those drivers are obviously not using, and may never

use." Pet. at 8. MWAA has committed Toll Road users to pay at least $2.8 billion of the project's expected $5.7 billion cost through increased tolls, making them by far the ***8** project's largest source of funds.[4] The *Washington Post* has reported that Toll Road commuters are "vulnerable" to cost increases because "tolls are the one share of the Silver Line project's funding formula that is not capped at a fixed dollar amount or percentage of the final tab."[5] Of course, Toll Road users are "vulnerable" to unchecked increases because those users alone have no political representation among relevant decision-makers.

The petition in this case states that, since 2005, "MWAA has more than tripled its exactions from Toll Road drivers in order to pay for the Metrorail." Pet. at 8. That actually *understates* the increases MWAA has imposed on Toll Road users. As of 2014, MWAA has hiked tolls by a staggering 466%.[6] This has inflated the average commuter's monthly cost from $50 to $140, creating real burdens on many Toll Road users, reducing Toll Road usage, and exacerbating congestion on nearby roadways.[7] Toll ***9** Road users, of course, have no political recourse because no one elected official, much less the President, is accountable for MWAA's actions.

Moreover, MWAA's insulation from political accountability appears to have led to predictable mismanagement, corruption, and self-dealing. The title of a November 2012 report by the USDOT Inspector General ("IG Report") says it all: "MWAA's Weak Policies and Procedures Have Led to Questionable Procurement Practices, Mismanagement, and a Lack of Overall Accountability."[8] The Report cautions that, "[a]s an independent public body subject to few Federal and State laws, MWAA must rely on the strength of its policies and processes to ensure credibility in its management of two of the Nation's largest airports and a multibillion-dollar public transit construction project." IG Report at 38. Nonetheless, the Report bluntly concludes that "MWAA's ambiguous policies and ineffectual controls have put these assets and millions of Federal dollars at significant risk of fraud, waste, and abuse and have helped create a culture that prioritizes personal agendas over the best interests of the Authority." *Id.*[9] Unsurprisingly, ***10** a 2014 statute grants the USDOT Inspector General oversight over MWAA, including the authority "to audit and investigate MWAA" and "to observe closed executive sessions of the MWAA Board of Directors." Consolidated Appropriations Act of 2014, Div. L, Title III, Pub. L. No. 113-76, 128 Stat. 600.

III. MWAA Exercises Federal Power for Federal Purposes.

As the petition correctly explains, the Federal Circuit erred by concluding that MWAA "is not a federal instrumentality for the purpose of Petitioners' claims," based primarily on the *absence* of federal control over MWAA. Pet. App. 24-25. The Federal Circuit's circular reasoning contradicted this Court's separation-of-powers analysis in *CAAN I*, and was subsequently undermined by the United States' *amicus curiae* brief following transfer to the Fourth Circuit. *See generally* Pet. at 18 (explaining that, with the exception of congressional members on the Board of Review, "all of the factors that led this Court [in *CAAN I*] to conclude that the Board of Review exercised federal power apply with equal force to MWAA here"); *id.* at 18-19 (explaining that the United States' *amicus curiae* arguments in the ***11** Fourth Circuit "confirmed that MWAA exercises *federal* power for purposes of petitioners' separation-of-powers claim").

Here, *amicus* provides additional considerations that demonstrate that MWAA exercises federal power for federal purposes.

A. Congress drives MWAA, not Virginia or D.C.

The Federal Circuit reasoned that, "though it may partly owe its existence to an Act of Congress," MWAA nonetheless "was in large part created by, and exercises the authority of, Virginia and the District of Columbia." Pet. App. 23. The court was mistaken. Whereas MWAA may superficially take the form of an interstate compact entity, in actual substance MWAA exercises federal power over federal property pursuant to federal law.

Congress's own actions with respect to MWAA loudly contradict the notion that MWAA exercises state authority:
• In 1986, Congress created MWAA, its Board of Review, and its Board of Directors. Virginia and D.C. amended their acts accordingly. [0]

***12** • In 1991, Congress responded to this Court's decision in *CAAN I* by altering the membership and powers of MWAA's Board of Review.

• In 1996, Congress responded to the D.C. Circuit's invalidation of the re-structured Board of Review in *CAAN II* by abolishing that board and increasing the number of presidential appointments to MWAA's Board of Directors. Virginia and D.C. followed suit. [2]

• In 1998, Congress directed National Airport to be renamed Ronald Reagan Washington National Airport. [3]

• In 2011, Congress made further changes to the composition of MWAA's Board of Directors. Virginia and D.C. thereafter conformed. [4]

• In 2014, Congress subjected MWAA to oversight of the DOT Inspector General. [5]

***13** The last item in that list, the 2014 oversight legislation, poses the issue most starkly. To put it mildly, this is not the way Congress would treat an interstate compact entity exercising state authority. Either that 2014 legislation is a permissible exercise of Congress's power to regulate a federal entity (in which case MWAA must necessarily violate the separation of powers, *see* Pet. 20-25), *or* the 2014 legislation intrudes upon the internal governance of a state-created entity (in which case the legislation must necessarily violate the Tenth Amendment). *See, e.g., New York v. United States,* 505 U.S. 144, 162 (1992) ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions."). It is not difficult to see the right answer: Congress ordered MWAA to submit to federal oversight because MWAA exercises federal authority that needs overseeing - and MWAA has not challenged Congress's authority to do so.

In sum, contrary to the Federal Circuit's conclusion, Congress's consistent treatment of MWAA does not paint a picture of an entity that "exercises the authority of … Virginia and the District of Columbia." Pet. App. 23. To the contrary, when it comes to MWAA, Congress is firmly in the driver's seat; Virginia and D.C. are merely along for ***14** the ride, but the politically helpless users of the Dulles Toll Road are saddled with the bill.

B. The Executive treats MWAA like a federal agency.

Additionally, the Executive Branch's actions with respect to MWAA also confirm that MWAA exercises federal, not state, authority.

First, following this Court's *CAAN I* decision, the Department of Justice took a litigation position that essentially confirms the petitioners' arguments here. After this Court invalidated MWAA's Board of Review in *CAAN I*, Congress altered the board's powers from veto to quasi-advisory, and eliminated the requirement that the board be composed of members of Congress. Metropolitan Washington Airports Amendments of 1991, Pub. L. No. 102-240, Title VII, 105 Stat. 2197. Those changes did not save the board, however. In subsequent litigation, both the district court and the D.C.

Circuit ruled that the re-structured board still labored under the same separation-of-powers defects which had doomed it in *CAAN I*. *See CAAN II* at 105; *Hechinger v. Metro. Wash. Airports Auth.,* 845 F.Supp. 902, 907-09 (D.D.C. 1994).

In *CAAN II*, the Department of Justice filed a brief in the D.C. Circuit supporting the parties *challenging* the re-structured Board of Review, deploying arguments that echo those made against MWAA in the present certiorari petition. For instance, DOJ argued that the new board - despite Congress's alterations - still encroached on separation-of-powers principles because it exercised federal power. *See* Br. for ***15** Intervenor United States in *Hechinger v. Wash. Metro. Airports Auth.,* 36 F.3d 97 (D.C. Cir. 1994), at 13-14 (No. 94-7036) (arguing revised board violated separation of powers because it was (1) created at the initiative of congress; (2) exercised powers delineated by Congress; and (3) exercised those powers to protect "an acknowledged federal interest"); *id.* at 23 (stating the board played a "key role in the execution and administration of the [federal] statutory scheme [governing MWAA]" and asserting that "[w]e believe this power is most properly labeled as executive in nature"); *id.* ("Since the Board of Review wields federal authority, its exercise of executive power violates the Appointments Clause. That is true regardless of whether or not the Board acts as agent of Congress."); *id.* at 26 (stating that " 'it is federal law that resulted in the establishment of the Board of Review with its particular composition and authority' ") (citing *Citizens for the Abatement of Aircraft Noise, Inc. v. Metro. Wash. Airports Auth.,* 917 F.2d 48, 54 (D.C. Cir. 1990)). All of the factors that led DOJ to argue for the Board of Review's unconstitutionality in 1994 apply with full force to MWAA as it operates today.

Second, in July 2012, U.S. Secretary of Transportation Ray LaHood sent a scathing letter to MWAA demanding that MWAA open its books and records to the USDOT Inspector General. [6] Based on "significant concerns about MWAA's policies and procedures in contracting, ethics, and travel, and the lack of transparency and accountability in the ***16** activities of MWAA's Board of Directors," USDOT appointed an Accountability Officer and demanded she be given "access to [MWAA's] personnel and documents" as well as "access to … all Board of Directors meetings … including general and closed sessions." *Id.* Not only does this letter show that MWAA is a "public body" that exercises power over "Federal interests," *id.*, but the spectacle of a cabinet officer being reduced to sending a demand letter to a subordinate officer makes a mockery of the President's authority to control his subordinates.

Third, as discussed in part II *supra*, in November 2012 the USDOT Inspector General issued a report condemning MWAA for "questionable procurement practices," "mismanagement," and a "lack of overall accountability." IG Report at 1. A month before, in October 2012, the Deputy Secretary of Transportation had responded to a draft version of the report. *See* Letter from USDOT Deputy Secretary John D. Porcari to Inspector General Calvin L. Scovel III (October 18, 2012) (attached as an Appendix to the IG Report at pages 48-50). In that letter, the Deputy Secretary referred to MWAA as "a public body entrusted with the management and operation of important Federal assets." IG Report at 48. Continuing in this vein, the Deputy Secretary stated: "As established by statute, MWAA is a public entity with considerable autonomy. While the Department will continue to hold MWAA accountable in its management and operation of *vitally important Federal assets*, it is primarily incumbent on MWAA to institute the reforms needed to regain the public's trust." *Id.* at 50 (emphasis added).

***17** None of these Executive Branch actions are remotely consistent with the notion, espoused by the Federal Circuit below, that MWAA is merely engaged in an exercise of *state* authority. To the contrary, throughout its history, the Executive has treated MWAA as a federal instrumentality exercising federal power, because that is precisely what it *is.*

Conclusion

The petition for certiorari should be granted.

Footnotes

1 No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the brief. Petitioners and respondent consented to the filing of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received notice of the *amici*'s intent to file this brief at least 10 days prior to the due date for *amicus curiae* briefs.

2 *See* http://www.wmata.com/about metro/news/PressReleaseDetail.cfm? ReleaseID 5749 (July 25, 2014 Washington Metropolitan Area Transit Authority press release announcing that " t]he combined phases of the Silver Line make it the largest and one of the most complex transportation projects in the United States) (last visited Sept. 18, 2014).

3 The Deputy Secretary's comments appear in a letter attached to a USDOT Inspector General Report ("IG Report) on MWAA. See U.S. Dep't of Transp., Office of the Inspector General, Report No. AV 2013 006, *MWAA s Weak Policies and Procedures Have Led to Questionable Procurement Practices, Mismanagement, and a Lack of Overall Accountability* (Nov. 1, 2012), at 50, *available at* https:// www.oig.dot.gov/sites/default/files/MWAA%20Final%C20Report%2010 31 012 FINAL signed 508 rev%2012 3 12.pdf. The IG Report and the Deputy Secretary's letter are discussed, *infra*, in parts II and III.B.

4 *See* Dulles Corridor Metrorail Project, *Frequently Asked Questions*, available at http://www.dullesmetro.com/info/faqs.cfm.html#3 (last visited Sept. 18, 2014); Pet. at 8 9.

5 See Lori Aratani and Mary Pat Flaherty, *Dulles Toll Road Users Shoulder an Increasing Share of Silver Line s Costs*, Washington Post, July 12, 2014, *available at* http:// www.washingtonpost.com/local/trafficandcommuting/dulles toll road users shoulder an increasing share of silver lines costs/2014/07/12/efa84a6a 09e6 11e4 a0dd f2b22a257353 story.html?hpid z3 (last visited Sept. 18, 2014).

6 *See, e.g.,* http://www.metwashairports.com/tollroad/4519.htm (listing Main Toll Plaza increases from $0.75 in 2005 to $2.50 in 2014) (last visited Sept. 18, 2014).

7 *See* Lori Aratani, *Higher Tolls Pushing Many Off the Dulles Toll Road*, Washington Post, May 31, 2014, *available at* http:// www.washingtonpost.com/local/trafficandcommuting/higher tolls pushing many off the dulles toll road/2014/05/31/e3dd933c e11b 11e3 810f 764fe508b82d story.html (last visited Sept. 18, 2014).

8 *See* IG Report, *supra* note 3; *see also id.* at 4 (finding that "MWAA's policies and processes have not ensured accountability and transparency for activities conducted by its Board of Directors).

9 In October 2012, the Deputy Secretary of Transportation responded to a draft version of the IG Report with similar condemnations. (The letter is included as an Appendix to the report at pages 48 50). For instance, the Deputy Secretary characterized the draft report as uncovering "numerous ethical and fiscal lapses, including the frequent award of contracts without free and open competition, cases of nepotism, and instances where employees accepted favors and gifts in the ordinary course of business. *This pattern of conduct is simply unacceptable for a public body entrusted with the management and operation of important Federal assets.* This way of doing business cannot continue. IG Report at 48 (emphasis added).

10 Metropolitan Washington Airports Act of 1986, Pub. L. No. 99 591, Title VI, 110 Stat. 3341 376. Specifically, section 607(c) codified at 49 U.S.C. § 49106(b) and reprinted at Pet. App. 75 "authorized MWAA to "acquire, maintain, improve, operate, protect, and promote the Metropolitan Washington Airports for public purposes, "to issue bonds, "to acquire real and personal property, and "to levy fees or other charges. Section 607(e) created a Board of Directors comprised of 11 members, 5 appointed by the Virginia Governor, 3 by the D.C. Mayor, 2 by the Maryland Governor, and 1 by the President. Section 607(f) created a Board of Review composed of members of Congress and disabled the Board of Directors from performing certain functions if the Board of Review was invalidated. Finally, Virginia and D.C. amended their interstate compact to provide for the Board of Review. *See* 1987 Va. Acts ch. 665; 1987 D.C. Law 7 18.

11 Metropolitan Washington Airports Amendments of 1991, Pub. L. No. 102 240, Title VII, 105 Stat. 2197.

12 Metropolitan Washington Airports Amendments of 1996, Pub. L. No. 104 264, Title IX, 110 Stat. 3274; 1997 Va. Acts ch. 661; D.C. Law 12 8.

13 Pub. L. No. 105 154, 112 Stat. 3.

14 Pub. L. No. 112 55, Section 191, 125 Stat. 671; 2012 Va. Acts ch. 549; D.C. Law 19 222.

15 Consolidated Appropriations Act of 2014, Div. L, Title III, Pub. L. No. 113 76, 128 Stat. 600.

16 http://www.metwashairports.com/file/LaHood.Curto 7.31.12.pdf (last visited Sept. 28, 2014).

2013 WL 5720377 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Kathleen SEBELIUS, Secretary of Health and Human Services, et al., Petitioners,
v.
HOBBY LOBBY STORES, INC., Mardel, Inc., David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett, Respondents.

No. 13-354.
October 21, 2013.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief for Respondents

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***i** QUESTION PRESENTED

The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.,* provides that the government "shall not substantially burden a person's exercise of religion" unless that burden satisfies strict scrutiny. *Id.* § 2000bb-1(a), (b). Respondents are a family and their closely held businesses, which they operate according to their religious beliefs. A regulation under the Patient Protection and Affordable Care Act requires Respondents to provide insurance coverage for all FDA-approved "contraceptive methods [and] sterilization procedures." 78 Fed. Reg. 39870, 39870 (July 2, 2013) (citing 42 U.S.C. § 300gg-13(a)(4)). Respondents' sincere religious beliefs prohibit them from covering four out of twenty FDA-approved contraceptives in their self-funded health plan. If Respondents do not cover these contraceptive methods, however, they face severe fines.

The question presented is whether the regulation violates RFRA by requiring Respondents to provide insurance coverage for contraceptives in violation of their religious beliefs, or else pay severe fines.

***II RULE 29.6 DISCLOSURE**

Respondent Hobby Lobby Stores is a privately held Oklahoma corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Mardel is a privately held Oklahoma corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondents David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett are individual persons.

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*1 BRIEF FOR RESPONDENTS

The government's petition contends that 1) the issues presented here are important, 2) the lower federal courts are divided, and 3) the decision below is incorrect. The government is correct on two out of its three contentions. The issues presented in the government's petition are indeed important, and the circuits are now hopelessly divided on critical questions of standing and religious liberty. However, Respondents respectfully suggest that the considered decision of the en banc Tenth Circuit Court of Appeals is correct. Nonetheless, Respondents agree with the government that, in light of the importance of the issues and the division in the circuits, plenary review by this Court is warranted.

STATEMENT

1. Respondents are David and Barbara Green; their children, Steve Green, Mart Green, and Darsee Lett; and their family businesses: Hobby Lobby Stores, an arts-and-crafts chain, and Mardel, a chain of Christian bookstores.

a. Founded in 1970 by David Green, Hobby Lobby has grown from a single arts-and-crafts store in Oklahoma City into a nationwide chain with over 500 stores and more than 13,000 full-time employees. In 1981, Mart Green founded Mardel, an affiliated chain of Christian bookstores with thirty-five stores and about 400 full-time employees. Hobby Lobby and Mardel remain closely held family businesses, ***2** organized as general corporations under Oklahoma law, and exclusively controlled by the Greens. App. 7a-8a, Verified Compl. ("VC"), ¶¶ 23, 24, 32-38. [2]

b. "The Greens have organized their businesses with religious principles in mind." App. 8a. In Hobby Lobby's official statement of purpose, the Greens commit to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." *Id.* Mardel primarily sells Christian materials and describes itself as "a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support." *Id.* The Greens each sign a Statement of Faith and a Trustee Commitment obligating them to conduct the businesses according to their religious beliefs and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries." JA 21a. [3]

"[T]he Greens allow their faith to guide business decisions for both companies." App. 8a. For example, all stores close on Sundays, at a cost of millions per year, to allow employees a day of rest. Each Christmas and Easter, Hobby Lobby buys hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior." [4] Store music features ***3** Christian songs. Employees have cost-free access to chaplains, spiritual counseling, and religiously-themed financial courses. Company profits provide millions of dollars every year to ministries. App. 8a; VC ¶¶ 39-43, 45, 47, 51.

The Greens and their businesses also refrain from business activities forbidden by their religious beliefs. For example, to avoid promoting alcohol, Hobby Lobby does not sell shot glasses. The Greens once declined a liquor store's offer to take

over one of their building leases, costing them hundreds of thousands of dollars a year. Similarly, the Greens do not allow their trucks to "back-haul" beer and so lose substantial profits by refusing offers from distributors. App. 8a; VC ¶44.

c. In the same way, the Greens' faith affects the insurance they offer in Hobby Lobby's self-funded health plan. The Greens believe that human beings deserve protection from the moment of conception, and that providing insurance coverage for items that risk killing an embryo makes them complicit in the practice of abortion. App. 50a-51a. Hobby Lobby's health plan therefore excludes drugs that can terminate a pregnancy, such as RU-486. The plan also excludes four drugs or devices that can prevent an embryo from implanting in the womb - namely, Plan B, Ella, and two types of intrauterine devices. Indeed, when the Greens discovered that two of these drugs had been included - without their knowledge - ***4** in the plan formulary, they immediately removed them. [5]

2. The Patient Protection and Affordable Care Act ("ACA") requires non-grandfathered group health plans to cover without cost-sharing a variety of preventive services, including "preventive care and screenings" for women. 42 U.S.C. § 300gg-13(a)(1)-(4); Pet. 3-8. That latter category has been defined by regulation to include items such as well-woman visits, gestational diabetes screening, testing and counseling for certain sexually-transmitted diseases, and breastfeeding support, supplies, and counseling. *See* Health Resources and Services Administration, *Women's Preventive Services Guidelines,* http://www.hrsa.gov/womensguidelines/ (last visited Oct. 21, 2013) ("HRSA Guidelines"). As relevant here, the regulation also requires plans to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA Guidelines; *see also*76 Fed. Reg. 46621, 46626 (Aug. 3, 2011). The government refers to this as the " contraceptive-coverage requirement." Pet. 8.

a. The contraceptive-coverage requirement includes drugs and devices - namely, Plan B, Ella, and two intrauterine devices - which, the ***5** government concedes, may prevent an embryo from implanting in the womb. Pet 10 n.5 (noting, by reference to the FDA *Birth Control Guide*, that these drugs and devices may prevent "attachment" or "implantation" of an embryo "in the womb"); App. 10a. Given the government's concession and the FDA's guidance, the court of appeals found "no material dispute" over how these drugs and devices function. App. 10a n.3. And given their beliefs, Respondents cannot cover them without facilitating what they believe to be an abortion. App. 50a-5*I*a. Respondents do not object to covering any of the sixteen other forms of FDA-approved contraceptives, [6] but they cannot cover these four methods without violating their faith. App. 14a-15a.

Noncompliance, however, would expose Respondents to severe fines, regulatory action, and lawsuits. 26 U.S.C. §§ 4980D, 4980H; 29 U.S.C. § 1185d, 1132; *see also* Pet. 3 n.3 (noting enforcement mechanisms). Continuing to offer a health plan without the four objectionable items would subject Hobby Lobby to a fine of $100 per day for each ***6** "individual to whom such failure relates." 26 U.S.C. § 4980D. Given that over 13,000 individuals are insured under Hobby Lobby's plan, this fine could total "at least $1.3 million per day, or almost $475 million per year." App. 15a. If Hobby Lobby instead drops employee insurance altogether, it will face severe disruption to its business, significant competitive disadvantages in hiring and retaining employees, as well as penalties totaling $26 million per year. *Id.;* VC ¶ 144; 26 U.S.C. § 4980H.

b. "A number of entities" - both religious and nonreligious - "are partially or fully exempted from the contraceptive-coverage requirement." App. 11a.

First, the regulation recognizes the religious sensitivity of contraceptive coverage by providing that HHS "may establish exemptions" for plans "established or maintained by religious employers *** with respect to any requirement to cover contraceptive services." 45 C.F.R. § 147.130(a)(iv)(A); App. 11a. Consequently, HHS has exempted "churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order." App. 11a-12a. Other religious groups who object to insurance on principle and members of "health care sharing

ministries" are exempt from the ACA altogether, and therefore by definition are not subject to the contraceptive-coverage requirement. 26 U.S.C. § 5000A (d)(2)(A), (B), (ii).

Second, HHS recently finalized an "accommodation" for certain non-exempt religious organizations allowing them to route contraceptive payments through their insurer or plan ***7** administrator. Pet. 8 (citing 45 C.F.R. § 147.131(b); 78 Fed. Reg. 39870); App. 12a. Through this alternative mechanism, HHS seeks to "protect[] certain nonprofit religious organizations with religious objections to providing contraceptive coverage from having to contract, arrange, pay, or refer for such coverage." 78 Fed. Reg. at 39872. The accommodation, however, "does not extend to for-profit organizations." *Id.* at 39875.

Third, wholly apart from any religious concerns, "grandfathered" plans may indefinitely avoid the contraceptive-coverage requirement by not making certain changes after the ACA's effective date. *See*42 U.S.C. § 18011 (a)(2) ("Preservation of right to maintain existing coverage"); App. 12a-13a. While they must comply with other ACA requirements - such as covering dependents to age 26, covering preexisting conditions, and reducing waiting periods (42 U.S.C. § 18011(a)(4); *see*75 Fed. Reg. 34538, 34542 Tbl. 1 (June 17, 2010)) - grandfathered plans need not cover contraceptives or any other women's preventive services. 75 Fed. Reg. 34540. When promulgating the current grandfathering regulations in 2010, HHS estimated that 34% of small employer and 55% of large employer plans would retain grandfathered status in 2013. *See id.* at 34552 Tbl. 3.

Fourth, "small employers" - that is, those with fewer than 50 employees, who collectively employ over 34 million people - need not offer health insurance at all. 26 U.S.C. § 4980H(c)(2); WhiteHouse.Gov, *The Affordable Care Act Increases Choice and Saving Money for Small Business* 1 (*"ACA Small Business"*), http://www.whitehouse ***8** .gov/files/documents/health reform for small businesses.pdf (last visited Oct. 21, 2013). To that extent, small employers "do not have to comply with any aspect of the shared responsibility health coverage requirements, including the contraceptive-coverage requirement." App. 13a.

As a result of these various exemptions, the contraceptive-coverage requirement does not apply to a large percentage of the American workforce. *See, e.g.,* App. 58a (finding "the contraceptive-coverage requirement presently does not apply to tens of millions of people"); Appellees' Br. at 40 n.ll (conceding that "48 percent" of all Americans who receive health coverage through their employers "were in grandfathered health plans in 2012"); *see also, e.g., Beckwith Elec. Co. v. Sebelius,* No. 8:13-cv-0648, 2013 WL 3297498, at *17 (M.D. Fla. June 25, 2013) (noting that, with respect to grandfathered plans, "[t]he government's best case scenario *** still leaves roughly a third of America's population (i.e., 100 out of 313.0 million) exempt from the contraceptive mandate").

c. Despite their sincere religious objections to facilitating the provision of abortifacients, Respondents do not qualify for any of these exceptions. Hobby Lobby's health plan is not grandfathered, [7] and, having more than 50 employees, it must offer insurance covering all mandated services. 26 U.S.C. § 4980H. As for-profit ***9** businesses, neither Hobby Lobby nor Mardel is covered by the religious employer exemption or the accommodation. App. 13a-14a. Consequently, Respondents must either violate their faith by covering the mandated contraceptives, or pay crippling fines that would destroy their livelihood.

3. Petitioners accurately set forth the procedural history of this case. Pet. 10-11. In brief: Respondents sued under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 20000bb *et seq.,* which provides that the government "shall not substantially burden a person's religious exercise" unless that burden satisfies strict scrutiny. *Id.*§ 2000bb-1(a), (b). [8] After being denied a preliminary injunction and emergency appellate relief, Respondents were granted initial en banc review by the Tenth Circuit, which heard argument before eight judges on May 23, 2013. App. 15a-16a. On June 27, the en banc court reversed the district court. *Id.* 5a-7a.

a. As a preliminary matter, the court unanimously concluded that Hobby Lobby and Mardel have Article III standing and that their claims are not barred by the Anti-Injunction Act, 26 U.S.C. § 7421. App. 17a-18a, 18a-21a; *see* Pet. 12 (noting government's agreement with both conclusions). The court therefore did not address whether the Greens could sue individually under RFRA, although that issue was thoroughly briefed and argued. App. 18a n.4.

***10** On the merits, in an opinion by Judge Tymkovich, a five-judge majority ruled that Hobby Lobby and Mardel had demonstrated a likelihood of success on their RFRA claims.

i. The majority first addressed the question of whether Hobby Lobby and Mardel are "persons" capable of engaging in the "exercise of religion" under RFRA. App. 23a. Because RFRA does not define "person," the court turned to the Dictionary Act, which provides that "unless the context indicates otherwise," the word "person" in federal law "includes corporations *** as well as individuals." 1 U.S.C. § 1; App. 24a. Thus, the majority concluded that "the plain language of the text encompasses 'corporations,' including ones like Hobby Lobby and Mardel." App. 24a. The court rejected the government's "strained" argument that RFRA silently "carried forward" an exclusion of for-profit entities found in other statutes, such as the exemptions in Title VII and the ADA. App. 26a-27a; *cf, e.g.,*42 U.S.C. § 2000e-1(a) (exempting "a religious corporation, association, educational institution, or society").

The court also rejected the government's argument that RFRA silently includes a background principle, supposedly found in the First Amendment, which distinguishes "non-profit, religious organizations [from] for-profit, secular companies." App. 33a. After extensive analysis, *see id.* 34a-43a, the majority concluded that the government's "position is not 'rooted in the text of the First Amendment,' and therefore could not have informed Congress's intent when enacting RFRA." *Id.* 36a (internal citation omitted). Moreover, excluding ***11** Hobby Lobby and Mardel from RFRA would be particularly inappropriate, since the companies publicly "express themselves for religious purposes," are "closely held family businesses with an explicit Christian mission as defined in their governing principles," "ma[k]e business decisions according to [religious] standards," and (in Mardel's case) "directly serve a religious community." *Id.* 37a, 39a, 42a.

ii. The court next considered whether the contraceptive-coverage requirement imposed a "substantial burden" on Hobby Lobby and Mardel's exercise of religion. App. 44a-56a. Drawing on this Court's decisions in *Thomas v. Review Bd.,* 450 U.S. 707, 717-18 (1981), and *United States v. Lee,* 455 U.S. 252, 257 (1982), the court held that it must consider three questions: first, it must "identify the religious belief" in question; second, it "must determine whether this belief is sincere"; third, it must determine "whether the government places substantial pressure on the religious believer" to act contrary to those beliefs. *Id.* 50a-51a.

In this case, the religious belief in question was Respondents' belief that by providing insurance coverage for contraceptives that could prevent a human embryo from implanting in the uterus, they themselves would be morally complicit in "the death of [an] embryo." *Ibid.* Because "[t]he government d [id] not dispute the corporations' sincerity," the court saw "no reason to question it either." *Ibid.* And given the fact that Hobby Lobby and Mardel were faced with the choice of "compromis[ing] their religious beliefs, pay[ing] close to $475 million more in taxes every year, or pay[ing] roughly $26 million ***12** more in annual taxes and drop[ping] health-insurance benefits for all employees," the court found it "difficult to characterize the pressure as anything but substantial." *Id.* 51a-52a. [9]

The court rejected the government's argument that the burden was too attenuated, and therefore insubstantial, because an employee's decision to use contraception could not properly be attributed to her employer. *Id.* 44a; Pet 26-27. Such reasoning is "fundamentally flawed," the court said, because it "requires an inquiry into the theological merit of the belief in question rather than the intensity of the coercion applied by the government to act contrary to those beliefs." App. 44a (emphasis omitted).

iii. Having found a substantial burden, the court then applied strict scrutiny. *Id.* 56a-61a. As to whether the contraceptive-coverage requirement furthered a compelling interest, the court reasoned that the government's asserted interests in

"public health and gender equality," were not compelling "because they are broadly formulated," and because the government offered "almost no justification for not 'granting specific exemptions to particular religious claimants.' " *Id.* 57a-58a (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 431 (2006)). Additionally, the government's interests could not be compelling because, under various exemptions and accommodations, "the contraceptive-coverage ***13** requirement presently does not apply to tens of millions of people." App. 58a.

Finally, the court found that requirement failed the least restrictive means test because - in light of the fact that Hobby Lobby and Mardel "ask only to be excused from covering four contraceptive methods out of twenty" - the government "does not articulate why accommodating such a limited request fundamentally frustrates its goals." *Id.* 59a-60a. [0]

b. In a separate concurrence, Judge Gorsuch, joined by Judges Kelly and Tymkovich, would have found that the Greens themselves, and not just Hobby Lobby and Mardel, were entitled to an injunction under RFRA. As Judge Gorsuch explained, given that Hobby Lobby and Mardel are controlled exclusively by the Greens, it is undisputed "that Hobby Lobby and Mardel cannot comply with the mandate unless and until the Greens direct them to do so." App. 78a. Judge Gorsuch rejected the government's argument that, under the rules of prudential standing, the Greens were barred as shareholders from asserting claims belonging to the corporation. *Id.* 83a-86a. As he explained, the prudential standing rule "does not bar corporate owners from bringing suit if they have 'a direct, personal interest in a cause of action.' " *Id.* 86a (quoting ***14** *Franchise Tax Bd. of Cal. v. AlcanAluminum Ltd.,* 493 U.S. 331, 336 (1990)). Here, given that the Greens would be personally required to "direct the corporations to comply with the mandate and do so in defiance of their faith," they have "a quintessentially 'direct' and 'personal' interest protected even under the shareholder standing rule." *Ibid.* [2]

c. In dissent, Chief Judge Briscoe (joined by Judge Lucero) expressed the view that for-profit corporations like Hobby Lobby and Mardel are not "persons" capable of exercising religion under RFRA. App. 118a. Judge Matheson was not convinced that RFRA categorically excluded for-profit corporations, but would have affirmed on the ground that it was a "novel and significant question" which required further development. App. 140a.

***15 REASONS FOR GRANTING THE PETITION**

The case for plenary review of the critically important issues presented by the government's petition could hardly be clearer. As the federal government embarks on an unprecedented foray into health care replete with multiple overlapping mandates, few issues are more important than the extent to which the government must recognize and accommodate the religious exercise of those it regulates. And the issues are not just surpassingly important; they also have divided the courts of appeals. Thus, Respondents agree with the government that this Court should grant the petition.

Needless to say, Respondents part company with the government when it comes to the merits of the decision below. While those issues should be fully explored in merits briefing, the decision below is manifestly correct. The corporate and individual Respondents both have standing to press their RFRA claims, and the RFRA question on the merits is not particularly close. The government does not doubt the sincerity of the religious beliefs at issue here and indeed accommodates those beliefs for others. And whatever questions may arise about the substantiality of certain government burdens on religious exercise in other contexts, the crippling fines at issue clearly suffice to trigger RFRA and strict scrutiny. The government cannot remotely satisfy that demanding standard. Its asserted interests are not compelling, the massive exemptions granted to others based on both religious and nonreligious grounds defeat any claim to narrow tailoring, and less-restrictive alternatives abound. ***16** This Court should grant plenary review and vindicate the religious exercise rights of Respondents.

A. This case is an excellent vehicle for resolving an exceptionally important question on which the circuits are split.

1. Respondents agree with the government that the Tenth Circuit's en banc decision presents a question of "exceptional importance." Pet. 32. Throughout this litigation, the government has taken the unprecedented position that commercial businesses and their owners - simply because they make profits - cannot exercise religion under the Constitution or federal law. *See, e.g.,* Pet. 20 (asserting that this Court's jurisprudence has "confined" free exercise rights "to individuals and non-profit religious organizations"). The court of appeals properly rejected the government's narrow view, although other courts of appeals have accepted it. When the federal government, bound by both RFRA and the First Amendment to respect religious liberty, takes a miserly view of the scope of religious exercise, the question is undeniably important. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. , 132 S. Ct. 694 (2012). But such questions assume even larger significance insofar as they arise under the Affordable Care Act, which imposes massive obligations on individuals and corporations alike in the process of attempting to fundamentally re-order the Nation's health care system. *See, e.g., Natl Fed'n of Indep. Bus. v. Sebelius,* U.S. , 132 S. Ct. 2566, 2609, 2624 (2012) (op. of Ginsburg, J., joined by ***17** Sotomayor, Breyer, and Kagan, JJ.) (observing that "the provision of health care is today a concern of national dimension," but cautioning that "[a] mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly *** interfered with the free exercise of religion").

2. Respondents also agree with the government that the Tenth Circuit's decision "directly conflicts with subsequent decisions by the Third and Sixth Circuits, both of which expressly rejected the court of appeals' reasoning in this case." Pet. 32-33 (citing *Conestoga Wood Specialties Corp. v. HHS,* 724 F.3d 377, 384 n.7 (3d Cir. 2013), *petition for cert. filed,* Sept. 19, 2013 (No. 13-356); *Autocam Corp. v. Sebelius,* No. 12-2673, 2013 WL 5182544, at *1 & n.1, *7 (6th Cir. Sept. 17, 2013), *petition for cert. filed,* Oct. 15, 2013 (No. 13-482)). The conflict is square. The Third and Sixth Circuits would categorically exclude Hobby Lobby, Mardel, and the Greens from RFRA's protection. *See, e.g., Conestoga Wood,* 724 F.3d at 381 (concluding that "for-profit, secular corporations cannot engage in religious exercise" and rejecting the owners' free exercise and RFRA claims). By contrast, the Tenth Circuit has ruled that RFRA protects them from being coerced by the contraceptive-coverage requirement to violate their faith or pay ruinous fines.

These issues need to be settled now by this Court. The existing conflict is likely to deepen rapidly, with ***18** the same issues pending in some thirty-five other cases around the country. [3]

***19** 3. This case presents an excellent vehicle for resolving these questions.

a. The Tenth Circuit's en banc decision comprehensively addressed the application of RFRA. It reached not only the threshold issue of whether ***20** for-profit corporations may sue under RFRA, *see* App. 23a-43a, but the merits as well. *See id.* 44a-56a (substantial burden); *id.* 56a-61a (strict scrutiny). [4] By contrast, the Third and Sixth Circuits addressed only the threshold issue. *See* Pet. 33-34 (noting *Conestoga Wood* and *Autocam* held that "a for-profit corporation and its controlling shareholders" have no RFRA claims). Since the government's petition encompasses all RFRA issues, and this Court should be in a position to address all three issues, this case is a better vehicle for addressing the basic, recurring and fundamentally important questions about the government's ability to force for-profit businesses and their owners to sacrifice their religious beliefs. *See* Pet. i (asking "whether RFRA allows a for-profit corporation" an exemption "based on the religious objections of the corporation's owners").

b. Factually, this case is an ideal vehicle for addressing whether a for-profit business and its owners can exercise religion. "Hobby Lobby and Mardel *** are closely held family businesses with an explicit Christian mission as defined in their governing principles." App. 42a. One of the coplaintiffs, Mardel, is a "Christian bookstore chain" App. 4a. And, in adherence to their companies' religious mission, the Greens "have made business decisions according to *** [religious] standards," App. 42a - including closing stores on Sunday, taking out evangelical ads in newspapers, providing cost- ***21** free spiritual counseling for employees, and avoiding business practices contrary to their beliefs. App. 7a-9a.

Moreover, "the Greens are unanimous in their belief that the contraceptive-coverage requirement violates the religious values they attempt to follow in operating Hobby Lobby and Mardel." App. 42a. Since the Greens alone control Hobby

Lobby's self-insured plan, App. 14a, a favorable decision from this Court will unambiguously allow them to continue offering a plan conforming to their religious convictions, without needing to secure the cooperation of a third-party insurer. *Cf.* Petition for Writ of Certiorari at 8, *Conestoga Wood Specialties Corp. v. Sebelius,* No. 13-356 (U.S. filed Sept. 19, 2013) ("Lacking injunctive relief, Conestoga's health issuer inserted coverage of the contraceptives into their plan over Petitioners' objection, because the issuer sought to avoid penalties on itself."). [5]

Finally, the magnitude of the potential fines at issue makes resolution of the substantial burden question straightforward. *See* App. 51a (given potential fines of $1.3 million per day, "it is difficult ***22** to characterize the pressure as anything but substantial"). Below, "the government did not question the significance of the financial burden" on Respondents. *Id.* 52a. With no "subsidiary factual issues" needing resolution, the Court can decide the substantial burden issue "as a matter of law." App. 52a.

c. This Court's review is urgently needed. As Petitioners point out, "[a]lthough the decision addressed a preliminary injunction, the court definitively decided the legal questions at the heart of the case, making it unnecessary to await further proceedings before granting review." Pet. 32; *see also, e.g., Pleasant Grove City, Utah v. Summum,* 555 U.S. 460, 466 (2009); *O Centro,* 546 U.S. at 423 (reviewing preliminary injunctions). [6] Challenges to the contraceptive-coverage requirement are proliferating. *See supra* note 13. And the extent of religious freedom is simply too important to be clouded with uncertainty and left to vary among the Circuits.

***23 B. The Tenth Circuit correctly decided that the contraceptive-coverage requirement violates RFRA.**

1. While the parties agree on the importance of the issues, the intractable nature of the division among the Circuits, and the need for this Court's plenary review, they obviously disagree on the merits. There will be time enough to explore the merits if this Court grants plenary review. That said, Respondents respectfully submit that the court of appeals correctly decided that Hobby Lobby and Mardel may assert religious exercise claims under RFRA. App. 24a-43a.

a. The ability of the corporate Respondents to assert rights under RFRA should not be open to serious debate. RFRA's plain text protects "a *person's* exercise of religion." 42 U.S.C. § 2000bb-1(a) (emphasis added). The Dictionary Act provides that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise *** the word[] 'person' *** include[s] *corporations,* companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (emphasis added). The court of appeals correctly noted that "we could end the matter here since the plain language of the text encompasses 'corporations,' including ones like Hobby Lobby and Mardel." App. 24a.

Furthermore, nothing in RFRA's "context" suggests it silently excludes some corporations, while including others. *See* App. 26a ("context" under the Dictionary Act "means the text of the Act of Congress ***24** surrounding the word at issue, or the text of other related congressional Acts") (quoting *Rowland v. Cal. Men's Colony,* 506 U.S. 194, 199 (1993)). The text makes no distinction between non-profit and for-profit corporations. Nor is there any indication that RFRA adopted the limited exemptions from statutes like Title VII and the ADA, thereby incorporating "[a] distinction between non-profit, religious organizations and for-profit secular companies." App. 27a. The Title VII and ADA exemptions are worded to exempt only "a religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1(a) (Title VII); *id.* § 12113(d)(1), (2) (ADA). RFRA does not use that language. Instead, RFRA protects any "person's" religious exercise, and broadly defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4); *id.*§ 2000cc-5(7)(A). The Title VII and ADA exemption language was available to Congress as a model when it composed RFRA, but Congress did not adopt it. The notion that Congress nonetheless incorporated those unusual limitations when it used language including all persons broadly defined strains credulity.

b. Nothing in the jurisprudence preceding RFRA suggests Congress meant to exclude for-profit corporations. App. 34a-43a.

Congress enacted RFRA against the backdrop of over a century of jurisprudence recognizing that corporations exercise a broad range of constitutional rights. As this Court said in *Monell v. Department of Social Services,* "by 1871, it was well understood that ***25** corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." 436 U.S. 658, 687 (1978). Thus, corporations have long been treated as "persons" under the Equal Protection Clause, the Due Process Clause and section 1983, [7] and recognized as capable of exercising rights under the First, Fourth, Fifth, Sixth, Seventh, and Eighth Amendments. [8]

This Court has rejected the government's approach to limiting rights based on their corporate origin. In *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978), the Court explained that "[t]he proper question *** is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect." *See also Citizens United v. FEC,* 558 U.S. 310, 342-43 (2010) (explaining that "political speech does not lose ***26** First Amendment protection 'simply because its source is a corporation' ") (quoting *Bellotti,* 435 U.S. at 784). Just as it is wrong to ask whether "corporations have speech rights," it is also wrong to ask whether "corporations exercise religion." The right question, per *Bellotti*, is whether the law abridges religious activity that RFRA and the First Amendment protect. Here the answer is plainly yes.

To be sure, this Court has noted a category of "purely personal" rights only natural persons may exercise. *See Bellotti,* 435 U.S. at 778 n.14 (suggesting that "purely personal guarantees," like the privilege against compulsory self-incrimination, are "unavailable to corporations and other organizations"). But "[i]t is beyond question that associations - not just individuals - have Free Exercise rights." App. 34a (citing *Roberts v. U.S. Jaycees,* 468 U.S. 609, 622 (1984)). And, "[a]s should be obvious," the right of religious exercise extends to all manner of religious associations - "including those that incorporate." App. 35a (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 525 (1993); *Terrett v. Taylor,* 13 U.S. (9 Cranch) 43, 49 (1815) (Story, J.)).

Moreover, this Court has long held that "*individuals* have Free Exercise rights with respect to their *for-profit businesses.*" App. 35a-36a (citing *Lee,* 455 U.S. 252); *Braunfeld v. Brown,* 366 U.S. 599 (1961)) (emphasis in original); *see also* App. 68a (Hartz, J., concurring) (noting that "the Supreme Court has already recognized that profit-seekers have a right to the free exercise of religion"). It makes no sense to say that "an individual operating ***27** for-profit retains Free Exercise protections but an individual who incorporates *** does not, even though he engages in the exact same activities as before." App. 38a. This Court has expressly rejected the notion that the profit motive negates the exercise of constitutional rights. *See, e.g., New York Times Co. v. Sullivan,* 376 U.S. 254, 265-66 (1964) (holding that "constitutionally protected" statements "do not forfeit that protection because they were published in the form of a paid advertisement").

In light of all this, it is impossible to read RFRA to contain a secret background principle that, "when individuals incorporate" a for-profit business, their "Free Exercise rights somehow disappear." App. 36a. Below, the government identified "no principled reason why an individual who uses the corporate form in a business must thereby sacrifice the right to the free exercise of religion." *Id.* 68a (Hartz, J., concurring). Nor is there any principled reason to believe that individuals forming corporations can exercise religion unless and until they earn profits. Such a position "is not 'rooted in the text of the First Amendment,' and therefore could not have informed Congress's intent when enacting RFRA." App. 36a.

2. Alternatively, the Greens themselves have an independently valid claim under RFRA. As four judges below correctly found, Hobby Lobby and Mardel cannot comply with the contraceptive-coverage requirement unless the Greens, "as the controlling owners and operators," personally "direct the corporations to [do so]." App. 86a. It is undisputed that

the Greens would be acting "in defiance of their faith" if they comply, and that their ***28** businesses would suffer crippling fines if they do not comply. *Ibid.* Thus, whether the Greens raise their claims independently or through their family businesses, there is not even a "colorable question that the Greens face a 'substantial burden' on their 'exercise of religion.' " *Id.* 87a; *see, e.g., Stormans, Inc. v. Selecky,* 586 F.3d 1109, 1120-21 (9th Cir. 2009) (relying on *EEOC v. Townley Eng'g & Mfg. Co.,* 859 F.2d 610, 619-20 (9th Cir. 1988)) (holding that "a corporation has standing to assert the free exercise right of its owners").

The government's only argument in response is that the Greens' claims are barred by the prudential "shareholder standing" rule, which bars shareholder claims that are purely derivative of a corporation's claims. *See, e.g., Alcan,* 493 U.S. at 336; App. 157a-159a. This argument is doubly flawed.

First, as Judges Gorsuch, Kelly, Tymkovich, and Matheson explained, the shareholder standing argument is meritless, because it is "well-established *** that 'a shareholder with a direct, personal interest in a cause of action [may] bring suit even if the corporation's rights are also implicated.' " *Id.* 159a (quoting *Alcan,* 493 U.S. at 336); *see also id.* 86a. Here, because the mandate "requires [the Greens] *** directly and personally to take *affirmative action* contrary to their religious beliefs," "their core alleged injury is religious," and not derivative of their companies' injuries. *Id.* 161a (emphasis in original).

Second, a prudential standing argument is just that, prudential. Congress is free to override any ***29** non-Article III limitation on standing and Congress clearly did that in RFRA. *See, e.g., Havens Realty Corp. v. Coleman,* 455 U.S. 363, 372 (1982) (where "Congress intended standing *** to extend to the full limits of Art[icle] III," courts "lack the authority to create prudential barriers to standing") (internal quotation marks omitted); 42 U.S.C. § 2000bb-1(c) (providing that "[s]tanding to assert a claim or defense under [RFRA] shall be governed by the general rules of standing under article III of the Constitution"). RFRA affirmatively protects the religious exercise rights of persons broadly defined. There is absolutely no basis in RFRA for the government's divide-and-conquer strategy where corporations have standing but no rights, and individuals who direct and control closely-held corporations have rights but no standing. Such a doctrine would defeat Congress' evident demand that the federal government respect the religious exercise rights of those it regulates. [9]

Because the Greens "assert rights *** independent of their shareholder status," App. 162a, they have standing to assert their individual RFRA claims against the contraceptive-coverage requirement.

***30** 3. On the merits, the court of appeals correctly concluded that the contraceptive-coverage requirement substantially burdens Respondents' religious exercise. Indeed, the government essentially recognizes as much by exempting certain religious organizations from this very requirement. Moreover, as the Tenth Circuit recognized, the substantial nature of the burden is made clear by "the *intensity of the coercion* applied by the government to act contrary to [Respondents' religious] beliefs." App. 44a (emphasis in original). This understanding of substantial burden "rests firmly" on this Court's free exercise cases. *See id.* 46a-50a (relying on *Thomas,* 450 U.S. at 717-18; *Lee,* 455 U.S. at 256-57). It focuses "on the coercion" imposed by the government on the claimant "to violate his beliefs." App. 48a (citing *Lee,* 455 U.S. at 256-57).

The court of appeals properly applied that standard to find Hobby Lobby and Mardel's religious exercise substantially burdened by the contraceptive-coverage requirement. First, the court accurately identified the religious exercise at issue as Respondents' "object[ion] to 'participating in, providing access to, paying for, training others to engage in, or otherwise supporting' " the mandated contraceptives. App. 50a-51a. Second, the court found the sincerity of Respondents' beliefs was undisputed. App. 51a. Finally, the court found it "difficult to characterize the pressure as anything but substantial," given the stark choices facing Hobby Lobby and Mardel - namely, either to "compromise their religious beliefs," pay nearly "$475 million more" in annual taxes, or drop employee health ***31** benefits and "pay roughly $26 million more in annual taxes." App. 51a-52a. Given that the government "did not question the significance of [this] financial burden"

below, the court correctly concluded that "Hobby Lobby and Mardel have established a substantial burden as a matter of law." App. 52a. [20]

The court properly rejected the government's substantial burden arguments. *See* App. 44a, 52a-56a. For instance, the government contended that any burden was not "substantial" because 1) use of the drugs depended on "[a]n employee's decision" that "cannot properly be attributed to her employer," and 2) insurance is "just another form of non-wage compensation *** supposedly the equivalent of money." App. 44a, 52a-53a. Both arguments failed for the same reason: they asked the court to second-guess the theology of Respondents' religious exercise. As the Tenth Circuit properly found, Respondents "have drawn a line at providing coverage for drugs and devices they consider to induce abortions" and it was not the court's "prerogative to determine whether [that] line *** 'was an unreasonable one.' " App. 53a (quoting *Thomas,* 450 U.S. at 715). Doing so would improperly require "an inquiry into the theological merit of the belief in question." App. 44a. Further, as the court explained, it was not the "employees' health care decisions" that burdened the companies' religious exercise, but rather "the ***32** government's demand that Hobby Lobby and Mardel enable access to contraceptives that [they] deem morally problematic." App. 53a.

4. Finally, the court of appeals correctly concluded that the government did not carry its burden of proving that the contraceptive-coverage requirement meets strict scrutiny. *See O Centro,* 546 U.S. at 429 (explaining that "the burden [of strict scrutiny] is placed squarely on the [g]overnment by RFRA *** including at the preliminary injunction stage") (citing 42 U.S.C. § 2000bb-1(b), 2000bb-2(3)).

a. The government did not demonstrate that applying the requirement to Respondents furthers any compelling interest. Below, the government articulated only "broadly formulated interests" in public health and gender equality, but "offer[ed] almost no justification for not 'granting specific exemptions to particular religious claimants.' " App. 57a-58a (quoting *O Centro,* 546 U.S. at 431); *see also* Pet. 27-28 (reiterating interests in "promotion of public health" and "assuring [women's] equal access to health-care services"). That lack of specificity dooms a compelling interest claim under RFRA. *See, e.g., O Centro,* 546 U.S. at 430-31 (RFRA requires government to "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' - the *particular claimant* whose sincere exercise of religion is being substantially burdened") (quoting 42 U.S.C. § 2000bb-1(b)) (emphasis added). The government failed to show with any "particularity" how its interests would be "adversely affected" by granting a limited four-drug exemption to Hobby Lobby and ***33** Mardel. App. 57a (quoting *Wisconsin v. Yoder,* 406 U.S. 205, 236 (1972)).

That failure is particularly glaring here. For instance, the government has offered religious exemptions and "religion-related accommodations" to thousands of non-profit employers, Pet. 8, which, in the government's own words, are necessary to "protect[]" objecting organizations from "having to contract, arrange, pay, or refer for [contraceptive] coverage," 78 Fed. Reg. 39870, 39872 (July 2, 2013). But the government failed to explain why Hobby Lobby and Mardel do not deserve the same "protection" - beyond the bald statement that they are "for-profit organizations." Pet. 9.

Worse still, the government exempts countless employers without any religious scruples based on nothing more than its interests in administrative convenience and appropriate "transition" rules. As the court of appeals properly concluded, the government's interests "cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." App. 58a. Numerous employers are not required to offer employees any contraceptive coverage, such as employers with "grandfathered" plans, [2] employers with fewer than fifty employees (who are not required to offer health insurance at all), and employers eligible for religious exemptions. *Id.* Given these enormous gaps, the government cannot ***34** plausibly maintain its interests are compelling. *See, e.g., Lukumi,* 508 U.S. at 547 (explaining that "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited") (internal citation omitted).

Finally, in its petition the government proposes a new interest in "ensuring a 'comprehensive insurance system with a variety of benefits available to all participants.' " Pet. 29 (quoting *Lee,* 455 U.S. at 258). But that interest - raised for the first time in this Court - cannot be compelling here. Unlike the social security system at issue in *Lee*, in which "mandatory participation [was] indispensable to [the system's] fiscal vitality" and to its ability to function (*see, e.g., O Centro,* 546 U.S. at 435), the contraceptive-coverage requirement cannot possibly demand "mandatory participation" because it expressly contemplates a system of widespread exemptions. *See, e.g.,*45 C.F.R. § 147.131(a) (providing for exemptions for "religious employer[s] *** with respect to any requirement to cover contraceptive services"). And, as already discussed, the requirement is honeycombed with religious and secular exemptions for thousands of employers and tens of millions of employees.

b. Even assuming a compelling interest, the contraceptive-coverage requirement still fails strict scrutiny because the government did not prove it is the least restrictive means of furthering its interests.

Below, the government offered no evidence explaining why it could not increase contraceptive ***35** access and use by other readily available means. *See, e.g., Korte v. Sebelius,* No. 12-3841, 2012 WL 6757353, at *4 (7th Cir. Dec. 28, 2013) (noting "the government has not advanced an argument that the contraception mandate is the least restrictive means of furthering" its "generalized interest[s]"). For instance, the government spends hundreds of millions a year through Title X of the Public Health Service Act to "[p]rovide a broad range of acceptable and effective medically approved family planning methods *** and services." 42 C.F.R. § 59.5(a)(1). [22] The government did not explain why it could not use a pre-existing program like this to redress genuine economic barriers to contraceptive access. *See, e.g.,*42 C.F.R. § 59.5(a)(7) (providing family-planning services for "persons from a low-income family"); *see also, e.g., Newland v. Sebelius,* 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) (noting such "analogous programs" and lack of proof that providing contraceptives would "entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women"), *aff'd,*No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013). Such alternative means would be far less restrictive of employers' religious freedom than the contraceptive-coverage requirement, which directly conscripts employer health plans. That intrusive approach is particularly unjustified for employers like Hobby Lobby and ***36** Mardel, who already provide employees with generous wages and benefits and who "ask only to be excused from covering four contraceptive methods out of twenty, not to be excused from covering contraception altogether." App. 60a. As the court of appeals observed, "[t]he government does not articulate why accommodating such a limited request fundamentally frustrates its goals."*Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Footnotes

1 The undisputed material facts are taken from Respondents' Verified Complaint. App. 64a.

2 For federal tax purposes, Hobby Lobby is a subchapter S corporation. App. 7a 8a.

3 As the court of appeals explained, " t]he Greens operate Hobby Lobby and Mardel through a management trust (of which each Green is a trustee), and that trust is likewise governed by religious principles. App. 8a.

4 A recent ad invites readers to "call Need Him Ministry at 1 888 NEED HIM if they "would like to know Jesus as Lord and Savior. *See* http:// www.hobbylobby.com/assets/images/holiday messages/messages/2013e.jpg (last visited Oct. 21, 2013).

5 The district court found this was not "due to anything other than a mistake. Upon discovery of the coverage, Hobby Lobby immediately excluded the two drugs, Plan B and Ella, from its prescription drug policy. The government does] not dispute that the company's policies have otherwise long excluded abortion inducing drugs. App. 174a.

6 Those methods include male and female condoms, diaphragms, sponges, cervical caps, spermicides, the pill, the mini pill, the continuous use pill, patches, vaginal rings, progestin shots, implantable rods, sterilization surgery for men and women, and sterilization implants for women. *See* FDA *Birth Control Guide* (XX/XX/2013), http:// www.fda.gov/

ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm. The contraceptive coverage requirement does not include contraceptive methods used by men. *See*78 Fed. Reg. 39870, 39870 & n.1 (July 2, 2013) (noting "HRSA Guidelines exclude services relating to a man's reproductive capacity, such as vasectomies and condoms).

7 The plan lost grandfather status due to changes made before the contraceptive coverage requirement was proposed. VC ¶59; App. 14a.

8 Respondents also sued under the First Amendment and the Administrative Procedure Act. App. 15a 16a.

9 Judge Hartz concurred on the substantial burden point. He found that the contraceptive coverage requirement imposes a substantial burden simply because it "compels the corporations to act contrary to their religious beliefs. App. 75a 76a.

10 Subsequently, the district court entered a preliminary injunction. Pet. 15. All lower court proceedings have been stayed by agreement of the parties pending this Court's disposition of the government's petition.

11 Additionally, Judge Gorsuch suggested that the government waived prudential standing by not raising it below, and also that RFRA's "plain text excludes prudential standing doctrines. App. 83a 86a; *see*42 U.S.C. § 2000bb 1(c) (RFRA is "governed by the general rules of standing under Article III).

12 In a partial concurrence, Judge Matheson agreed that the Greens had standing as the people who "own and manage Hobby Lobby and Mardel, and who are "directly and personally involved in implementing the contraceptive coverage requirement]. App. 162a. Three other judges, however, disagreed. *See* App. 99a 103a (op. of Bacharach, J.); *id.* 135a 136a (op. of Briscoe, C.J., joined by Lucero, J.); *see also id.* 71a n.1 (op. of Hartz, J.) (expressing doubts about the Greens' standing).

13 *See* Pet. 35 & n.12 (observing that "comparable RFRA claims are pending in many other courts, including the Seventh, Eighth, Eleventh, and D.C. Circuits) (citing *O Brien v. HHS,* 894 F. Supp. 2d 1149 (E.D. Mo. 2012), *appeal docketed,* No. 12 3357 (8th Cir. Oct. 4, 2012) (argument scheduled for Oct. 24, 2013); *Korte v. Sebelius,* 912 F. Supp. 2d 735 (S.D. Ill. 2012), *appeal docketed,* No. 12 3841 (7th Cir. Dec. 18, 2012) (argued May 22, 2013); *Grote v. Sebelius,* 914 F. Supp. 2d 943 (S.D. Ind. 2012), *appeal docketed,* No. 13 1077 (7th Cir. Jan. 9, 2013) (argued May 22, 2013); *Gilardi v. Sebelius,* 926 F. Supp. 2d 273 (D.D.C. 2013), *appeal docketed,* No. 13 5069 (D.C. Cir. Mar. 5, 2013) (argued Sept. 24, 2013); *Beckwith Elec. Co., v. HHS,* No. 8:13 cv 0648, 2013 WL 3297498 (M.D. Fla. June 25, 2013), *appeal docketed,* No. 13 13879 (11th Cir. Aug. 28, 2013)); *see also Annex Med., Inc. v. Sebelius,* No. 1:12 cv 2804, 2013 WL 101927 (D. Minn. Jan. 8, 2013), *appeal docketed,* No. 13 1118 (8th Cir. Jan. 14, 2013) (argument scheduled for Oct. 24, 2013).

In addition to those six cases, eight others are currently proceeding through the courts of appeals. *Mersino Mgmt. Co. v. Sebelius,* No. 2:13 cv 11296, 2013 WL 3546702 (E.D. Mich. July 11, 2013), *appeal docketed,* No. 13 1944 (6th Cir. July 17, 2013); *Eden Foods, Inc. v. Sebelius,* No. 2:13 cv 11229 (E.D. Mich. May 21, 2013), *appeal docketed,* No. 13 1677 (6th Cir. May 22, 2013); *Geneva Coll. v. Sebelius,* No. 2:12 cv 207, 2013 WL 1703871 (W.D. Pa. Apr. 19, 2013), *appeal docketed,* No. 13 3536 (3d. Cir. Aug. 22, 2013); *Monaghan v. Sebelius,* 931 F. Supp. 2d 794 (E.D. Mich. 2013), *appeal docketed,* No. 13 1654 (6th Cir. May 17, 2013); *Triune Health Group v. HHS,* No. 1:12 cv 6756 (N.D. Ill. Jan. 3, 2013), *appeal docketed,* No. 13 1478 (7th Cir. Mar. 5, 2013); *Am. Pulverizer Co. v. HHS,* No. 6:12 cv 3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012), *appeal docketed,* No. 13 1395 (8th Cir. Feb. 26, 2013); *Legatus v. Sebelius,* 901 F. Supp. 2d 980 (E.D. Mich. 2012), *appeal docketed,* No. 13 1092 (6th Cir. Jan. 24, 2013); *see also Newland v. Sebelius,* No. 12 1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013) (relying on *Hobby Lobby* to affirm preliminary injunction).

Eighteen additional cases are still in the district courts because the government has either not appealed or has voluntarily dismissed its appeal. *See Tyndale House Publishers, Inc. v. Sebelius,* No. 13 5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013) (granting government's motion to dismiss appeal from grant of preliminary injunction); *see also Midwest Fastener Corp. v. Sebelius,* No. 1:13 cv 1337 (D.D.C. Oct. 16, 2013); *Barron Indus. v. Sebelius,* No. 1:13 cv 1330 (D.D.C. Sept. 25, 2013); *Armstrong v. Sebelius,* No. 1:13 cv 563, 2013 WL 5213640 (D. Colo. Sept. 17, 2013); *Briscoe v. Sebelius,* No. 1:13 cv 285, 2013 WL 4781711 (D. Colo. Sept. 6, 2013); *QC Group v. Sebelius,* No. 0:13 cv 1726 (D. Minn. Aug. 30, 2013); *Willis & Willis, P.L.C. v. Sebelius,* No. 1:13 cv 1124 (D.D.C. Aug. 23, 2013); *Trijicon, Inc. v. Sebelius,* No. 1:13 cv 1207 (D.D.C. Aug. 14, 2013); *Ozinga v. HHS,* No. 1:13 cv 3292 (N.D. Ill. July 16, 2013); *SMA, L.L.C. v. Sebelius,* No. 0:13 cv 1375 (D. Minn. July 8, 2013); *Sharpe Holdings, Inc. v. HHS,* No. 2:12 cv 92 (E.D. Mo. June 28, 2013); *Johnson Welded Prods. v. Sebelius,* No. 1:13 cv 609 (D.D.C. May 24, 2013); *Hartenbower v. HHS,* No. 1:13 cv 2253 (N.D. Ill. Apr. 18, 2013); *Hall v. Sebelius,* No. 0:13 cv 295 (D. Minn. Apr. 2, 2013); *Bick Holdings, Inc. v. Sebelius,* No. 2:13 cv 462 (E.D. Mo. Apr. 1, 2013); *Tonn and Blank Constr. v. Sebelius,* No. 1:12 cv 325 (N.D. Ind. Apr. 1, 2013); *Lindsay v. HHS,* No. 1:13 cv 1210 (N.D. Ill. Mar. 20, 2013); *Sioux Chief Mfg. Co. v. Sebelius,* No. 4:13 cv 36 (W.D. Mo. Feb. 28, 2013).

Finally, three additional cases remain in district court either because the plaintiffs have not yet appealed an adverse decision or the district court has not yet ruled. *See M.K. Chambers v. HHS,* No. 2:13 cv 11379, 2013 WL 5182435 (E.D. Mich. Sept. 13, 2013); *Infrastructure Alternatives, Inc. v. Sebelius,* No. 1:13 cv 31 (W.D. Mich. Sept. 30, 2013); *Holland v. HHS,* No. 2:13 cv 15487 (S.D. W.Va. filed June 24, 2013).

14 Four judges also concluded that the Greens have Article III and prudential standing to bring RFRA claims. *See* App. 82a 87a (op. of Gorsuch, J., joined by Kelly and Tymkovich, JJ.); *id.* 152a 162a (op. of Matheson, J.).

15 The petitioners in *Autocam Corp. v. Sebelius* suggest there is a dispute in this case about how the objectionable drugs operate. Petition for Writ of Certiorari at 37, *Autocam Corp. v. Sebelius,* No. 13 482 (U.S. filed Oct. 15, 2013). They are mistaken. The government concedes in its petition, as it has throughout this litigation, that the drugs to which Respondents object can prevent an embryo's "implantation in the womb. *See* Pet. 10 n.5. Based on that concession, the en banc court found "no material dispute on the issue and, thus, that the court "need not wade into scientific waters here. App. 10a n.3.

16 The government took the same position on remand to the district court in this case, where it declined to introduce additional evidence and agreed that "there are no factual disputes precluding the district court from entering a preliminary injunction. Prelim. Inj. Hr'g Tr. at 6 (July 19, 2013). Moreover, when the district court asked counsel for the government whether this case was expected to require a trial, counsel stated she thought the case "would likely involve mostly questions of law, and that "at this point we] do not intend to seek any "discovery period. *Id.* at 7.

17 *See Power Mfg. Co. v. Saunders,* 274 U.S. 490, 493 (1927) (Equal Protection Clause) (collecting cases); *Minneapolis & St. Louis Ry. Co. v. Beckwith,* 129 U.S. 26, 28 (1889) (Due Process Clause); *Monell,* 436 U.S. at 687 88 (section 1983).

18 *See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Utils. Comm n,* 447 U.S. 557, 566 68 (1980) (commercial speech); *Hale v. Henkel,* 201 U.S. 43, 76 (1906) (unreasonable search); *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 568 (1977) (double jeopardy); *Pa. Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922) (takings); *Armour Packing Co. v. United States,* 209 U.S. 56, 76 77 (1908) (right to criminal jury); *Ross v. Bernhard,* 396 U.S. 531, 532 33 (1970) (right to civil jury); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 433 34 (2001) (protection from excessive fines).

19 The weakness of the government's prudential standing argument is underscored by the fact that it did not even raise the argument until prompted by the en banc court. *See* App. 83a (op. of Gorsuch, Kelly, and Tymkovich, JJ.) (explaining that prudential standing was forfeited, because the government "did not raise it] as a defense in the district court or in its principal appellate brief, but only "took up that cudgel when the en banc court] *asked* for supplemental briefing on the issue).

20 Alternatively, the court could have resolved the question as Judge Hartz did. *See* App. 76a (op. of Hartz, J.) (reasoning that Hobby Lobby and Mardel are substantially burdened simply because the regulation "compels them] to act contrary to their religious beliefs).

21 The government insists that grandfathering is "transitional, Pet. 30, but, as the court of appeals pointed out, plans may remain grandfathered "indefinitely, App. 13a.

22 *See also, e.g.,* RTI International, *Title X Family Planning Annual Report: 2011 National Summary* 1 (2013), http:// www.hhs.gov/opa/pdfs/fpar 2011 national summary.pdf ("In fiscal year 2011, the Title X] program received approximately $299.4 million in funding.).

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2014 WL 546899 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Kathleen SEBELIUS, Secretary of Health and Human Services, et al., Petitioners,
v.
HOBBY LOBBY STORES, INC., MARDEL, INC., David GREEN, Barbara GREEN, Steve GREEN, Mart GREEN, and Darsee LETT, Respondents.

No. 13-354.
February 10, 2014.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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*i QUESTION PRESENTED

The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, provides that the government "shall not substantially burden a person's exercise of religion" unless that burden satisfies strict scrutiny. *Id.* § 2000bb-1(a), (b). Respondents are a family and their closely held businesses, which they operate according to their religious beliefs. A regulation under the Patient Protection and Affordable Care Act requires Respondents to provide insurance coverage for all FDA-approved "contraceptive methods [and] sterilization procedures." 78 Fed. Reg. 39870, 39870 (July 2, 2013) (citing 42 U.S.C. § 300gg-13(a)(4)). Respondents' sincere religious beliefs prohibit them from covering four out of twenty FDA-approved contraceptives in their self-funded health plan. If Respondents do not cover these contraceptive methods, however, they face severe fines.

The question presented is whether the regulation violates RFRA by requiring Respondents to provide insurance coverage for contraceptives in violation of their religious beliefs, or else pay severe fines.

*II RULE 29.6 DISCLOSURE

Respondent Hobby Lobby Stores is a privately held Oklahoma corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Mardel is a privately held Oklahoma corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondents David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett are individual persons.

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*1 INTRODUCTION

On the merits, this is one of the most straight-forward violations of the Religious Freedom Restoration Act this Court is likely to see. Respondents' religious beliefs prohibit them from providing health coverage for contraceptive drugs

and devices that end human life after conception. Yet, the government mandate at issue here compels them to do just that, or face crippling fines, private lawsuits, and government enforcement. That is a textbook "substantial burden" on religious exercise under RFRA. Indeed, the government has effectively acknowledged this substantial burden by exempting countless non-profit entities with the same basic religious objection. And it has exempted plans covering tens of millions of people for reasons no more compelling than administrative convenience. Given these myriad exemptions, the mandate cannot possibly be the least restrictive means of achieving any compelling government interest - and it is certainly not some universal policy that cannot tolerate additional exemptions. If RFRA means anything, it means the government cannot hand out exceptions for secular reasons and then insist that "uniformity" forecloses similar exceptions for religious exercise. But the mandate does precisely that.

Understandably eager to avoid the merits, the government directs considerable effort to driving an artificial wedge between the corporate Respondents and their owners. But that distinction is illusory; *both* the corporations and their owners are entitled to relief under RFRA. Corporations frequently engage in religious exercise, as even the government concedes in ***2** the case of non-profits, and no constitutional right turns on a corporation's tax status. Ultimately, whether it is the individuals, the corporations, or both who are exercising religion, the government cannot simply wish away the reality that its policies substantially burden Respondents' religious exercise in a wholly unjustified manner.

STATEMENT OF THE CASE

A. Statutory Background

1. The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), provides that: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." *Id.* § 2000bb-1(a). Upon showing a substantial burden, RFRA entitles a claimant to an exemption unless the government can satisfy strict scrutiny. That is, the government must prove that "application of the burden to the person - (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b). RFRA constrains all federal laws and regulations, unless Congress explicitly exempts them. *Id.* § 2000bb-3(a)-(b); see generally *Gonzales v. O Centro*, 546 U.S. 418 (2006).

RFRA directly responded to this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Id.* at 879 (quotation marks omitted). In so holding, *Smith* declined to apply the strict scrutiny approach of cases like *Sherbert v. Verner,* 374 U.S. 398 (1963), and ***3** *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Through RFRA, Congress sought "to restore the compelling interest test *** and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). Congress determined this "compelling interest test *** is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb(a)(5). RFRA thus mandates "case-by-case consideration of religious exemptions" under strict scrutiny. *O Centro*, 546 U.S. at 436.

2. This dispute arises from a regulation promulgated under the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 ("ACA").

The ACA is an exceptionally complex piece of legislation with many novel, overlapping mandates and exemptions. "The Act's 10 titles stretch over 900 pages and contain hundreds of provisions." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012) (*"NFIB"*). The ACA "requires most Americans to maintain 'minimum essential' health insurance coverage," which they may do through employer-based coverage, through Medicaid or Medicare, or by "purchas[ing] insurance from a private company." *Ibid.* In addition to this "individual mandate," the ACA also imposes an "employer mandate," which requires certain employers to provide "minimum essential" health coverage to employees. 26 U.S.C. § 4980H.

The ACA also contains new substantive requirements for group health plans. One category of mandatory benefits is women's "preventive care and ***4** screenings," which must be covered without cost-sharing. 42 U.S.C. § 300gg-13(a)(4). Rather than defining this category, Congress delegated that authority to the Health Resources and Services Administration ("HRSA"), a sub-agency within HHS. HRSA, in turn, asked the Institute of Medicine ("IOM"), part of the "semi-private" National Academy of Sciences, "to develop recommendations to help implement these requirements." Pet.Br.5; Pet.App.9a-10a; see generally IOM, *Clinical Preventive Services for Women: Closing the Gaps* (2011) ("IOM Report"). In August 2011, HRSA adopted the IOM's recommendations without change. HRSA, *Women's Preventive Services Guidelines,* http:// www.hrsa.gov/womensguidelines.

The end result of this regulatory process is that "non-grandfathered [health] plans *** generally are required to provide coverage without cost sharing" of "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *Ibid.* "Four of the twenty approved methods - two types of intrauterine devices (IUDs) and the emergency contraceptives commonly known as Plan B and Ella - can function by preventing ***5** the implantation of a fertilized egg." [2] Pet.App.10a. This requirement to cover FDA-approved drugs and devices is the contraceptive-coverage mandate at issue here.

The government has exempted a vast array of employers from this mandate for both religious and secular reasons. First, HHS recognized that the mandate would significantly impact religious believers. See 45 C.F.R. § 147.131(a) (authorizing "an exemption *** with respect to a group health plan established or maintained by a religious employer *** with respect to any requirement to cover contraceptive services"). Accordingly, it established exemptions for "religious employers," defined as non-profit organizations "described in a provision of the Internal Revenue Code that refers to churches, their integrated auxiliaries, conventions or associations of churches, and to the exclusively religious activities of any religious order." Pet.App.11a-12a; see 45 C.F.R. § 147.131(a); 26 U.S.C. § 6033(a)(3)(A)(i), (iii).

Second, HHS has provided an "accommodation" for other religious non-profit organizations whose religious beliefs prevent them from complying with all or part of the mandate, allowing them to route ***6** contraceptive payments through their insurer or plan administrator. 45 C.F.R. § 147.131(b). [3]

Third, wholly apart from any religious concerns and for the sake of administrative convenience, "grandfathered" plans may indefinitely avoid the mandate by not making certain changes after March 2010. See 42 U.S.C. § 18011(a)(2) ("Preservation of right to maintain existing coverage"). This exemption has no time limit, allows the addition of new employees, and is keyed to medical inflation. 42 C.F.R. § 147.140(a)-(b), (g). While grandfathered plans must comply with certain other ACA requirements - such as covering dependents to age 26, covering preexisting conditions, and reducing waiting periods, 42 U.S.C. § 18011(a)(4); 75 Fed. Reg. 34538, 34542 Tbl. 1 (June 17, 2010) - grandfathered plans need not cover contraceptives or any other women's preventive service. 75 Fed. Reg. at 34540.

Fourth, small businesses with fewer than fifty employees - 96% of all firms in the United States - are exempt from the ACA requirement that employers provide health insurance to their employees. [4] Small ***7** businesses can thus avoid the mandate and any penalty by not providing insurance to their employees.

Based on the government's own estimates, "the contraceptive-coverage requirement presently does not apply to tens of millions of people." Pet.App.58a; see also, *e.g.*, 75 Fed. Reg. at 34552 Tbl.3 (55% of large employer plans would retain grandfathered status in 2013); Pet.Br.53 (36% of Americans covered through their employers were in grandfathered health plans in 2013).

The government, however, has refused to provide any exemption for for-profit entities and their owners who object on religious grounds to providing the mandated contraceptives. 78 Fed. Reg. 39870, 39875 (July 2, 2013) (noting that exemption does not apply to for-profit employers).

B. Factual Background

1. Respondents are David and Barbara Green; their children, Steve Green, Mart Green, and Darsee Lett; and their family businesses, Hobby Lobby Stores, an arts-and-crafts chain, and Mardel, a chain of Christian bookstores. [5]

Founded in 1970 by David Green, Hobby Lobby has grown from a single arts-and-crafts store in Oklahoma City into a nationwide chain with over 500 stores and more than 13,000 full-time employees. In 1981, Mart Green founded Mardel, an affiliated chain of Christian bookstores, which now has thirty-five ***8** stores and about 400 full-time employees. Hobby Lobby and Mardel remain closely held family businesses, organized as general corporations under Oklahoma law, and exclusively controlled by the Greens. JA129-30, 134. David Green is Hobby Lobby's CEO, his son Steve is President, his daughter Darsee is Vice President, and his son Mart is Vice CEO of Hobby Lobby and CEO of Mardel. JA129-30. For federal tax purposes, Hobby Lobby is a subchapter-S corporation. Pet.App.7a-8a.

2. "The Greens have organized their businesses with express religious principles in mind." Pet.App.8a. Hobby Lobby's official statement of purpose commits the company to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." JA134-35. The Greens operate Hobby Lobby and Mardel through a management trust they created, of which each Green is a trustee. Pet.App.8a; JA129-30, 134. The Greens each signed a Statement of Faith and a Trustee Commitment obligating them to conduct the businesses according to their religious beliefs, to "honor God with all that has been entrusted" to them, and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries." JA134.

"[T]he Greens allow their faith to guide business decisions for both companies." Pet.App.8a. All Hobby Lobby stores close on Sundays, at a cost of millions per year, to allow employees a day of rest. Each Christmas and Easter, Hobby Lobby buys hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior." *E.g., Easter 2013* ***9** *Advertisement*, http:// www.hobbylobby.com/assets/images/holiday messages/messages/2013e.jpg. Store music features Christian songs. Employees have cost-free access to chaplains, spiritual counseling, and religiously-themed financial courses. And company profits provide millions of dollars every year to ministries. Pet.App.8a; JA134-39. Mardel primarily sells Christian materials and describes itself as "a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support." Pet.App.8a; JA137-38.

Respondents also refrain from business activities forbidden by their religious beliefs. For example, to avoid promoting alcohol, Hobby Lobby does not sell shot glasses. Hobby Lobby once declined a liquor store's offer to take over one of its building leases, costing it hundreds of thousands of dollars a year. Similarly, Hobby Lobby does not allow its trucks to "back-haul" beer and so loses substantial profits by refusing offers from distributors. Pet.App.8a; JA136.

In the same way, Respondents' faith affects the insurance offered in Hobby Lobby's self-funded health plan. Respondents believe that human beings deserve protection from the moment of conception, and that providing insurance coverage for items that risk killing an embryo makes them complicit in abortion. Pet.App.50a-51a. Hobby Lobby's health plan therefore excludes drugs that can terminate a pregnancy, such as RU-486. The plan likewise excludes four drugs or devices that can prevent an embryo from implanting in the womb - namely, Plan B, Ella, and two types of intrauterine devices. Indeed, when Respondents discovered that two of these drugs ***10** had been included - without their knowledge - in the plan formulary, they immediately removed them. Pet. App. 174a.

3. Respondents' religious beliefs will not allow them to do precisely what the contraceptive-coverage mandate demands - namely, provide in Hobby Lobby's health plan the four objectionable contraceptive methods. But the government makes

non-compliance costly. The statute imposes a fine of $100 per day for each "individual to whom such failure relates." 26 U.S.C. § 4980D(b)(1). Because Respondents' plan covers over 13,000 individuals, this fine could amount to over $1.3 million per day or nearly $475 million per year. Pet.App.15a; JA154. In addition, the Labor Department and private plaintiffs may sue Respondents for failure to provide all FDA approved contraceptive methods. 29 U.S.C. § 1132.

If Respondents instead ceased providing any health insurance to their employees, they would owe a lower but still substantial penalty of $26 million per year, see 26 U.S.C. § 4980H, and would face severe disruption to their business. Dropping insurance would place them at a competitive disadvantage, and hobble their employee recruitment and retention efforts. Pet.App.51a; JA153. It would also harm the employees who currently depend on Hobby Lobby's generous health insurance - and would undermine Respondents' desire to provide health benefits for their employees, which is itself religiously motivated. *Ibid.*

Despite their sincere religious objections to facilitating abortion, Respondents do not qualify for any exemption from the mandate. Having altered ***11** their plan terms before the mandate was promulgated, Hobby Lobby's health plan is not "grandfathered," Pet.App.14a; JA140, and with well over 50 employees, they must offer qualifying insurance. 26 U.S.C. § 4980H. As for-profit businesses, neither Hobby Lobby nor Mardel is covered by the religious employer exemption or the accommodation. Pet.App.13a-14a. Consequently, Respondents must either violate their faith by covering the mandated contraceptives, or subject their family businesses to crippling consequences.

C. Procedural History

1. On September 12, 2012, Respondents sued in the United States District Court for the Western District of Oklahoma, challenging the mandate under RFRA, the First Amendment, and the Administrative Procedure Act, 5 U.S.C. § 553. See JA128. They simultaneously moved for a preliminary injunction, JA9, which the district court denied. The court held that Hobby Lobby and Mardel, as for-profit corporations, have no free exercise rights and thus are not "persons" under RFRA. Pet.App.188a. Additionally, the court concluded that the Greens individually could not show a "substantial burden" on their religious exercise, because the mandate's burden on them was only "indirect and attenuated." Pet.App.194a.

2. The Tenth Circuit granted initial en banc hearing and reversed. Pet.App.5a, 16a. By a 5-3 majority, the en banc court held that Hobby Lobby and Mardel were "persons" capable of religious exercise and could therefore sue under RFRA. Pet.App.24a (interpreting 42 U.S.C. § 2000bb-1(a)). The en banc ***12** court also rejected the government's argument that RFRA excludes religious exercise by for-profit corporations. Pet.App.33a. Additionally, four judges found that the Greens could sue individually under RFRA. Pet.App.78a (op. of Gorsuch, J., joined by Kelly and Tymkovich, JJ.); *id.* 162a (op. of Matheson, J.). [6]

The en banc court next held that Hobby Lobby and Mardel were likely to succeed on their RFRA claim. The court first recognized Respondents' sincere religious belief (which the government did not dispute) that providing the mandated coverage would make them morally complicit in abortion. Pet.App.50a-51a. The court then held that the mandate imposed a "substantial burden" on Respondents' exercise of religion because it pressured them to violate that belief. Pet.App.50a-51a. Because the mandate forced Respondents to either "compromise their religious beliefs," "pay close to $475 million more in taxes every year, or pay roughly $26 million more in annual taxes and drop health-insurance benefits for all employees," the court found it "difficult to characterize the pressure as anything but substantial." Pet.App.51a-52a.

The court rejected the government's argument that the burden on Respondents was too attenuated, ***13** and therefore insubstantial, because an employee's decision to use contraception could not properly be attributed to her employer. Pet.App.54a-56a. The court found this reasoning "fundamentally flawed," because it "requires an inquiry into the

theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs." Pet.App.44a.

The court then concluded that the mandate failed strict scrutiny. The government's asserted interests in "public health and gender equality" were not compelling "because they are 'broadly formulated,' " because the government offered "almost no justification for not 'granting specific exemptions to particular religious claimants,' " and because "the contraceptive-coverage requirement presently does not apply to tens of millions of people." Pet.App.57a-58a (quoting *O Centro*, 546 U.S. at 431). The court also held that the mandate was not the least restrictive means of achieving those over-broad interests because the government did "not articulate why accommodating [Respondents'] limited request fundamentally frustrates its goals." Pet.App.60a. [7]

SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act protects Respondents' religious exercise. RFRA covers any "person's exercise of religion," 42 U.S.C. § 2000bb-1(a), ***14** but it does not separately define "person." The Dictionary Act thus supplies the meaning of the term, which is specifically designed to include both natural persons (like the Greens) and corporations (like Hobby Lobby and Mardel). This understanding is supported by RFRA's context and this Court's jurisprudence, which has long protected the exercise of religion by corporations and in commercial contexts. Indeed, the government is forced to concede that RFRA applies to non-profit corporations and offers no support for the notion that a corporation's ability to exercise constitutional rights turns on its tax status. RFRA therefore clearly protects both the individual and the corporate Respondents. And the government's attempt to drive a wedge between the Greens and their businesses - where only the former have rights and only the latter suffer burdens - is a misguided shell game. The fact remains that the Greens exercise their faith through Hobby Lobby and Mardel, and those beliefs are entitled to protection under a statute that draws no distinction between natural or corporate persons, let alone between for-profit and non-profit corporations.

The contraceptive mandate substantially burdens Respondents' exercise of religion. Respondents' faith prohibits them from facilitating abortion, and specifically from providing health coverage for the four mandated drugs and devices that can end life after conception. The government does not dispute that these are sincere religious beliefs or that they deserve protection - indeed, the government accommodates the same religious beliefs of certain non-profit corporations. Yet, the mandate compels Respondents to do precisely what their religion prohibits or face ***15** draconian consequences - including millions in fines, private lawsuits, and government enforcement actions. This is the paradigmatic substantial burden under RFRA. The government's attempt to recharacterize the mandate as concerned only with the exchange of money ignores the mandate's purpose and effect: to force employers to provide *specific* contraceptives. And the government's suggestion that the burden is too "attenuated" to warrant relief is just a backdoor effort to question the sincerity of Respondents' religious beliefs. Respondents object to being forced to facilitate abortion by providing abortifacients, and that objection does not turn on the independent decisions of their employees.

The government has not come close to carrying its burden of demonstrating that the mandate satisfies strict scrutiny. First, the government's articulated compelling interests are woefully deficient. Two - public health and gender equality - are defined so broadly that they could never satisfy strict scrutiny. There are countless less restrictive means to achieve these broadly defined goals without implicating Respondents' religious exercise. The third is newly minted for this Court, and is therefore forfeited. But that newly articulated interest - the promotion of a "comprehensive" scheme of providing benefits to all - actually highlights the most glaring problem with the government's defense of the mandate: the government has already granted a bevy of exceptions to the mandate, for reasons ranging from religious accommodation to administrative convenience. Having granted multiple exemptions for multiple reasons, the government cannot validly fall back on a compelling interest in comprehensiveness. This case ***16** is the polar opposite of the social security system, where the government can credibly insist that everyone must contribute and even a modest exception for employers endangers the system. Indeed, if RFRA means anything, it makes crystal clear that when the government

grants exceptions for secular reasons, it cannot insist on enforcing that law in the name of comprehensiveness when it substantially burdens sincerely-held religious beliefs.

ARGUMENT

I. The Religious Freedom Restoration Act Protects Respondents' Exercise Of Religion.

A. Both the Corporate and Individual Respondents Are "Persons Exercising Religion" Under RFRA.

1. RFRA protects any "person's exercise of religion." 42 U.S.C. § 2000bb-1(a), (b). Because RFRA does not specifically define "person," the Dictionary Act's definition of the term controls. See, *e.g., United States v. United Mine Workers of Am.,* 330 U.S. 258, 275 (1947). The Dictionary Act provides that: "In determining the meaning of any Act of Congress, unless the context indicates otherwise, *** the word[] 'person' *** include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Thus, as a matter of simple statutory interpretation, RFRA protects both the individual and corporate Respondents' religious exercise. This conclusion should "end the matter." Pet.App.24a.

Nothing else in RFRA suggests any limitation on the Dictionary Act's definition. When applying the Dictionary Act, the relevant "context" is "the text of ***17** the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 199 (1993). If anything, RFRA's context *confirms* that the Dictionary Act's broad definition controls. The statute contains no specialized or limited definition of "person," while it specifically defines other terms. See, *e.g.*, 42 U.S.C. § 2000bb-2(1)-(4) (defining "government," "covered entity," "demonstrates," and "exercise of religion"). And it defines "exercise of religion" capaciously to include "*any* exercise of religion." 42 U.S.C. § 2000bb-2(4) (cross-referencing Religious Land Use and Institutionalized Persons Act ("RLUIPA")); *id.* § 2000cc-5(7)(A)-(B) (emphasis added). What is more, the Dictionary Act includes all manner of artificial entities within its broad definition without so much as hinting that anything turns on their tax status. Indeed, religion is commonly exercised by and through corporations, associations, and societies - which, of course, is why the government rightly concedes that *non-profit* corporations come within RFRA's ambit.

Thus, no plausible reading of RFRA's text, context, and history would exclude Respondents from its protection. In fact, the congressional debates leading up to RLUIPA displayed an undisputed public understanding that the language in RFRA "protected for-profit corporations and their owners." Christian Legal *Soc'y Amicus* Br.32.

2. Congress knows how to limit statutory protections to a subset of artificial entities or "persons," and it chose not do so in RFRA. For instance, Congress expressly limited religious ***18** exemptions in Title VII and the ADA to "a religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1(a); *id.* § 12113(d)(1), (2). "Congress [wa]s aware of" these limited exemptions, but "chose not to" employ such limited formulations in RFRA. *Mississippi ex rel. Hood v. AU Optronics Corp.,* U.S. , No. 12-1036, slip op. at 6-7 (U.S. 2014) (quoting *Hall v. United States,* 132 S. Ct. 1882, 1889 (2012)). And when "Congress decline[s] to include an exemption," that "indicates that Congress intended no such exception." *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2134-35 (2012). Congress is thus "quite capable of narrowing the scope of a statutory entitlement *** when it wants to," and it has chosen not to do so here. Pet.App.27a. That choice must be respected.

The government ignores this legislative choice. Indeed, one way to understand the flaws with the government's approach is that it attempts through regulation to accommodate only a subset of those entitled to a statutory exemption under RFRA. See *supra* p. 5 (describing narrowly-defined class of "religious employers"). But when Congress makes a broad accommodation for all persons whose religious exercise is substantially burdened, an agency is not free to offer a regulatory exemption only to a narrowly defined subset of such persons.

3. The government offers no contrary analysis of RFRA's text and context. Instead, it asserts that RFRA protects only "individuals and religious non-profit institutions" because no pre-*Smith* case held "that for-profit corporations have religious beliefs." Pet.Br.17, 18-19. But the place to look for the scope of RFRA's coverage is its text, which broadly protects ***19** any religious exercise. RFRA does not offer only begrudging protection such that a plaintiff must identify a right to religious exercise clearly established by a pre-*Smith* holding. Accordingly, the burden of the government's argument is to establish that the exercise of religion by a for-profit corporation is such an oxymoron that Congress could not have included it when broadly protecting the religious exercise of all persons, including corporations.

In any event, far from holding that religion and commercial activity are incompatible, this Court's pre-*Smith* cases squarely recognized that religious exercise may legitimately occur in the sphere of for-profit business. In *United States v. Lee*, for instance, the Court addressed a claim by an Amish carpenter and farmer that "both payment and receipt of social security benefits is forbidden by the Amish faith." 455 U.S. 252, 254, 257 (1982). The Court concluded that compelling the employer to "participat[e] in the social security system interferes with [his] free exercise rights," despite the obvious for-profit nature of his business. *Id.* at 257. Similarly, in *Braunfeld v. Brown,* the Court entertained a challenge to a Sunday closing law by Orthodox Jewish "merchants *** engage[d] in the retail sale of clothing and home furnishings." 366 U.S. 599 (1961). There, too, this Court recognized that the law burdened free exercise rights because it made "religious beliefs more expensive." *Id.* at 605. Although both laws ultimately withstood strict scrutiny, there was no doubt that the claimants were exercising their religious beliefs through for-profit commercial activities.

***20** The government does not resist this conclusion but instead offers the fig leaf that *Lee* and *Braunfeld* involved "individual sole proprietors," rather than corporations. Pet.Br. 18. This is a classic distinction without a difference. None of this Court's cases, before or after *Smith*, suggests that an entity's particular *form* determines whether it or its owners can exercise religion. To the contrary, the Court has unanimously recognized the free exercise rights of a "not-for-profit corporation organized under Florida law," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993); "a New Mexico corporation on its own behalf," *O Centra Espirita Beneficiente Uniao do Vegetal v. Ashcroft,* 389 F.3d 973 (10th Cir. 2004), *aff'd, O Centro*, 546 U.S. 418; and an "ecclesiastical corporation," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012), *reversing EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772 (6th Cir. 2010). This recognition dates back to the earliest decades of the Republic. In 1815, this Court explained that "the legislature may *** enable all sects to accomplish the great objects of religion by giving them *corporate rights* for the manag[e]ment of their property, and the regulation of their temporal as well as spiritual concerns." *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815) (Story, J.) (emphasis added).

Indeed, in *Gallagher v. Crown Kosher Super Market, Inc.,* 366 U.S. 617, 618-19 (1961), five members of the Court assumed that a commercial corporation owned by four Orthodox Jewish shareholders could challenge a Sunday closing law under the Free Exercise Clause. The government's claim that *Gallagher* made an "express reservation" of ***21** whether for-profit corporations can exercise religion simply misreads the decision. Pet.Br. 18. Four Justices in *Gallagher* stated that, given the companion decision in *Braunfeld*, they "need not decide whether appellees have standing to raise these questions." 366 U.S. at 631 (op. of Warren, C.J., joined by Black, Clark, and Whittaker, JJ.). But the government overlooks the fact that five other Justices (Frankfurter, Harlan, Douglas, Brennan, and Stewart) *did* reach the question and concluded that the corporation was exercising religion by closing on the Jewish Sabbath. [8] See also Orthodox Union *Amicus* Br. 8-11; Ethics & Public Policy *Amicus* Br. 16-20.

Finally, the government's restrictive approach to RFRA misconceives the statutory framework. Even setting aside that this Court's pre-*Smith* precedents support Respondents, RFRA "is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in ***22** those decisions." H.R. Rep. No. 103-88, at 7 (1993); see also S. Rep. No. 103-111, at 9 (1993). The statute restored "the compelling interest test as set forth in" this Court's pre-*Smith* case law. 42 U.S.C. § 2000bb(b)(1). But Congress never intended to restrict RFRA's protection only to the specific facts of those earlier cases. See, *e.g.*, H.R. Rep. No. 103-88, at 6-7 (noting "expectation" that courts would find "guidance" in pre-*Smith* cases but "neither approv[ing] nor disapprov[ing] of the result in any particular court decision").

Furthermore, in 2000, Congress specifically amended RFRA's definition of "religious exercise" to eliminate its prior reference to the Free Exercise Clause and instead cross-referenced the broader definition from RLUIPA protecting "any exercise of religion." See Ethics & Public Policy *Amicus* Br.6-11. RFRA review, in other words, is not like review in the qualified immunity or federal habeas contexts, which require clearly established federal law controlling the case at hand. The scope of RFRA is answered instead by the statutory text, which covers all persons, including corporations, without regard to their tax status.

B. Free Exercise Rights, Like Most Constitutional Protections, Extend to For-Profit Corporations and Their Owners.

This Court has long held that corporations enjoy the full panoply of rights protected in the Constitution, except for those that are "purely personal." And the Court has never suggested that free exercise rights are purely personal, or that individuals could not exercise religion when engaged in particular activities (like ***23** making money) or when using particular means (like a corporation). The government does not dispute any of this. Instead, it seeks to drive a wedge between the Greens and their businesses, and proposes another distinction - found nowhere in RFRA, the Constitution, or this Court's decisions - between non-profit and for-profit corporations. But the federal tax code does not decide the scope of constitutional rights, and the government's baseless proposal would lead to all manner of absurd results.

1. It is firmly rooted in this Court's jurisprudence that the First Amendment, like most other constitutional provisions, protects corporations and their owners. For over a century, it has been "well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978). Consequently, corporations have long been treated as "persons" under the Equal Protection Clause, the Due Process Clause, and section 1983, [9] and have been recognized as capable of exercising rights under the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments. [0] C12 *Amicus* Br. 12-13.

***24** The government does not argue that religious exercise is a "purely personal" right that can be exercised only by individuals. *Compare First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (Fifth Amendment privilege against compelled self-incrimination is "purely personal"). Nor could it, since "[i]t is beyond question that associations - not just individuals - have Free Exercise rights." Pet.App.34a. This Court has explained that an individual's "freedom to speak, *to worship*, and to petition the government *** could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added). Indeed, a great many of this Court's free exercise decisions have protected groups, not individuals. See *supra* p. 20 (citing *Hosanna-Tabor; O Centro; Lukumi*).

The history of the Free Exercise right confirms that religious activity has been routinely undertaken through corporations. In his *Commentaries on the Law of England*, Blackstone lists "advancement of religion" *first* in the list of purposes that corporations might pursue. 1 *Blackstone Commentaries on the Law of England* ch. 18 ("Of Corporations") 467; see also Christian Booksellers *Amicus* Br. 12-13. Indeed, "religious institutions *** had long been organized as ***25** corporations at common law and under the King's charter ***." *Citizens United v. FEC*, 558 U.S. 310, 388 (2010). There is no reason to ignore this history or contort the statutory text to hold otherwise.

Moreover, the government's insistence that one kind of corporation does not "have" religious exercise rights fundamentally misunderstands this Court's approach. In *Bellotti*, the Court explained that "[t]he proper question *** is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect." 435 U.S. at 776; see also *Citizens United*, 558 U.S. at 342-43 (an activity "does not lose First Amendment protection 'simply because its source is a corporation' ") (quoting *Bellotti*, 435 U.S. at 784). Under *Bellotti*, it cannot possibly be right to ask whether for-profit corporations "have" free exercise rights, in contrast to other entities organized in different forms or under separate provisions of the tax code. The question is simply whether the law burdens

religious exercise. Here, the government's own actions leave no doubt that the answer is plainly yes: it has exempted churches and other entities for precisely the same religious exercise Respondents raise in this case.

2. The government's proposed distinction between the religious exercise of for-profit and non-profit corporations fails for similar reasons. Most obviously, the distinction appears nowhere in RFRA's text or the Dictionary Act. There is simply no reason to believe Congress intended the unadorned term ***26** "person" in RFRA to include individuals, non-profit corporations, and profit-making enterprises (provided they are organized as something other than a corporation), but to exclude for-profit corporations. And the Dictionary Act does not exclude for-profit corporations from its capacious definition of "person."

Moreover, the government's profit-based approach to religious exercise conflicts with this Court's First Amendment cases, which do not turn on a claimant's tax status. This is true not only for religious exercise (as *Lee* and *Braunfeld* demonstrate), but also for the speech, press, and establishment clauses. See, *e.g., N. Y. Times v. Sullivan*, 376 U.S. 254, 265-66 (1964) (holding that "constitutionally protected" statements "do not forfeit that protection because they were published in the form of a paid advertisement"); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011) ("While the burdened speech results from an economic motive, so too does a great deal of vital expression."); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 117 (1982) (holding, under the Establishment Clause, that the state may not delegate power over liquor licenses to churches).

***27** Nor does the government offer any support for the odd notion that the First Amendment singles out religious exercise as the *only* right that may not be exercised while earning a living. Instead, the government offers only the false dichotomy that "[f]or-profit corporations are different from religious non-profits in that they use labor *to make a profit*, rather than to perpetuate a religious values-based mission." Pet.Br.19 (quotation marks omitted). [2] But corporations frequently pursue moral or religious goals alongside profits. See generally Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-makers?*, 21 Geo. Mason L. Rev. 59 (2013); Christian Booksellers *Amicus* Br. 14-20; Council for Christian Colleges *Amicus* Br.13-19. [3] "States do not generally require for-profit corporations to reject all goals that do not maximize revenues," Twenty States *Amicus* Br. 17, and for good reason: that would impermissibly condition basic constitutional freedoms on satisfying the tax code's definition of a non-profit. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (government "may not deny a benefit to a person on a ***28** basis that infringes on his constitutionally protected interests"). Indeed Oklahoma, where Respondents are incorporated, recognizes that general corporations may undertake any "lawful acts," including acts inspired by religious belief. Okla. *Amicus* Br.3-11.

3. Without any foothold in text, context, or history, the government seeks to artificially divide Respondents, suggesting that only the Greens have religious rights but only their businesses suffer the burden of the mandate. Allowing *any* Respondent to sue under RFRA, it says, would wrongly "impute" the Greens' religious beliefs to their businesses and thus "reject the bedrock principle that a corporation is legally distinct from its owners." Pet.Br.25. But neither the law nor the government's own logic recognizes this division between the Greens and their family businesses.

The unremarkable principle that a corporation is "distinct" from its owners for some purposes does not permit the government to divide and conquer Respondents so that their religious rights simply vanish. The government concedes that RFRA and the First Amendment protect "religious non-profit institutions," Pet.Br.18-19, which are often organized in the corporate form. Non-profit corporations are just as "legally distinct" from their individual members as any for-profit corporation. See, *e.g.*, 1A William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 25 ("The distinctness of the corporate entity applies equally to all kinds of corporations," and "nonprofit corporations ***, like other corporations, are legal entities separate from their members"). Yet no one has ever dreamed that a non-profit corporation ***29** can be burdened because only its individual members actually exercise religion. In short, whether an entity exercises religion "cannot be about the protections of the corporate form," since "[r]eligious associations can incorporate, gain those protections, and nonetheless retain their Free Exercise rights." Pet.App.38a. Furthermore,

RFRA - which protects a "person's exercise of religion," without qualification - does not even hint that it depends on the nuances of corporate structure at all.

The government incorrectly relies on decisions involving federal statutes that - unlike RFRA - expressly turn on corporate structure. See Pet.Br. 24-25. Those cases, and the statutes at issue, distinguish themselves. *Cedric Kushner Promotions, Ltd. v. King,* involved a RICO provision that "foresees two separate entities, a 'person' and a distinct 'enterprise.' " 533 U.S. 158, 160 (2001); see also 18 U.S.C. § 1962(c) ("unlawful for any person employed by or associated with any enterprise *** to conduct or participate *** in the conduct of such enterprise's affairs" by committing certain crimes). The Court simply found sufficient "distinctness" between a corporation and its owner to apply RICO. *Cedric Kushner*, 533 U.S. at 163. Similarly, *Domino's Pizza, Inc. v. McDonald* involved 42 U.S.C. § 1981, which specifically protects a person's right to "make and enforce contracts" without regard to race. 546 U.S. 470, 474 (2006). The Court held the corporation's sole shareholder could not sue under the statute because the contractual rights at issue belonged to the corporation only. *Id.* at 477. But this Court did *not* hold that the corporation was unable to enforce its rights, even if it did so at the direction of the sole shareholder. See *id.* at 473 n.1 ***30** ("[T]he Courts of Appeals to have considered the issue have concluded that corporations may raise § 1981 claims."). And, even farther afield, *United States v. Bestfoods*, 524 U.S. 51 (1998), does not involve the distinction between a corporation and its shareholders, but rather "the principle that a parent corporation is distinct from its subsidiaries." Pet.Br.25. More fundamentally, none of these cases relies on the corporate form to strip *both* individual *and* corporation of the relevant statute's rights or liabilities.

4. Nor is the government correct that the Greens *themselves* cannot sue under RFRA simply because they exercise their religion through for-profit corporations. Pet.Br.26-31. This flatly contradicts the statutory text and the actual facts of this case. RFRA broadly protects "any" religious exercise, and does not purport to limit the choice of means by which believers may exercise their faith. *Cf. M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 411 (1819) ("The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else.").

It is undisputed that the Greens have committed themselves to conducting their business activities according to their religious beliefs. See, *e.g.,* Pet.App.8a. Hobby Lobby and Mardel are closely-held corporations controlled entirely by the Greens. JA129-30, 134; Pet.App.7a-8a. Thus, Hobby Lobby and Mardel act only through the Greens. The record amply demonstrates how the Greens have pursued their religious commitments through their business activities, Pet.App.8a, and there is no dispute about the precise religious exercise at issue here: the Greens ***31** cannot in good conscience direct their corporations to provide insurance coverage for the four drugs and devices at issue because doing so would "facilitat[e] harms against human beings." Pet.App.14a.

Thus, forcing Respondents to comply with the mandate would directly burden the Greens' religious exercise. Threats against one's business and livelihood - like threats against one's home, bank account, or unemployment check - can obviously impose unbearable pressure. Here, the devastating consequences for non-compliance will be visited upon the *Greens* family businesses, and will occur only if the *Greens* continue to exercise their faith by excluding four products from their companies' health plan. [4]

The unavoidable result of the government's argument is that "an individual operating for-profit retains Free Exercise protections but an individual who incorporates *** does not, even though he engages in the exact same activities as before." Pet.App.38a. That approach would produce absurd results. For example, the government agrees that a Jewish *individual* could exercise religion while operating a kosher butcher shop as a sole proprietor. See Pet.Br. 18. Presumably, he could continue to exercise religion if he formed a general partnership ***32** with his brother. But the government says the ability of this religiously-observant butcher to exercise his faith abruptly ends - and the government's power to override his faith begins - at the moment of incorporation, "even though he engages in the exact same activities as before." Pet.App.38a. That rule is found nowhere in RFRA, the Dictionary Act, or this Court's decisions. [5]

***

Both the Greens and their businesses can sue under RFRA. Indeed, they are indistinguishable for purposes of this case: Hobby Lobby and Mardel will comply with the mandate only if the Greens, and no one else, direct them to do so. But in all events the government cannot possibly be correct that *neither* the Greens *nor* their businesses can sue under RFRA, based on the specious reasoning that only the flesh-and-blood Greens can exercise religion while only the "corporate entity" can suffer the mandate's burdens. That shell game defies both law and logic.

***33** It also has dangerous implications. For instance, if the government were correct, then a non-profit religious corporation could be denied a land-use permit, and the government could say the burden falls only on the corporate entity, not on its members. The government could equally say that only the editors of the New York Times can truly exercise free speech rights, and so the First Amendment is unconcerned with defamation liability for the corporate entity. Businesses owned by women and minorities could face discrimination, and neither the owners nor their companies could seek protection. On the flip-side, the government's argument would allow a corporate defendant to deny religious or racial discrimination on the ground that the corporate entity terminated employment and any animus flowed only from the controlling shareholder.

In any of those contexts, the government's argument would be a non-starter. It should fare no better here. A corporation's status as a distinct entity with limited liability does not render its rights or its owners' rights invisible to the First Amendment and federal civil-rights laws.

II. The Mandate Violates Respondents' Rights Under RFRA.

The contraceptive-coverage mandate violates Respondents' RFRA rights. RFRA requires the government to justify actions that "substantially burden" religious exercise by demonstrating that the specific burden is "the least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The mandate substantially burdens Respondents' religious exercise by coercing ***34** them - under threat of multi-million dollar fines - to violate their sincere belief that they cannot provide the four drugs and devices at issue. Indeed, the government itself understands the mandate's profound impact on believers, which is why it exempts certain religious groups, including some that have incorporated, from the mandate. The government's willingness to exempt others - and many for reasons as mundane as administrative convenience - dooms its efforts to meet strict scrutiny. The contraception mandate is the very antithesis of the kind of rigorously uniform requirement which admits no exceptions. And RFRA makes plain that the willingness to make exceptions for secular reasons estops the government from refusing to alleviate substantial burdens on sincere religious beliefs.

A. The Mandate Substantially Burdens Respondents' Exercise of Religion.

The substantial burden inquiry proceeds in two logical steps. The Court first must identify the sincere religious exercise at issue. Then, it must determine whether the government has placed substantial pressure on the plaintiff to abstain from that religious exercise. See, *e.g.*, *Korte v. Sebelius*, 735 F.3d 654, 682-85 (7th Cir. 2013); *Gilardi v. HHS*, 733 F.3d 1208, 1216-18 (D.C. Cir. 2013); Pet.App.50a-51a; see also *O Centro*, 546 U.S. at 428; *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981); see generally U.S. Conference of Catholic Bishops *Amicus* Br. 15-32 (describing substantial burden analysis). Only the second step is at issue here.

1. Respondents' religious beliefs prohibit them from providing coverage for contraceptives that risk ***35** destroying a human embryo. As the government concedes, the mandate coerces Respondents to do just that, by requiring them to cover four types of contraceptives that may prevent uterine implantation of an embryo. See Pet.Br.9 n.4; see also Pet.App.10a n.3 ("no material dispute" on this issue). In Respondents' view, offering these items in their health plan makes them complicit in abortion. See JA127, 139 (Respondents cannot "participat[e] in, provid[e] access to, [or] pay[]

for *** abortion-causing drugs and devices," including "deliberately providing insurance coverage for *** [such] drugs or devices"). Thus, Respondents' objection under RFRA is to the mandate's requirement that they provide these specific drugs in Hobby Lobby's health plan, in violation of their faith. See, *e.g.,* Pet.App.53a ("Hobby Lobby and Mardel have drawn a line at providing coverage for drugs or devices they consider to induce abortions."). And the government concedes that these beliefs are "sincere" and "entitled to respect." Pet.Br.32.

Respondents' unwillingness to facilitate acts they regard as immoral is plainly an "exercise of religion" under RFRA. [6] See 42 U.S.C. § 2000cc-5; 2000bb-2(4) ("exercise of religion" under RFRA "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief"). This Court has recognized that religious exercise often involves "abstention from *** physical acts." *Smith*, 494 U.S. at 877; see also *Thomas*, 450 U.S. at 715. And Respondents' belief that their religion draws a moral ***36** line at providing insurance coverage is not open to judicial re-examination. The government acknowledges this much, see Pet.Br.32 (citing *Thomas*)), as indeed they must, given that they have recognized the profound impact the mandate has on some believers by offering exemptions to entities with precisely the same objection as Respondents. See, *e.g.,* 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011).

2. Given the draconian penalties for non-compliance, there can be no doubt that the mandate substantially burdens Respondents' exercise of religion. Indeed, the mandate and its multi-million dollar enforcement penalties are the paradigmatic substantial burdens.

A law substantially burdens religious exercise when it pressures a believer to forego a religious practice or violate a religious belief. And this Court has identified "substantial burdens" in far less onerous circumstances than these. In *Sherbert* and *Thomas*, for instance, the Court found such pressure in the unavailability of unemployment benefits. See *Sherbert*, 374 U.S. at 404 (concluding "the pressure upon [a Seventh-day Adventist] to forego [abstaining from Saturday work] is unmistakable"); *Thomas*, 450 U.S. at 717-18 (law's "coercive impact *** put[] substantial pressure on [a Jehovah's Witness] to modify his behavior and to violate his beliefs" by participating in manufacturing tanks). Even though the compulsion was indirect, this Court held that "the infringement upon free exercise [wa]s nonetheless substantial." *Id.* at 718.

But "a fine imposed" for adherence to religious beliefs is as direct and obvious a burden as one could ***37** imagine. *Sherbert*, 374 U.S. at 404. Fining someone for an act or omission compelled by faith is the paradigmatic substantial burden against which all other less direct impositions are compared. Thus, *Yoder* found a "severe" and "inescapable" burden where a law "affirmatively compel[led]" Amish parents to send their children to high school, or else be "fined the sum of $5 each." 406 U.S. at 208, 218. Similarly, *Lee* found a law "interfere[d] with *** free exercise rights" by compelling an Amish carpenter to participate in the social security system against his beliefs or face a $27,000 tax assessment. 455 U.S. at 257; see also, *e.g., Hernandez v. Comm'r,* 490 U.S. 680, 699 (1989) (*Lee* involved a "substantial burden"). [7]

The penalties imposed by the mandate make *Yoder*'s $5-per-child penalty look quaint. If Respondents continue to offer their current health plan, which comports with their religious beliefs but not the mandate, Respondents face fines of $100 per ***38** affected individual per day, which could total "over $1.3 million per day, or close to $475 million per year." Pet.App.51a; 26 U.S.C. § 4980D; JA126 (over 13,000 full-time employees). If Respondents drop insurance altogether, they would face annual penalties of $2,000 per employee, or more than $26 million, 26 U.S.C. § 4980H, and "put themselves 'at a competitive disadvantage in [their] efforts to recruit and retain employees," while undermining their faith-based interest in providing adequate benefits. Pet.App.51a (quoting JA153). Additionally, failure to comply with the mandate would open Respondents to costly private lawsuits and government enforcement under ERISA. See 29 U.S.C. § 1132(a)(1), (2), (5). It is thus impossible "to characterize the pressure as anything but substantial." Pet.App.51a. Since the government "did not question the significance of th[is] financial burden," the court of appeals correctly found a substantial burden "as a matter of law." Pet.App.52a.

Finally, the government's insistence that the burden here is insubstantial is difficult to square with its own felt-need to alleviate the same burdens experienced by others. After all, religious objections to the mandate were no surprise. The government knew it was treading on sensitive territory when it imposed a mandate concerning topics as fraught with religious controversy as abortion and contraception. Recognizing the inevitability of religious conflict, the government exempted certain non-profit entities and accommodated others. Having done so, the government is poorly positioned to deny that the mandate imposes a substantial burden on Respondents too.

***39** This is not to say that if the government accommodates some religious exercise it must accommodate all. Conceivably, the government could accommodate some religious objectors in particular circumstances and yet justify refusing to accommodate others with the same beliefs by satisfying strict scrutiny. But logically the government cannot accommodate the religious exercise of some while denying that the law substantially burdens others engaged in the exact same religious exercise.

3. The government offers no coherent response to this straightforward substantial burden analysis. Rather than follow this Court's actual guidance from *Thomas, Lee*, and other cases, it proposes a list of newfound "principles" that should "guide[]" the Court - such as whether the relationship between Respondents' injury and the mandate is "too attenuated," and whether their claims involve "actions and rights of independent actors and affected third parties." Pet.Br.32-33. Indeed, the closest the government comes to an actual standard is this masterpiece of obfuscation:

> [A] proffered burden may be deemed not substantial in cases where the nature of applicable legal regimes and societal expectations necessarily impose objective outer limits on when an individual can insist on modification of, or heightened justifications for, governmental programs that may offend his beliefs.

Id. at 33. This tortured standard has no mooring in RFRA's plain text or in this Court's pre-*Smith* cases ***40** and is a far cry from *Yoder*'s simplicity, where a mandate and penalty were the quintessential substantial burden even when the fine was a mere $5.

The government's suggested guideposts and factors have no place in the substantial burden analysis. Indeed, to the extent they are relevant at all, they implicate distinct components of a RFRA claim. The government's "attenuation" concern, for example, is at best a backdoor effort to question the sincerity of Respondents' beliefs, which the government has wisely conceded. The major premise of its "attenuation" argument is that the burden is insubstantial because Respondents are merely required to "pay[] money into an undifferentiated fund to finance covered benefits" that employees may "independent[ly]" elect to use. *Ibid.* But that premise is incorrect. The mandate does not require the funding of health care accounts for whatever services the employee needs. It unambiguously requires Respondents to cover specifically-named items in their health plan. 42 U.S.C. § 300gg-13(a)(4) (authorizing HRSA to recommend "additional preventive care and screenings"). Indeed, the whole point of the mandate is to require cost-free coverage of *particular* services - a point the government recognizes in its brief. Pet.Br.50 ("Congress's objective [was] to increase access to recommended preventive services by eliminating all associated out-of-pocket costs.").

The balance of the government's "attenuation" argument simply ignores the nature of Respondents' religious-based objection and the government's own concession that the objection is sincere. Respondents object to the government's mandate that they provide ***41** religiously-objectionable drugs and devices. It is irrelevant that the ultimate decisions to use the mandated drugs "are made by *** plan participants and beneficiaries." Pet.Br.33. The government's suggestion otherwise misunderstands the nature of its own mandate and Respondents' religious objection. As the court of appeals correctly explained, "[i]t is not the employees' health care decisions that burden [Respondents'] religious beliefs, but the government's demand that Hobby Lobby and Mardel *enable access* to contraceptives that [they] deem morally problematic." Pet.App.53a (emphasis added). Put differently, Respondents have never filed suit regarding any decisions

by their employees. Respondents sued only when the government forced Respondents to provide specific drugs and devices in violation of their faith.

The most fundamental problem, though, with the government's "attenuation" argument is that it invites "an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs." Pet.App.44a. At bottom, the government insinuates that Respondents simply misapprehend their own beliefs because their employees' use of the objectionable items cannot be attributed to Respondents "in any meaningful sense." Pet.Br.33. But that is not how Respondents see it: they sincerely believe that *providing* the coverage makes them morally complicit. And that belief is not open to question here. See, *e.g.*, *Smith*, 494 U.S. at 887 ("[r]epeatedly *** 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 ***42** claim"); *Lee*, 455 U.S. at 256-57 ("[i]t is not within 'the judicial function and judicial competence' *** to determine whether appellee or the Government has the proper interpretation of the Amish faith"); *Thomas*, 450 U.S. at 715-16 (because Jehovah's Witness "drew a line" against participating in tank manufacturing, "it is not for us to say that the line he drew was an unreasonable one"). It is not for the government to insist that Respondents' faith should have reached a conclusion more convenient for the government's regulatory goals.

The cases the government cites provide no support. *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Board of Education v. Allen*, 392 U.S. 236 (1968), rejected free exercise challenges to tax dollars flowing to religious entities because, in both cases, the plaintiffs failed to identify any religious practice subject to government coercion. See *Tilton*, 403 U.S. at 689; *Allen*, 392 U.S. at 249. [8] Quite obviously that is not true here. Respondents do not object to their tax dollars being used by the government to subsidize practices with which they disagree. They object to the government forcing *them* to facilitate such services directly or face draconian penalties. Similarly inapposite is the government's citation to *Bowen v. Roy*, 476 U.S. 693 (1986), which held that the government did not violate free exercise rights when it assigned a social security number to the plaintiff's child. There was no burden in *Bowen* because the ***43** challenged action did not "place[] any restriction on what [plaintiff] may believe or what he may do." *Id.* at 699. But *Bowen* was clear that "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion." *Id.* at 700. Here we have the exact opposite of *Bowen:* the *government* seeks to dictate *private* conduct by compelling Respondents to offer religiously-objectionable services, a textbook substantial burden on religious exercise. [9]

The government's invocation of the effect on third-parties also has no place in the substantial burden inquiry. The substantial burden test quite obviously focuses on the burden to the objectors and their religious beliefs. The effect on others of allowing the religious objectors to opt out of a program is properly considered in evaluating whether the government has carried its burden under strict scrutiny, but it does not affect whether there is a substantial burden. Thus, folding concerns about "affected third parties," Pet.Br.33, into the substantial burden inquiry is a category mistake that improperly shifts the government's burden to the believer. Moreover, any relevant adverse impact on third parties must flow from allowing religious objectors to opt out of the otherwise comprehensive program. In a situation like this, where the government program forces one party ***44** to provide a benefit to another, the loss of that benefit is not the kind of impact on third parties that should matter. From the perspective of RFRA, a hypothetical government mandate that a person mow his lawn on Sundays should be analyzed no differently from a mandate that the same person mow his neighbor's lawn on Sundays. The fact that the neighbor loses free yard work in one scenario does not alter the substantial burden analysis in the least.

B. The Mandate Fails Strict Scrutiny.

The mandate does not satisfy strict scrutiny. Under RFRA, the government must prove that burdening the claimant's religious exercise is "the least restrictive means of advancing a compelling interest." *O Centra*, 546 U.S. at 423 (citing 42 U.S.C. § 2000bb-1(b)). This is "the most demanding test known to constitutional law," *City of Boerne v. Flores,* 521 U.S. 507, 534 (1997), and the government cannot meet it here.

The government's asserted interests are woefully deficient. The interests identified in the lower courts - public health and gender equality - are overly general, when RFRA requires specificity. And the government's newly-identified interest in ensuring "a comprehensive insurance system," Pet.Br.38, is both forfeited and inapposite. In RFRA, Congress clearly wanted to vindicate religious exercise, even with respect to laws of general applicability. At the same time, the strict scrutiny standard recognizes that not all laws of general applicability are created equal. For a small subset of laws, like social security, the government may be able to show that its need for a truly comprehensive system means it cannot make an ***45** exception even for what Congress has deemed the best of reasons. But the mandate with its manifold exemptions is not a law of general applicability, and it is the very antithesis of the kind of truly comprehensive program that can admit only minimal exceptions. When the government allows exceptions for all manner of reasons, including administrative convenience, RFRA makes crystal clear that the government cannot deny exemptions necessary to avoid a substantial burden on religious exercise.

1. The government has not established a compelling interest.

To demonstrate a compelling interest, the government must show that the mandate furthers interests "of the highest order." *Lukumi*, 508 U.S. at 546. This determination "is not to be made in the abstract" but "*in the circumstances of this case.*" *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000). Further, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). RFRA requires specificity: the government must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' - the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)). Thus, this Court will not find a compelling interest where the government has already granted broad exceptions under the law at issue. See, *e.g.*, *O Centro*, 546 U.S. at 433-34.

***46** 1. The government fails to meet this demanding burden. As it did below, the government argues that the mandate is the least restrictive means of advancing compelling interests in "public health and gender equality." Pet.Br.15, 46-51. But it makes no attempt to justify these "broadly formulated interests" with respect to the specific burden on Respondents' religious exercise, as RFRA requires. *O Centro*, 546 U.S. at 431. Nor could it. These compelling interests are at such a high level of generality that they defy meaningful application of strict scrutiny. While public health and gender equality are noble interests, they provide no better guidance in applying strict scrutiny than the equally noble interest in promoting the general welfare. There are countless other ways of promoting public health that would have little or no impact on anyone's religious exercise.

The government's reliance on general findings in the IOM Report does not save its public health argument. See Pet.Br.5. If anything, it undermines this asserted interest. Most fundamentally, the fact that the mandate derives from recommendations of the IOM - a "semi-private" organization - underscores that Congress did not deem a contraception mandate strictly necessary to promote public health, let alone consider the necessity of including the four specific drugs and devices to which Respondents object.[20] ***47** Moreover, the IOM Report does not even discuss the necessity *of covering* specific contraceptive methods in employer-provided health plans.[2] HHS never asked the IOM to make recommendations about "coverage decisions," which the Report noted "often consider a host of other issues, such as *** ethical, legal, and social issues; and availability of alternatives." IOM Report at 6-7; *id.* at 2 (HRSA charge). In fact, HHS ordered the IOM to *exclude* coverage-relevant considerations like "cost effectiveness." *Id.* at 3.

The government's generally-stated interest in gender equality fares no better. Putting to one side the oddity of a claim that mandating contraceptives for women but not men is strictly necessary to promote gender equality, this asserted interest remains hopelessly general. The government relies entirely on boilerplate assertions that "women have different health needs than men," and therefore face higher costs than men, which they "may not be able to afford." Pet.Br.49-51.

These broad assertions would justify virtually any forced subsidization of health care costs for women, but they hardly suffice to demonstrate that forcing Respondents to provide four drugs and devices is strictly necessary to promote gender equality. The government has thus failed even to argue, much less demonstrate, that Respondents' practice of covering ***48** most contraceptives along with the vast majority of women's preventive care - while merely excluding the four items at issue here - triggers any gender equality interest at all, much less a compelling one.

The government's failures in this regard are fatal. Strict scrutiny requires real evidence of an "actual problem in need of solving." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (quotation omitted). But the government has offered *no* proof that Respondents' exclusion of these four contraceptives threatens public health or gender equality at all. See *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 821 (2000) (noting that, "[w]ithout some sort of field survey, it is impossible to know how widespread the problem in fact is"). Because the government "bears the risk of uncertainty" under strict scrutiny, "ambiguous proof will not suffice." *Brown*, 131 S. Ct. at 2739. The government has not carried its heavy burden. [22]

This is not the first time the federal government has incorrectly relied on such overbroad interests. In *O Centro*, the government opposed a RFRA exemption for a group's religious use of a tea (*hoasca*) containing DMT, a Schedule I narcotic under the Controlled Substances Act ("CSA"). 546 U.S. at 425 (citing 21 U.S.C. § 812(c)). The government argued that the CSA's conclusion that Schedule I narcotics are unsafe and susceptible to abuse was a sufficiently compelling ***49** reason to deny individualized exemptions under the statute. *Id.* at 430. But this Court rejected that argument because RFRA requires this Court to "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 430-31. Applying that "more focused" inquiry, this Court held that DMT's placement under Schedule I did not "relieve[] the Government of the obligation to shoulder its burden under RFRA." *Id.* at 430-32. First, there was no showing that Congress had "considered the harms posed by the particular use [of DMT] at issue [t]here - the circumscribed, sacramental use of *hoasca." Ibid.* Second, the Schedule I listing could not carry "determinative weight," because the CSA authorized individual exemptions from its requirements. *Id.* at 432-33. Third, Congress had already made such an exemption for Native Americans' religious use of peyote, also a Schedule I narcotic. *Id.* at 433-34.

Those same basic problems bedevil the government's reliance on broad interests in public health and gender equality. Even if the mandate promotes those interests, the salient question is whether the religious accommodations RFRA would otherwise compel fatally undermine those interests. In *O Centro*, a single exemption for another Schedule I substance was fatal to the government's effort to invoke the statute's broader goals. Here, the statute is silent on the need for mandatory contraception coverage, the regulations envision exemptions, and numerous exemptions have been granted. If it really were strictly necessary to both public health and ***50** gender equality for all employers to pay for these four drugs and devices, it would be well-nigh inexplicable that the government allows so many employers to decline to provide this assertedly indispensable subsidy. "[A] law cannot be regarded as protecting an interest of the highest order *** when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (quotation omitted). As explained by the Tenth Circuit - and as confirmed by every court to address strict scrutiny - the mandate is subject to a wide variety of exceptions that undermine any claim that the government's interests are compelling. Simply stated, "the contraceptive-coverage requirement presently does not apply to tens of millions of people." Pet.App.58a; Judicial Education Project *Amicus* Br.5 n.2 (collecting cases).

For example, many employers are not required to cover any contraceptives at all, including those offering "grandfathered" plans, 42 U.S.C. § 18011, and those with fewer than fifty employees (who are not required to offer health insurance to begin with), 26 U.S.C. § 4980H(c)(2)(A). [23] In addition, HHS has already granted religious exemptions for other entities (including corporations) pursuant to express regulatory authority to do precisely what it claims this Court cannot do: "establish exemptions *** with ***51** respect to any requirement to cover contraceptive services." 45 C.F.R. § 147.130(a)(iv)(A); 147.131(a). [24]

These numerous exceptions belie the government's claim that the mandate is strictly necessary to further compelling interests in public health, gender equality, or anything else. Government programs necessary to furthering compelling interests do not provide express and openended regulatory authority to grant exemptions. Nor do they typically provide "grandfather" clauses that permit the supposedly vital subsidy to be phased in over time (or never at all) to accommodate the administrative convenience of both regulators and regulated.

2. The mandate's numerous exemptions also fatally undermine the government's newly-identified interest in ensuring a "comprehensive insurance system." Pet.Br.38-46. The government did not invoke this compelling interest below and the argument is thus forfeited. But the reason the government did not invoke it below is that the asserted interest is a complete misfit. The mandate, honeycombed with religious and secular exemptions, ***52** is the antithesis of the kind of government program whose demands for true comprehensiveness and uniformity can admit no exceptions. Given the mandate's myriad exemptions, invoking a compelling interest in a "comprehensive insurance system," Pet.Br.38, 46, is like invoking a compelling interest in maintaining an impenetrable barrier to justify a sieve.

The exceptions for the religious exercise of other groups and for grandfathered plans are devastating to the government not just because they undermine the strength of its late-breaking interest. They are devastating because RFRA itself demands that the government consider the feasibility of making exceptions to otherwise general rules in order to accommodate religious exercise. Thus, as this Court emphasized in *O Centro*, RFRA utterly rejects "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." 546 U.S. at 436. To the contrary, "RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rules of general applicability.' " *Ibid.* (quoting 42 U.S.C. § 2000bb-1(a)). Under that demanding test, the government's ability to grant one exception - there, for peyote - without fatally undermining the statutory goals doomed the government's ability to refuse another exception when doing so would remove a substantial burden on religious exercise. Here, not only has the government already granted myriad exemptions covering millions, but its justification for many of those is mere administrative convenience, which is all that supports the grandfather clause. In light of that, the ***53** government's authority to decline to alleviate the substantial burden on Respondents is nil.

The mandate's numerous exceptions make the government's reliance on *Lee* profoundly puzzling. *Lee* involved an Amish employer who objected to paying social security taxes for his Amish employees. While this Court found a substantial burden and was unfazed by the commercial context, it nonetheless held that "[t]he design of the [social security] system requires support by mandatory contributions from covered employers *and* employees," and that "mandatory participation is indispensable" to the system's "fiscal vitality." *Lee*, 455 U.S. at 258 (emphasis added). As the government explained to this Court in *Lee*, the "social security system was established when private systems of voluntary support collapsed under the burden of all those who had no other means of survival," and the system "could not exist" with broad exemptions. Gov't Br.*27-28, *United States v. Lee*, No. 80-767, 1981 WL 389829 (U.S. June 5, 1981). "Widespread individual voluntary coverage" would be "difficult, if not impossible, to administer." *Lee*, 455 U.S. at 258.

Lee simply recognizes what is implicit in RFRA. Some laws demand virtually uniform and universal participation. In those rare cases, the government might be able to show that opt outs - even for the best of reasons - are incompatible with its objectives. See generally *O Centro*, 546 U.S. at 435 (explaining government can demonstrate compelling interest in uniform application only "by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer ***54** the program") (discussing *Lee* and *Braunfeld*). But the mandate is nothing like social security. The exceptions the government itself has allowed, for religious and non-religious reasons alike, conclusively demonstrate that the mandate is perfectly compatible with the religious exemptions required by RFRA.

The government's related newfound argument that it has created private enforcement rights for third parties under ERISA is likewise both forfeited and deeply flawed. The government claims that granting Respondents a RFRA exemption would "disrupt" its preferred allotment of rights, and would "deprive participants and beneficiaries

of statutorily-guaranteed benefits." Pet.Br.43. But this argument does little more than describe why the program substantially burdens Respondents' religious exercise. The fact that the government requires a qualifying health plan to provide these objectionable products and allows employees to use ERISA to enforce the requirement hardly strengthens the government's case. If anything, subjecting Respondents to private enforcement actions on top of government penalties only underscores the substantiality of the burden.

The government's reliance on ERISA fails for two other reasons. First, an exemption for Respondents would not stop the government from using any of the myriad available alternatives to provide access to the products at issue. Second, not receiving coerced coverage from Respondents cannot be a cognizable harm, because nobody is lawfully entitled to a "benefit" from a regulatory scheme that violates RFRA. Religious exemptions to laws forcing nurses to assist with abortions, bookstores to sell Bibles, or ***55** convenience stores to sell liquor would all just as surely "deprive" someone of a "statutorily-guaranteed benefit." But that kind of impact on third parties should be irrelevant to the RFRA analysis. Any time a statute takes the form of a mandate that party A must do something for party B, granting a RFRA exemption to party A will make party B worse off. But there is no reason whatsoever to treat exemptions from such Peter-to-Paul mandates as uniquely disfavored under RFRA. [25]

Finally, the government's interest in "ERISA rights" suffers the same fundamental problem as its other failed interests - namely the mandate's exemptions for religious and non-religious employers. Exempted employers may exclude the four items at issue here without fatally undermining ERISA or any other compelling interest. Of course, those plans do not violate ERISA by not offering the mandated ***56** coverage, but that is the whole point. The government's ERISA-based argument is nothing more than a description of its own mandate system, which can and does make exceptions for religious and nonreligious employers. [26] RFRA simply mandates a further exception for Respondents when, as here, it is necessary to eliminate a substantial burden on sincerely held religious beliefs. [27]

2. The mandate is not the least restrictive means of achieving the government's asserted interests.

Even if it could offer actual evidence that Respondents' religious exercise threatened a ***57** compelling government interest, the government has not proven that its refusal to exempt Respondents is the least restrictive means of achieving that interest. Under strict scrutiny, the government must "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert*, 374 U.S. at 407. If a less restrictive alternative would serve its purpose, the government "must use that alternative." *Playboy Entm't Group*, 529 U.S. at 813.

The government ignores these familiar standards. The only asserted interests the government has preserved are pitched at such a high level of generality that they defy the least restrictive means analysis. There are literally thousands of ways for the government to advance general interests in promoting public health and gender equality without implicating Respondents' religious exercise. The conflict here arises only because the government has chosen the hardly obvious path of forcing Respondents to pay for religiously-objectionable drugs and devices.

The government's only response is to dilute the least restrictive alternative test with the bald assertion that it "does not require Congress to create or expand federal programs." Pet.Br.57. But the government cites no authority for this statement, which contradicts RFRA's command that *the government* (which surely includes Congress) has the burden of demonstrating that no less restrictive means could achieve its allegedly compelling interest. [28] If Congress had wanted to accommodate ***58** religious exercise only where there was no budget-neutral least restrictive alternative or no least restrictive alternative available within the existing corpus of federal programs, presumably it would have said so.

The most obvious less-restrictive alternative is for the government to pay for its favored contraceptive methods itself. See, *e.g.*, 42 C.F.R. § 59.5(a)(1)) (authorizing grants to "[p]rovide a broad range of acceptable and effective medically approved family planning methods *** and services" through Title X of the Public Health Service Act). And indeed the

government has attempted something like that with respect to certain objecting employers. See 78 Fed. Reg. at 39879-80 (outlining accommodation for self-insured religious non-profits). But when the government is disinclined to pay for some favored subsidy and decides to make someone else pay for it - especially when the subsidy touches subjects as religiously sensitive as abortion and contraception - the government cannot be surprised if RFRA poses an obstacle. [29]

***59** And that is why in the final analysis this is such a straight-forward case under RFRA. The government concedes both that Respondents' beliefs are sincere and that the mandate burdens them. The government's effort to dismiss that burden as insubstantial is belied by the draconian fines for noncompliance and its willingness to accommodate others with the exact same beliefs. That means strict scrutiny applies and under that demanding standard the case is not close. The hard cases under strict scrutiny are those like *Lee* where the mandate at issue is virtually uniform and universal - not a case like this one where the mandate is riddled with exceptions. Indeed, the ultimate question here is not whether there will be an exception to an otherwise uniform mandate, but who will pay for a third-party's religiously-sensitive abortifacients. The government already exempts many employers. And when the government's objectives are perfectly compatible with granting exceptions for reasons both religious and secular, RFRA leaves no room to decline exceptions for others whose sincerely-held religious beliefs are substantially burdened.

*60 CONCLUSION

The judgment of the court of appeals should be affirmed.

Footnotes

1 FDA approved methods include male and female condoms, diaphragms, sponges, cervical caps, spermicides, the pill, the mini pill, the continuous use pill, patches, vaginal rings, progestin shots, implantable rods, sterilization surgery for men and women, and sterilization implants for women. FDA, *Birth Control Guide* (XX/XX/2013), http://www.fda.gov/For Consumers/ByAudience/ForWomen/FreePublications/ucm313215.htm. The contraceptive coverage mandate does not include contraceptive methods for men. 78 Fed. Reg. 39870, 39870 n.1 (July 2, 2013).

2 As it has throughout this litigation, the government concedes that the drugs and devices at issue can prevent uterine implantation of an embryo. See Pet.Br.9 n.4 (conceding that Plan B (levonorgestrel), Ella (ulipristal acetate) and copper IUDs like ParaGard may act by "preventing implantation (of a fertilized egg in the uterus) ; *ibid.* (admitting that IUDs with progestin "alter] the endometrium); see also FDA, *Birth Control Guide, supra.* The en banc Tenth Circuit found "no material dispute on this issue. Pet.App.10a n.3.

3 Hundreds of non profit religious organizations have challenged the "accommodation, and in nineteen out of twenty decided cases it has been enjoined. Reply Br.3 4 nn.2 3, *Little Sisters of the Poor v. Sebelius*, No. 13A691 (U.S. Jan. 3, 2014) (collecting cases); Order, *Little Sisters*, No. 13A691 (Jan. 24, 2014) (enjoining accommodation pending appeal).

4 26 U.S.C. § 4980H; *The Affordable Care Act Increases Choice and Saving Money for Small Business,* WhiteHouse.Gov 2, http://www.whitehouse.gov/files/documents/health reform for small businesses.pdf.

5 In this brief, "the Greens refers collectively to the Green family members. "Respondents refers collectively to the Greens, Hobby Lobby, and Mardel. The undisputed material facts are taken from Respondents' Verified Complaint. JA124 69.

6 These four judges rejected the government's argument based on the prudential "shareholder standing rule because that rule "does not bar corporate owners from bringing suit if they have 'a direct and personal interest in a cause of action. Pet.App.86a (quoting *Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990)); *id.* 161a (same). As explained below, the government has abandoned its shareholder standing argument. See *infra* n.15.

7 Because a majority did not resolve the remaining injunction factors, the court remanded. Pet.App.66a. Subsequently, the district court entered a preliminary injunction, which the government then appealed. Pet.Br.12. All lower court proceedings have been stayed pending this Court's disposition of the case. *Ibid.*

8 See 366 U.S. at 642 (noting that Justices Brennan and Stewart "are of the opinion that the Massachusetts statute, as applied to the appellees in this case, prohibits the free exercise of religion) (cross referencing *Braunfeld*, 366 U.S. at 616 (dissenting opinions of Brennan and Stewart, J J.)); see also *id.* at 631 (incorporating concurrence and dissent in *McGowan v. Maryland*, 366 U.S. 420 (1961)); *McGowan*, 366 U.S. at 520 (Frankfurter, J., concurring, joined by Harlan, J.) (noting the "restraint upon

the religious exercise of Orthodox Jewish practicants which the Sunday closing] restriction entails); *id.* at 577 (Douglas, J., dissenting) (asserting that " w]hen these laws are applied to Orthodox Jews, as they are in No. 11 *Gallagher*] and No. 67 *Braunfeld*] *** their vice is accentuated, and that, " i]f the Sunday laws are constitutional, *kosher markets are on a five day week*)) (emphasis added).

9 See *Power Mfg. Co. v. Saunders,* 274 U.S. 490, 493 (1927) (Equal Protection Clause) (collecting cases); *Minneapolis & St. Louis Ry. Co. v. Beckwith,* 129 U.S. 26, 28 (1889) (Due Process Clause); *Monell,* 436 U.S. at 687 88 (section 1983).

10 See, *e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm n*, 447 U.S. 557, 566 68 (1980) (commercial speech); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (unreasonable search), *overruled on other grounds by Murphy v. Waterfront Comm n of New York Harbor*, 378 U.S. 52 (1964); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977) (double jeopardy); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (takings); *Armour Packing Co. v. United States*, 209 U.S. 56, 73, 76 77 (1908) (right to criminal jury); *Ross v. Bernhard*, 396 U.S. 531, 532 33 (1970) (right to civil jury); *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433 34 (2001) (protection from excessive fines).

11 This Court's commercial speech cases do not turn on the identity or tax status of the speaker, but on the nature of the speech in question. Thus the New York Times may *sometimes* engage in commercial speech (i.e., when it is selling subscriptions) but engages in noncommercial speech when it is editorializing. Even this Court's Commerce Clause decisions do not turn on corporate form or tax status of the actor, but on the nature of the activity. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 586 (1997) (rejecting "any categorical distinction between the activities of profit making enterprises and not for profit entities as "wholly illusory for Commerce Clause purposes).

12 Nor can the government derive this principle from Justice Brennan's concurrence in *Corporation of Presiding Bishop v. Amos* (PetBr.19), which acknowledged that some "for profit activities could have a religious character. 483 U.S. 327, 345 & n.6 (1987).

13 See also, Dustin Volz & Sophie Novack, *Why CVS is Ready to Lose Billions and Stop Selling Cigarettes* (Feb. 5, 2014), http:// www.nationaljournal.com/health care/why cvs is ready to lose billions and stop selling cigarettes 20140205 ("Put simply, the sale of tobacco products is inconsistent with our purpose.).

14 The government is also wrong to suggest that Respondents' position would allow "any human resources manager to seek an exemption under RFRA for the entire company. Pet.Br.30. A human resources manager might seek a Title VII accommodation from his employer if asked to violate his beliefs, but would have no RFRA claim against the government to exempt the entire company he works for.

15 In passing, the government alludes to the "shareholder standing rule, a prudential rule barring shareholder claims purely derivative of a corporation's claims. Pet.Br.28; see, *e.g., Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990). But the government does not raise the prudential shareholder standing bar in this Court, and it forfeited the argument below. See, *e.g.,* Pet.App.83a (op. of Gorsuch, Kelly, and Tymkovich, J J.). And in all events, the shareholder standing rule does not apply because the mandate "requires the Greens] *** directly and personally *** to take *affirmative action* contrary to their religious beliefs. *Id.* at 161a (op. of Matheson, J.); see also *id.* at 86a (op. of Gorsuch, Kelly, and Tymkovich, JJ.); *Korte v. Sebelius*, 735 F.3d 654, 668 69 (7th Cir. 2013) (same).

16 See 38 Protestant Theologians' *Amicus* Br.24 25; 67 Catholic Theologians' *Amicus* Br.2 3; Orthodox Union *Amicus* Br.5 6.

17 The Tenth Circuit correctly held that government substantially burdens religious exercise if, *inter alia*, it "places substantial pressure on an adherent *** to engage in conduct contrary to a sincerely held religious belief. Pet.App.45a (citing *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)). Other circuits have adopted similar formulations. See, *e.g., Bethel World Outreach Ministries v. Montgomery Cnty. Council,* 706 F.3d 548, 555 56 (4th Cir. 2013). In contrast, the Seventh Circuit has held that a substantial burden "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise *** effectively impracticable. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). The Tenth Circuit declined to follow this formulation, Pet.App.56a n.18, as have other circuits. See, *e.g., Midrash Sephardi, Inc. v. Town of Surf side*, 366 F.3d 1214, 1227 (11th Cir. 2004).

18 Similarly, *Hernandez*, 490 U.S. at 700, merely suggested there was no burden on religious exercise where plaintiffs did not claim coercion but only that "an incrementally larger tax burden interferes with their religious activities.

19 The government's reliance on *Zelman v. Simmons Harris,* 536 U.S. 639 (2002), is also misplaced. *Zelman* upheld a school voucher program under the Establishment Clause; it says nothing about whether the mandate burdens Respondents' free exercise rights let alone limits the "moral culpability for the religious believer s] to "the government's legal culpability in the Establishment Clause *** context. Pet.App.55a.

20 Indeed, Congress treated the mandate as a lesser value goal by requiring even grandfathered plans to comply with some ACA requirements (such as the prohibition on lifetime limits and the extension of young adult coverage), but not with the mandate.

See 42 U.S.C. § 18011 (requiring grandfathered plans to comply with 42 U.S.C. § 300gg 11, 300gg 12, and 300gg 14, but not 42 U.S.C. § 300gg 13).

21 The government also fails to articulate a public health justification for two of the products Respondents do not cover, Plan B and Ella. Instead, it merely asserts that "contraceptive methods are not interchangeable, and that certain IUDs are more effective than others without any evidence that Respondents' inability to cover the four objectionable products actually creates a compelling public health problem in need of remedy. Pet.Br.48.

22 To the extent the government argues that mandating coverage of these four items somehow *marginally* advances its public health interests, "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced. *Brown*, 131 S. Ct. at 2741 n.9.

23 The government insists that grandfathering is "transition al], Pet.Br.53, but, as the court of appeals pointed out, plans may remain grandfathered "indefinitely, Pet.App.13a. Grandfathered plans may add new beneficiaries, change insurance issuers, and enter into new insurance contracts. 45 C.F.R. § 147.140(a)(1)(i); (b). The co pay limits for grandfathered plans are indexed to medical inflation. *Id.* § 147.140(g)(iv).

24 The government warns that, if the Court finds these exemptions undermine its compelling interests, this "would *discourage* the government from accommodating religion. Pet.Br.52. But " t]he Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. *O Centro*, 546 U.S. at 436. RFRA requires "case by case consideration of religious exemptions to generally applicable rules. *Ibid.* Here, the numerous exemptions already given show the government lacks a compelling interest in denying a religious exemption to Respondents.

25 Contrary to the government's suggestion, Pet.Br.40 41, *Sherbert* and *Yoder* both rejected the argument that a religious exemption was unavailable because it would burden third parties. In *Sherbert*, the state claimed that an exemption from the unemployment system would lead to "spurious claims that could "dilute the unemployment compensation fund and burden employer scheduling. 374 U.S. at 407. In *Yoder*, the state claimed an exemption from the compulsory attendance law would burden "the substantive right of the Amish child to a secondary education. 406 U.S. at 229 31. Applying strict scrutiny in both cases, the Court found the state failed to prove those burdens would actually flow from the exemptions and also that the state could not alleviate them through less restrictive means. See, *e.g., Sherbert*, 374 U.S. at 408 (it would "plainly be incumbent upon the state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights).

26 This uniformity argument is further undermined by the fact that Congress chose not to make ERISA applicable to all plans. For example, as the government explained in *Little Sisters of the Poor et al. v. Sebelius*, Congress provided that " 'church plan s] *** are exempt entirely from regulation under ERISA, unless they elect otherwise. Gov't Br.15, *Little Sisters*, No. 13A691 (U.S. Jan. 3, 2014); see also Letter from the Church Alliance to HHS 2 (Apr. 8, 2013), http://church alliance.org/sites/ default/files/ images/u2/comment letter 4 8 13.pdf (church plans cover "approximately one million participants from more than 155,000 churches, synagogues, and affiliated organizations).

27 Nor is RFRA protection "incompatib le] with ERISA. Pet.Br.43. Indeed, in another mandate case, the government conceded that, in third party lawsuits under ERISA, religious employers "would be free to raise their religious objections as defenses in that litigation, see, *e.g.*, 42 U.S.C. § 2000bb 1(c), and the plan participant would be free to contest those defenses. Gov't Br., *Wheaton Coll. v. Sebelius*, No. 12 5273, 2012 WL 5398977, at *16 (D.C. Cir. Nov. 5, 2012). The government also mischaracterizes lower court authority about whether RFRA applies in private lawsuits (Pet.Br.43 44), which in reality strongly supports what it told the D.C. Circuit in *Wheaton.* Judicial Education Project *Amicus* Br.24 25.

28 *Cf. Riley v. Nat l Fed n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (identifying the following less restrictive alternatives to state's overbroad fundraising disclosure law: (1) creating a new publication program, and (2) expanding the enforcement of existing antifraud laws).

29 Indeed, employees who want health coverage for the four products at issue here could simply purchase their own policy on the exchanges. See *What if I Have Job Based Insurance?,* HealthCare.gov, https:// www.healthcare.gov/what if i have job based health insurance/. Employees who decline employer based insurance are generally not eligible for subsidized premiums, but the government could change that with the stroke of a pen, if it believes its stated interests are compelling enough to do so.

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2012 WL 3643775 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Robie J. WAGENFEALD; Paul W. Kunkel, Jr., Petitioners,

v.

Marlin N. GUSMAN, Orleans Parish Criminal Sheriff; William C. Hunter, OPCSO Chief Deputy, Respondents.

No. 12-85.
August 22, 2012.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief in Opposition

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***i** Question Presented (Restated)

Petitioners were arrested for public intoxication on a Saturday morning in the French Quarter and taken to the Orleans Parish Prison. They received no probable cause determination for their warrantless arrest within 48 hours - as required by Louisiana law - because Hurricane Katrina hit New Orleans the following Monday morning. The prison flooded. Petitioners were evacuated and transferred to state custody. A month later they were freed.

Petitioners sued respondent Gusman in federal court, claiming violations of the Fourth, Sixth, and Eighth Amendments, as well as false imprisonment under Louisiana law. The jury found Gusman liable for false imprisonment, on the theory that he illegally detained petitioners by not releasing them 48 hours after arrest. The jury found Gusman not liable under the Fourth, Sixth, and Eighth Amendments.

On appeal, the U.S. Fifth Circuit held that Gusman should have been granted judgment as a matter of law on the false imprisonment claim. The court reasoned that Katrina was an emergency suspending the 48-hour rule and that Gusman had therefore not unlawfully detained petitioners.

The question presented is:

Did the U.S. Fifth Circuit correctly hold that respondent Gusman was entitled to judgment as a matter of law on the state-law false imprisonment claim?

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***1** The U.S. Fifth Circuit held that respondent, Orleans Parish Sheriff Marlin Gusman, was entitled to judgment as a matter of law on petitioners' false imprisonment claim. This was a Louisiana law issue. Because the decision below addressed no federal issue, the Court should deny certiorari.

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statement

The Fifth Circuit opinion accurately sets forth the relevant facts and trial proceedings. *See* Pet. App. 2a-5a; 5a-7a. For the Court's convenience, those portions of the opinion are reproduced below.

A. Factual Background

"The facts of this case are largely undisputed. On the evening of Friday, August 26, 2005, [petitioners], traveling by car from Houston, Texas to Toledo, Ohio, stopped for the night in New Orleans. They checked into a hotel, then proceeded to the French Quarter, some time after 1:00 a.m. on the morning of August 27, and remained there for approximately four hours, consuming several beers each. At approximately 5:00 ***2** a.m., two New Orleans police officers placed

[petitioners] under arrest for public intoxication under New Orleans Municipal Code § 54-405. [Petitioners] assert that they were not intoxicated when the arrests took place, but instead that Kunkel fell to the ground when his bad knee gave out as he stepped off a curb, and that Waganfeald was attempting to help Kunkel to his feet.

At the time of the arrests, Hurricane Katrina was in the Gulf of Mexico and was estimated to make landfall on Monday morning. For several days prior to Katrina's estimated landfall, [respondent Sheriff Marlin] Gusman and his staff prepared the Orleans Parish Prison ("OPP") to weather the storm with all staff and all prisoners - an average daily population of 5,800 - remaining inside the complex. At that time, OPP comprised eleven main facilities which held inmates, as well as ancillary buildings. In the event of serious flooding, Gusman's plan called for staff and prisoners to "vertically evacuate" to the upper floors of the OPP facilities. On the morning of Sunday, August 28, a mandatory evacuation order was issued for residents of New Orleans, but that order did not apply to OPP staff and prisoners.

[Petitioners'] arresting officers took them to the Intake and Processing Center ("IPC") at OPP, at which point [petitioners'] money, valuables, and cell phones were confiscated. [Petitioners] were not given an opportunity to make bail, but instead were placed in the Templeman III facility at OPP, which could house as many as 1,200 pre-trial detainees. At the time, Gusman was in charge of OPP, [respondent ***3** William] Hunter directed prison operations, and Warden Gary Bordelon oversaw Templeman III.

Normally, a number of telephones - both free and collect - were available for inmate use in the IPC. Collect telephones were also available in the Templeman III building. For security reasons, cell phones were not allowed in the prison complex. After being booked, [petitioners] attempted to make phone calls using the IPC telephones, but soon discovered that they were not working. That Saturday, Hunter, who was responsible for the phone system, became aware that all of the telephones at OPP were inoperable. Hunter instructed the telephone supervisor, Donald Hancock, to report to the prison. Hancock examined the system that day and determined that the telephone service provider's lines were overloaded. Because the problem was not with the OPP telephones themselves, prison officials were unable to remedy the problem. Hancock reported his findings to Hunter at some point that weekend. Sheriff Gusman testified that he was not made aware of the problem with the phones. Gusman further testified that, in theory, he or Hunter could have allowed the inmates to use their cell phones, but Gusman emphasized that prison policy forbids cell phone use (even by most deputies) because of security risks. OPP phones remained inoperable throughout the weekend, and [petitioners] were unable to make any phone calls during that time.

After being booked, [petitioners] were placed in separate cells in Templeman III, where they remained as Hurricane Katrina approached and then ***4** hit New Orleans at approximately 6:00 AM on Monday, August 29, 2005. Initially, OPP officials believed that the complex had weathered the storm unscathed. After the levees were breached and the city flooded, however, the prison's generators stopped working, and its water and food supplies were contaminated. As floodwater entered the Templeman III building, officers evacuated inmates to higher floors. [Petitioners] experienced insufferable conditions as the water rose in their cells. Kunkel was locked in his cell until Wednesday evening; Waganfeald was moved to a miniature gymnasium within OPP. Both Kunkel and Waganfeald went without food and water for approximately three days. The temperature was very high; there was no air circulation; the toilets did not flush. In the midst of this chaos, [petitioners] believed that the prison guards had abandoned them, and they had no way of making contact with the outside world. Both men believed that they might die.

[Petitioners] were finally moved from OPP on Wednesday, August 31, but this did not mark the end of their ordeals. They were taken by boat to a highway overpass, where they, along with thousands of other inmates, continued to endure heat, hunger, and thirst. [Petitioners] were then placed on buses and transported out of New Orleans. For about a month, Kunkel endured further deplorable conditions, first at Louisiana's Hunt Correctional Institute, and then at the Louisiana State Penitentiary at Angola, before being released on October 3, 2005. Waganfeald was taken to Cat[a]houla Parish Prison and was released on ***5** October 5, 2005. Other than an eye infection for which Kunkel received treatment at

Angola, petitioners did not suffer physical injuries, but both men have reported psychological trauma as a result of these experiences."

B. District Court Proceedings

"[Petitioners] filed suit on August 28, 2006, asserting claims under 42 U.S.C. § 1983 for violations of, *inter alia*, the Fourth Amendment (based on their allegedly unlawful detention), the Sixth Amendment (based on their inability to contact counsel by telephone), and the Eighth Amendment (based on their conditions of confinement). Their complaint also asserted claims for false imprisonment under Louisiana law. The named defendants included Gusman, individually and in his official capacity as Criminal Sheriff of Orleans Parish; Hunter, individually and in his official capacity as Chief Deputy Criminal Sheriff of Orleans Parish; Bordelon, individually and in his official capacity as Warden of the Templeman III jail facility; various officers of the New Orleans Police Department; the City of New Orleans; and Mayor C. Ray Nagin.

[Petitioners] proceeded to trial against Gusman, Hunter, and Bordelon. On October 14, 2010, the jury found Gusman liable for false imprisonment and awarded compensatory damages of $200,000 to Waganfeald and $259,300 to Kunkel. The jury found, however, that Gusman was not liable for the Fourth, Sixth, and Eighth Amendment claims. The jury also rejected the claims against Gusman in this official capacity, finding that his official policies were not the moving force behind any violation of [petitioners'] ***6** constitutional rights. Additionally, the jury found Hunter liable for violating the [petitioners'] Sixth Amendment right to counsel, denied qualified immunity to Hunter, and awarded each [petitioner] $100,000 for these violations. The jury rejected the remaining claims against Hunter, and it exonerated Bordelon on all claims. The district court then entered judgment later that month.

At the close of [petitioners'] case and at the close of evidence, [respondents] orally moved for judgment as a matter of law. The district court denied each motion. After the jury verdict was announced, [respondents] moved for judgment as a matter of law, or, in the alternative, a new trial. The district court denied both motions, and [respondents] timely appealed."

C. Fifth Circuit Opinion

On appeal, a Fifth Circuit panel unanimously held that Gusman should have been granted judgment as a matter of law on the state-law false imprisonment claim. Pet. App. 14a.

The court had to interpret Louisiana law, since the only basis for Gusman's liability was the state-law tort of false imprisonment. Pet. App. 6a (explaining jury found liability under Louisiana false imprisonment claim, but not under Fourth, Sixth, or Eighth Amendments); Pet. App. 10a n.12 (observing that the court "has a duty to determine state law as it believes the State's highest court would") (quoting *Hulin v. Fibreboard Corp.,* 178 F.3d 316, 328 (5th Cir. 1999)). Since it was undisputed that Gusman had detained petitioners, the only issue was whether ***7** there was a legally sufficient basis for finding their detention "unlawful." Pet. App. 7a-8a (citing Fed. R. Civ. P. 50(a)(1); *Kennedy v. Sheriff of East Baton Rouge,* 935 So.2d 669, 690 (La. 2006)). [2]

Petitioners argued their detention was unlawful solely because they did not receive a probable cause determination within 48 hours of their warrantless arrest. Pet. App. 8a. Louisiana law requires such a determination "within forty-eight hours of arrest," or else the arrestee "shall be released on his own recognizance." Pet. App. 8a (quoting La. Code Crim. PROC. art. 230.2(A)). Interpreting state law, the court found that the Louisiana statute incorporated this Court's decision in *County of Riverside v. McLaughlin,* 500 U.S. 44, 56 (1991), which "held that a probable cause determination must generally be made within 48 hours to comply with the Fourth Amendment." Pet. App. 8a-9a (citing *Louisiana v. Wallace,* 25 So.3d 720, 723-24 (La. 2009)). Further, the court reasoned that the 48-hour rule - as a matter of both federal

and state law - contains an exception for "a *bona fide* emergency or other extraordinary circumstance." App. 9a (quoting *Riverside,* 500 U.S. at 57); *see also Wallace,* 25 So.3d at 727 (stating that the Louisiana rule obtains "[i]n the absence of a *bona fide* emergency or other extreme circumstances"); Pet. App. 10a (finding it "plain that both the federal and the Louisiana 48-hour rules contain an emergency exception").

***8** Based on this interpretation of Louisiana law, the court found that Gusman's failure to afford petitioners a 48-hour hearing (or else release them) fell within the emergency exception to the rule. The court based its conclusion on the extraordinary circumstances surrounding Katrina's landfall, the unexpected and catastrophic breaches of the New Orleans levees, and the subsequent flooding of the prison where petitioners were housed. *See* Pet. App. 11a-12a (discussing prison flooding and evacuation). The court observed that, "if Katrina was not an emergency, it is difficult to imagine any set of facts that would fit that description," *id.*, and thus concluded:

> In light of this clear emergency, we hold that the 48-hour rule was suspended. Consequently, Gusman did not falsely imprison the [petitioners] by holding them without a probable cause determination rather than releasing them into the teeth of the storm on the morning of August 29, 2005.

Pet. App. 12a-13a. The court therefore reversed the denial of Gusman's motion for JMOL on the false imprisonment claim. Pet. App. 14a, 20a. [3]

***9 Reasons for Denying the Petition**

The decision below resolved an issue of state law only. The Fifth Circuit held that respondent Gusman was entitled to judgment as a matter of law on petitioners' false imprisonment claim under Louisiana law. The certiorari petition presents no federal issue and should be denied.

I. The Fifth Circuit's decision resolved an issue of state law, not federal law.

Petitioners misleadingly suggest that this is a Fourth Amendment case and that it concerns the breadth of the "emergency exception" to the probable cause requirement for warrantless arrests. *See, e.g.,* Pet. at 1 (setting forth text of Fourth Amendment); *id.* at 6 (stating "[t]he Fifth Circuit reversed the jury's verdict *with respect to the Fourth Amendment claims"*) (emphasis added). It is not and does not. Instead, the decision below interprets only the Louisiana tort of false imprisonment, and finds no evidentiary basis for an unlawful detention. That is a *state* law issue, and it is axiomatic that this Court rarely grants certiorari merely to review an application of state law. *See, e.g., Leavitt v. Jane L.,* 518 U.S. 137, 144-45 (1996) (explaining that the Court "do[es] not normally grant petitions for ***10** certiorari solely to review what purports to be an application of state law," absent extraordinary circumstances); *Braxton v. United States,* 500 U.S. 344, 347 (1991) (stating "principal purpose" of certiorari jurisdiction is resolving conflicts "concerning the meaning of provisions of federal law); *see generally* Sup. Ct. R. 10 (setting forth certiorari considerations).

The Fifth Circuit's decision touches the Fourth Amendment only indirectly, because the 48-hour rule from this Court's *County of Riverside* decision was incorporated into Louisiana statute governing probable cause determinations. *See, e.g.*, Pet. App. 8a (observing that the Louisiana statute "tracks [this Court's] decision in *County of Riverside*"). How a State administers such determinations *could* raise a Fourth Amendment issue, of course, but it simply did not in this case. The jury, after all, *rejected* any liability for Gusman under the Fourth Amendment. *See, e.g.*, Pet. App. 6a (noting that "[t]he jury found … that Gusman was not liable for the *Fourth*, Sixth, and Eighth Amendment claims"); *id.* at 13a (noting that jury rejected claim that Gusman had a "policy, practice or custom of deliberate indifference" to the 48-hour rule). Petitioners themselves recognize this. *See* Pet. 2 (noting that "a jury found [Gusman] … liable for false imprisonment *under Louisiana law*") (emphasis added).

In order to interpret the Louisiana probable cause statute, the Fifth Circuit had to determine whether it contains an "emergency exception." Pet. App. 8a-9a. That was an easy question: both the state rule and its federal predecessor say that the 48-hour rule *must* ***11** admit some exception for "emergency or other extreme circumstances." *Id.* at 9a (quoting *Wallace,* 25 So.3d at 723-24); *see also Riverside,* 500 U.S. at 57 (recognizing emergency exception in Fourth Amendment context). But the important point for present purposes is that this was a determination of state and not federal law. *See, e.g.*, Pet. App. 9a-10a (interpreting Louisiana Supreme Court's decision in *Wallace* and concluding that it mimics the federal 48-hour rule); *id.* at 10a (noting that "[a] federal court has a duty *to determine state law* as it believes the State's highest court would") (emphasis added).

Petitioners appear to assume that the Fifth Circuit's brief discussion of the Fourth Amendment "emergency exception" converted what was a state-law decision into a federal-law decision. It did not. *See, e.g.*, Pet. App. 6a (noting that jury found Gusman liable for "false imprisonment" but not for "the Fourth, Sixth, and Eighth Amendment claims"). But even indulging that dubious assumption, petitioners identify no disagreement among lower courts about the existence or contours of the Fourth Amendment emergency exception. *See* Pet. 9 (merely observing that "this Court established a 48-hour benchmark"). Nor do they identify any split of authority over how this exception has been applied in situations like this one. The two cases petitioners cite are both from the Fifth Circuit, are nothing like this case, and show no disagreement about applying the emergency exception. *See* Pet. 12.[4] Petitioners ***12** thus fail to establish any "increasing" federal deference to state detentions in the Fifth Circuit, *id.,* and they fail to cite any cases outside the Fifth Circuit to claim even a plausible inter-circuit disagreement on that point. *See, e.g., Jones v. Bock,* 549 U.S. 199, 220 n.9 (2007) (declining to address a "possible intra-circuit split").

Petitioners do not stop, however, with carelessly suggesting that this is a Fourth Amendment case. They also state repeatedly that the Fifth Circuit "determined that detentions lasting more than one month [are] permissible as a matter of law." Pet. 12; *see also id.* at 7 (asserting that "the Fifth Circuit concluded that detentions lasting over one month were reasonable as a matter of law"). One searches the Fifth Circuit's opinion in vain for any such holding. Quite to the contrary, the court emphasized the extraordinary nature of the situation faced by Gusman and his staff. *See, e.g.*, Pet. App. 12a ("As the storm bore down on New Orleans, Gusman and his officers had to provide for the security and safety of approximately 5,800 of their own inmates, plus 130 more inmates who were transferred from St. Bernard Parish."). The court laid down no blanket rule for detentions-in-general. Moreover, the court asked only whether petitioners' detention became ***13** illegal when 48 hours elapsed. *See, e.g., id.* at 8a (noting that "[t]he only basis" urged for an unlawful detention was that petitioners "were not granted a probable cause determination within 48 hours after their arrest"); *see also* Pet. 11 (admitting that "the Fifth Circuit only evaluated [petitioners'] detention at a single, discrete moment"). Nowhere did the court suggest it was ruling on the propriety of petitioners' subsequent detention by *state* officials after petitioners had left Gusman's custody.[5]

In sum, petitioners simply complain about the application of the generally-accepted emergency exception in the context of a state-law tort claim. This is an issue of state law, not federal law. And even if it were a federal issue, disagreement over the mere application of an uncontroversial general rule presents no candidate for certiorari. *See* Sup. Ct. R. 10 (explaining that certiorari "is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law").

***14 II. The Fifth Circuit's decision did not address or implicate any Seventh Amendment issue.**

Petitioners also claim that the Fifth Circuit "undermine[d] the Seventh Amendment right to trial by jury" by "substitut[ing] its own judgment for that of a New Orleans jury." Pet. 13.

Petitioners fail to point out where they raised this Seventh Amendment issue below. *See, e.g., Adarand Constr., Inc. v. Mineta,* 534 U.S. 103, 110 (2001) (explaining "that this is a court of final review and not first view") (quoting *Matsushita*

Elec. Industrial Co. v. Epstein, 516 U.S. 367, 399 (1996) (Ginsburg, J., concurring in part and dissenting in part)). Nor did the Fifth Circuit address the issue. *See, e.g., Nat'l Collegiate Athletic Ass'n v. Smith,* 525 U.S. 459, 470 (1999) (confirming that "we do not decide in the first instance issues not decided below").

Anyway, there *is* no Seventh Amendment issue. The court of appeals simply reversed the district court's denial of respondent's motion for judgment as a matter of law and directed entry of judgment. *See* Pet. App. 7a (setting forth standard of review for denial of JMOL); *id.* at 14a (concluding that "we must reverse the district court's denial of Gusman's motion for [JMOL]"); *id.* at 20a (directing entry of judgment).[6] Petitioners cite no authority for the proposition that this unremarkable appellate ***15** disposition "undermined" their Seventh Amendment right to a jury trial. Nor could they. The law is settled that an appellate court - upon determining that the district court erroneously denied a motion for judgment as a matter of law - may "direct the entry of judgment as a matter of law for the defendant" without violating the Seventh Amendment. *Weisgram v. Marley Co.,* 528 U.S. 440, 451-52 (2000) (citing *Neely v. Martin K. Eby Constr. Co.,* 386 U.S. 317, 327-30 (1967)).

Conclusion

The petition for certiorari should be denied.

Footnotes

1 Petitioners agree. *See* Pet. 3 (stating, " e]xcept at the margins, the circumstances surrounding the initial arrest and detention of p]etitioners Robbie sic] Wagenfeald and Paul Kunkel are adequately set forth in the Fifth Circuit's opinion); *id.* at 14 (stating that " t]his case does not present a significant factual dispute and that " t]he parties broadly agree with respect to events and timeline).

2 Under Louisiana law, the tort of false imprisonment requires proof that the plaintiff was (1) detained (2) unlawfully. Pet. App. 8a (citing *Kennedy, supra*).

3 The court did not reach Gusman's alternative arguments that (1) his actions were protected by discretionary immunity under Louisiana law, and (2) the jury's verdict was internally inconsistent. *See* Pet. App. 10a 11a (declining to reach question of discretionary immunity under La. Rev. Stat. Ann. § 2798.1); Pet. App. 14a (declining to reach issue of whether jury's Fourth Amendment verdict was inconsistent with its false imprisonment verdict). The court did go on to hold that respondent Hunter was entitled to qualified immunity on petitioners' Sixth Amendment claim. Pet. App. 18a (holding " t]here is no particularized, clearly established law which would have instructed Hunter that, under the Sixth Amendment, he had to allow pre trial detainees to use their cell phones when land lines were disrupted). Petitioners have not sought certiorari on that Sixth Amendment issue, however. *See* Pet. 5 (noting that the alleged "Sixth Amendment violation … is not part of this petition).

4 *Brown v. Sudduth,* 675 F.3d 472, 477 80 (5th Cir. 2012), merely affirms a jury's finding that a jurisdictional dispute over a murder investigation, combined with difficulty in locating a magistrate, justified a delay in determining probable cause. Even worse, *Jones v. Loundes County,* 678 F.3d 344, 349 (5th Cir. 2012), "d id] not reach the merits of the emergency exception] argument because appellants] failed to show that any defendant wa]s liable for the alleged deprivation of their Fourth Amendment rights.

5 Moreover, it was undisputed at trial that petitioners were transferred by Gusman to custody of the state corrections department immediately following their evacuation from the parish prison. *See* ROA 989 90; 881 83; 834 43; 1019 27; 850; 884 85. Petitioners apparently wish to litigate in this Court whether Gusman continued to exercise *de facto* custody over them after the evacuation. *See* Pet. 17 (arguing " t]he jury could have concluded petitioners "were still in the custody of Sheriff Gusman … a month after the storm). Adjudicating a fact issue which the Fifth Circuit never even addressed is plainly inappropriate for certiorari jurisdiction. *See* Sup. Ct. R. 10 (explaining that certiorari is "rarely granted when the asserted error consists of erroneous factual findings).

6 *See also* Fed. R. Civ. P. 50(e) (upon reversing the denial of motion for JMOL, appellate court may "order a new trial, direct the trial court to determine whether a new trial should be granted, or *direct the entry of judgment*) (emphasis added).

2011 WL 4048833 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Oren ADAR, Individually and as Parent and Next Friend of J.C.A.-S. a minor; Mickey Ray Smith, Individually and as Parent and Next Friend of J.C.A.-S. a minor, Petitioners,
v.
Darlene W. SMITH, In Her Capacity as State Registrar and Director, Office of Vital Records and Statistics, State of Louisiana Department of Health and Hospitals, Respondent.

No. 11-46.
September 9, 2011.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief in Opposition

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***i** Questions Presented (Restated)

Persons who adopt a Louisiana-born child in another State may obtain a revised birth certificate from the Louisiana Registrar of Vital Records. Under Louisiana law, however, they may replace the child's natural parents on the certificate only if they were eligible to adopt in Louisiana.

Petitioners are an unmarried same-sex couple who adopted a Louisiana-born child in New York and asked to be named as the child's fathers on his birth certificate. When the Registrar refused, they sued under 42 U.S.C. § 1983 alleging violations of full faith and credit and equal protection.

The questions presented are:

(1).

May the Full Faith and Credit Clause be enforced through section 1983?

(2).

Does Louisiana's obligation to give full faith and credit to a sister-state adoption extend to Louisiana's administration of its public records?

(3).

By linking birth certificate revision to its adoption laws, does Louisiana irrationally discriminate on the basis of adoptive parents' marital status?

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***1** Introduction

Louisiana owes full faith and credit to sister-state adoptions. This case concerns a different matter, however. Petitioners say that full faith and credit compels a Louisiana official to revise a birth certificate to track the terms of another state's adoption, even when the revision would be barred by Louisiana law. They also insist they can accomplish this through a section 1983 action. These are the only significant questions presented. The *en banc* Fifth Circuit properly rejected both.

It held that full faith and credit creates only a rule of decision for courts and therefore cannot be enforced through section 1983. Even if it could be, however, the court also held that full faith and credit does not control another state's collateral enforcement measures, such as revisions to birth certificates or other public records. Both holdings are supported by this Court's precedent, and neither implicates a circuit split.

The Court should deny review.

Jurisdiction

The Court has jurisdiction under 28 U.S.C. § 1254(1).

Statement

I. The New York Adoption

"Infant J" was born in Shreveport, Louisiana in 2005. Alerted by their adoption consultant, petitioners Oren Adar and Mickey Ray Smith traveled to Shreveport, where the child's mother agreed to an adoption. Petitioners took Infant J with them to Connecticut, and later adopted him in a proceeding in the Ulster County Family Court in ***2** Kingston, New York on April 27, 2006. ROA 422-26; 435; 444. [2]

Petitioners' status as an unmarried same-sex couple did not bar the adoption. While New York law appears to allow adoption only by "[a]n adult unmarried person or an adult husband and his adult wife *together,*" N.Y. Domestic Relations Law § 110 (1999) (emphasis added), New York courts interpret that section to allow joint adoption by certain unmarried couples, whether heterosexual or homosexual. *See, e.g., Matter of Garrett,* 841 N.Y.S.2d 731, 732 (N.Y. Sur. Ct. 2007) (observing that "[i]t is undeniable that the area of [New York] adoption law has undergone a significant transformation in recent years"). As an unmarried couple, petitioners could not have jointly adopted Infant J in Louisiana. *See* La. Child. Code Ann. art. 1221 (2004) (allowing private adoption by "[a] single person, eighteen years of age or older, or a married couple jointly").

II. The Louisiana Birth Certificate

Petitioners sent the New York adoption decree to respondent, the Louisiana Registrar of Vital Records and Statistics, Darlene Smith. [3] They asked for a new birth certificate identifying both men as Infant J's parents, pursuant to section 40:76 of the vital statistics laws. ROA 372-73; 435-36; 444; *see* La. Rev. Stat. Ann. § 40:76 (2001). Subsection A of 40:76 provides that, upon receipt of a properly certified out-of-state adoption decree of a ***3** Louisiana-born person, the Registrar "may create a new record of birth." Subsection C then provides that the Registrar "shall make a new record … showing" *inter alia* "the names of the adoptive parents."

The Registrar denied petitioners' request. She explained that "adoptive parents" in section 40:76(C) cannot include an unmarried couple, in light of Louisiana's determination that only married couples may jointly adopt. *See* La. Civ. Code Ann. art. 13 (1999) (requiring laws on same subject matter to be "interpreted in reference to each other"). The Registrar thus informed petitioners she could not place both men's names on Infant J's new certificate. She explained this was her policy regarding *any* out-of-state adoption by an unmarried couple, whether homosexual or heterosexual. She further explained that, in her discretion, she could place one of petitioners' names on a new certificate, since Louisiana law allows a single person to adopt. ROA 373-74; 376; 390-95; 426-27; *see also* App. 1a-2a.

Louisiana is not the only state that anchors birth certificate revision to parameters set by its domestic adoption law. Other states take similar approaches. *See, e.g.*, Tenn. Code Ann. § 68-3-312(f) (1977) (requiring state registrar to issue new birth certificate upon receipt of out-of-state adoption decree, "if not in conflict with Tennessee adoption laws"). [4] What these other states do by ***4** express provision, Louisiana simply does by official construction of its birth certificate revision law. *See, e.g., Esso Standard Oil Co. v. Crescent River Ports Pilots Ass'n,* 106 So.2d 316, 327 (La. 1958) (explaining that "[c]ontemporaneous construction must be given substantial weight and in the case of doubt is decisive") (and collecting authorities). The Registrar's consistent construction of section 40:76 has never been questioned by the Department Secretary, the Governor, the Attorney General, or the Louisiana Legislature. [5]

III. Federal Proceedings

Petitioners sued the Registrar in federal district court. They sought declaratory and injunctive relief under 42 U.S.C. § 1983, alleging the Registrar had violated the Full Faith and Credit Clause, U.S. Const, art. IV § 1, and the Equal Protection Clause, U.S. Const, amend. XIV § 1. ROA 115-20.

The district court granted petitioners summary judgment on their full faith and credit claim. [6] Relying principally on *Baker v. General Motors Corp.,* 522 U.S. 222 (1998), and *Finstuen v. Crutcher,* 496 F.3d 1139 (CA10 2007), the court reasoned that Louisiana owes full faith and credit to the New York adoption. App. 138a- ***5** 142a. While recognizing that Louisiana retained control over "the time, manner, and mechanisms for enforcing" the decree, the court interpreted section 40:76 as requiring the Registrar to place both petitioners on the certificate, regardless of whether they would qualify as "adoptive parents" in Louisiana. App. 143a-146a. The court therefore ordered the Registrar to issue a new birth certificate "identifying Oren Adar and Mickey Ray Smith as the child's parents." App. 146a.

A panel of the U.S. Fifth Circuit affirmed. First, the panel agreed that Louisiana owes full faith and credit to the adoption. App. 102a-117a. [7] Second, while the panel was "doubtful" whether section 40:76 is an enforcement mechanism, it declined to resolve the issue and instead found the Registrar's application of 40:76 is not "evenhanded." App. 118a-119a. Refusing any deference to the Registrar and "[p]roceeding on a blank slate," App. 119a, the panel decided a *res nova* issue under Louisiana law: it held the phrase "adoptive parents" in section 40:76(C) includes two unmarried men jointly constituted "fathers" by another state. App. 119a-132a; [8] *see also* App. 2a (summarizing proceedings).

The Fifth Circuit granted the Registrar's petition for rehearing *en banc*, vacating the panel decision. App. 87a-88a. After additional briefing and argument, the *en banc* court reversed the district court and remanded for dismissal of petitioners' claims. App. 31a.

Eleven of the sixteen judges held that the Full Faith and Credit Clause does not create rights redressable under section 1983. App. 6a-22a. They reasoned that the Clause ***6** simply commands state courts to honor the preclusive effects of a sister-state judgment, and that "[s]ection 1983 has no place in [the Clause's] orchestration of inter-court comity." App. 8a-13a, 7a. The eleven judges relied in particular on this Court's decision in *Thompson v. Thompson,* which said the Clause

> only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the … judicial proceedings of a State other than the one in which the court is sitting.

484 U.S. 174, 182-83 (1988) (quoting *Minn. v. N. Sec. Co.,* 194 U.S. 48, 72 (1904)); *see* App. 15a-18a, 11a n.3 (discussing *Thompson*). Concurring, Judge Southwick emphasized that *Thompson* "is too recent and clear an explanation of the effect of the Full Faith and Credit Clause to be ignored." App. 37a. Consequently, the *en banc* majority concluded that,

whereas plaintiffs may vindicate an alleged full faith and credit violation in the course of state court litigation (with eventual review by this Court), they may not do so directly through section 1983. App. 19a-22a.

In the alternative, nine [9] of the sixteen judges held that the Registrar's refusal to place both men on the birth certificate did not violate full faith and credit. App. 22a-28a. They relied on the "stark distinction" in this Court's jurisprudence "between recognition and enforcement of judgments under the foil faith and credit clause." App. 26a (citing *Baker,* 522 U.S. 222). Because full faith and credit commands states to honor a judgment's preclusive effects ***7** among the parties, Louisiana could not allow the adoption to be re-litigated in its own courts. Louisiana admitted this. App. 22a-23a. But, as the nine judges pointed out, "the mechanisms for enforcing a judgment do not travel with the judgment itself for purposes of full faith and credit." App. 26a (quoting *Baker,* 522 U.S. at 239). Thus, Louisiana could apply its own laws to determine the effect of the New York adoption on a Louisiana birth certificate. App. 24a-28a; *see also* App. 26a (reasoning that "[t]he adoption decree 'can only be executed in [Louisiana] as its laws may permit' ") (quoting *Fall v. Eastin,* 215 U.S. 1, 12 (1909) (quoting *McElmoyle ex rel. Bailey v. Cohen,* 38 U.S. (13 Pet.) 312, 325 (1839)). [0]

Finally, the same nine judges reached, and rejected, petitioners' claim that Louisiana's birth certificate law denies equal protection to the adopted children of unmarried couples. The court first denied that the law discriminates on the basis of illegitimacy - and that it therefore triggers heightened scrutiny - because "Infant's J's birth status is irrelevant to the Registrar's decision." App. 29a (distinguishing *Levy v. Louisiana,* 391 U.S. 68 (1968), and its progeny). Second, the court pointed out that Louisiana links birth certificate revision to its domestic adoption law, which permits adoption only by a married couple or a single person. App. 29a. The court reasoned that Louisiana's substantive adoption regime and its "corresponding vital statistics registry" together further Louisiana's "rational preference for stable adoptive families." App. 31a, 29a.

***8** Five judges dissented. App. 38a-86a. They would have ruled that full faith and credit (1). applies to all state actors, not only state courts, App. 46a-54a; (2) creates individual rights redressable under section 1983, App. 46a-63a (relying principally on *Dennis v. Higgins,* 498 U.S. 439 (1991)); and (3). requires the Registrar to recognize petitioners' status as adoptive parents for purposes of Louisiana's birth certificate revision law, App. 63a-75a.

Judge Reavley, one of the original panel members, concurred to "respond briefly to the disappointing dissent." App. 32a. He wrote that the dissent's insistence that full faith and credit could be vindicated through section 1983 was a "disturbing theme … [t]hat ignores all of the authority to the contrary" and "would isolate us from controlling precedent of many years." App. 32a, 33a.

Petitioners now seek review by this Court.

Reasons for Denying the Petition

In the decision below, the *en banc* Fifth Circuit correctly applied settled full faith and credit principles to resolve a novel problem - whether one state's adoption decree may control the operation of another state's public records. Clear majorities of the sixteen-judge court gave two answers to this conundrum, neither of which implicate a circuit split and both of which are supported by venerable authority. Given the flux in our society's views about the family, these issues will likely come up again and may eventually produce divergent opinions about the role full faith and credit plays in our constitutional architecture. Now is not the time confront them, however.

***9** The Fifth Circuit's primary holding that full faith and credit may not be enforced through section 1983 is amply supported by this Court's precedent. In *Thompson v. Thompson,* 484 U.S. 174 (1988), the Court drew on over a century of authority to explain that full faith and credit functions as a rule of decision for courts, not as a source of individual rights-of-action. Petitioners now ask this Court to repudiate *Thompson* and allow full faith and credit to be vindicated through

section 1983. Not only would doing so "isolate us from controlling precedent of many years," App. 33a (Reavley, J., concurring), but the issue has not produced actual disagreement among circuit courts.

The Fifth Circuit's alternative holding is squarely supported by the core distinction between recognition and enforcement of judgments. *See Baker,* 522 U.S. at 239 (explaining that "the mechanisms for enforcing a judgment do not travel with the judgment itself for purposes of full faith and credit"). The extent to which one state allows a birth certificate to be revised by another state's adoption is a collateral matter determined by forum law, not a matter of judgment "recognition" controlled by full faith and credit. Petitioners would instead blur recognition and enforcement, subverting the interstate harmony that full faith and credit was intended to foster. Once again, however, petitioners have not shown that circuit courts actually disagree about this. [2]

Lost in these technical arguments is the fact that Louisiana's position does not threaten, in the least, the full faith and credit actually owed to petitioners and their adopted child. Petitioners themselves admit that their relationship with Infant J was created by the New York ***10** adoption decree, not by the Louisiana birth certificate, and that the outcome of this litigation will not change that. Louisiana freely conceded below that it considers the issues and claims settled among the parties in New York to be final. It admitted that it cannot allow the parties to relitigate the adoption in Louisiana courts. Full faith and credit asks no more than that, leaving Louisiana free to determine collateral matters - such as revision of its public records - according to its own law.

I. The Fifth Circuit's Decision That Full Faith and Credit Cannot Be Enforced Through Section 1983 Does Not Merit Review.

The *en banc* Fifth Circuit held, 11-to-5, that the Full Faith and Credit Clause and its enabling statute, 28 U.S.C. § 1738, may not be enforced through section 1983. App. 6a-7a. Petitioners say that holding creates a conflict with the Tenth, Seventh, and Ninth Circuits, Pet. 14-16, 26-27; that it is "sufficiently serious" on its own to merit review, *id.* at 19-21; and that it is mistaken in light of the Clause's text and this Court's jurisprudence, *id.* at 22-24, 28-32. Only the second of these three assertions has any validity. The Fifth Circuit's decision is important because it explicates in painstaking detail the role full faith and credit plays in our constitutional architecture. More than that, however, is required to make a decision certworthy. *Contra* petitioners, the Fifth Circuit's decision does not "conflict" with other circuits in a meaningful way because no other circuit has actually addressed the interplay of the Clause and section 1983. And - far from "ignor[ing] this Court's precedent," Pet. 29 - the Fifth Circuit's decision was compelled by *Thompson v. Thompson,* which said the Clause does not furnish an individual remedy for its enforcement but provides only a rule of decision for courts. ***11** *See* 484 U.S. 174, 182-83 (1988) (relying on *Minn. v. N. Sec. Co.,* 194 U.S. 48, 72 (1904)).

A. Only the Fifth Circuit has actually addressed this issue.

Petitioners allege a 3-to-1 split on this issue because, contrary to the decision below, the Tenth, Seventh, and Ninth Circuits have "adjudicated full faith and credit claims on the merits against non-judicial state actors." Pet. 14 (citing *Finstuen v. Crutcher,* 496 F.3d 1139, 1142 (CA10 2007); *Rosin v. Monken,* 599 F.3d 574, 575 (CA7 2010); *United Farm Workers v. Ariz. Agric. Emp't Relations Bd.,* 669 F.2d 1249, 1257 (CA9 1982)). But a casual reading of those decisions shows that none actually addresses the issue at hand. Petitioners admit this, *sotto voce. See* Pet. 26 (claiming that other circuits "have *unremarkably assumed* that Section 1983 is available … to enforce violations of the Full Faith and Credit Clause") (emphasis added). In other words, petitioners' alleged split is an illusion.

Only the Fifth Circuit has addressed whether a purported full faith and credit violation may be asserted via section 1983. This required no small effort at parsing constitutional text, history, and jurisprudence. *Compare* App. 7a-22a; *id.* at 32a-33a (Reavley, J., concurring); *id.* at 33a-37a (Southwick, J., specially concurring), *with id.* at 44a-63a (Weiner, J., dissenting). No other circuit has done anything like that. The cases petitioners identify may have "assumed" section

1983 was a proper vehicle; or the issue may not have come up. Who knows? In any event, petitioners have not shown that the Fifth Circuit's decision on the interplay of full faith and credit and section 1983 is "in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

12 B. The Fifth Circuit correctly applied this Court's decision in *Thompson v. Thompson.

Petitioners also say the Fifth Circuit erred by (1) overlooking that the Full Faith and Credit Clause is "directed to 'each State,' not just 'each State's courts,' " Pet. 22; (2) relying on this Court's "inapposite" *Thompson* decision, which involved private persons, not state actors, *id.* at 22-23, 28; and (3) "ignor[ing]" this Court's precedents on the enforceability of constitutional provisions through section 1983, *id.* at 29-30 (relying primarily on *Dennis v. Higgins,* 498 U.S. 439 (1991)). Each of these arguments is mistaken. [3]

Principally, petitioners ignore that this Court has already determined that full faith and credit serves a function incompatible with section 1983. In *Thompson v. Thompson,* the Court explained that the Clause

> 'only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting.'

484 U.S. at 182-83 (quoting *N. Sec.,* 194 U.S. at 72). This observation was necessary to hold that the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A, did not create an implied right of action. Because the ***13** PKPA followed "the pattern of the Full Faith and Credit Clause," the Court understood it simply as "a mandate directed *to state courts* to respect the custody decrees of sister States." *Thompson,* 484 U.S. at 183 (emphasis added). *Thompson*'s basic premise is that the Full Faith and Credit Clause envisions enforcement, not by an individual right of action, but rather by providing a rule of decision for pending state court proceedings. *See, e.g., id.* (explaining that, because patterned on full faith and credit, the PKPA "is most naturally construed to furnish a rule of decision for courts … and not to create an entirely new cause of action").

Petitioners try to distinguish *Thompson* because it "concern[ed] claims against private individuals rather than Section 1983 claims against state actors." Pet. 22. They are wrong for many reasons. First, *Thompson* "gave a clear and quite limited explanation of the reach of the Full Faith and Credit Clause," one which is "too recent … to be ignored." App. 35a, 37a (Southwick, J., specially concurring). Second, the relief actually sought in *Thompson* was against "state courts," not merely against private persons. *See* App. 17a (quoting *Thompson v. Thompson,* 798 F.2d 1547, 1552 (CA9 Cir. 1986)). Finally, even assuming *Thompson* addressed only implied private rights, this Court has explained that "our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983." *Gonzaga University v. Doe,* 536 U.S. 273, 283-85 (2002).

Thompson also refutes petitioners' reliance on *Dennis v. Higgins,* 498 U.S. 439 (1991), and similar cases. *See* Pet. 29. The purpose of the analysis in those cases is to discern whether constitutional provisions or federal statutes confer an individual right of action. *See, e.g., Golden State Transit Corp. v. Los Angeles,* 493 U.S. 103, 106 (1989) (setting out considerations for determining when federal ***14** statutes confer "rights" under section 1983); *see also Dennis*, 498 U.S. at 450 (reasoning that, unlike the Supremacy Clause, the Commerce Clause "is the source of a right of action in those injured by regulations that exceed [its] limitations"). *Thompson* has already settled that question with respect to full faith and credit: the Clause does not confer an individual right of action, but only furnishes a command to state courts in pending proceedings. *See* 484 U.S. at 182-83. [4] As the *en banc* Fifth Circuit explained, *Dennis* is consistent with *Thompson* because, unlike the Commerce Clause right addressed in *Dennis*, "[f]ull faith and credit jurisprudence has followed an entirely different enforcement path." App. 28a n.9.

Finally, petitioners' textual argument fails. They claim the Fifth Circuit's decision "contradicts the plain language" of the Clause, which "is directed to 'each State,' not just 'each State's courts.' " Pet. 22 (quoting U.S. Const. art. IV § 1). But petitioners read the Clause carelessly: it directs only that "Full Faith and Credit shall be given *in* each State." U.S. Const, art. IV § 1 (emphasis added). Thus, the Clause's "plain language" begs the question petitioners think it answers. *See also* App. 47a (Weiner, J., dissenting) (claiming that the Clause "addresses itself to the states *qua* states"). More to the point, however, petitioners ignore the fact that, since 1790, Congress has implemented the Clause through a statute requiring that

> ***15** [s]uch Acts, records and judicial proceedings … shall have the same full faith and credit *in every court* within the United States … as they have by law or usage *in the courts* of such State … from which they are taken.

28 U.S.C. § 1738 (emphases added); *see also, e.g., Baker v. Gen. Motors Corp.,* 522 U.S. 222, 231-32 & n.4 (1998) (discussing implementing statute). That plain language suggests, at the very least, that *Thompson* was correct when it said full faith and credit is a rule for *courts* and not a source of individual rights-of-action. *See* 484 U.S. at 183 (describing "the pattern of the Full Faith and Credit Clause and section 1738" as providing a "command to state courts"). [5]

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Petitioners have not shown that the *en banc* Fifth Circuit's holding either implicates a circuit split or contravenes this Court's settled view that full faith and credit is not a source of individual rights-of-action. The Court should therefore deny review.

II. The Fifth Circuit's Alternative Decision on Full Faith and Credit Does Not Merit Review.

Alternative to its section 1983 holding, the *en banc* Fifth Circuit held, 9-to-5, that the Registrar did not deny full faith and credit to the New York adoption by refusing to place petitioners on a revised birth certificate. App. 7a, ***16** 22a-28a. Relying on the "stark distinction between recognition and enforcement of judgments under the full faith and credit clause," App. 26a (citing *Baker*, 522 U.S. 222), the majority held that birth certificate revision fell on the "enforcement" side and was thus governed by Louisiana law. App. 26a-28a. The majority emphasized that the Registrar accepted the adoption's validity, and "concede[d] that [petitioners'] parental relationship … with Infant J cannot be revisited in [Louisiana] courts." App. 23a. Those matters, concerning "recognition" of the adoption under full faith and credit, were not at issue. *Id.*; *see also* App. 7a (whether parental relationship can be "relitigated in Louisiana … is not at issue here"). Enforcement of the adoption in Louisiana public records was a different matter, however. The New York decree, the majority concluded, " 'can only be executed in [Louisiana] as its laws may permit.' " App. 26a (quoting *Fall v. Eastin,* 215 U.S. 1, 12 (1909) (quoting *McElmoyle ex rel. Bailey v. Cohen,* 38 U.S. (13 Pet.) 312, 325 (1839)).

Petitioners seek review of that alternative holding, claiming that it "fundamentally alters" longstanding full faith and credit principles by allowing states "to disregard foreign judgments based on their state's public policy preferences." Pet. 19, i. Petitioners are wrong about that, but, more importantly for present purposes, they have failed to show there is any circuit split on the issue.

A. There is no circuit split on whether birth certificate revision laws are collateral to the full faith and credit due sister-state adoptions.

Petitioners suggest that the Fifth Circuit's alternate holding conflicts with *Finstuen v. Crutcher,* 496 F.3d 1139 (CA10 2007). Pet. 15-17. *Finstuen* addressed a different full faith and credit issue, however. The Tenth Circuit said an Oklahoma statute violated full faith and credit by categorically denying *recognition* to foreign same-sex ***17** adoptions. *Finstuen,*

496 F.3d at 1156 (holding full faith and credit violated by statute "providing for categorical non-recognition of a class of adoption decrees from other states"); *see* Okla. Stat. tit. 10, § 7502-1.4 (A) (2004). Oklahoma's supplementary birth certificate law was not the focus of *Finstuen*, since that law (unlike Louisiana's) allowed issuance of the birth certificate. *See* 496 F.3d at 1146 n.4, 1154; Okla. Stat. tit. 10, § 7505-6.5 (A), (B) (1998); *id.* § 7505-6.6(B) (1998). *Finstuen*, then, involved non-recognition of sister-state adoptions, something not at issue here. *See, e.g.*, App. 23a (observing that "recognition" of New York decree "is not at issue"). Indeed, the Registrar conceded below that Louisiana had to recognize the New York adoption under full faith and credit. *See, e.g.*, App. 7a (noting Registrar conceded that the adoption "cannot be relitigated in Louisiana"); Appellant's Suppl. Br. at 24-25 (stating that "[w]hen one state has conclusively adjudicated … issues in an adoption proceeding," such as termination of parental rights and suitability of adoptive parents, "another state may not relitigate them").

Finstuen thus fails to pose a clean disagreement on the issue the Fifth Circuit decided - *i.e.*, whether birth certificate revision is a collateral matter controlled by forum law. Indeed, *Finstuen* appears to *agree* with the Fifth Circuit on that issue: the Tenth Circuit observed in *dictum* that, notwithstanding full faith and credit, Oklahoma retained authority to apply its own enforcement measures to out-of-state adoptions. *See* 496 F.3d at 1154 (noting that "Oklahoma continues to exercise authority over the manner in which adoptive relationships should be enforced in Oklahoma"). In any event, *Finstuen* resolved a full faith and credit issue different from the one decided below. There is no circuit split on that issue.

bB. *18 The Fifth Circuit correctly distinguished judgment recognition from collateral matters such as birth certificate revision.

On the merits, petitioners say the Fifth Circuit's resolution of this issue betrays full faith and credit by allowing states to resist recognition of foreign judgments "based on parochial policy assessments of the wisdom of those judgments." App. 21. They insist the majority's distinction between "recognition" and "enforcement" is a sham. *Id.* ("It is no answer to label the State's action in this case a denial of 'enforcement' as opposed to a denial of 'recognition' of the judgment."). They argue instead that, in order to afford full faith and credit to the adoption, "Louisiana must accept the New York court's adjudication of [petitioners'] adoptive parent status, … and must evenhandedly enforce that decree under Louisiana's own birth certificate law." *Id.*

Petitioners would fundamentally alter the role of the Full Faith and Credit Clause in our constitutional architecture. They ignore the bedrock principles - extensively discussed by the *en banc* majority - that the Clause (1) simply nationalizes the rules of *res judicata*, and (2) therefore does not control the collateral effects of a judgment in other states. *See* App. 7a-9a, 22a-26a. Instead, petitioners would misuse the Clause to convert the New York adoption into a Louisiana judgment. This would subvert over a century of settled authority. *See Thompson v. Whitman,* 85 U.S. 457, 462-63 (1873) (observing that the Constitution " 'did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, as evidence' ") (quoting Joseph Story, Commentary on the Conflict of Laws § 609).

19 *(1). Full faith and credit nationalizes a judgment's preclusive effects but does not control collateral matters in other states.

The Full Faith and Credit Clause commands that issues and claims adjudicated in one state court be recognized as final in every other state court. *See generally Baker*, 522 U.S. at 233; *Mills v. Duryee,* 11 U.S. (7 Cranch.) 481, 484 (1813). The Clause "brings to our Union a useful means of ending litigation," because through it, "the local doctrines of *res judicata*, speaking generally, become a part of national jurisprudence." *Riley v. New York Trust Co.,* 315 U.S. 343, 348-49 (1942). A state must honor in its own courts what has been adjudicated elsewhere, even when it would have barred the underlying lawsuit. *See Baker*, 522 U.S. at 232-34 (recognizing "no roving 'public policy exception' to the full faith and credit due *judgments*' ") (emphasis in original).

But just as *res judicata* explains the power of full faith and credit, *res judicata* also marks its limits. *See, e.g., id.* at 237-38 (using claim preclusion to measure credit due an injunction); *id.* at 242 (Scalia, J., concurring) (the Clause "establish[es] a rule of evidence, rather than of jurisdiction") (quotations omitted). This inherent limitation on the Clause's operation means that "[e]nforcement measures do not travel with the sister state judgment as preclusive effects do," but instead "remain subject to the evenhanded control of forum law." *Baker*, 522 U.S. at 235 (citing *McElmoyle*, 38 U.S. at 325; Restatement (Second) of Conflict of Laws § 99 (1969)). So, while one state's judgment "may indeed conclusively adjudicate the rights and obligations running between the *parties*" to litigation, *Baker*, 522 U.S. at 235 (emphasis in original), that judgment " 'does not carry with it into another state the efficacy of a judgment upon property or persons, to be enforced by execution.' " ***20** *Fall v. Eastin,* 215 U.S. 1, 12 (1909) (quoting *McElmoyle,* 38 U.S. at 325). In other words, the rendering state's judgment "can only be executed in the latter [state] as its laws may permit." *Id.*

The Court has applied this distinction between recognition and enforcement in various settings. The constitutional credit due another state's judgment did not control, for example, the forum state's title transfer laws (*Fall*, 215 U.S. at 12), or its statute of limitations for judgment debts (*McElmoyle*, 38 U.S. at 327-28), or "provisions for bond, sequestration, receiver, and injunction" (*Lynde v. Lynde,* 181 U.S. 183, 187 (1901). Indeed, a divorce judgment in Nevada did not control a subsequent New York alimony decree, because the fact "that marital capacity was changed does not mean that every other legal incidence of marriage was necessary affected." *Estin v. Estin,* 334 U.S. 541, 544-54 (1948); *see also Sutton v. Leib,* 342 U.S. 402, 407 (1952) (explaining that the Clause has the "function of avoiding relitigation in other states of adjudicated issues, while leaving to the law of the forum state the application of the predetermined facts to the new problem").

More pointedly, the Court has used this principle to measure the credit due to a sister-state adoption. *Hood v. McGehee* held that, by excluding from its inheritance law children adopted in sister states, Alabama did not "fail[] to give full credit to the [Louisiana] adoption of the plaintiffs." 237 U.S. 611, 615 (1915). Writing for the Court, Justice Holmes explained that Alabama "does not deny the effective operation of the Louisiana [adoption] proceedings" but only says that "whatever may be the status of the plaintiffs, whatever their relation to the deceased … the law does not devolve his estate upon them." *Id.* (citing *Olmstead v. Olmstead,* 216 U.S. 386 (1910)).

***21** In sum, with respect to full faith and credit, this Court has repeatedly recognized the distinction between preclusive effects, on the one hand, and domestic mechanisms that operate independently of those preclusive effects, on the other. In *Hood* the Court applied that distinction to an adoption. This shows that "there are many situations in which the *res judicata* effects of a state-court judgment are properly controlled by the domestic rules of a second state." *See* 18B Wright, Miller & Cooper Fed. Prac. & Proc. 2d § 4467, at 14 (2002).

(2). The Fifth Circuit correctly ruled that birth certificate revision is collateral to recognition of a sister-state adoption.

The *en banc* majority recognized this basic distinction at the core of full faith and credit and correctly applied it to Louisiana's birth certificate revision law. *See* App. 25a-26a (concluding that "[o]btaining a birth certificate falls in the heartland of enforcement, and therefore outside the full faith and credit obligation of recognition").

First, the court made the obvious point that birth certificate revision is legally distinct from the validity of the underlying adoption. App. 23a. The Registrar, after all, conceded that the parent-child relationship created by the New York adoption "cannot be revisited in [Louisiana] courts." *Id.* Petitioners, in turn, admitted that the New York adoption decree - and not the Louisiana birth certificate - created their relationship with the child and conceded, further, that "nothing that happens in this case will change that." *Id.; see also* Pet. 4 n.3 (admitting that "the adoption decree *itself* creates the parent-child relationship") (emphasis added).

Second, relying on the settled distinction between judgment recognition and enforcement, *see* Part II.B.1 *supra*, the court reasoned that Louisiana's birth certificate ***22** law alone "determines what incidental … rights flow" from the New York adoption decree. App. 24a (citing *Estin,* 334 U.S. at 544-45). The court laid particular emphasis on this Court's treatment of an adoption decree in *Hood v McGehee:*

> Just as the Court in *Hood* did not find full faith and credit denied by Alabama's refusing certain rights to out-of-state adoptions, so here full faith and credit is not denied by Louisiana's circumscribing the kind of birth certificate available to unmarried adoptive parents.

App. 25a (citing *Hood,* 237 U.S at 615). The court accurately read *Hood* as an example of the broader proposition that "the full faith and credit clause does not require the enforcement of every right which has ripened into a judgment of another state or has been conferred by its statutes." App. 23a-24a (quoting *Broderick v. Rosner,* 294 U.S. 629, 642 (1935)); *see also Pink v. A.A.A. Highway Express, Inc.,* 314 U.S. 201, 210 (1941) (observing that "the full faith and credit clause is not an inexorable and unqualified command … [but] leaves some scope for state control within its borders of affairs which are peculiarly its own").

Finally, the court warned that interpreting full faith and credit to control the operation of Louisiana's vital records registry would subvert interstate comity. The Clause does not compel a state to "substitute the statutes of other states for its own statutes." App. 25a (quoting *Sun Oil Co. v. Wortman,* 486 U.S. 717, 722 (1988)). Nor does it control Louisiana's "right to channel and direct the rights created by foreign judgments," especially in the public realm of vital records. App. 25a. To rule otherwise would be to allow the New York decree to "compel within Louisiana 'an official act within [its] exclusive province.' " App. 26a (quoting *Baker*, 522 U.S. at 235).

***23** The nine judges in the *en banc* majority therefore concluded that Louisiana law - and not the preclusive effects of the New York adoption - govern petitioners' right to receive a revised birth certificate bearing both of their names. App. 27a-28a. Because Louisiana law would not permit any unmarried couple, whether adopting in-state or out-of-state, from having their names placed on a revised certificate, the court reasoned that "the Registrar's refusal … can in no way constitute a denial of full faith and credit." App. 28a.

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Petitioners have not shown that the *en banc* Fifth Circuit's alternative holding either implicates a circuit split or misapplies the longstanding distinction between judgment recognition and enforcement under the Full Faith and Credit Clause. The Court should therefore deny review.

III. The Fifth Circuit's Equal Protection Decision Does Not Merit Review.

The *en banc* Fifth Circuit also ruled, 9-to-5, that the Registrar's refusal to place unmarried adoptive parents on a revised birth certificate did not violate the Equal Protection Clause. App. 28a-31a. The court pointed out that Louisiana had chosen to "have its birth certificate requirements flow from its domestic adoption law," which allows joint adoption only by married couples. App. 29a; *see* La. Child. Code Ann. art. 1221 (2004) (allowing private adoption by "[a] single person, eighteen years of age or older, or a married couple jointly"). Applying rational basis review, the court found that Louisiana's distinction between married and unmarried adoptive couples furthered its "legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children." App. 29a-30a ***24** (quoting *Lofton v. Sec'y of Dep't of Children & Family Servs.,* 358 F.3d 804, 819 (CA11 2004)).

Petitioners seek review of the court's equal protection holding, asserting that the court should have applied heightened scrutiny and, regardless, that Louisiana's policy is irrational. Pet. 32-36, i. But petitioners have not shown that the

Fifth Circuit's decision raises a significant equal protection issue, and, more importantly, they have made no effort to demonstrate any circuit disagreement on these issues.

Petitioners have not identified a single decision from any circuit addressing how the Equal Protection Clause applies to the categories states establish for potential adoptive parents. Nor have they cited any case addressing the extent to which states may link those adoption categories to birth certificate revision. This failure alone strongly counsels against reviewing this novel equal protection question. *See, e.g., Nike, Inc. v. Kasky,* 539 U.S. 654, 663 (2003) (Stevens, J., concurring in dismissal of certiorari as improvidently granted) (observing that the "novelty and importance of constitutional questions" often justifies denying review); *Lackey v. Texas,* 514 U.S. 1045 (1997) (Stevens, J., respecting denial of certiorari) (noting that "the importance and novelty of the question presented … provide a principled basis for postponing consideration of the issue until after it has been addressed by other courts").

Facing this precedential vacuum, petitioners say the Fifth Circuit should have applied this Court's precedents forbidding discrimination against illegitimate children. App. 32-35 (citing *Levy v. Louisiana,* 391 U.S. 68 (1968), and its progeny); *see also, e.g., Pickett v. Brown,* 462 U.S. 1, 7 (1983) (observing that equal protection invalidates discriminatory laws "relating to status of birth"). They contend these cases should not be confined to ***25** classifications based on a child's birth status, citing one decision in which this Court applied *Levy* to invalidate a law prohibiting undocumented immigrant children from attending public schools. App. 33 (discussing *Plyler v. Doe,* 457 U.S. 202, 223 (1982)). Petitioners claim, at bottom, that the Fifth Circuit should have used *Levy* and *Plyler* to strike down Louisiana's birth certificate revision law because it "punish[es] children for the status or actions of their parents." App. 34, 32.

Petitioners' argument suffers from two irredeemable flaws.

First, petitioners have identified no decision, state or federal, applying *Levy* and its progeny to any question remotely connected to this case. No court, it seems, has ever used that line of cases to test the permissible categories of adoptive parents, or to condemn a state preference that persons jointly adopting children be married, or to question whether states may yoke birth certificate revision to domestic adoption law. Petitioners claim that the Fifth Circuit's decision *not* to do so "parts ways with the Second, Sixth, and Ninth Circuits," App. 34, but this argument evaporates under the slightest scrutiny. None of the cited decisions has anything to do with the issues presented here. Two are equal protection challenges to federal *firearm* statutes (*United States v. Toner,* 728 F.2d 115 (CA2 1984); *United States v. Thoreson,* 428 F.2d 654 (CA9 1970)), and the third does not involve equal protection at all. *See Walton v. Hammons,* 192 F.3d 590, 592-601 (CA6 1999) (interpreting federal Food Stamp Act in light of the 1996 welfare reforms).

Second, accepting petitioners' equal protection argument would facially invalidate most adoption laws in the United States. Their premise is that a preference for *married* over *unmarried* adoptive couples violates equal protection because, like classifications based on illegitimate ***26** birth status, it "punish[es] children for the status or action of their parents." App. 32. But, as petitioners' *amici* point out, most states limit *joint* adoption to married couples. *See, e.g.*, Brief of *Amici Curiae* Gary J. Gates & Nan D. Hunter at 10 (observing that "[n]umerous states limit joint adoption to married couples"); Brief of *Amici Curiae* Adoption and Children's Rights Organizations *et al.* at 6-7 (asserting that "many state statutes still do not permit adoption by unmarried couples jointly"). [6]

While this case focuses on birth certificate revision, and not on the categories of potential adoptive parents *per se,* petitioners insist on overlooking Louisiana's "decision to have its birth certificate requirements flow from its domestic adoption law." App. 29a. Consequently, accepting their novel equal protection argument would take one giant step toward invalidating any adoption law in the United States that limits joint adoption to married couples. Petitioners' *amici* are already auditioning that argument. *See, e.g.*, Brief of *Amici Curiae* Adoption and Children's Rights Organizations *et al.* at 4 (attacking "Louisiana's policy to limit the classes of prospective parent[s]"); *id.* at 18-19 (arguing that "Louisiana's refusal to recognize the legitimacy of an entire category of prospective adoptive ***27** parents - namely unmarried couples - is … inconsistent with" individual assessment of children's best interests); Brief of *Amici Curiae* Professors of Law

Joan Heifetz Hollinger *et al.* at 9 & n.3 (suggesting that "categorical rules" excluding unmarried couples as prospective adoptive parents "are not consistent with standard adoption practices").

The Court should deny review where accepting petitioners' central premise would accomplish a staggering subversion of our nation's adoption laws, especially where there is no disagreement among lower courts on the issue.

Conclusion

The petition for certiorari should be denied.

Footnotes

1 Petitioners' third question, concerning equal protection, fails to present a serious issue on which there is any circuit disagreement whatsoever. *See* Part III, *infra.*

2 "ROA refers to the official record in the U.S. Fifth Circuit.

3 The Registrar directs Louisiana's vital records registry, within the office of preventive and public health services. *See* La. Rev. Stat. Ann. § 40:36(A) (2001) (identifying Registrar as "custodian of all vital certificates and records "); *id.* § 40:33(A) (2001) (describing registry). The Registrar's duties appear in chapter 2 of Louisiana's Public Health and Safety Law. *See id.* tit. 40, ch. 2 (2001 & supp. 2011).

4 *See also, e.g.*, Fla. Stat. Ann. § 382.016(1)(d)(2) (2005) (forbidding amended birth certificate "to include the name of the child's father if paternity was established by adoption and the father would not be eligible to adopt under the laws of this state "); Tex. Health & Safety Code Ann. § 192.008(a) (2005) (providing that a "supplementary birth certificate of an adopted child must be in the names of the adoptive parents, one of whom must be a female, named as the mother, and the other of whom must be a male, named as the father ").

5 Petitioners insist that the Registrar "selectively disregards some foreign adoptions based on her assessment of their "wisdom, and that her decision is based on "disapproval of adoptions by unmarried couples. *See, e.g.*, Pet. i, 1, 2, 12. These charges are baseless. The record establishes that Registrar's policy is based solely on her understanding of Louisiana law. *See* ROA 426 (explaining that her construction of section 40:76 is controlled by Louisiana law allowing only married couples to adopt jointly); ROA 164 65 (pointing to "Louisiana statutes that] recognize single parent adoptions and married couple adoptions, and explaining that "in keeping with the law, this is what I am allowed to do and this is what I'm not allowed to do ").

6 The court did not reach the equal protection claim. App. 142a n.8.

7 Like the district court, the panel also did not reach the equal protection claim. App. 133a n.76.

8 Finding section 40:76 "clear and unambiguous, the panel refused to certify its interpretation to the Louisiana Supreme Court. App. 118a.

9 Two of the nine, Judges Reavley and Jolly, were members of the original panel but changed their votes after *en banc* rehearing. *Compare* App. 89a *with* App. 1a *and* App. 32a.

10 Unlike the panel, *see* App. 117a 132a, the *en banc* majority properly accepted the Registrar's construction of Louisiana law. *See Pennhurst State Sch. & Hospital v. Halderman,* 465 U.S. 89, 106 (1984) (Eleventh Amendment bars a federal court from "instruct ing] state officials on how to conform their conduct to state law ").

11 The dissenters also disagreed with the majority's decision to reach the equal protection claim and suggested Louisiana lacked a rational basis for limiting birth certificate revision to married adoptive couples. App. 79a 86a.

12 Petitioners' third question, concerning the Fifth Circuit's equal protection holding, does not present a serious constitutional issue on which any circuit disagrees. *See* Part III, *infra.*

13 Petitioners' assertion that the Fifth Circuit "needlessly reached this issue for the first time on *en banc* rehearing is puzzling. They admit that the Fifth Circuit "invited briefing on this specific question after granting rehearing. Pet. 25. It is well settled that " t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals .] *Singleton v. Wulff,* 428 U.S. 106, 121 (1976); *see also Exxon Shipping Co. v. Baker,* 554 U.S. 471,487 (2008) (quoting *Singleton*).

14 *Cf., e.g., Golden State Transit,* 493 U.S. at 106 (holding that Supremacy Clause is "not a source of any federal rights, but only "secure s] federal rights by according them priority whenever they come in conflict with state law) (quotations omitted)); *Carter v. Greenhow,* 114 U.S. 317, 322 (1885) (holding that the Contracts Clause confers individual rights "only indirectly and

incidentally by affording "a right to have a judicial determination declaring the nullity of the attempt to impair a contract's] obligation).

15 Petitioners' law professor *amici* at least notice that the Clause only says "*in* each State. *See* Brief of *Amici Curiae* Dean Erwin Chemerinsky *et al.* at 10. But then they commit the same error as petitioners by overlooking the implementing statute, which quite clearly refers to "full faith and credit *in every court.* 28 U.S.C. § 1738 (emphasis added).

16 *See also* Ala. Code § 26 10A 5(a) (1990) (providing that " a]ny adult person *or husband and wife jointly* who are adults may petition the court to adopt a minor) (emphasis added); *and see, e.g.,* Ariz. Rev. Stat. Ann. § 8 103 (1970); Ark. Code Ann. § 9 9 204 (1) (1977); Del. Code Ann. tit. 13, § 903 (1992); D.C. Code § 16 302 (1963); Fla. Stat. Ann. § 63.042 (2)(a) (2003); Haw. Rev. Stat. § 578 1 (1992); Iowa Code § 600.4 (2) (2000); Kan. Stat. Ann. § 5 92113(1990); Mont. Code Ann. § 42 1 106(1) (1997); Me. Rev. Stat. Ann. § 9 301 (2001); N.H. Rev. Stat. Ann. § 170 B:4 (I) (2004); N.D. Cent. Code § 14 15 03 (1) (2003); Ohio Rev. Code Ann. § 3107.03 (A) (1996); Okla. Stat. tit. 10, § 7503 1.1 (1) (1998); Utah Code Ann. § 78B 6 117 (3) (2008); W. Va. Code § 48 22 201 (2001); Wis. Stat. § 48.82 (1)(a) (2008) (same or similar restrictions).

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2011 WL 4479077 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Barion PERRY, Petitioner,
v.
STATE OF NEW HAMPSHIRE, Respondent.

No. 10-8974.
September 23, 2011.

On Writ of Certiorari to the Supreme Court of New Hampshire

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*i QUESTION PRESENTED

Whether the New Hampshire Supreme Court correctly determined that the admission at trial of a pretrial identification cannot violate due process where no improper state action has caused the circumstances under which the identification was made.

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*iii TABLE OF AUTHORITIES

Cases

*1 INTERESTS OF *AMICI* STATES

The states have a well-established interest in regulating the procedures under which their laws are carried out, *Patterson v. New York,* 432 U.S. 197, 201 (1977), and, accordingly, in "promulgat[ing] their own rules of evidence … in their own state courts." *Spencer v. Texas,* 385 U.S. 554, 568-69 (1967). State decisionmaking in this area is "not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the conscience of our people as to be ranked as fundamental." *Speiser v. Randall,* 357 U.S. 513, 523 (1958).

In this case, petitioner contends that a criminal defendant has a generalized due process interest in the reliability of eyewitness identification testimony, even absent any state action improperly influencing the witness's identification. Petitioner's ill-advised rule would constitutionalize a rule of evidence in order to protect an amorphous reliability interest found nowhere in the Constitution's text. Because such a rule would directly undermine their prerogative to establish rules of evidence, *amici* States urge the Court to reject petitioner's argument.

SUMMARY OF THE ARGUMENT

Law enforcement officials often use procedures such as lineups or photo displays to help eyewitnesses identify the perpetrator of a crime. If properly conducted, these procedures are an invaluable investigative tool; if abused, they

undermine a fair trial. Consequently, the Court has ***2** frequently considered whether admission of eyewitness testimony tainted by improper identification procedures violates the Constitution. *See, e.g., Simmons v. United States,* 390 U.S. 377, 384 (1968) (addressing when due process is violated by "impermissibly suggestive" police procedures). Decades of litigation have produced a sensible constitutional rule: due process bars evidence derived from an improper identification procedure unless the evidence is sufficiently reliable to offset the corrupting effect of that procedure. *See Manson v. Braithwaite,* 432 U.S. 98, 114 (1977). Central to all these cases has been improper state action - a skewed lineup, say, or a biased photo array - that allows the state to stack the deck against a defendant by, in effect, saying to a witness, "This is the man." *Foster v. California,* 394 U.S. 440, 443 (1969).

Petitioner now urges the Court to subtract from this line of cases the basic requirement of state action. The Court should reject that invitation for several reasons.

First, the rules announced in the Court's identification caselaw make no sense outside the context of state action. State action in the form of a concrete police identification procedure is inseparable from the Court's analysis in literally every decision. *See* Part 1(A), *infra*. Petitioner manages to obscure this fact only by using highly selective quotations from the Court's opinions. This fundamental misreading of the Court's rulings leads petitioner to focus on "reliability" and nothing else. *See* Part I(B), *infra*. But the Court has never ***3** announced a freestanding due process interest in reliable evidence. To the contrary, reliability becomes a factor in due process analysis only *after* a defendant has shown an unnecessarily suggestive police procedure - and then only as a means of *admitting* evidence that would otherwise have been excluded. Petitioner would thus turn the Court's eyewitness identification jurisprudence on its head. Furthermore, his rule excluding state action from the due process analysis ignores the well-established principle that due process applies only "to acts of the states, not to acts of private persons or entities." *Rendell-Baker v. Kohn,* 457 U.S. 830, 837 (1982).

Second, petitioner's proposed rule would improperly constitutionalize a rule of evidence. *See* Part II, *infra*. Nothing in the Constitution authorizes the Court to promulgate an evidentiary code. The Court has intervened in evidentiary matters only when admission of certain evidence would violate a specific constitutional guarantee. *See, e.g., Crawford v. Washington,* 541 U.S. 36, 50-51 (explaining that "not all hearsay implicates the Sixth Amendment's core concerns"). Absent that, the Court has declined to usurp states' authority over evidentiary rules or to interfere with a jury's ability to weigh facts. In the eyewitness identification context, constitutional rules are meant to account for improper state influence on witnesses, not to protect a fictional due process interest in reliable evidence. Courts could not hope to construct (and consistently apply) any test that would measure the myriad variables affecting "reliability." And, if they tried, they would soon find themselves swamped with ***4** suppression challenges in every case that involved identification evidence.

Finally, states have a substantial interest in ensuring that eyewitness identifications are used fairly in criminal trials, and they are fully capable of adapting their rules and procedures to do so. *See* Part III, *infra*. States have actively implemented measures ranging from law enforcement guidelines to revised evidentiary rules in response to advances in scientific understanding. Several state supreme courts have in fact implemented protocols for addressing the situation at issue here - identifications influenced by factors outside of state control. *See, e.g., State v. Chen,* 25 A.3d 256, 261-62, 268-69 (N.J. 2011) (holding that while such identifications do not implicate due process concerns, they should nevertheless be evaluated for reliability under a modified *Manson* test). Simply put, states are best suited to address concerns about the reliability of eyewitness testimony, and the Court should not undermine their efforts by recognizing the amorphous due process interest petitioner advocates.

ARGUMENT

I. State Action is a Prerequisite for Due Process Protection

A. The Court's eyewitness caselaw makes no sense outside the state-action context

Petitioner contends that the Due Process Clause bars admission of eyewitness testimony arising from ***5** "impermissibly suggestive circumstances," regardless of whether those circumstances were the product of state action. Br. at 8. This Court's decisions, however, support no such free-floating due process interest in the reliability of eyewitness evidence. Petitioner must therefore construct his argument from phrases misleadingly excerpted from the Court's opinions. *See, e.g.*, Br. at 9, 14, 17 (citing *Manson v. Braithwaite,* 432 U.S. 98, 114 (1997), for the proposition that "reliability is the linchpin in determining the admissibility of identification testimony"). When the language petitioner relies on is placed in proper context, however, his argument crumbles. At the heart of every one of the Court's eyewitness identification cases is the necessary predicate of state action in the form of improper police procedures. If that state action is subtracted, as petitioner's argument requires, then the rules announced in those cases simply make no sense.

The Court first considered the admissibility of pretrial eyewitness confrontations in the late 1960s. In the first such case, *United States v. Wade,* 388 U.S. 218 (1967), it ruled that a pretrial lineup was a "critical stage" at which the accused was entitled to counsel under the Sixth Amendment. *Id.* at 236. Animating the Court's decision was concern over "the degree of suggestion inherent in [police identification procedures]," *id.* at 228, and the attendant difficulty of challenging those procedures during trial:

> [A]ny protestations by the suspect of the fairness of the lineup made at trial are likely ***6** to be in vain; the jury's choice is between the accused's unsupported version and that of the police officers present. In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification.

Id. at 231. The Court accordingly held that, in cases of tainted post-indictment identification procedures, a witness would be allowed to provide in-court identification testimony only if the state established by clear and convincing evidence that the in-court identification had an independent source, or that the introduction of the evidence was harmless error. *Id.* at 240-42.

In a case decided along with *Wade, Stovall v. Denno,* 388 U.S. 293 (1967), the Court addressed the due process concerns implicated by police identification procedures. *Stovall* involved a hospital-room "showup" without the presence of counsel. *Id.* at 295. Setting aside the right- to counsel issue, the Court held that a pretrial confrontation could violate due process if it was "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the accused] was denied due process of law." *Id.* at 301-02. The propriety of the police procedure would turn on "the totality of the circumstances surrounding it." ***7** *Id.* at 302. Applying that test, the Court concluded that, because no one knew how long the victim might live, the hospital-room showup had been proper. *Id.* at 302.

The Court reaffirmed *Stovall* in *Simmons*, a bank robbery case in which bank employees had identified the defendant on the basis of photographs shown to them by the police shortly after the robbery. 390 U.S. at 380-81. In rejecting the petitioner's argument that it should categorically prohibit such photo presentations, the Court reasoned that any generalized risk of misidentification would be "substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error." *Id.* at 384. The Court instead instructed that each case must be considered on its own facts, and that eyewitness identifications at trial following pretrial photographic identifications would be set aside on due process grounds "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." [2]

Applying these principles, the Court invalidated a pretrial identification proceeding on due process grounds in *Foster*. There, a witness finally identified the defendant after two highly irregular lineups and an individual showup. 394 U.S. at

443. "In effect," ***8** the Court reasoned, "the police repeatedly said to the witness, This is the man,' " and thus violated the defendant's right to due process. *Id.*

The Court began to limit the reach of these decisions in the 1970s. In *Kirby v. Illinois,* for example, the Court limited *Wade*'s right-to-counsel requirement to post-indictment lineups. 402 U.S. 682, 690 (1972). The Court likewise ruled in *United States v. Ash* that there was no right to counsel during pre- or post-indictment photographic lineups. 413 U.S. 300, 321 (1973). At the same time, the Court also lowered the due process barriers to admission of evidence derived from imperfect identification procedures.

The Court first did so in *Neil v. Biggers,* 409 U.S. 188 (1972), a case involving a pre-*Stovall* station-house showup. *Id.* at 195, 199. Declining to adopt a *per se* rule of exclusion, the Court instead applied a "totality of the circumstances" analysis guided by factors including: "the witness's level of certainty when identifying the defendant … *at the time of the confrontation,*" and "the length of time between the crime and *the confrontation." Id.* at 199-200 (emphasis added). [3] Just as previous decisions, *Biggers* reiterated that "the primary evil to be ***9** avoided is 'a very substantial likelihood of irreparable misidentification,' " *id.* at 381 (quoting *Simmons,* 390 U.S. at 384), and that "it is the likelihood of misidentification which violates a defendant's right to due process." *Id.* at 381-82. Those observations, obviously, were made in the course of analyzing the due process concerns created by a police-orchestrated station-house showup. [4]

The Court used the same approach five years later in *Manson*, which held that identifications derived from post-*Stovall* confrontations should be tested under the same totality of the circumstances analysis. In *Manson*, an undercover officer had purchased drugs from a suspect and later identified the seller based on a photograph left on his desk by another police officer. 432 U.S. at 100-01. Disagreeing with lower courts, the Court rejected *per se* exclusion of the identification. *Id.* at 108-09. The Court's opinion emphasized that the due process interests at stake were readily protected by the normal methods for testing evidence at trial:

> While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart - the 'integrity' - of the adversary process. Counsel can both cross-examine the identification ***10** witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification.

Id. at 113 n.14 (quoting *Clemons v. United States,* 408 F.2d 1230, 1251 (D.C. Cir. 1968) (Leventhal, J., concurring)). The Court thus concluded that "reliability is the linchpin in determining the admissibility of identification testimony *for both pre- and post-Stovall confrontations." Id.* at 114 (emphasis added).

The Court further diminished due process barriers to introduction of identification evidence in *Watkins v. Sowders,* 449 U.S. 341 (1981). The question in *Sowders* - which consolidated cases involving allegedly improper lineups, photographic arrays, and showups - was whether due process required a hearing outside the jury's presence whenever a defendant asserts that a witness's identification was tainted by improper procedures. The Court answered in the negative, noting that while such hearings are prudent, they are not constitutionally required. *Id.* at 349. Writing for the majority, Justice Stewart emphasized that the reliability of identification evidence is primarily a question for jurors:

> Where identification evidence is at issue … the proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform. Indeed, the *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability ***11** of that evidence…. Under our adversary system of justice, cross-examination has always been considered a most effective way to ascertain truth.

Id. at 347, 349.

In sum, the current due process standard for evaluating eyewitness testimony has emerged from several decades of development in this Court's jurisprudence. A criminal defendant challenging an eyewitness identification under the Due Process Clause must first show that law enforcement officers used an identification process that was "unnecessarily suggestive." *Manson,* 432 U.S. at 106. If so, the reviewing court must then apply the *Biggers* factors to determine the independent reliability of the in-court identification. These factors are to be weighed against "the corrupting effect of the suggestive identification itself." *Id.* at 114. State courts would be prudent to conduct a hearing on these issues outside the presence of the jury, but there is no *per se* constitutional requirement that they do so. *Sowders,* 449 U.S. at 349.

B. Petitioner fundamentally misconstrues the function of reliability in the Court's holdings

Petitioner's argument that state action is *not* a prerequisite for a due process challenge to eyewitness testimony is incomprehensible in light of the Court's cases. Simply put, the presence of orchestrated police procedures has been a necessary ***12** predicate of the Court's analysis in every single one if its eyewitness identification cases, whether dealing with the Sixth Amendment right to counsel or the Due Process Clause. For instance, its first decision, *Wade*, spoke of the dangers inherent in "[t]he confrontation *compelled by the State* between the accused and the victim or witnesses to a crime." 388 U.S. at 228 (emphasis added). Or again, *Stovall* defined the claim as whether "the *confrontation conducted* in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification" that it denied petitioner due process. 388 U.S. at 301-02 (emphasis added). And the issue in *Sowders* was whether due process requires a hearing when a defendant "has proffered some evidence that *pretrial police procedures* directed at identification were impermissibly suggestive." 449 U.S. 341, 350 (Brennan, J., dissenting) (emphasis added); *see also id.* at 351-52 (noting that the Court's caselaw had "held admissible identification evidence tainted by suggestive *confrontation procedures* and lacking sufficient indicia of reliability") (emphasis added).

Petitioner's strategy for avoiding the obvious thrust of the Court's cases is simply to airbrush any contrary language out of the picture. For instance, Petitioner relies heavily on *Manson's* phrase that "reliability is the linchpin," see Br. at 9, 14, 17, 24, 29. But reading the *entire* sentence shows what the Court was really talking about:

> ***13** Reliability is the linchpin in determining the admissibility of identification testimony *for both pre- and post-Stovall confrontations*.

432 U.S. at 114 (emphasis added). In other words, police-orchestrated confrontations lay at the core of the rule. Further, the Court's ultimate holding answered the original question presented, which was:

> [W]hether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a *police procedure* that was both suggestive and *unnecessary*.

Id. at 106 (emphasis added). Thus, the Court viewed evidence of an "unnecessarily suggestive police procedure" as a prerequisite for application of the *Biggers* reliability factors. *Id.* at 114 ("Against these factors is to be weighed the corrupting effect of the suggestive identification itself."). By contrast, these decisions provide no support for petitioner's argument that there is a free-floating due process interest in "reliability" untethered from police-supervised procedures.

Justice Marshall reinforced this point in his *Manson* dissent. In urging a *per se* exclusionary rule, he cautioned that "impermissibly suggestive identifications are not merely worthless *law enforcement tools*. They pose a grave threat to society at large in a more direct way than most ***14** *governmental disobedience of the law." Id.* at 127 (Marshall, J., dissenting) (emphasis added). The majority responded that, while a *per se* rule would have the more significant deterrent effect, a more flexible rule would still encourage police to avoid unnecessarily suggestive procedures. *Id.* at 112.

Just as there is no way to excise state action from *Manson*'s holding, there is no way to excise it from *Biggers*. Petitioner repeatedly notes phrases from *Biggers* such as, "[t]he primary evil to be avoided is 'a very substantial likelihood of misidentification,' " 409 U.S. at 198 (quoting *Simmons,* 390 U.S. at 384), and "[i]t is the likelihood of misidentification which violates a defendant's right to due process …" *Id.*; *see, e.g.*, Br. at 14, 16, 32. But Petitioner again misleadingly subtracts the text from its context. The very next sentences of the opinion read:

> Suggestive *confrontations* are disapproved because they increase the likelihood of misidentification, and *unnecessarily* suggestive *confrontations* are condemned for the further reason that the increased chance of misidentification is gratuitous. But as *Stovall* makes clear, the admission of evidence of a *showup* without more does not violate due process.

Id. (emphasis added).

Petitioner's selective quotations of *Manson* and *Biggers* badly obscure the underlying point of those decisions: reliability was central to the Court's analysis *only* as a means of testing the admissibility ***15** of eyewitness evidence derived from unnecessarily suggestive police procedures. Neither of those decisions, however, in any way supports petitioner's radical suggestion that courts may wield the Due Process Clause to test the "reliability" of any eyewitness evidence, regardless of whether it is derived from police-orchestrated procedures.

The vast majority of courts, including the New Hampshire Supreme Court below, have accordingly recognized the necessity of state action for due-process eyewitness-identification claims. *See, e.g., Chen,* 25 A.3d at 261-62 ("This case is not about governmental conduct. It therefore does not implicate due process concerns raised by suggestive police procedures."); *People v. Owens,* 97 P.3d 227, 233 (Colo. Ct. App. 2004) (adopting the approach of the "majority of jurisdictions" requiring state action). [5]

***16** Furthermore, the necessity of state action in this context is consistent with the Court's requirement of it elsewhere. The law is well-established that the Due Process Clause "applies to acts of the states, not to acts of private persons or entities." *Rendell-Baker,* 457 U.S. at 837; *see also Shelley v. Kraemer,* 334 U.S. 1, 13 (1948) (explaining that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful."). This understanding has remained undisturbed for more than a century:

> Civil rights … cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong …. [that may be] vindicated by resort to the laws of the state for redress.

The Civil Rights Cases, 109 U.S. 3, 17 (1883). Thus, as the Court explained in *Colorado v. Connelly,* 479 U.S. 157 (1986), even "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that ***17** evidence inadmissible under the Due Process Clause." *Id.* at 166.

Petitioner's response is halfhearted at best: he argues that *Connelly* is inapposite because it (a) dealt with involuntary confessions by mentally ill defendants, a category of evidence that does not "warrant special protection," (b) rejected reliability as a factor, whereas the Court's identification cases declare it a guiding factor, and (c) involved a rule of deterrence, which is not a consideration in eyewitness cases. Br. at 33.

But all three of these points flatly ignore the extensive body of caselaw echoing this same point in other contexts. *See, e.g., Lugar v. Edmondson Oil Co., Inc.,* 457 U.S. 922, 925, (1982) (taking of property without due process); *Rendell-Baker,*

457 U.S. at 837 (termination of pseudo-public employee); *Shelley,* 334 U.S. at 13 (enforcement of discriminatory housing covenants). Nothing about the language of *Connelly* or any of these other cases indicates that the state-action requirement depends on the context of the particular claim at issue; instead, the Court has consistently and unambiguously stated that due process protections simply do not apply to private conduct.

Petitioner's deterrence point additionally misses the mark for the reason that the deterrence objective of a due process evidentiary exclusion is irrelevant to the state-action requirement. Even if deterrence *were* relevant, however, the Court's eyewitness identification cases explicitly note that deterrence was a factor in excluding unnecessarily suggestive ***18** testimony. *See Manson,* 432 U.S. at 112 (noting that, while a *per se* rule of exclusion would have more deterrent effect, a totality-of-the-circumstances approach would still lead police to use more reliable procedures).

In sum, Petitioner's argument that suggestive identifications implicate due process absent state action is flatly contradicted by this Court's caselaw.

II. The Court Should Decline Petitioner's Invitation to Constitutionalize a Rule of Evidence

In addition to its utter lack of jurisprudential pedigree, petitioner's proposed rule makes little sense from either a constitutional or a practical perspective. It asks the Court to consitutionalize a rule of evidence based on a nonexistent due process interest in evidentiary reliability, something the Court has never done in any other area. Moreover, from the standpoint of the practical administration of criminal justice, the rule would be a disaster.

The Constitution does not authorize the Court to promulgate a Code of Evidence. An evidentiary matter may raise a constitutional question, to be sure, but only because it happens to implicate a specific guarantee secured by the Constitution. For instance, admission of hearsay violates the Constitution in certain cases, not because hearsay is "unreliable," but because the Constitution promises an accused the right to confront witnesses against him. *See, e.g., Crawford,* 541 U.S. at 50-51 (explaining that, while the two doctrines overlap, ***19** "not all hearsay implicates the Sixth Amendment's core concerns"). Similarly, the Court requires testimony by a minimum of two witnesses in treason cases, *see, e.g., Haupt v. United States,* 330 U.S. 631, 640-41 (1947), not because uncorroborated testimony is less reliable, but because the Constitution expressly demands it. U.S. CONST, art. III § 3.

One searches in vain, however, for the Constitution's "Reliable Evidence Clause." In other words, generalized concerns about evidentiary reliability do not trigger constitutional protection. *See Crawford,* 541 U.S. at 67-69 (rejecting reliability as an inadequate gauge for constitutional guarantees). As Justice Black once explained, the Founders did not draft the Bill of Rights "merely in order to mention a few types of evidence 'for illustration,' " while leaving the Court with the residual power to invalidate any other evidence the Justices deem unreliable. *Foster,* 394 U.S. at 449 (Black, J., dissenting). Petitioner seeks to do exactly what Justice Black condemned. He would elevate the admission of any eyewitness identification to constitutional magnitude based solely on a judge's assessment of that evidence's "reliability." The Constitution provides no warrant for such a rule.

As discussed in Part I(A), *supra*, the Court's eyewitness identification cases illustrate this principle. Evidence is excluded precisely because the police connived in its creation by manipulating witness confrontations. As the Court said in *Foster,* 394 U.S. at 443, "[i]n effect, the police repeatedly sa[y] to the witness, 'This is the man.' " " 'Reliability" ***20** factors in only as way of salvaging evidence not entirely corrupted by suggestive procedures. *Manson,* 432 U.S. at 114 (balancing reliability factors against the influence of the unnecessarily suggestive confrontation). The bottom line is that the constitutional question arises from the corrupt police practice, not from any free-floating concern with "reliability" of evidence.

Importantly, the Court has refused to constitutionally police other types of evidence that - just like eyewitness testimony - are highly impactful yet potentially unreliable. For instance, scientific or expert testimony may exercise extraordinary

influence on a jury, but the Court has ruled that its admission is governed by rules of evidence, not by the Constitution. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 592-93 (1993). Because *Daubert* did not announce a constitutional requirement, states are free to develop their own rules for admission of this evidence. *See State v. O'Key,* 899 P.2d 663, 672 n.7 (Or. 1995) ("As a statutory case, rather than a constitutional case, *Daubert* is not binding on the states."). The Court has taken the same approach with respect to polygraph evidence. *See Scheffer,* 523 U.S. at 312 ("Individual jurisdictions … may reasonably reach differing conclusions as to whether polygraph evidence should be admitted."); *see also Middleton v. Cupp,* 768 F.2d 1083, 1085 (9th Cir. 1985) ("The admission of testimony concerning polygraph tests does not rise to a constitutional violation."). Accepting Petitioner's argument for a generalized due process interest in reliability would consign ***21** long-established evidentiary rules like these to constitutional limbo.

Adopting Petitioner's rule would also undercut the central role juries have always played in our legal system. "It is an incontestable fact in our judicial history that the jury is the sole tribunal to weigh and determine facts." *Foster,* 394 U.S. at 447 (Black, J., dissenting). And in cases based on eyewitness evidence, assessing the reliability of that evidence will often be the jury's *only* duty. *See, e.g., Sowders,* 449 U.S. at 347. Thus, "[t]o take that power away from the jury is to rob it of the responsibility to perform the precise functions the Founders most wanted it to perform." *Foster, ibid.* It is no exaggeration to say, then, that petitioner's rule would fundamentally recast the respective roles of judge and jury in criminal trials. With respect to eyewitness evidence, judges would essentially assume the core function of assessing the "reliability," and hence the veracity, of the most critical witnesses in criminal proceedings.

Finally, constitutionalizing a rule of evidentiary reliability would intrude on powers reserved to, and long exercised by, the states. The states have a well-established power "to promulgate their own rules of evidence … in their own state courts …." *Spencer,* 385 at 568-69. And as Justice Stevens noted in *Manson*, "this rulemaking function can be performed more effectively by the legislative process than by somewhat clumsy judicial fiat, and … the Federal Constitution does not foreclose experimentation by the states in development of such rules." ***22** *Manson,* 432 U.S. at 118 (Stevens, J., concurring). The states have developed rules to account for eyewitness identifications, *see* Part III, *infra*, and the Court should not undermine these efforts.

Aside from these glaring constitutional deficiencies, Petitioner's rule would also be virtually impossible to apply in any coherent fashion. Consistency would be the primary casualty. Judges applying the *Manson*/*Biggers* factors have done so in the familiar realm of police procedures such as lineups, showups, and photo arrays. These are concrete law enforcement procedures easily accessible to judges. The judicial mind can therefore readily grasp how irregularities in those procedures can skew their legitimate uses and irremediably prejudice a criminal defendant.

Petitioner would widen the due process analysis beyond police procedures to encompass *anything* bearing on the reliability of an eyewitness identification. This promises disastrous confusion, because the list of potential reliability factors could literally go on forever. As the New Jersey Supreme Court has observed in this context: "How dark is too dark as a matter of law? How much [stress] is too much?" *State v. Henderson,* No. A-8-08-62218, 2011 WL 3715028, at *48 (N.J. Aug. 24, 2011). Judges have no guideposts to make such free-ranging assessments, and they would invariably reach wildly disparate conclusions. And because the variables would by definition lie outside governmental control, rulings would have no deterrent impact against ***23** future occurrences. *See* Manson, 432 U.S. at 112 (describing deterrent impact of exclusions on police).

Implementation of Petitioner's rule would also severely strain the criminal justice system. Defendants would surely demand a hearing in virtually every case in which eyewitness identification plays a part, threatening to overwhelm the system. *Henderson,* 2011 WL 3715028, at *49. And the impact would not be limited to trial courts: challenges to admission of identification evidence would likely become a routine feature of direct appeals and habeas petitions.

In sum, the numerous constitutional and practical problems posed by Petitioner's rule dictate that the Court should reject it.

III. States are Well-equipped to Address Concerns About the Reliability of Eyewitness Identification Evidence

States have a fundamental interest in ensuring that criminal prosecutions are conducted fairly. Towards that end they have developed and refined rules of evidence and procedure that promote reliability in the determination of guilt and innocence. These standards are not static: they have evolved to reflect scientific understanding and societal expectations. For instance, serious concerns about the reliability of polygraph evidence have led most states to exclude it from criminal trials. *United States v. Scheffer,* 523 U.S. 303, 311 (1998) (discussing cases).

***24** The eyewitness identification context is no different. States have enacted a wide variety of measures to ensure that eyewitness evidence is fairly obtained and properly presented. With regard to law enforcement procedures - the only identification variables within the states' control - many states have taken steps to eliminate reliability concerns at the outset. A number have adopted guidelines providing best practices for identification procedures. For instance, the California Commission on the Fair Administration of Justice has recommended double-blind and sequential identification procedures, mandatory recording of lineups and photo displays, the provision of cautionary instructions to witnesses, and training against displaying confirming feedback to witnesses. Cal. Comm'n on the Fair Admin, of Justice, *Report and Recommendations Regarding Eyewitness Identification Procedures* (2006). [6]

Other states have passed legislation addressing identification issues. Maryland, for example, has required all state law enforcement agencies to adopt ***25** written eyewitness identification policies that comply with United States Department of Justice Standards. *See* Md. Code Ann., Pub. Safety § 3-506 (2009). And Ohio has mandated a variety of lineup procedures and required courts to take noncompliance with these rules into account when conducting suppression hearings or instructing juries on assessing reliability. OHIO REV. CODE § 2933.83 (2011). [7]

Further, numerous state courts have acknowledged post-*Manson* scientific findings and incorporated them into their rulings. Most recently, in *Henderson*, the New Jersey Supreme Court performed a sweeping survey of the scientific literature in announcing a new test for admission of such evidence. 2011 WL 3715028 at *9-37, 45-47. Although the court said evidence of state action is required to trigger a suppression hearing, the state must then offer proof that the identification is ***26** reliable, considering a variety of both state-caused and external variables. *Id.* at *45. Twenty years before *Henderson*, the Utah Supreme Court crafted its own criteria for assessing the reliability of suggestive identifications, finding "some of [the *Biggers]* criteria to be scientifically unsound." *State v. Ramirez,* 817 P.2d 774, 780 (Utah 1991). [8]

State courts have also addressed the issue at the heart of this case - suggestive influences by variables other than state action - under laws of evidence. In *Chen*, a companion case to *Henderson,* the New Jersey Supreme Court clarified that nongovernmental suggestive influences do not trigger due process protection, but introduced a modified approach for assessing reliability of eyewitness identification based on the court's *Henderson* test. 25 A.3d at 268-69. Similarly, the Connecticut Supreme Court held in *State v. Holliman,* 570 A.2d 680 (Conn. 1990), that even if an identification challenge did not involve state action - and therefore lacked a constitutional basis - the criteria in *Manson* were "appropriate guidelines by which to determine the admissibility of identifications that result from ***27** procedures conducted by civilians." *Id.* at 684. And in *State v. Hibl,* 714 N.W.2d 194 (Wis. 2006), the Wisconsin Supreme Court held that even when there is no action by law enforcement, courts "still have a gate-keeping function" to assess the reliability of identification evidence under Wisconsin's equivalent of Federal Rule of Evidence 403. *Id.* at 204-05.

These cases illustrate that state courts are fully capable of addressing reliability issues with identification evidence using evidentiary principles. Yet even apart from special examinations into reliability of such evidence, several basic features of state criminal procedure offer protection to defendants in Petitioner's situation. First, in cases where identification testimony is expected to be a prominent issue, defendants may be allowed to utilize peremptory challenges to select jurors

who indicate an openness to criticisms of eyewitness evidence. *See Ross v. Oklahoma,* 487 U.S. 81, 89 (1988) ("[I]t is for the state to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise."); *cf. Rhone v. State,* 492 N.E.2d 1063, 1064 (Ind. 1986) (upholding state's peremptory strike of a potential juror due to her expressed reluctance to convict on the basis of a single eyewitness's testimony). Additionally, defense counsel can use cross-examination to thoroughly expose any factors that may undermine an eyewitness's testimony. "Cross-examination [is] the greatest legal engine ever invented for the discovery of truth," *California v. Green,* 399 U.S. 149, 158 (1970) (internal quotation marks and citation omitted), and is "the device best ***28** suited to determine the trustworthiness of testimonial evidence," *Sowders,* 449 U.S. at 349.

Several states also allow defendants to present expert testimony on the reliability of eyewitness identification evidence. *See, e.g., Henderson,* 2011 WL at 3715028 at *51; *LeGrand,* 867 N.E.2d at 378-79. At least one state supreme court - Utah's - has actively encouraged the use of experts. *See State v. Clopten,* 223 P.3d 1103, 1118 (Utah 2009) ("We expect … that in cases involving eyewitness identification of strangers or near-strangers, trial courts will routinely admit expert testimony."). As noted in *Clopten*, expert testimony may be a powerful supplement to cross-examination in cases where eyewitnesses are mistaken, yet display a high degree of confidence in their testimony. *Id.* at 1110.

Finally, defense counsel can again attack eyewitness testimony in closing argument. *See Manson,* 432 U.S. at 114 n.14. The court may then instruct the jurors on the proper standards for evaluating such evidence. *See, e.g., Henderson,* 2011 WL 3715028 at *51-52 (mandating development of model jury instructions considering generally accepted scientific evidence); *Sowders,* 449 U.S. at 347 ("Where identification evidence is at issue, however, no … special considerations justify a departure from the presumption that juries will follow instructions.").

In sum, outside the context of suggestive police confrontations, the reliability of eyewitness identification testimony is an evidentiary matter like any other. States have developed rules and ***29** procedures for ensuring that such evidence is used fairly, and will continue to do so. Petitioner's attempt to mint a novel due process interest in the reliability of all such evidence would simply sweep these state efforts away. Because the Due Process Clause does not "establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure," *Spencer,* 385 U.S. at 564, the Court should reject Petitioner's argument.

CONCLUSION

The Court should affirm the judgment of the New Hampshire Supreme Court.

Footnotes

FN

* Counsel of Record

1 The Court held, as an initial matter, that *Wade* did not apply retroactively and that Stovall therefore had no Sixth Amendment claim. *Id.* at 300 01.

2 This "irreparable misidentification language appears to derive from Wade's discussion of lineups that deprive a defendant from "meaningfully … attack ing] the credibility of the witness' courtroom identification. 388 U.S. at 231.

3 The other factors addressed the reliability of the witness' identification of the suspect prior to the police orchestrated confrontation. *See id.* at 199 200 (relying on "the witness's opportunity to view the perpetrator at the time of the crime; the witness's degree of attention at the time of the crime; and the accuracy of the witness's prior description of the perpetrator).

4 Given that the victim in *Biggers* had been raped and spent nearly a half hour with the assailant in good light, the Court concluded that, on balance, there was no substantial likelihood for misidentification, even though the identification procedure had been unnecessarily suggestive. *Id.* at 200 01.

5 *See also, e.g., United States v. Sharpe,* 193 F.3d 852, 868 (5th Cir. 1999); *Reese v. Fulcomer,* 946 F.2d 247, 259 (3d Cir. 1991); *United States v. Kimberlin,* 805 F.2d 210, 233 (7th Cir. 1986); *United States v. Peele,* 574 F.2d 489, 491 (9th Cir. 1978); *Clency*

v. State, 475 So. 2d 642, 644 (Ala. Grim. App. 1985); *Kimble v. State,* 539 P.2d 73, 77 (Ak. 1975); *State v. Nordstrom,* 25 P.3d 717, 729 (Ariz. 2001); *People v. Peggese,* 102 Cal. App. 3d 415, 422 (Cal. Ct. App. 1980); *State v. Holliman,* 570 A.2d 680, 684 (Conn. 1990); *Green v. State,* 614 S.E.2d 751, 755 (Ga. 2005); *People v. Bynum,* 348 N.E.2d 194, 196 (Ill. App. Ct. 1976); *Harris v. State,* 619 N.E.2d 577, 581 (Ind. 1993); *State v. Zahner,* 545 N.W.2d 337, 339 (Iowa Ct. App. 1996); *Wilson v. Commonwealth,* 695 S.W.2d 854, 857 (Ky. 1985); *State v. Daughtery,* 563 So. 2d 1171, 1174 (La. Ct. App. 1990); *Com. v. Colon Cruz,* 562 N.E.2d 797, 805 (Mass. 1990); *Tidwell v. State,* 784 S.W.2d 645, 647 (Mo. Ct. App. 1990); *People v. Rose,* 219 A.D.2d 564, 564 65 (N.Y. App. Div. 1995); *State v. Brown,* 528 N.E.2d 523, 532 (Ohio 1988); *State v. Pailon,* 590 A.2d 858, 863 (R.I. 1991); *State v. Reid,* 91 S.W.3d 247, 272 (Tenn. 2002); *Rogers v. State,* 774 S.W.2d 247, 260 (Tex. Crim. App. 1989), *overruled on other grounds by Peek v. State,* 106 S.W.3d 72 (Tex. Crim. App. 2003); *State v. Marshall,* 284 N.W.2d 592, 599 (Wis. 1979).

6 *See, also, e.g*, Office of the Attorney Gen., N.J. Dep't of Law and Pub. Safety, *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (2001); Task Force on Wrongful Convictions, N.Y. State Bar Ass'n, *Final Report of the New York State Bar Association s Task Force on Wrongful Convictions* (2009); Governor's Comm'n on Capital Punishment, State of Ill., *Report of the Governor s Commission on Capital Punishment* (2002); N.C. Actual Innocence Comm'n, *Recommendations for Eyewitness Identification* (2003) Office of the Attorney Gen., Wis. Dep't of Justice, *Model Policy and Procedure for Eyewitness Identification* (2005).

7 *See, also, e.g.*, 2011 Conn. Acts 11 252 (effective Oct. 1, 2011) (setting procedures for lineups and photo arrays and establishing task force to study identification issues); 725 Ill. Comp. Stat. Ann. 5/107A 5 (2009) (mandating a variety of lineup reforms, including recording of all lineups, special instructions for witnesses, and requirement that lineup fillers appear substantially similar to witness's previous description of suspect); N.C. Gen Stat. § 15A 284.50 .53 (2009) (enacting comprehensive lineup guidelines along with legal remedies for noncompliance); 2007 60 Vt. Adv. Legis. Serv. (LexisNexis 2007) (establishing committee to study best practices for eyewitness identification procedures); W. Va. Code § 62 1E 1 to 3 (2008) (imposing lineup reforms and creating best practices task force); Wise. ST. ANN. § 177.50 (2011) (requiring law enforcement agencies to adopt procedures to reduce the likelihood of inaccurate identifications).

8 The body of state caselaw taking into account scientific critiques of the reliability of eyewitness testimony is too extensive to adequately catalogue here. However, representative cases include *State v. Chapple,* 660 P.2d 1208 (Ariz. 1983); *People v. McDonald,* 690 P.2d 709 (Cal. 1984); *State v. Ledbetter,* 881 A.2d 290 (Conn. 2005); *Brodes v. State,* 614 S.E.2d 766 (Ga. 2005); *State v. Warren,* 635 P.2d 1236 (Kan. 1981); *Commonwealth v. Silva Santiago,* 906 N.E.2d 299 (Mass. 2009); *People v. LeGrand,* 867 N.E.2d 374 (N.Y. 2007); *State v. Copeland,* 226 S.W.3d 287 (Tenn. 2007); and *State v. Dubose,* 699 N.W.2d 582 (Wis. 2005).

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2011 WL 2066580 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Lance DAVENPORT, John Njord, and F. Keith Stepan, Petitioners,
v.
AMERICAN ATHEISTS, INC., R. Andrews, S. Clark, and M. Rivers, Respondents.

No. 10-1297.
May 23, 2011.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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*i Questions Presented

Since this Court decided *Van Orden v. Perry,* 545 U.S. 677 (2005), a three-way circuit split has developed over the appropriate test for evaluating whether a passive display with religious imagery violates the Establishment Clause. The Sixth and Tenth Circuits have held that the "endorsement test" applies. The Fourth and Eighth Circuits have held that Justice Breyer's "legal judgment test" applies. And the Ninth Circuit has held that *both* tests apply.

The petition for certiorari presents three questions:

1. Whether the Court should resolve the 2-2-1 circuit split over the appropriate test for evaluating whether a passive display with religious imagery violates the Establishment Clause.

2. Whether this Court should set aside the "endorsement test" - as five Justices have urged over the past three decades - and adopt instead the "coercion test."

3. Whether a memorial cross placed on state land by the Utah Highway Patrol Association, a private organization, to commemorate fallen state troopers is an unconstitutional establishment of religion.

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*1 Interest of State *Amici*

Every state sponsors public memorials and monuments to honor persons, places, events, and institutions. And, like Utah, thirteen states have roadside memorial programs to honor the memory of deceased persons. State officials are thus commonly involved in the design of memorials and monuments, and often face the question of whether religious imagery may or may not be included consistent with the Establishment Clause. U.S. Const. amend. I. The twenty state *amici* therefore ask the Court to grant certiorari in this case.

Introduction

The Court should resolve a deep and persistent split over what standard governs the use of religious imagery in public displays. Circuits continue to struggle over what rule should be gleaned from the simultaneous decisions in *Van Orden v. Perry,* 545 U.S. 677 (2005), and *McCreary County v. ACLU,* 545 U.S. 844 (2005). *See* Pet. at 12-16 (describing split). This passage from a recent Ninth Circuit opinion illustrates the problem:

> Because the Supreme Court issued *McCreary*, broadly espousing *Lemon [v. Kurtzman,* 403 U.S. 602 (1971)], contemporaneously with *Van Orden*, *2 narrowly eschewing *Lemon*, we must read the latter as carving out an exception for certain Ten Commandments displays. We cannot say how narrow or broad the "exception" may ultimately be[.]

Card v. City of Everett, 520 F.3d 1009, 1018 (9th Cir. 2009). Just to be safe, the Ninth Circuit applies two different tests. *See Trunk v. City of San Diego,* 629 F.3d 1099, 1107 (9th Cir. 2011) (applying both *Lemon* and Justice Breyer's "legal judgment" test from *Van Orden*). In another circuit, the Fourth, the stress of divining the governing standard splintered one three-judge panel three different ways. [2] The babel proceeds directly from this Court's case law, and only the Court can silence it.

This case dramatizes how unpredictable interpretation of the Establishment Clause has become, and therefore how hard it is for state officials to know when their decisions risk violating it. Utah allows memorial crosses on public rights-of-way to honor fallen highway troopers. The memorials are designed and financed by a private organization, the Utah Highway Patrol Association, and Utah expressly declines to endorse the memorial design. *See* Pet. at 3-4 (describing ***3** program). Yet the Tenth Circuit - while *agreeing* that the memorials have a secular purpose - ruled that their "primary effect" was to "advance religion." Pet. at 5-6. The court reached this conclusion by applying a gloss on *Lemon* known as the "endorsement test," a test which five Justices over the last three decades have expressly rejected. Pet. at 6, 19-20 (citing *Cnty. of Allegheny v. ACLU,* 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in judgment and dissenting in part, joined by Rehnquist, C.J., White and Scalia, JJ.); *Van Orden,* 545 U.S. at 692-93 (Thomas, J., concurring). Indeed, the Tenth Circuit added its own gloss on the endorsement test by presuming religious symbols on public property are unconstitutional unless they are somehow "secularize[d]." Pet. at 6. The panel was not deterred by the fact that, only last Term, a plurality of this Court explained that

> [a] cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs. The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society.

Salazar v. Buono, 130 S.Ct. 1803, 1818 (2010 (op. of Kennedy, J., joined by Roberts, C.J., and Alito, J.).

***4** States need to know when the Establishment Clause allows religious imagery in public displays and when it does not. Not only do states have numerous laws providing for monuments and memorials, but many states have roadside memorial programs similar to Utah's. As states administer these programs, they will often have to decide whether memorials may include religious symbols. States, of course, may exclude religious imagery for various legitimate reasons, but they should not be tempted to do so simply by fear of violating an imprecise and subjective constitutional standard. The Court should grant review in this case to clarify that standard and enable states to decide for themselves whether to include religious imagery in memorial programs such as the one at issue here.

Argument

State roadside memorial laws raise the question of whether religious imagery may be included to honor the dead.

State statute books teem with laws for memorializing persons, places, events, and institutions. *See, e.g.*, La. Rev. Stat. Ann. § 25:527 (2007) (authorizing Historical Preservation and Cultural Commission to "mark by proper monuments, tablets, or markers of proper design state landmarks and objects") [3] Government ***5** officials typically oversee the design and content of such memorials. *See, e.g.*, Miss. Code Ann. § 45-3-53 (providing that markers commemorating fallen highway patrol officers "shall be designed by the Department of Public Safety"). [4] Given the subject matter of memorials, officials will often be required to gauge whether to include religious imagery in them. They will do so knowing their decisions could invite expensive challenges under the Establishment Clause. [5]

These widespread memorial laws are reason enough to grant review in this case. Perennially ***6** looming over state and local officials is the threat of litigation over memorial design. [6] The Court's last attempt to impose order on this vexed area of law has not demonstrably succeeded. *See, e.g., Green v. Haskell Cnty. Bd. of Com'rs,* 574 F.3d 1235, 1244 (10th Cir. 2009) (observing that "confusion about whether and to what extent *Lemon* continues to control … was exacerbated by" *McCreary County* and *Van Orden*). States would welcome knowing what standard governs the matter so that, at a minimum, lower courts could begin to fashion a coherent body of precedent to guide officials. *Cf. Card,* 520 F.3d 1009, 1016 ("Confounded by the ten individual opinions in the two cases, and perhaps inspired by the Biblical milieu, courts have described the current state of the law as both 'Establishment Clause purgatory,' and 'Limbo.' ") (citations omitted).

There is also a more specific reason to grant review in this case. Like Utah, at least thirteen states provide official means for remembering the dead in roadside memorials - states such as Alaska, California, Colorado, Georgia, Florida, Illinois, ***7** Minnesota, Missouri, New Mexico, Texas, Virginia, West Virginia and Wyoming. [7] State involvement in this area has resulted from the growth of private roadside memorials. For instance, in 2009 a *New York Times* forum on the subject - entitled *Room for Debate: Should Roadside Memorials Be Banned?* - was prefaced this way:

If you drive anywhere these days … you've seen them, roadside memorials with crosses and flowers to honor the victim of a car accident. […] These homemade shrines, however, are not without controversy. Why do people feel a need to build them? Are they a distraction or a warning? Should restrictions be placed on them?

***8** N.Y. Times, July 12, 2009. [8] States have acted to address various concerns raised by private memorials, such as highway safety. [9] But the question commonly arises whether memorials may include religious imagery. Indeed, one of the participants in the *New York Times* debate - the only lawyer, incidentally - opined bluntly that because roadside memorials "invariably include Christian crosses and other religious symbols," they "violate[] the constitutional principle of separation of church and state." N.Y. Times, *supra.*

States take various approaches to the sensitive matter of memorial design. Many states control the design of memorials, while some allow private input. *Compare, e.g.*, 605 Ill. Comp. Stat. Ann. § 125/20(a) (prescribing design and content of memorial marker), *with* W. Va. Code Ann. § 17-202(a)(2) (allowing "[d]ecorations, flowers or other memorial ornaments or tributes [to] be placed on the right-of-way by family members"). Regardless of approach, however, states are closely involved in determining what images and language appear in memorials. *See, e.g.*, Colo. Rev. Stat. Ann. § 43-2 ***9** 149((4)(b) (authorizing county commissioners to suggest "an alternative design" for the memorial).

These programs pointedly raise the question of whether a memorial may include religious imagery. Where private persons are permitted to contribute to a memorial's design, some will understandably want symbols or language from their own religious traditions. *See, e.g.*, Alaska Stat. Ann. § 19.25.260(g) (allowing memorial to include "ornamentation commonly used at funerals or at gravesides as a tribute to a decedent"). One state - New Mexico - honors this impulse by protecting private memorials known as *descansos*, which are traditional roadside shrines often taking the form of a cross. *See* N.M. Stat. Ann. § 30-15-7(A); Joan E. Alessi, Descansos: The Sacred Landscape of New Mexico 22 (Fresco Fine Art Pub. 2007). [0]

When a state itself designs a memorial, the dilemma of religious imagery does not disappear; it deepens. Now government assumes responsibility for deciding what symbols are permitted. One state may opt for memorials with minimal text and imagery. *See, e.g.*, Cal. Sts. & High. Code Ann. § 101.10(a)(1) (prescribing "Please Don't Drink and Drive," followed by: "In Memory of (victim's name)"). Another, however, may want to include images indicative of death and loss. For instance, ***10** Wyoming sponsored a contest for schoolchildren and from entries selected two symbols for its memorial program - a broken heart and a dove - explaining that "the heart symbolizes grief and sorrow, while the dove flying upward suggests hope, peace, and healing."

In approaching these matters of death and remembrance, states need to know how much discretion the First Amendment affords them. Some states may decide to exclude religious imagery from official memorials, [2] while others may permit it in some sensible way. But a state's policy should not be influenced by confusion about what the Establishment Clause requires.

When states, like Utah, allow religious imagery in memorials, they do so simply to honor the traditions of those who remember deceased loved ones. The Establishment Clause does not require states to marginalize this common human impulse. ***11** In other words, states may acknowledge some citizens' religious sensibilities without "establishing" a religion. As three Justices recently observed, "[a] cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs." *Salazar,* 130 S.Ct. at 1818 (op. of Kennedy, J., joined by Roberts, C.J., and Alito, J.). The Court should grant review to confirm that commonsense conclusion and clarify the constitutional standards underlying it.

Conclusion

The petition for certiorari should be granted.

Footnotes

1 All counsel of record received timely notice of the *amici* states' intent to file this brief. Sup. Ct. R. 32.2(a). No motion for leave to file this brief is necessary because it is presented on behalf of the *amici* states by their respective Attorneys General. Sup. Ct. R. 32.4.

2 *See, e.g., Myers v. Loudoun Cnty. Pub. Schs.,* 418 F.3d 395, 402 (4th Cir. 2005) (applying Justice Breyer's "legal judgment test to Pledge challenge); *id.* at 409 (Duncan, J., concurring) (relying on this Court's "repeated assurances, albeit in dicta, that the Pledge does not violate the Establishment Clause "); *id.* at 410 (Motz, J., concurring) (relying on different dicta).

3 *See also generally, e.g.*, Ala. Code § 16 44A 53 (West 2011) (authorizing development of "master plan for the Alabama Veterans Living Legacy, including the "National Veterans Shrine and Interpretive Gateway "); Cal. Health & Safety Code § 13081(a) (authorizing "construction of a memorial to California firefighters on the grounds of the State Capitol "); 625 Ill. Comp. Stat. Ann. 5/3 694(a) (authorizing issuance of "Chicago Police Memorial Foundation license plates "); Tex. Transp. Code Ann. § 201.910 (authorizing memorial markers for certain peace officers killed in line of duty).

4 *See also, e.g.*, Ariz. Rev. Stat. Ann. § 41 1363(B) (West 2011) (providing that proponents of a monument or memorial in a governmental mall "shall submit a concept to the relevant department which "shall review … and approve the final design, dimensions, location and maintenance requirements "); Ark. Code Ann. § 22 3 216(c)(1) (establishing "Law Enforcement Officers' Memorial Design Committee "); N.J. Stat. Ann. § 39:3 27.123(a) (providing that an "appropriate slogan and emblem to commemorate fallen law enforcement officers are "to be designed by the Superintendent of State Police ").

5 *See, e.g.*, Sue Fox, *Facing Suit, County to Remove Seal s Cross*, L.A. Times, June 2, 2004, at B1 (reporting that "Los Angeles County supervisors … ended an emotional debate over the symbolism of a tiny gold cross on the county seal by deciding to remove it rather than defend it against a threatened ACLU lawsuit ").

6 *See, e.g., Ten Commandments posting fails in Rapides Parish vote*, Baton Rouge Morning Advocate, Apr. 13, 2011, at 10A (noting police jurors' comments that "I carry the Ten Commandments in my heart. But if I vote today to ratify, I have broken the law, and " w]e all love Jesus Christ. But when our attorney tells us to leave this alone, we need to respect that "); J. Michael Kennedy, County Seal Has a Cross the ACLU Can't Bear, L.A. Times, May 25, 2004, at B3 (observing that the city of Redlands, California "capitulated when faced with a lawsuit and ordered the cross removed from every city logo ").

7 *See* Alaska Stat. Ann. § 19.25.260 (West 2011); Cal. Sts. & High. Code Ann. § 101.10; Colo. Rev. Stat. Ann. § 43 2 149; 605 Ill. Comp. Stat. Ann. § 125/15; Mo. Rev. Stat. Ann. § 227.295; N.M. Stat. Ann. § 30 15 7; N.M. Code R. § 18 20 78; Tex. Transp. Code Ann. § 201.910; 43 Tex. Admin. Code § 22.17; Va. Code Ann. § 33.1 206.1; W. Va. Code Ann. § 17 20 1; *see also* www.dot.state.wy.us/wydot/news info/roadside memorials (last visited May 5, 2011) (Wyoming program); www.dot.state.ga.us/doingbusiness/PoliciesManuals/pap/Documents/Policies/6160 9.pdf (last visited May 5, 2011) (Georgia); www.dot.state.mn.us/maint/files/mnt bull/MEMORIALB0MARKERB20BULLETINB06 9 04.pdf (last visited May 6, 2011) (Minnesota); http:// floridaplates.com/memorial/index.htm (last visited May 6, 2011) (Florida). In New

Hampshire, roadside memorial legislation was introduced in 2009 but was not enacted. *See* H.B. 228 (2009 session). Wisconsin prohibits memorials, but allows adoption of highways in the deceased's name. *See* www.dot.wisconsin.gov/business/rules/memorials.htm (last visited May 6, 2011).

8 http://roomfordebate.blogs.nytimes.com/2009/07/12/should roadside memorials be banned/ (last visited May 16, 2011).

9 For instance, the *Athens Banner Herald* observed that " t]he Georgia Department of Transportation has struck the perfect balance between sensitivity and safety with the introduction earlier this month of a formal plan for memorializing those who die on state and federal roadways. http://onlineathens.com/stories/021011/opi 83469070.shtml (last visited May 16, 2011).

10 *Descansos* were the subject of a recent, well received documentary film, *Resting Places*, narrated by Liam Neeson. *See* http:// webpages.charter.net/dnance/whatever/kc.htm (last visited May 14, 2011) (describing documentary film on the "global phenomenon of roadside crosses and the " o]pponents who] want it stopped).

11 See www.dot.state.wy.us/webdav/site/wydot/shared/PublicB0Affairs/RoadsideB0MemorialB20ProgramB0Brochure.pd (last visited May 5, 2011). Wisconsin disallows memorials but has sometimes "worked with grieving families to place plantings at a rest area near a crash scene. *See* www.dot.wisconsin.gov/business/rules/memorials.htm (last visited May 14, 2011). Similarly, Delaware provides an alternative "Highway Memorial Garden to honor crash victims. *See* Mike Chalmers, *States seek alternative to roadside memorials*, USA Today, June 4, 2010, http:// www.usatoday.com/news/nation/2010 06 04 roadside memorials alternatives N.htm# (last visited May 14, 2011).

12 For instance, a 2009 New Hampshire bill would have required memorials to be "nondenominational in appearance. *See* H.B. 228 (2009 session).

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2011 WL 2159629 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Linda A. THOMAS, Petitioner,
v.
STATE OF LOUISIANA, Department of Social Services, Respondent.

No. 10-1171.
May 27, 2011.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief in Opposition

James D. "Buddy" Caldwell, Louisiana Attorney General, S. Kyle Duncan, Appellate Chief, Counsel of Record, Ross W. Bergethon, Lance Guest, Assistant Attorneys General, Louisiana Department of Justice, P.O. Box 94005, Baton Rouge, LA 70804, (225) 326-6716, DuncanK@ag.state.la.us, Counsel for Respondent.

***i** Question Presented

Whether someone who was convicted of a misdemeanor and sentenced to one year of probation, yet never challenged her conviction via direct appeal, state-court collateral attack, or federal habeas petition, is barred from attacking her sentence for the first time in a civil lawsuit by the rule of *Heck v. Humphrey,* 512 U.S. 477 (1994), and by analogous but independent state tort law principles.

***ii** TABLE OF CONTENTS

***iv** TABLE OF AUTHORITIES

Cases

***1 Opinions Below**

The opinion of the court of appeals (App. 1a-17a) is published at 406 F. App'x 890. The district court's order (App. 18a-26a) is not published in the Federal Supplement, but is available at 2010 WL 2217003.

Jurisdiction

Respondent accepts petitioner's jurisdictional statement.

Statement

Petitioner was terminated from her job with respondent on November 1, 2007 because she had improperly authorized food stamp benefits for her friends and family. Pet. at 7. She was arrested shortly thereafter on charges of felony theft and malfeasance of office. *Id.* at 8.

In October 2008, while those charges were still pending, petitioner filed suit against respondent in Louisiana state court. Her complaint alleged discriminatory retaliation in violation of Title VII and also included state-law claims of false arrest and false imprisonment. Respondent removed the case to federal district court; that court stayed the matter pending resolution of the criminal charges. *Id.*

On September 16, 2009, petitioner was convicted of misdemeanor theft. She was sentenced to a short period of imprisonment (she ultimately served 14 days in jail), along with a fine, restitution, and one year of supervised probation. *Id.*; App. 3a. Petitioner does not appear to have ***2** appealed the conviction or otherwise sought state collateral relief, and she did not file a federal habeas petition during her one-year probation.

After lifting the stay, the district court granted summary judgment to respondent on all claims. App. 19a-26a. The court did not specifically detail its grounds for dismissing the false arrest and false imprisonment claims. On appeal, the Fifth Circuit accepted respondent's argument that petitioner's state-law claims were barred by *Heck.* App. 14a-15a.

This application of *Heck* to state-law claims appears to reflect a minority approach, but is ***3** consistent with circuit precedent. *See Hainze v. Richards,* 207 F.3d 795, 799 (CA5 2000) (applying *Heck* to bar state-law claims based on the same premise as constitutional claims under 42 U.S.C. § 1983).

Reasons for Denying the Petition

Although this case is a poor vehicle for resolving it, petitioner correctly notes a profound circuit split about the meaning of *Heck v. Humphrey,* 512 U.S. 477 (1994). *See* Pet. at i. The split concerns whether *Heck* - which categorically bars section 1983 actions that necessarily implicate the invalidity of a criminal conviction or sentence - contains an "impossibility exception" for plaintiffs who cannot challenge their convictions through federal habeas. *See generally Cohen v. Longshore,* 621 F.3d 1311, 1315 (CA10 2010) (canvassing split). The contours of the split are neither as clear nor as lopsided as petitioner claims, *see infra* part I.B.1, but the divergence is deep and this Court should resolve it in a future case.

Not in this one, though. As the court of appeals noted, petitioner's state-law tort claims were barred not only by *Heck* but also on independent state grounds. App. 14a n.4. Moreover, because of petitioner's lack of diligence in challenging

her conviction while in custody - she did not even directly appeal it, for instance - she would not qualify for the putative exception to *Heck* that she ***4** asks this Court to recognize. *See infra* parts I.A & I.B.

Apart from those vehicle problems, however, respondent briefly outlines *infra* its disagreement with petitioner on the merits. *See* Sup. Ct. R. 15.2 (requiring brief in opposition to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted"). *Heck*'s categorical bar does not support an "impossibility exception." The Court should not accept petitioner's invitation to commit the same error already made by several courts of appeal - namely, to ignore both the language and reasoning of *Heck* in favor of *dicta* in scattered opinions that would alter *Heck*'s rationale and undermine its protection of the integrity of state criminal convictions. *See infra* part II.

I. This case presents a poor vehicle for addressing whether *Heck* supports an "impossibility exception."

A. Petitioner's claims are separately barred on state tort law grounds.

Petitioner brought her false arrest and false imprisonment claims under Louisiana law, not section 1983. App. 18a. The Fifth Circuit held that these claims were barred by *Heck.* App. 14a. But the court also held that petitioner's state-law claims failed independently of *Heck.* Specifically, the court correctly held that the torts of false arrest and false imprisonment both required petitioner to show she was detained unlawfully, and that she ***5** could not do so under Louisiana law because she had been convicted of the crime for which she was arrested and imprisoned. App. 14a n.4 (citing *Harrison v. State Through Dept. of Pub. Safety & Corrs.,* 721 So. 2d 458, 465 n.9 (La. 1998) and *Restrepo v. Fortunato,* 556 So. 2d 1362, 1363 (La. Ct. App. 1990)).

Thus, regardless of whether *Heck* applies to this case, petitioner's conviction would still preclude her claims as a matter of *state* law. [2] Petitioner cannot account for this flaw in her petition, and simply dismisses the reasoning behind the alternate state-law holding as "circular." Pet. at 11 n.2. But petitioner then engages in her own circular reasoning, asserting that because she is trying to prove the unlawfulness of her arrest and imprisonment in *this suit*, her claims cannot be barred by state law. *Id.* This logically incoherent argument is flatly contradicted by numerous decisions dismissing state-law claims on the same ***6** grounds as the Fifth Circuit did in this case. [3] *See, e.g, Wolfe v. Perr,* 412 F.3d 707, 719 (CA6 2005) (applying *Heck* to federal claims, but affirming grant of summary judgment on state-law false arrest and malicious prosecution claims due to a finding of probable cause); *Marshall v. Downey,* 2010 WL 5464270, at *8 (E.D.N.Y. Dec. 27, 2010) (ruling § 1983 malicious prosecution claim was barred by *Heck*, but dismissing state-law version of claim because plaintiff's failure to show a favorable termination was a "fatal flaw in a malicious prosecution claim under … state tort law."); *Jones v. Camden Police Dept.,* 2010 WL 3489021, at *3 (D.S.C. Aug. 13, 2010) ("Even if Plaintiff's claims for false arrest and false imprisonment are not barred by *Heck*, he fails to show that he was falsely arrested or falsely imprisoned."); *Kroncke v. Vaca,* 2009 WL 3165448, at *1 n.2 (Ariz. Ct. App. Oct. 1, 2009) (affirming dismissal on grounds that federal claims were barred by *Heck* and analogous state-law claims were precluded by underlying conviction).

Because petitioner's claims would fail under state law regardless of this Court's resolution of the question presented by petitioner, this case does not present an appropriate vehicle for the Court's review of that question. *See, e.g., Haring v. Prosise,* 462 U.S. 306, 314 n. 8 (1983) (noting that "a ***7** challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review"); *Leroy v. Great Western United Corp.,* 443 U.S. 173, 181, n. 11 (1979) (explaining that "it is not our practice to reexamine state-law determinations of this kind").

B. Petitioner's lack of diligence in challenging her conviction means she could not profit from any "impossibility exception" to *Heck*.

1. The precise terms of the circuit disagreement do not apply to petitioner's situation.

Petitioner correctly notes that the courts of appeals are divided on whether the *Heck* bar applies to plaintiffs who are no longer in custody. She claims that seven circuits - the Second, Fourth, Sixth, Seventh, Ninth, Tenth and Eleventh - recognize an exception for such plaintiffs, whereas four - the First, Third, Fifth, and Eighth - do not. Pet. at 13-19. But petitioner's characterization of a neatly defined, seven-to-four split is inaccurate.

The Ninth Circuit, for example, has acknowledged only a limited exception to *Heck* for "former prisoners challenging loss of good-time credits, revocation of parole or similar matters, [but] *not* challenges to an underlying conviction." *Guerrero v. Gates,* 442 F.3d 697, 705 (CA9 2006) (quoting *Nonnette v. Small,* 316 F.3d 872, 878 (CA9 2002)) (emphasis added). And the Seventh Circuit has clarified that while there is "probably" an exception to *Heck* where "no route other than a ***8** damages action under section 1983 is open to the [plaintiff] to challenge his conviction," *Heck* nonetheless bars relief where, as here, a plaintiff had the option of pursuing a direct appeal or some form of collateral attack in the state courts. *Hoard v. Reddy,* 175 F.3d 531, 533 (CA7 1999) (applying *Heck* where plaintiff could access state postconviction remedies); *see also Maiden v. City of Waukegan,* 2009 WL 2905594, at *13-14 (N.D. Ill. 2009) (noting the possibility of a *Heck* exception as an open question in the circuit, but characterizing the *Spencer* concurrences as noncontrolling dicta). Finally, the Eleventh Circuit reiterated as recently as 2008 that it has "expressly declined to consider that issue … where the § 1983 action is otherwise barred under *Heck.*" *Christy v. Sheriff of Palm Beach County, Fla.,* 288 F. App'x 658, 666 (CA11 2008); *see also Domotor v. Wennet,* 630 F. Supp. 2d 1368, 1380-81 (S.D. Fla. 2009), and *Gray v. Kinsey,* 2009 WL 2634205, at *8 (N.D. Fla. Aug. 25, 2009) (declining to apply impossibility exception). [4]

***9** Thus, while the lower courts are without question deeply divided over *Heck*, it is unlikely that the Fifth Circuit's position reflects a minority view. But regardless of the breakdown of the split, there is no split at all on the question of whether *Heck* applies to plaintiffs who *are* in custody and have *not* attempted to satisfy the favorable termination requirement. That is the scenario here: as discussed *infra*, petitioner was in custody - serving a short prison sentence followed by one year of probation - during the pendency of her district court case, but she made no attempts to invalidate the conviction through a direct appeal, state collateral review, or federal habeas review.

***2. Petitioner's failure to challenge her conviction while in custody forecloses any access to a putative "impossibility exception" to* Heck.**

Petitioner argues that *Heck* should not bar civil rights claims where the circumstances of the conviction render federal habeas relief impossible. Pet. at 24. In doing so, she espouses the *Heck* concurrence's reasoning that individuals who are not "in custody" for habeas purposes - because, for instance, they were merely fined or served a short term of imprisonment - should not have to "show the prior invalidation of their convictions or sentences in order to obtain § 1983 damages for unconstitutional conviction or imprisonment." *Heck,* 512 U.S. at 500 (Souter, J., concurring). Yet even if the Court were to adopt the position of the *Heck* and *Spencer* concurrences and announce an impossibility exception (which it should not do), ***10** petitioner *could not benefit from it* because she *was* in custody at the time of her lawsuit and did not attempt to appeal her conviction or seek habeas relief.

Petitioner was convicted of misdemeanor theft on September 16, 2009, and sentenced to a short prison term (14 days served) followed by twelve months' supervised probation. Pet. at 8; App. 2a. Petitioner was thus "in custody" for habeas purposes for the full year of her probation - until approximately October 2010. *See* 28 U.S.C. § 2254(a) (providing that federal courts may entertain habeas petitions from persons "in custody pursuant to the judgment of a State court"); *Jones v. Cunningham,* 371 U.S. 236, 242 (1963) (explaining that "custody" extends beyond physical confinement and encompasses other "significant restraints on … liberty" that are "not shared by the public generally"); *Lee v. Stickman,* 357 F.3d 338, 342 (CA3 2004) ("It is … clear that being on probation meets the 'in custody' requirement for purposes of the habeas statute."). Petitioner thus cannot seriously argue that it would have been "impossible" for her to obtain

habeas relief during this period. *See Schwartz v. New Mexico Corr. Dept. Prob. & Parole,* 384 F. App'x 726, 730-31 (CA10 2010) (applying *Heck* bar where plaintiff had approximately three months of probation remaining when he filed his lawsuit and "could therefore have brought his selective prosecution claim in a habeas action"); *Beckway v. DeShong,* 717 F. Supp. 2d 908, 928 (N.D. Cal. 2010) (holding that impossibility exception did not apply to ***11** plaintiff who was "in custody" by virtue of a one-year probation sentence). [5]

No circuit has held that a former prisoner who had the opportunity to challenge her sentence but failed to do so can later avoid the *Heck* bar because habeas is no longer available. In fact, as petitioner acknowledges, most of the circuits to have recognized some sort of impossibility exception have nonetheless barred claims "by individuals who did not diligently seek relief while incarcerated." Pet. at 15; *see, e.g., Cohen v. Longshore,* 621 F.3d 1311, 1316-17 (CA10 2010) ("If a petitioner is unable to obtain habeas relief - *at least where this inability is not due to the petitioner's own lack of diligence* - it would be unjust to place his claim for relief beyond the scope of § 1983….") (emphasis added); *Guerrero,* 442 F.3d at 705 ("Guerrero cannot now use his 'failure timely to pursue habeas remedies' as a shield against the implications of *Heck.*"). [6] And even in cases - unlike this one - ***12** where federal habeas relief is truly unavailable, courts still apply the favorable termination requirement unless plaintiffs have diligently pursued state appellate or postconviction remedies. *See, e.g., Nance v. Vieregge* 147 F.3d 589, 591 (CA7 1998) (no exception from *Heck* where plaintiff had options of seeking a pardon from the governor or a writ of coram nobis); *Gray,* 2009 WL 2634205 at *9 (applying *Heck* where, "[d]espite the unavailability of federal habeas relief, the plaintiff [was] not without a remedy to seek relief from his conviction through appeal of the traffic conviction."). [7]

***13** In sum, nothing about this case implicates a concern that petitioner has been "bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for [her] to satisfy." *Spencer,* 523 U.S. at 21 (Souter, J., concurring). There is no indication in the petition or the record below that petitioner appealed her conviction or otherwise sought state postconviction relief. Nor did she file a federal habeas petition, even though she was "in custody" for an entire year. [8]

Petitioner's claims thus plainly would not fall within any sort of "impossibility exception," even if the Court were to take the inadvisable step of creating one. Like the independent state-law ground problem discussed in part I.A, *supra*, the exception's inapplicability demonstrates that this petition is not a suitable vehicle for addressing the persistent circuit disagreement over the meaning of *Heck.*

II. *Heck* cannot support an "impossibility exception."

Apart from the vehicle problems with her petition, petitioner's view of *Heck* - and her ***14** corresponding view of how the Court should resolve the persisting circuit disagreement over *Heck* - are both wrong. *See* Pet. at 24-28. Recognizing the "impossibility exception" that several circuits have concocted would fundamentally undermine *Heck* by divorcing the decision from its common-law roots, and would thus remove the protections *Heck* erected for the integrity of state criminal processes.

The "[p]athmarking" decision in *Heck, see Skinner v. Switzer,* 131 S.Ct. 1289, 1298 (2011), held that a tort suit premised on the invalidity of a state conviction or sentence is not cognizable under 42 U.S.C. § 1983. *Heck,* 512 U.S. at 487 (holding that a section 1983 damages claim premised on an "allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, … *is not cognizable under § 1983*") (emphasis added). *Heck* reached that conclusion about the scope of section 1983 by consulting the statute's animating background in common-law tort principles. *Id.* at 483 (explaining that "to determine whether there is any bar to the present suit, we look first to the common law of torts") (citing *Memphis Community Sch. Dist. v. Stachura,* 477 U.S. 299, 306 (1986)). [9] The Court held that, ***15** because common-law tort actions were "not appropriate vehicles for challenging the validity of outstanding criminal judgments," neither could an action lie under section 1983 that would

"necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." *Heck,* 512 U.S. at 486. Such an action, the Court carefully explained, would survive dismissal only if the plaintiff proves that

the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

Id. at 486-87.

Several circuits have ignored this plain holding - and the reasoning undergirding it - by engrafting an "impossibility exception" onto *Heck. See, e.g., Cohen,* 621 F.3d at 1315 (discussing exception); *see also supra* part I.B.1 (discussing circuit split); *but see, e.g., Entzi v. Redmann,* 485 F.3d 998, 1003 (CA8 2007) (holding that *Heck* expressly rejected an impossibility exception). ***16** These courts draw on language from Justice Souter's *Heck* concurrence and from opinions concurring and dissenting from the majority opinion in *Spencer v. Kemna,* 523 U.S. 1 (1988). *See, e.g., DeWalt v. Carter,* 224 F.3d 607, 617 (CA7 2000) (drawing on *Spencer* opinions); *but see Randell v. Johnson,* 227 F.3d 300, 301-02 (CA5 2000) (rejecting reliance on *Spencer* and "declin[ing] to announce for the Supreme Court that it has overruled one of its decisions"). The exception would generally allow a section 1983 plaintiff to circumvent the *Heck* bar "when it is no longer possible to meet [*Heck*'s] favorable termination requirement via a habeas action." *Wilson v. Johnson,* 535 F.3d 262, 267 (CA4 2008).

These courts have fundamentally misread *Heck.* First, any impossibility exception to *Heck*'s bar is foreclosed by *Heck* itself. The *Heck* majority opinion noted, *and expressly rejected*, Justice Souter's alternative reading. *See Heck,* 512 U.S. at 490 n.10 (observing that Justice Souter would not apply the bar to cases "involving former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges"). The majority responded to Justice Souter in clear terms:

> We think the principle barring collateral attacks - a longstanding and deeply rooted feature of both the common law and our own jurisprudence - is not rendered inapplicable by the fortuity that a convicted criminal in no longer incarcerated.

***17** *Id.; see also, e.g., Entzi,* 485 F.3d at 1003 (noting this same language from *Heck* to reject any impossibility exception).

Second, as the quoted language indicates, *Heck*'s rejection of an impossibility exception is not *dictum* - rather, it necessarily flows from *Heck*'s rationale and is therefore inseparable from its holding. *See, e.g., Entzi,* 485 F.3d at 1003 (identifying this language as part of *Heck*'s holding); *Figueroa v. Rivera,* 147 F.3d 77, 81 (CA1 1998) (identifying the principle as part of *Heck*'s "core holding"). This, again, is plain on the face of *Heck.* The majority rejected Justice Souter's gloss not on mere policy grounds, but rather because it would have "abandon[ed]" the basic principle underlying *Heck* - *i.e.*, "the common-law principle that one cannot use the device of a civil tort action to challenge the validity of an outstanding criminal conviction." 512 U.S. at 490 n.10. [0]

Third, the examples typically put forward to justify an impossibility exception fail to do so, and would themselves undermine the core of *Heck.* Thus, for instance, it is said that section 1983 must be available to a plaintiff who has been fined or sentenced to a short term of confinement, because under those circumstances federal habeas is not ***18** available. *See, e.g., Heck,* 512 U.S. at 500 (Souter, J., concurring) (noting similar examples); Pet. at 24 (same). But this line of reasoning ignores what *Heck* actually held. A person who has been fined or sentenced to a short term - and who therefore may lack access to federal habeas - may nonetheless overcome the *Heck* bar by proving his conviction or sentence has been

• "reversed on appeal,"

• "expunged by executive order," or

• "declared invalid by a state tribunal authorized to make such determination[.]"

512 U.S. at 486-87.

In other words, *Heck* expressly recognized that a putative section 1983 plaintiff might have to rely on *state* processes to establish the invalidity of his underlying conviction or sentence. Consequently, an impossibility exception based solely on a lack of access to *federal* habeas would simply rewrite *Heck.* Unlike the "impossibility exception," *Heck* itself contains no naked preference for federal oversight before a plaintiff may wield civil rights laws to attack his outstanding state conviction. *Cf. Coleman v. Thompson,* 501 U.S. 722, 731 (1991) (observing that "[u]nder our federal system, the federal and state 'courts [are] equally bound to guard and protect rights secured by the Constitution' ") (quoting *Ex parte Royall,* 117 U.S. 241, 251 (1886)).

In some future case - soon, we hope - the Court should reject the "impossibility exception" ***19** concocted by several circuits for the simple reason that it eviscerates *Heck. Heck* did not turn on a situation-specific appraisal of whether federal habeas relief was available in a given case. Rather, *Heck* categorically delineated the substantive scope of a section 1983 action attacking a criminal conviction or sentence. To make that determination, *Heck* drew on the "principle barring collateral attacks - a longstanding and deeply rooted feature of both the common law and our own jurisprudence" - to bar *all* section 1983 actions attacking a criminal conviction or sentence that has not been previously set aside. 512 U.S. at 490 n.10. The Court should take some future case to reassert that principle against the numerous circuits who continue to undermine it and, along with it, the integrity of state criminal processes. This case is a poor vehicle for doing so, however.

Conclusion

The petition for certiorari should be denied.

Footnotes

1 Most courts treat *Heck* as applying only to federal claims. *See, e.g., Gauger v. Hendle,* 349 F.3d 354, 362 (CA7 2003) (holding that *Heck* did not apply to claims under Illinois law), *rev'd on other grounds, Wallace v. City of Chicago,* 440 F.3d 421 (CA 7 2006); *Bradshaw v. Jayaraman,* 205 F.3d 1339 (CA6 1999) (table) (reversing dismissal of state law claims under *Heck* because the state supreme court had not adopted the reasoning in *Heck*); *Roe v. Graham,* 2010 WL 4916328, at *1 (E.D. Ark. Nov. 23, 2010) (declining to apply *Heck* to state law claims); *Montelongo v. City of Phoenix,* 2009 WL 73665, at *2 (D. Ariz. Jan. 9, 2009) (holding that *Heck* did not apply to state law claims); *Hill v. City of Chicago,* 2007 WL 1424211, at *5 (N.D. Ill. May 10, 2007) (same); *Lamar v. Beymer,* 2005 WL 2464178, at *12 (W.D. Ky. Oct. 4, 2005) (same); *Gausvik v. Perez,* 239 F. Supp. 2d 1108, 1123 (E.D. Wash. 2002) (same); *Childs v. King County,* 116 Wash. App. 1067, *6 (Wash. Ct. App. 2003) ("*Heck* involved interpretation of a federal statute; it does not apply to causes of action under state law.); *but see Blunt v. Becker,* 2010 WL 570489, at *5 (N.D. Ill. Feb. 16, 2010) (dismissing federal and state wrongful imprisonment claims under *Heck*). Some state courts have explicitly incorporated *Heck* into state law, *see Agner v. City of Hermosa Beach,* 315 F. App'x 29, 30 (CA9 2008) (noting that California applies *Heck* principles to state law claims), but the Louisiana Supreme Court does not appear to have done so.

2 Even though, as a practical matter, the lack of a favorable termination in this case would serve to bar both federal and state claims, differences in state laws mean that this will not always be the case. For instance, in *Bradshaw*, the Sixth Circuit affirmed the district court's dismissal of federal claims under *Heck*'s favorable termination rule, but reversed its dismissal of the plaintiff's state law legal malpractice claim because Tennessee law permits malpractice actions before a conviction has been

overturned. 205 F.3d at 1339; *see also Williams v. City of Medford,* 2010 WL 5789000, at *5 6 (D. Or. Nov. 16, 2010) (noting that Oregon law was unclear on whether a criminal conviction would always preclude a later damages claim for false arrest).

3 Moreover, as discussed in part I.B., *infra*, the proper avenues for petitioner to challenge her conviction were a state appeal, state post conviction review, and, if unsuccessful, a federal habeas petition. She inexcusably failed to pursue these remedies.

4 Petitioner contends that "any doubt in the Eleventh Circuit] is most likely put to rest by *Morrow v. Federal Bureau of Prisons,* 610 F.3d 1271, 1272 (CA11 2010). But *Morrow* did not purport to answer the question for the circuit, as emphasized by the separate concurrence arguing that the court *should* adopt the position espoused by Justice Souter in *Spencer.* See 610 F.3d at 1273 74 (Anderson, J., concurring). Moreover, the plaintiff's claims in *Morrow* "in no way implie d] the invalidity of his conviction or of the sentence imposed by his conviction, *id.* at 1272, and thus would not have been barred by *Heck* anyway. See *Heck,* 512 U.S. at 487 ("the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence).

5 See also *Wesbecher v. Landaker,* 2008 WL 2682614, at *4 (E.D. Cal. July 1, 2008) (holding, in *Heck* context, that "plaintiff's release from custody does not render moot any habeas proceedings challenging his underlying criminal conviction because, by his own admission, he remains under parole supervision and continues to suffer collateral consequences stemming from that conviction.); *Mitchell v. Dep t of Corr.,* 272 F. Supp. 2d 464, 480 (M.D. Pa. 2003) (holding that plaintiff could not "defeat the intent and specific requirements of habeas and *Heck*'s favorable termination requirement by waiting to file for damages just before his release.).

6 *See also Hoard,* 175 F.3d at 533 (holding that *Heck* exception applies only where "no route other than a damages action under section 1983 is open to the person to challenge his conviction, and not where habeas or state postconviction relief was available); *Powers v. Hamilton County Public Defender Comm n,* 501 F.3d at 601 (holding that a plaintiff would not be "entitled to such an exception if the plaintiff could have sought and obtained habeas relief while still in prison but failed to do so); *Cunningham v. Gates,* 312 F.3d 1148, 1153 n. 3 (CA9 2002) ("We decline to hold that Cunningham's failure timely to pursue habeas remedies takes his § 1983 claim out of *Heck*'s purview.).

7 *See also Domotor v. Wennet,* 630 F. Supp. 2d 1368, 1380 (S.D. Fla. 2009) (explaining that "to allow the Plaintiff to circumvent applicable state procedures and collaterally attack her convictions in federal court would pose] the precise situation that *Heck* seeks to preclude) (internal quotation marks omitted); *Jean Laurent v. Hennessy,* 2008 WL 5274322, at *1 (E.D.N.Y. Dec. 18, 2008) (" A]lthough the Second Circuit has recognized an exception in Section 1983 actions under *Heck* if a plaintiff was unable to pursue a *habeas* petition and satisfy *Heck* because he was no longer in custody, that exception does not apply to Jean Laurent because he failed to file a direct appeal of his state court conviction and failed to file a timely habeas petition.); *cf. Soos v. Mitchell,* 2010 WL 3985037, at *5 (CD. Cal. June 11, 2010) (holding, where plaintiff was subject to a fine and was not in custody for habeas purpose, that "since Plaintiff diligently sought appellate relief of his conviction and is precluded from seeking habeas relief through no fault of his own … *Heck* does not bar his § 1983 claim.).

8 Indeed, because the statute of limitations for federal habeas corpus petitions is one year, petitioner not only *could* have filed her petition during the course of her probation, but was *required to do so* for the petition to be timely. 28 U.S.C. § 2244(d)(1). Nothing about the circumstances of petitioner's year long probation offers her an excuse for failing to do so.

9 *Heck* thus follows other decisions in which the Court has measured the scope of section 1983 against its common law background. For instance, the Court has recognized that the statute's otherwise unqualified language must be read to include qualified and absolute immunity. *See Imbler v. Pachtman,* 424 U.S. 409, 418 19 (1976) (discussing recognition of absolute and qualified immunity, given that "§ 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them). Similarly, the Court has explained that the statute's historical context "compels the conclusion that it excludes vicarious liability. *Monell v. Dep t of Social Serv s,* 436 U.S. 658, 691 (1978); *see also, e.g., Connick v. Thompson,* 131 S.Ct. 1350, 1359 (2011) (confirming that "local governments … are not vicariously liability under § 1983 for their employees' actions).

10 Incredibly, petitioner buries any mention of this language language which is part of *Heck*'s core holding and which expressly rejects the same exception which she asks this Court to recognize in a footnote. *See* Pet. at 26 n.9 (observing that "other language in the Court's opinions may cast doubt on this conclusion) (citing *Heck,* 512 U.S. at 490 n.10).

11 *See, e.g., Heck,* 512 U.S. at 483 (identifying issue to be decided as "whether the claim is *cognizable* under § 1983 at all); *id.* at 489 (explaining that " w]e … deny the *existence* of a cause of action under section 1983]); *id.* at 490 (explaining that "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence *does not accrue* until the conviction or sentence has been invalidated) (emphases added).

2010 WL 5628243 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Pat QUINN, Governor of the State of Illinois, Petitioner,
v.
Gerald JUDGE, David Kindler, and Roland W. Burris, U.S. Senator, Respondents.

No. 10-821.
January 21, 2010.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit
January 21, 2011

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*i QUESTION PRESENTED

Whether, contrary to longstanding practice and the laws of many States, the Seventeenth Amendment requires a special election to fill a vacant Senate seat "every time that a vacancy happens in the state's senate delegation" - as the decision below holds - even where the vacated term will expire in the normal course following the next, biennial Congressional election.

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*1 INTERESTS OF *AMICI* STATES

This case poses a recurring question of critical importance to the states and their citizens: how to fill senate seats left vacant by death or resignation. Exercising their considerable discretion over the times, places, and manner of holding senate elections, every state has enacted laws for electing replacement Senators. These laws and derivative practices reflect nearly a century of state experience. The Seventh Circuit's decision in this case interprets the Seventeenth Amendment in complete isolation from that accumulated practical wisdom. Its unheard-of rule requiring a special election for every senate vacancy, regardless of its timing, threatens to upend the vacancy-election laws of every state.

In the face of this potentially significant disruption to nationwide election practices, the *amici* states urge the Court to grant Illinois' petition.

SUMMARY OF ARGUMENT

Senate vacancies are a historical certainty. Since the 1913 ratification of the Seventeenth Amendment, which provides for direct popular election of senators, vacancies have occurred, on average, once every 174 days. States have long exercised their constitutional discretion to fill those vacancies in a manner that best protects compelling state and voter interests. That discretion derives *2 from two sources. The Elections Clause empowers states to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, §4, cl. 1; *see also Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 451 (2008) ("The States possess a *broad* power to prescribe the Times, Places, and Manner of holding Elections for Senators and Representatives.") (emphasis added) (internal quotation marks omitted). And the Seventeenth Amendment itself directs that

the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election *as the legislature may direct.*

U.S. Const. amend. XVII para. 2 (emphasis added); *see also Valenti v. Rockefeller,* 292 F. Supp. 851, 856 (W.D.N.Y. 1968), *aff'd,* 393 U.S. 405 (1969) (reasoning that the Seventeenth Amendment's drafters did not intend to depart from the normal rule of state discretion to regulate the time and manner of elections).

Vacancies occurring late in a six-year senate term pose unique problems for states. Elections to fill the soon-to-expire term are impractical given the fast-approaching regular election for the following term. While states have developed various strategies for filling these vacancies, one sensible option has always been to bypass a special replacement election and fill the vacancy via the regularly scheduled election for the following six-year term. This ***3** practice has become nearly uniform in recent decades, *see infra* Part I(C), and no court has ever seriously disputed that it lies within the states' constitutionally guaranteed power to "direct" the filling of senatorial vacancies. Until now.

When President Obama resigned his senate seat, Illinois planned to fill the vacancy via the regular November 2010 election for the new term. That route was consistent with its vacancy-election law, and with those of most states. But the Seventh Circuit rejected that practice and, in doing so, announced an unprecedented and misguided rule of constitutional law: that states must always stage a replacement election for the unexpired senate term no matter the timing of the vacancy.

As detailed by petitioner, *see* Pet. 13-16, the Seventh Circuit's decision conflicts with this Court's decisions in *Valenti, supra,* and *Rodriguez v. Popular Democratic Party,* 457 U.S. 1 (1982). That conflict alone merits review. Sup. Ct. R. 10(c). But the Seventh Circuit's error goes far deeper in its practical implications for state practice generally, making review particularly urgent.

Flatly stated, the Seventh Circuit's unprecedented rule contradicts the well-established interpretation of the Seventeenth Amendment as manifested by the longstanding laws and practices of the states. If applied nationwide, its rule would facially invalidate the vacancy-election laws of 19 states and cast serious constitutional doubt on the application of the laws of the remaining states. *See infra* Parts I(A) & I(B).

***4** But the disruptive impact of the Seventh Circuit's rule is most dramatically illustrated by fact that it would nullify what has become the prevalent approach for dealing with late-term vacancies. *See infra* Part I(C). Since 1913, there have been 83 late-term [2] senate vacancies caused by resignation or death. In 34 of those instances, pursuant to a state's vacancy law, the governor has appointed a replacement senator to serve out the remainder of the term until election of a new senator at the next congressional election. The Seventh Circuit has now declared that common, and common-sense, historical practice flatly unconstitutional.

In other words, according to the rule adopted by the Seventh Circuit, the following 34 appointed senators - unbeknownst to them - have served unconstitutional senate terms: [3]

George B. Martin (KY), appointed 1919

Frank B. Willis (OH), 1921

Elijah S. Granmer (WA), 1932

Rose McConnell Long (LA), 1936

Thomas M. Storke (CA), 1938

Berkley L. Bunker (NV), 1940

***5 G. Lloyd Spencer (AR), 1941**

Wilton E. Hall (SC), 1944

Hugh B. Mitchell (WA), 1945

Frank P. Briggs (MO), 1945

Edward P. Carville (NV), 1945

Spessard L. Holland (FL), 1946

Ralph E. Flanders (VT), 1946

Vera C. Bushfield (SD), 1948

Charles E. Daniel (SC), 1954

Joseph H. Bottum (SD), 1962

Pierre Salinger (CA), 1964

Walter F. Mondale (MN), 1964

Robert P. Griffin (MI), 1966

Charles E. Goodell (NY), 1968

Elaine S. Edwards (LA), 1972

Howard M. Metzenbaum (OH), 1974

Wendell R. Anderson (MN), 1976

Kaneaster Hodges, Jr. (AR), 1977

Paul G. Hatfield (MT), 1978

George J. Mitchell (ME), 1980

Nicholas F. Brady (NJ), 1982

David K. Karnes (NE), 1987

Lincoln Chafee (RI), 1999

Dean Barkley (MN), 2002

Lisa Murkowski (AK), 2002

Robert Menendez (NJ), 2006

Michael F. Bennett (CO), 2009

George S. Lemieux (FL), 2009

An interpretation of the Seventeenth Amendment that overturns such a widespread, longstanding, and common-sense practice cannot be right.

Clarifying the proper scope of state discretion under the Seventeenth Amendment will remove the ***6** cloud of uncertainty hanging over state election practices created by the Seventh Circuit's opinion. While no other circuit has (yet) adopted the Seventh Circuit's approach, waiting is not the wise course here. For when the next senatorial vacancy inevitably occurs, the Seventh Circuit's opinion virtually assures a challenge to the appointment. And however that challenge fares, it will inevitably sow chaos, confusion, and cost into the state's election machinery. The Court can avoid that unhappy and predictable result by reviewing the Seventh Circuit's decision now.

ARGUMENT

I. The Opinion Below Conflicts with Long-Established State Laws and Practices.

A. Past practice is an indispensible guide to constitutional construction.

While the Seventh Circuit minutely parsed the inconclusive language of the Seventeenth Amendment, it did so in isolation from the most authoritative guide to what that language means: the long-established practices of the states in implementing it. On the one hand, the court relied on an abstract examination of the Amendment's text to craft an unheard-of rule requiring replacement elections in every instance. The states, on the other hand, have long interpreted the Amendment as affording them discretion to bypass special replacement elections under certain common-sense circumstances. When interpreting the text of the ***7** Seventeenth Amendment, the Seventh Circuit simply "disregard[ed] the gloss which life has written upon it." *Nashville, C. & St. L. Ry. v. Browning,* 310 U.S. 362, 369 (1940).

In contrast to the Seventh Circuit's approach, this Court has long drawn on state practices to help construe open-textured constitutional language:

> The framers of the constitution employed words in their natural sense …. But where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction [by the states] is entitled to the greatest weight.

McPherson v. Blacker, 146 U.S. 1, 7 (1892); *see also, e.g., M'Culloch v. Maryland,* 17 U.S. 316, 401 (1819) (reasoning that a "doubtful question" of constitutional construction, "if not put at rest by the practice of the government, ought to receive a considerable impression from that practice"). Most relevant to this case, for instance, the Court has deferred to states' longstanding interpretation of their powers under the Elections Clause, cautioning that "the terms of the constitutional provision provide no such clear and definite support for a contrary construction as to justify disregard of *the established practices of the states.*" *Smiley v. Holm,* 285 U.S. 355, 369 (1932) (emphasis added).

These interpretive principles were on display in the three-judge panel opinion in *Valenti*, which this ***8** Court affirmed. *See* Pet. at 13-15 (explaining significance of *Valenti*). In upholding the constitutionality of a New York vacancy-election law that would have resulted in a 29-month interim senate appointment before a replacement election, *Valenti* recognized that decades of practical experience had allowed the states to subject the vacancy-election problem to "careful scrutiny" and to adjust their laws accordingly. 292 F. Supp. at 859. The court relied heavily on the fact that New York's statute was the product of a growing historical consensus. *Id.* at 858 ("there is ample authority for relying on this evidence [of historical practices] as one persuasive guide to constitutional construction"). Consistent with the court's decision, no

election was ever held to fill the unexpired term. The seat was instead filled in the already-scheduled election for the following six-year term.

Over 40 years after *Valenti*, New York's 1968 approach to filling senate vacancies continues to represent that of a large majority of states, including Illinois. Thus, in rejecting Illinois' common practice, the Seventh Circuit disregarded the same historical consensus that *Valenti* found determinative. An examination of the extent to which the Seventh Circuit's unprecedented mandatory-election rule contradicts established state practices reveals the flaws in its constitutional interpretation.

***9 B. More than a third of states have formally codified the very practice the Seventh Circuit has forbidden.**

The clearest manifestation of the consensus against late-term replacement elections is that a third of the states have proscribed them. The vacancy-election laws of 19 states prohibit special replacement elections for senate seats under certain circumstances. Louisiana law, for example, provides that:

> If a vacancy occurs in the office of United States senator and the unexpired term is one year or less, *no special election shall be called by the governor* and, if a senator is appointed to fill the vacancy, he shall serve for the remainder of the unexpired term, and his successor shall be elected at the next regular election for United States senator.

La. Rev. Stat. Ann. § 18:1278(C) (West 2011) (emphasis added).[4] Other states, such as Alaska, ***10** more explicitly time their cutoff dates to allow for primaries:

[I]f the vacancy occurs on a date that is less than 60 days before or is on or after the date of the primary election in the general election year during which a candidate to fill the office is regularly elected, the governor may not call a special election.

Alaska Stat. Ann. § 15.40.140 (West 2010). Taking yet another approach, Missouri makes no mention of the length of the unexpired term, but instead requires appointees to serve until the January following the general election, precluding a special election in the interim:

> [T]he person appointed … shall continue in office until the first Monday in January next following the first ensuing general election, at which general election a person shall be elected to fill the unexpired portion of the term, *or for the ensuing regular term*, as the case may be, and the person so elected shall enter upon the discharge of the duties of the office the first Monday in January next following his election ….

Mo. Rev. Stat. §§ 105.030, 105.040 (2010) (emphasis added).

Whatever their formulation, these provisions manifest states' judgments that holding multiple elections in close succession for the same senate seat ***11** would do more harm than good. *See infra* Part II. The Seventh Circuit's departure from this formerly uncontroversial consensus could not be more radical: its rule, if applied nationally, would facially invalidate all 19 of these statutes. That sweeping rejection would, perhaps, be less disconcerting if the vacancy-election laws of the other two-thirds of the states took the opposite approach. But that is emphatically not the case. As explained in the following section, these 19 states have simply formalized the consensus position demonstrated by the practices of the remaining states.

C. The Seventh Circuit's rule conflicts with the practices of the overwhelming majority of the remaining states.

The provisions discussed above leave no doubt about those states' position on late-term vacancy elections: they categorically reject them. But even if states do not formally prohibit such elections, they can - and do - opt to bypass them in practice. Illinois' vacancy election law is, after all, silent on the issue. It reads, in its entirety:

> When a vacancy shall occur in the office of United States Senator from this state, the Governor shall make temporary appointment to fill such vacancy until the next election of representatives in Congress, at which time such vacancy shall be filled by election, and the senator so elected shall take office as soon thereafter as he shall receive his certificate of election.

***12** 10 Ill. Comp. Stat. 5/25-8 (2010). Illinois sensibly interpreted its statute to allow it to fill President Obama's vacant seat via the upcoming general election for the 2011-17 term - e.g., the "next election of representatives in Congress." *Id.* This application of its law, rather than the explicit terms of that law, reflected the same considerations that led 19 other states to codify the practice.

States with laws similar to Illinois have, until now, had no reason to believe that they could not apply their laws as Illinois does. Twenty-two states'[5] laws are identical to Illinois' in that they provide for the vacancy to be filled in the next regularly scheduled statewide general election.[6] The eight ***13** remaining states require a special election within a certain time period after the vacancy, typically several months.[7] But even those states, like Illinois, set the replacement election on the date of the general election whenever possible in light of the overall time limit. All of these laws demonstrate the flexibility inherent in vacancy statutes. Even if a particular state has not taken a firm position on how to handle late-term vacancies, Illinois' approach of bypassing the replacement election is always an implicit and common-sense option. The Seventh Circuit's rule would erase it.

This would be a cause for concern even if the limitation on state practice were purely theoretical. But it is not: the impact of the Seventh Circuit's rule would be widespread and concrete. Recent historical practice shows that most states would almost certainly apply their statutes exactly as Illinois does, and would therefore experience the same kind of disruption that Illinois has already faced from application of the Seventh Circuit's misguided rule.

The Seventh Circuit attempted to downplay the disruption its rule would cause. The court claimed that, out of 193 vacancies since the Seventeenth Amendment's ratification, there were only 27 ***14** instances in which a replacement election never occurred. App. 36a-37a. The court did not properly frame the data, however. Instead of looking at vacancies in general, the court should have focused on the far more relevant class of *late-term* vacancies. Out of 83 such vacancies since 1913, the term expired without a replacement election 34 times.[8] Narrowing the focus to seats vacated in the final year shows the terms expiring without a replacement election in 18 of out of 37 instances. In other words, the Seventh Circuit's rule would have invalidated roughly *40 percent* of the appointments made in response to late-term vacancies since the ratification of the Seventeenth Amendment.

Even more significant than the raw numbers is the marked historical trend in state practice: over the past thirty years, late-term appointees have almost always filled out the term. Since 1980, there have been ten late-term vacancies. In all but three instances, the states opted to bypass a special replacement election. The last example of the sort of simultaneous regular and special election forced on Illinois in 2010 seems to have occurred in 1986. *See* Part II, *infra.*

***15** Simply put, experience matters. Decades of addressing the vacancy problem have led the states to a consensus that late-term vacancy elections are a bad idea. Whether manifested explicitly through statutes or implicitly through practice,

this consensus is a "persuasive guide to constitutional construction." *Valenti,* 292 F. Supp. at 858. The Seventh Circuit's refusal to follow that guide casts critical doubt on the soundness of its novel reading of the Seventeenth Amendment.

II. States Have Compelling Interests in Avoiding the Type of Late-Term Election Imposed on Illinois.

The consensus against late-term vacancy elections did not develop in a vacuum. States have a powerful interest in ensuring a smoothly functioning election process. *See John Doe No. 1 v. Reed,* 130 S. Ct. 2811, 2819 (2010) ("The State's interest in preserving the integrity of the electoral process is undoubtedly important."); *Anderson v. Celebrezze,* 460 U.S. 780, 796 (1983) ("There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election"). Avoiding redundant elections for soon-to-expire senate seats would further this overarching interest in a variety of significant ways. *See* Pet. at 19-20 (explaining that the Seventh Circuit's rule would lead to unnecessary vacancies in other offices and would distort campaign contribution limits). This section highlights two of the most compelling: facilitating primary elections and avoiding voter confusion.

***16** Direct primary elections serve the critical function of encouraging full democratic participation in choosing candidates. *See, e.g., Valenti,* 292 F. Supp. at 862. The need for a delay between a vacancy and the replacement election to allow for primaries is either explicit or implicit in most vacancy-election statutes. [9] But the Seventh Circuit's mandatory-election rule would force states faced with late-term vacancies to skip primaries in order to hold a replacement election before the term expires. That is exactly what happened in Illinois last November. Pet. at 10-11.

A state's decision to select replacement candidates through primaries is "supported by policy considerations even more compelling that those which justify the prohibition of vacancy elections in 'off-years.' " *Valenti,* 292 F. Supp. at 861. Indeed, as the *Valenti* court noted, "[t]he clear purpose of the Seventeenth Amendment was to give effect to the direct voice of the people in the selection of Senators." *Id.* at 864 (citing Sen. Rep. No. 961, 61st Cong., 1st Sess. (1911)). In light of this goal, the ***17** Amendment's drafters and ratifiers left it to the states to choose whether to delay - or forego - a replacement election in order to allow the public, rather than party-committee members, to select candidates for this important office. *Id.* at 862. The Seventh Circuit's rule would take this discretion away from the states - exactly the result that *Valenti* rejected.

Beyond primaries, however, the Seventh Circuit's rule also threatens the proper functioning of the elections themselves. Most states' vacancy-election laws either require or prefer that a senate vacancy be filled in the next general election. *See supra* Part I(C). Thus, the only way for these states to comply with the Seventh Circuit's rule without rewriting their laws would be to hold the same sort of simultaneous special and general elections Illinois was forced to hold in 2010. Such dual elections pose a significant threat of voter confusion. *See Bullock v. Carter,* 405 U.S. 134, 145 (1972) (holding that each state has a legitimate interest in regulating the number of candidates on the ballot in order to "prevent the clogging of its election machinery, [and] avoid voter confusion").

Requiring voters to place two votes on the same ballot for a single senate seat virtually guarantees errors. Already-crowded ballots would include two lists of largely redundant names. Many voters are likely to be unsure whether the double listing is a printing error, or if they should select the same name twice. As petitioner noted, the results of Illinois' 1970 election seem to document such voter ***18** confusion. That year, a court order required the state to stage simultaneous general and special elections for the same House of Representatives seat. Returns showed that 2000 more votes were cast to fill the unexpired term, which was listed first on the ballot, than for the upcoming full term. Pet. at 18.

More recent elections bear out this concern. Voters in the Rochester, New York area were called upon in November 2010 to make two selections for the same House seat - one to fill out the remainder of the term and one for the following term. Local news reports warned of the potential for confusion and referred voters to sample ballots. [0] Nonetheless,

of 210,146 ballots cast in the election, 12,044 more contained "blank" or "void" entries for the replacement selection than for the full term.

That same day, voters in Pennsylvania's 12th Congressional District participated in simultaneous special and general elections for John Murtha's ***19** former seat in the House of Representatives. Reporting on the earlier special primary - likewise a simultaneous general/special affair - a local newspaper commented:

> Primary day is usually a cut-and-dried affair: Democrats vote for Democrats, Republicans vote for Republicans, and that's that. But there is nothing normal about Tuesday's vote in the 12th Congressional District. For starters, there are two ballots - a special and a primary - for the same congressional seat. There are six total candidates, but one of them appears only on the special ballot and three others appear only on the primary. Two candidates will be listed on both. People registered with third parties or those who are unaffiliated - voters who normally cannot participate in Pennsylvania primaries - can vote Tuesday, but only in the special election. Got all that?

Mike Faher, *Unusual Ballot May Cause Confusion in the 12th District,* Tribune-Democrat, May 15, 2010 (paragraphs condensed). [2] Voter confusion appears to have affected the November election day, as well: whereas 185,226 votes were tallied for candidates in the general election, candidates in the special ***20** election only received 137,189 votes. [3] The drop-off between the two votes was roughly 26%.

Voter participation statistics for simultaneous general/special senate elections are more difficult to come by. The last simultaneous such election before Illinois' 2010 court-ordered election appears to have occurred in North Carolina in November 1986. Voters chose between the same two candidates to fill the unexpired term ending in January 1987 as well as the following full term. Returns showed that 56,455 more votes were cast for the full term than for the replacement election. [4]

These statistics do not prove definitively that voter confusion affected these elections - voter confusion, after all, is notoriously difficult to document. But why else would voters leave their ballots blank for an office as important as United States senator? Such *de facto* disenfranchisement is exactly what states have hoped to avoid by ***21** developing the strategy of bypassing snap special elections altogether. The Seventh Circuit's rule would erase the states' discretion to do so by ignoring those many years of practical experience. Its novel rule therefore cannot be a correct interpretation of the Seventeenth Amendment.

CONCLUSION

The Court should grant the petition for certiorari.

Footnotes

* Counsel of Record

1 There were 35,697 days between the ratification of the Seventeenth Amendment on April 8, 1913 and January 1, 2011. This calculation assumes 205 vacancies during that period.

2 That is, vacancies occurring in the final two years of the term.

3 The state *amici* have set forth the full data for vacancies since 1913 in tabular form as an appendix to this brief. The data are derived from the Biographical Directory of the United States Congress, http:// bioguide.congress.gov/biosearch/biosearch.asp; and Senate Historical Office, Senators of the United States 178 2011, http:// www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf (sites last visited January 12, 2011).

4 *See also* Cal. Elec. Code § 10720 (West 2010); Conn. Gen. Stat. Ann. § 9 211(a)(3) (West 2010); Iowa Code §§ 69.8, 69.11, 69.13 (2010); Md. Code Ann., Elec. Law § 8 602(a)(3) (West 2010); Mass. Gen. Laws ch. 54, § 140 (2010); Minn. Stat. § 204D.28 (2010); Miss. Code Ann. § 23 15 855(2) (West 2010); Neb. Rev. Stat. § 32 565(2)(a) (2009); N.Y. Pub. Off. Law § 42(4 a) (McKinney 2010); N.D. Cent. Code § 16.1 13 08 (2009); Ohio Rev. Code Ann. § 3521.02 (West 2011); 26 Okl. St. Ann § 12 101(B) (West 2010); S.C. Code Ann. § 7 19 20 (2010); S.D. Codified Laws § 12 11 6 (2010); W. Va. Code § 3 10 3 (2010); Wyo. Stat. Ann. § 22 18 111(a) (2009).

5 Out of the 33 states not already discussed in Part II(B), *supra.*

6 See Ariz Rev. Stat. Ann. § 16 222 (2010); Colo. Rev. Stat. Ann. § 1 12 201 (West 2010); Del. Code Ann. tit. 15 § 7321 (West 2010); Fla. Stat. § 100.161 (2010); Ga. Code Ann. §21 2 542 (West 2010); Haw. Rev. Stat. § 17 1 (2010); Idaho Code Ann. § 59 910 (2010); Ind. Code § 3 13 3 1 (2010); Kan. Stat. Ann. § 25 318 (2010); Ky. Rev. Stat. Ann. § 63.200 (West 2010); Me. Rev. Stat. tit. 21, § 391 (2009); Mich. Comp. Laws § 168.105 (2010); Mont. Code Ann. § 13 25 202 (2009); Nev. Rev. Stat. § 304.030 (2010); N.H. Rev. Stat. Ann. § 661:5 (2010); N.J. Stat. Ann. § 19:3 26 (West 2010); N.M. Stat. Ann. § 1 15 14 (West 2010); N.C. Gen. Stat. § 163 12 (West 2010); 25 Pa. Stat. Ann. § 2776 (West 2010); Tenn. Code Ann. § 2 16 101 (2010); Utah Code Ann. § 20A 1 502 (West 2010); Va. Code Ann. § 24.2 207 (2010). All but three of these states mirror Illinois in defining "general election to mean the biennial congressional election. Only Michigan, Pennsylvania, and Virginia tie the replacement election to a *yearly* statewide election, either the congressional election in even numbered years, or the gubernatorial or municipal election in odd years.

7 See Ala. Code §§ 36 9 7 to 9 (2010); Ark. Code Ann. § 7 8 102 (West 2010); Or. Rev. St. § 188.120 (2010); R.I. Gen. Laws § 17 4 9 (2010); Tex. Elec. Code Ann. §§ 203.004; 204.001 to 005 (West 2010); Vt. St. Ann. tit. 17, § 2621 (2010); Wash. Rev. Code § 29A.28.041 (2011); Wisc. Stat. § 8.50 (2010).

8 In most of these cases, the appointee served out the remainder of the term. In some instances, however, the appointee resigned slightly early to allow the winner of the next full term to take office early and thus gain seniority. These cases are distinct from the so called "technical resignations that were excluded from both the Seventh Circuit's and petitioner's data, App. 36a; Pet. 21, in that the original vacancies in the seat took place prior to the election for the next term.

9 *See Valenti,* 292 F. Supp. at 861 ("surely the need for at least some delay to allow for the nomination of candidates is implicit in all of the statutes). Some states' statutes explicitly provide for a particular interval before an election can be held. *See, e.g.*, Wisc. Stat. § 8.50 (2010) (election to be held between 62 and 77 days after vacancy). Others ensure for minimum intervals through rollover provisions. *See, e.g.*, Me. Rev. Stat. tit. 21, § 391 (2009) (if a vacancy occurrs less than 60 days before the statewide primary, the replacement election is deferred to the *second* successive general election).

10 See, e.g., *29th Congressional District: Vote Twice on Election Day,* WHEC.com, http://www.whec.com/news/stories/s1809722.shtml?cat 565; Sean Carroll, *Confusion Winning This Race,* WHAM.com, http:// www.13wham.com/news/local/story/NY 29 Confusion Winning This Race/a17fo4ISQkq 4V9aT VEHw.cspx (last visited January 7, 2011).

11 Compare http:// www.elections.state.ny.us/NYSBOE/elections/2010/general/2010Congress.pdf (results for general election, showing 11,204 "blank or "void votes out of 210,145 cast), with http:// www.elections.state.ny.us/NYSBOE/Elections/2010/Special/29thCDResults.pdf (results for special election, showing 23,249 "blank & void votes out of 210,146 cast).

12 Available at http://tribune democrat.com/local/x712209306/Unusual ballot may cause confusion in the 12th district (last visited January 12, 2011).

13 Compare http:// www.electionreturns.state.pa.us/ElectionsInformation.aspx? FunctionID 13&ElectionID 39&OfficeID 11 (general election returns), *with* http://www.electionreturns.state.pa.us/ElectionsInformation.aspx? FunctionID 13&ElectionID 35&OfficeID 11 (special election returns). Note that the Pennsylvania Department of State's Elections website only displays votes recorded for candidates, and does not provide any information on votes counted as "blank or otherwise.

14 Workbook #1: Voter Turnout, Voter Registration, Party Affiliation, and General Election Results, 1960 2004, University of North Carolina, http://southnow.org/research and data/datapacks/NC VotingData (showing 1,591,330 votes cast in general election and 1,534,875 in special election) (last visited January 7, 2011).

2011 WL 246084 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

S&M BRANDS, INC., Tobacco Discount House #1, and Mark Heacock, Petitioners,
v.
James D. "Buddy" CALDWELL, in his official capacity as
Attorney General of the State of Louisiana, Respondent.

No. 10-622.
January 24, 2011.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Respondent's Brief in Opposition

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***i** Questions Presented

1. Whether this Court should grant a petition for certiorari to consider the applicability of *Parker v. Brown* state-action immunity to the Master Settlement Agreement ("MSA") among 46 states and various tobacco companies, even though the courts of appeals have uniformly held that the MSA and related legislation are not subject to challenge under the antitrust laws, and even though the issue of *Parker* immunity was neither properly raised in nor decided by the court below.

2. Whether this Court should grant a petition for certiorari to review the ruling of the court below that the MSA does not violate the Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, even though that ruling expressly applied the controlling decisions of this Court and reached the same result as every other court that has considered a Compact Clause challenge to the MSA.

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***1** Introduction

This case is the latest in a long series of challenges to the 1998 tobacco Master Settlement Agreement ("MSA") and the legislation that the 46 states that are parties to that Agreement ("Settling States") have enacted to implement it. More than twenty such challenges have been brought in federal court, and all have been rejected. In six of those cases, this Court has denied petitions for certiorari premised on the same statutory or constitutional provisions - the Sherman Act and the Compact Clause - that are the basis of the instant Petition. The Petition provides no reason why the Court should review this consistent and settled jurisprudence.

The MSA is a "landmark agreement," *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 533 (2001), that addresses "tobacco use, particularly among children and adolescents," which this Court has recognized as posing "perhaps the single most significant threat to public health in the United States." *Id.* at 570 (quoting *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 161 (2000)). The Agreement was signed by the Attorneys General of 46 Settling States. It was thereafter endorsed by the legislatures of those States, all of which have enacted legislation to implement it. The Agreement was also expressly "approved in all respects" by courts in each of the Settling States, all of which found that "entering into this settlement is in the best interests of the State." *See, e.g., Ieyoub ex rel. Louisiana v. American Tobacco Co.,* No. 96-1209 (Dec. 11, 1998, 14th Judicial District, Calcasieu ***2** Parish). In addition, Congress has recognized the existence of the MSA, approving the states' use of MSA payments "for any expenditures determined appropriate by the State[s]." 42 U.S.C. §1396b(d)(3)(B).

As Petitioners acknowledge, Pet. 35, there is no circuit conflict on either issue raised in the Petition. Petitioners assert instead that the courts below erred. Their arguments, however, rest on allegations about the MSA's effects that the courts below rejected based on the undisputed facts contained in a summary judgment record. The rulings below expressly follow longstanding precedents of this Court. Indeed, challenges to the MSA or to the actions of state officials enforcing MSA-related legislation have been rejected by the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and D.C. Circuits. Moreover, given the unique circumstances that led to the MSA, there is little prospect that the same issues will arise in the future, nor is there a need for the Court to exercise its supervisory powers.

For these reasons, the Petition, like the many similar petitions that have come before, should be denied.

***3 Statement**

A. The Master Settlement Agreement and Escrow Statutes

1. Beginning in the mid-1990s, a large number of states, including Louisiana, sued the major cigarette manufacturers on a number of legal theories, seeking to recover the Medicaid costs and other damages they had incurred as a result of smoking-related disease. In 1997, the states and major tobacco manufacturers agreed on a proposed settlement whose implementation was conditioned on the enactment of federal legislation. This legislation failed to be enacted, which led to further negotiations that culminated in the MSA.

Petitioners claim that the 1997 proposed settlement was "similar to the MSA in most relevant respects," and suggest that because that settlement required federal legislation to be implemented, the MSA must be legally deficient because Congress did not enact or approve it. Pet. 10-11, 30-31. [2] Petitioners also suggest that the Federal Trade Commission's criticisms of the 1997 proposed settlement as having potentially anti-competitive consequences apply equally to the MSA. In fact, however, the 1997 proposed settlement was different in many respects from the MSA. Among other things, it would have limited the tobacco companies' future liability in actions brought by private parties and would have given the Food and Drug ***4** Administration broad authority to regulate tobacco products. S.1415, 105th Cong., 1st Sess. Moreover, the FTC's criticism was addressed to a provision of the settlement that would have expressly allowed the tobacco companies to "jointly confer, coordinate, or act in concert" to achieve the goals of the settlement, which the Commission was concerned would have conferred on the tobacco companies "a broad degree of immunity from the antitrust laws," and had "the potential to reduce competition and enhance the ability of the cigarette companies to 'coordinate' price increases." FTC, *Competition and the Financial Impact of the Proposed Tobacco Settlement* (September 1997), at ii, A-2. The MSA, in contrast, in no way authorizes the companies that have signed it to confer, coordinate, or act in concert, nor is there anything in the MSA or elsewhere purporting to exempt them from antitrust liability for any action taken before or after the MSA Went into effect.

2. After further negotiations among representatives of the states and major tobacco companies following the failure of the 1997 proposed settlement, the MSA was made available for signature by any state that wished to sign it. Forty-six states and six other governmental jurisdictions, which are collectively referred to in the MSA as the "Settling States," did so. As noted above, courts in all Settling States subsequently found the MSA to be in the "best interests" of the state and "approved [it] in all respects." (Four states (Florida, Minnesota, Mississippi, and Texas) had earlier entered into separate settlements with the major tobacco companies - settlements whose provisions do not ***5** differ from those of the MSA in any material respects.) The manufacturers that agree to the MSA are referred to as "Participating Manufacturers," or "PMs." Those manufacturers that settled pursuant to the MSA as of its execution date are referred to as "Original Participating Manufacturers" ("OPMs"), while those manufacturers that have since settled are referred to as "Subsequent Participating Manufacturers" ("SPMs").

The MSA's objectives were to resolve the states' tobacco litigation while addressing the states' public health concerns regarding tobacco use, particularly by youth. To achieve these objectives, the MSA settled and released the states' past and future claims against the Participating Manufacturers. In exchange, the OPMs agreed to make billions of dollars in Initial Payments to the Settling States over the MSA's first five years. MSA §IX(b). And all PMs - not only the OPMs - agreed to make billions of dollars more in Annual Payments to the Settling States each year in perpetuity and to restrict their advertising, marketing and promotional practices. MSA §§IX(c), III. The MSA significantly promotes public health in a variety of ways vital to reducing tobacco use, especially among minors. It does this through the marketing restrictions mentioned above, the establishment of a foundation dedicated to research and education regarding tobacco use prevention and cessation, and by the imposition of per-cigarette settlement costs that through ordinary market behavior are passed through in whole or part in the form of increases in the price of cigarettes.

***6** The MSA has had a dramatic, positive impact on public health, and this will likely increase over time. Because most smokers begin to smoke by the time they reach the age of 19, reductions in youth smoking will almost certainly translate into reductions in smoking in the overall population. Indeed, because of the MSA and other measures, cigarette consumption declined 24% between 1997 and 2007. *Freedom Holdings, Inc. v. Cuomo,* 592 F.Supp.2d 684, 687 (S.D.N.Y. 2009), *aff'd*, 624 F.3d 38 (2d Cir. 2010). These consumption declines will, in turn, lead to a substantial reduction in death and disease caused by smoking and will have a beneficial impact on the finances of the Settling States as the costs of medical care for - and the productivity losses resulting from - smoking-related diseases also decline.

The PMs' payments under the MSA are non-discretionary and are calculated according to precise formulas tied to the number of cigarettes each PM sells in a given year, reflecting the fact that the harm the manufacturer's cigarettes cause will vary depending on how many of its cigarettes are consumed. PM per-cigarette payments do not vary with PMs'

market share. Nothing in the MSA or any state statute authorizes or requires the PMs to take any action - joint or otherwise - with respect to prices or output, nor does any provision limit any cigarette manufacturer's freedom to set its own prices and output. To date, the Settling States have received approximately $74.7 billion pursuant to the MSA, of which Louisiana's share has been about $1.7 billion.

***7** 3. Each MSA Settling State has enacted an "Escrow Statute" that requires every cigarette manufacturer either: (a) to become a Participating Manufacturer and generally perform its financial obligations under the MSA, or (b) if it remains a Non-Participating Manufacturer ("NPM"), to deposit a specified amount into an escrow account for every cigarette it sells in the state. *See, e.g.*, La. R.S. §13:5063. NPMs do not make payments to the Settling States, nor are they bound by the MSA's marketing restrictions. Under a state's Escrow Statute, the amount an NPM must deposit in escrow is a statutorily specified amount for each of the NPM's cigarettes sold in that state and is guaranteed not to exceed what the NPM would have to pay under the MSA on account of its sale of those same cigarettes if it were to settle with the Settling States as a PM. *Id.* §13.5063(A), (C)(2)(b). Escrow deposits may be withdrawn to pay a tobacco-related liability or settlement to the state. To the extent they are not so used, they are released to the NPM after 25 years. In the meantime, the NPM receives interest on the account as it is earned. *Id.* §13.5063(C)(2)(c). The Louisiana statute addresses the concern that non-settling manufacturers would likely be judgment-proof absent the escrowed funds, and reflects the legislature's judgment that "[i]t is the policy of this state that financial burdens imposed on the state by cigarette smoking be borne by tobacco product manufacturers rather than by the state to the extent that such manufacturers either determine to enter into a settlement with the state or are found culpable by the courts." *Id.* §13.5061(4). The statute thus provides Louisiana with security ***8** for potential liabilities of NPMs while significantly reducing what would otherwise be a "free rider" MSA-related cost advantage for NPMs. *Id.* §13.5061(6).

Notwithstanding the escrow requirement, the MSA has provided an enormous opportunity for existing tobacco companies that chose to remain NPMs, such as Petitioner S&M Brands, as well as new entrants into the United States cigarette market that do not wish to become PMs. As the district court found in *Freedom Holdings*, NPMs had a total market share of 0.5% in 1998, when the MSA was signed. That share mushroomed to 8.1% in 2003, assisted in part by shortcomings in the Escrow Statute. Even after those shortcomings were remedied, NPMs' total market share was 5.4% in 2007, or more than ten times their 1998 share. 592 F. Supp. 2d at 691-92. (A significant portion of the reduction in NPM market share from 2003 to 2007 occurred because a large NPM became an SPM in 2004. *Id.* at 691 n.5.)

B. Petitioners' "Interstate Cartel" Allegations

Petitioners assert as fact their own unproven and unfounded allegation that "the MSA set up an interstate cartel enabling" the tobacco companies "to charge monopoly prices and recover their MSA costs, plus hefty additional profits, from consumers without fear of price competition among themselves or from non-participating cigarette manufacturers." Pet. 4. None of the arguments made in support of that allegation survives scrutiny, and none has resulted in any court finding that the MSA or its ***9** implementing legislation violates - or is inconsistent with - the Sherman Act. [3]

1. According to Petitioners, the MSA "discourages price competition for market share by allocating the costs of the MSA among the Majors [OPMs] in proportion to their *current* national market share of cigarette sales." *Id.* (emphasis in original). Allocation of payments based on market share, however, simply means that each OPM pays the same amount to the Settling States for each cigarette it sells - *i.e.*, the MSA payment obligation imposes a flat per-cigarette cost that is the same for each OPM. Such an allocation creates no more disincentive for an OPM to compete based on price or to gain market share than does an excise tax, because each OPM pays the same per-cigarette amount no matter how large or small its market share. [4]

***10** Petitioners further allege that the MSA "discourages price competition and divides the market" among SPMs that signed the MSA within 90 days of its execution date. Pet. 5. These "grandfathered SPMs" are obligated to make

MSA payments only to the extent that their sales exceed the higher of their 1998 market share or 125% of their 1997 market share. MSA §IX(i)(1), (4). According to Petitioners, this means that to the extent grandfathered SPMs exceed their grandfathered market shares, they "are penalized by having to make MSA payments on excess sales." Pet. 5. Grandfathered SPMs, however, have lower average costs than do other PMs because the grandfathered portion of their sales is exempted from MSA payments. Moreover, once their sales exceed their grandfathered market shares, their per-cigarette marginal costs are no greater than those of other PMs. Accordingly, SPMs are in no way "penalized" for engaging in price competition and gaining market share, nor does the MSA in any way "divide the market."

Petitioners also state that the MSA "stabilizes prices and limits price competition from all other manufacturers joining the MSA after 90 days by imposing annual MSA payments on those manufacturers based on their entire national market share" that are larger than the per-cigarette payments required to be made by OPMs. Pet. 5. ***11** Petitioners are correct to the extent that OPMs receive a "Previously Settled States Reduction" (currently about 12.24% of their MSA payments), whereas SPMs do not. MSA §§II(kk), IX(c)(1). This Reduction, however, only partially offsets the settlement payments the OPMs make to the four states that settled separately with them, and thus operates like a partial tax credit for those other payments. The SPMs, however, did not settle with those states and thus receive no credit. In the aggregate, each OPM actually pays somewhat more for each cigarette it sells anywhere in the United States than do later-signing SPMs, which are not inhibited in their ability to compete on price.

2. In support of their "interstate cartel" characterization, Petitioners also contend that the MSA restrains competition "by forbidding numerous forms of advertising, as well as lobbying and litigation adverse to the MSA," and that many of these restrictions apply nationwide. Pet. 5. The MSA, however, is a settlement of litigation that included allegations of unlawful advertising in violation of state laws. For example, Louisiana's lawsuit against the major tobacco companies alleged, among other things, that "[f]or many years the defendants have engaged in a vast misleading promotional, public relations, and lobbying campaign that has as its chief goal increasing the number of persons addicted to tobacco products and decreasing the number of persons who attempt or succeed in quitting." *Ieyoub ex rel. Louisiana v. American Tobacco Co.,* No. 96-1209 (Mar. 12, 1996 14th Judicial District, Calcasieu Parish), Petition ¶ 61. The restrictions in Section III of the Agreement, ***12** which settled those allegations and similar allegations by other states, are akin to an assurance of voluntary compliance following settlement of a consumer fraud complaint. They do not prohibit advertising generally nor is their purpose to divide markets, unlike the restrictions in *Blackburn v. Sweeney,* 53 F.3d 825 (7th Cir. 1995), Pet. 16. Moreover, each Settling State can enforce these restrictions only against violations in its own territory. MSA § VII(c).

3. Petitioners also allege that the MSA "stabilizes prices and limits price competition from" NPMs "by requiring member States to enact" Escrow Statutes "compelling NPMs to pay into escrow each year an amount equal to or greater than the MSA payments on comparable sales." Pet. 5-6. States are not required to enact Escrow Statutes, although the MSA creates a strong economic incentive for them to do so. Each Settling State's Escrow Statute "establishes a state regulatory scheme that does not require or allow any input from private parties." *Xcaliber Int'l Ltd. LLC v. Caldwell,* 612 F.3d 368, 376-77 (5th Cir. 2010). Unlike *National Electrical Contractors Ass'n, Inc. v. National Constructors Ass'n,* 678 F.2d 492 (4th Cir. 1982), Pet. 16 n.9, therefore, this is not a situation in which private parties have entered into an agreement to impose costs on competitors; those costs are imposed by statute by the states.

The stated goal of the Escrow Statutes is to "effectively and fully neutralize [] the cost disadvantages that the Participating Manufacturers experience *vis-à-vis* Non-Participating ***13** Manufacturers within … [each] Settling State as a result of" the MSA's provisions. MSA §IX(d)(2)(E). As noted above, the Statutes expressly provide that an NPM cannot be required to pay more into escrow than it would have paid under the MSA for the same cigarettes had it signed the MSA as an SPM, including any downward adjustment to which such an SPM would have been entitled. *See, e.g.*, La. R.S. §13.5063(C)(2)(b). As the Second Circuit has held, the Statutes "can be analogized to the imposition of a flat tax … whose only arguably 'anti-competitive' effect is to raise cigarette prices," and they otherwise allow "normal market mechanisms [to] function." *Freedom Holdings, Inc. v. Cuomo,* 624 F.3d at 56, 59, 62 (2d Cir. 2010).

4. Experience under the MSA has confirmed the foregoing conclusions. As the *Freedom Holdings* district court found after examining the evidence in that case, "[t]he updated reports reveal that the payment structure of the MSA does not favor the major cigarette companies over those companies that either did not join the MSA, or joined the MSA at some later date." 592 F. Supp. 2d at 691. The MSA and Escrow Statutes have internalized in the price of the cigarette manufacturers' products a portion of the social costs of the death and disease caused by smoking, but there is no evidence - and no court has found - that they have permitted or authorized any cigarette manufacturer to fix prices, limit output, divide markets or charge monopoly prices, or that they have discouraged price competition. [5]

***14 C. The Proceedings Below**

1. Petitioners' complaint, filed August 2, 2005, pleaded several constitutional theories in support of their claim that the Louisiana Attorney General should be enjoined from enforcing the MSA and the Louisiana Escrow Statute. Count I alleged a violation of the Compact Clause. Although as part of their Compact Clause count Petitioners alleged that "[t]he MSA and its Qualifying Statute encroach upon federal supremacy by patently violating the federal antitrust laws, including the Sherman Act," Complaint ¶ 62, there was no separate Sherman Act-based count. Nor did Petitioners plead as a basis for the district court's jurisdiction a claim brought under the antitrust laws. *See* 15 U.S.C. §15(a).

The Louisiana Attorney General filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) on November 2, 2005. The motion was referred to a Magistrate Judge, who issued his Report on September 5, 2006, recommending that the complaint be dismissed in its entirety. In doing so, the Magistrate Judge observed that "[i]f the MSA actually violates antitrust laws, … a party with proper standing may bring a suit under those laws to enforce them. But the potential for such claims does ***15** not require the court to annul the MSA as a violation of the Compact Clause." Report at 20-21. Petitioners filed objections to the Magistrate's Report but did not contend that their antitrust allegations formed the basis for a claim separate from their Compact Clause claim. On November 9, 2006, the district court issued an order stating that it was "inclined to agree with the reasoning" of the Magistrate Judge's Report, but that it was "constrained by" the Fifth Circuit's reversal of the grant of a motion to dismiss similar claims in *Xcaliber International Ltd. LLC. v. Foti,* 442 F.3d 233 (5th Cir. 2006). Accordingly, the district court accepted the Magistrate Judge's recommendation to dismiss the complaint only as to Petitioners' Tenth Amendment claim. Petitioners did not amend their complaint to plead a separate antitrust claim, although they could have done so as of right under Fed. R. Civ. P. 15(a).

2. After Petitioners conducted substantial discovery directed to the Louisiana Attorney General and the National Association of Attorneys General, the parties filed cross motions for summary judgment. On September 24, 2009, the district court granted the Louisiana Attorney General's motion for summary judgment and denied Petitioners' motion for summary judgment. The court held that the Compact Clause claim "fails as a matter of law," Pet. App. B15, because there is no "actual or potential encroachment or interference" with federal supremacy, *id.* B13. The court went on to find that even if congressional consent were required, "Congress has plainly provided it" when it amended the Medicaid statute in 1999 "and disclaimed any ***16** federal interest in the moneys received by the Settling States pursuant to the Agreement." *Id.* B14. *See* 42 U.S.C. §1396b(d)(3)(B)(i-ii). The court did not address Petitioners' antitrust contentions as a separate claim, but instead treated them as one element of Petitioners' Compact Clause claim, consistently with the treatment of those contentions in Petitioners' complaint and in the earlier Magistrate Judge's Report. In a footnote in its opinion, the district court addressed Petitioners' Compact Clause "antitrust policy" argument by summarizing the opinions of other courts that had previously rejected claims that the MSA or related statutes are preempted under the antitrust laws, but the court had no occasion to address the issue of state-action immunity under *Parker v. Brown,* 317 U.S. 341 (1943), and did not do so. Pet. App. B10 n.7.

3. The Fifth Circuit affirmed unanimously on August 10, 2010. *First*, applying the test in this Court's decision in *United States Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452 (1978), the Fifth Circuit held that the MSA did not require congressional consent under the Compact Clause for the same reasons that the Fourth Circuit had earlier reached the

same conclusion in *Star Scientific, Inc. v. Beales,* 278 F.3d 339 (4th Cir.), *cert. denied sub nom. Star Scientific, Inc. v. Kilgore,* 537 U.S. 818 (2002). Pet. App. A5-7. The court did not address the district court's additional finding that, if congressional consent were required, Congress had provided it.

***17** *Second*, the Fifth Circuit noted that - insofar as it related to the Escrow Statute - any antitrust challenge was foreclosed by its earlier decision in *Xcaliber International Ltd. v. Caldwell,* 612 F.3d 368 (5th Cir. 2010). Pet. App. A8. Recognizing, however, that *Xcaliber* had involved a challenge only to the Escrow Statute, the Fifth Circuit went on to consider "whether the MSA and Escrow Statute working together create an antitrust violation." *Id.*

The Fifth Circuit began its analysis by noting that "[w]hether the MSA and Escrow Statute violate federal antitrust laws has been addressed by the Sixth, Eighth, and Ninth Circuits, and all of those courts have rejected the plaintiffs' arguments." *Id.* The court then quoted from the Sixth Circuit's decision in *Trident International Corp. v. Kentucky,* which it said "aptly described the argument the present plaintiffs raise and why it must be rejected." *Id.* A9. In *Trident*, the plaintiffs had alleged that the Kentucky Escrow Statute was inconsistent with - and hence preempted by - the Sherman Act because it was "enacted by Kentucky to effectuate the provisions of the MSA [and] punishes NPMs and rewards SPMs - a practice that constitutes an 'illegal *per se* output cartel.' " 467 F.3d at 555. In affirming the grant of a motion to dismiss, the Sixth Circuit recognized that Sherman Act preemption arises only if Kentucky's Escrow Statute " 'mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or … places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.' " *Id.* at 554 (quoting *Rice v. Norman Williams Co.* 458 U.S. 654, 661 (1982)). The Sixth ***18** Circuit then reasoned that because Kentucky "neither mandated nor explicitly authorized" the PMs to engage in *per se* violations of the antitrust laws following the MSA's execution, Trident's argument on this issue was foreclosed. *Id.* at 557.

After quoting from the Sixth Circuit's decision in *Trident*, the Fifth Circuit concluded:

> We agree with the Sixth Circuit and the other circuits that have already considered the issue of whether the MSA and Escrow Statute violate the Sherman Act, and we adopt their rationale. Accordingly, we find no merit to the plaintiffs [sic] arguments that the MSA and Escrow Statute violate federal antitrust laws.

Pet. App. A10.

Reasons for Denying the Petition

The Petition should be denied, much like the twenty-some similar federal court challenges to the 1998 MSA that have preceded it and been unanimously rejected. In the 12 years since the MSA went into effect, this Court has denied *six* petitions for certiorari raising one or both of the issues now re-raised by Petitioners. *See Grand River Enter. Six Nations, Ltd. v. Beebe,* 574 F.3d 929 (8th Cir. 2009), *cert. denied sub nom. Grand River Enter. Six Nations, Ltd. v. McDaniel,* 130 S. Ct. 2095 (2010) (Sherman Act); *Sanders v. Brown,* 504 F.3d 903 (9th Cir. 2007), *cert. denied*, 553 U.S. 1031 (2008) (Sherman Act); *Mariana v. Fisher,* 338 F.3d 189 (3d Cir. 2003), *cert. denied sub nom. Mariana v. Pappert,* 540 U.S. 1179 (2004) (Sherman Act and Compact Clause standing); ***19** *Star Scientific, Inc. v. Beales,* 278 F.3d 339 (4th Cir.), *cert. denied sub nom. Star Scientific, Inc. v. Kilgore,* 537 U.S. 818 (2002) (Compact Clause); *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.,* 263 F.3d 239 (3d Cir. 2001), *cert. denied*, 534 U.S. 1081 (2002) (Sherman Act); *Hise v. Philip Morris Inc.,* 46 F. Supp.2d 1201 (N.D. Okla. 1999), *aff'd mem.*, 208 F.3d 226 (10th Cir.), *cert. denied*, 531 U.S. 959 (2000) (Sherman Act and Compact Clause). Nothing material has changed since this Court first declined to review these issues in 2000. No split of authority has developed. To the contrary, decisions rejecting legal challenges to the MSA have stacked up, and this Court has repeatedly denied certiorari. There is no reason for a different outcome here.

Indeed, this case is a uniquely poor vehicle for reviving Petitioners' claims against the MSA. The Fifth Circuit did not even reach the first purported "question presented." Pet. i. The Court of Appeals denied Petitioners' antitrust claim on an antecedent question and thus did not resolve the *Parker v. Brown* state-action immunity issue at all. And with respect to the Compact Clause question, Petitioners themselves concede that the Fifth Circuit merely "adopted" the Fourth Circuit's reasoning in *Star Scientific, Inc. v. Beales* rather than "[o]ffering … its own" analysis. Pet. 27. This Court, of course, declined to review *Star Scientific*'s reasoning nine years ago, and Petitioners point to no compelling reason why the Fifth Circuit's mere adoption of the Fourth Circuit's reasoning strengthens the case for certiorari. The Fourth Circuit's reasoning, in any event, was consistent with this Court's jurisprudence and correct. The Court should treat this Petition no ***20** differently from the other petitions challenging the MSA that it has uniformly denied over the past decade.

I. The issue of state-action immunity was not ruled on by the courts below, and in any event applying such immunity to defeat antitrust challenges to the MSA would be entirely consistent with this court's decision in *Parker V. Brown* and the decisions of other appeals courts.

1. Petitioners contend that the Court should grant their Petition because the Fifth Circuit incorrectly applied the state-action immunity doctrine of *Parker v. Brown.* The *Parker* immunity issue was not properly raised below, however, and the Fifth Circuit did not address or decide it. There is no warrant for this Court to resolve an issue never resolved below, and the Petition's efforts to obtain this Court's review on a purely academic question only underscore the absence of any necessity for this Court's review.

Indeed, the Fifth Circuit's sole mention of *Parker* came in describing the *second* step of petitioners' two-step antitrust claim. *See* Pet. App. A7 ("The plaintiffs … argue that the MSA and Escrow Statute are *per se* violations of the Sherman Act …. The plaintiffs further assert that the only defense *potentially* available to the Attorney General is the implied state-action immunity found under *Parker v. Brown.*") (emphasis added). The Fifth Circuit set out to address "whether the MSA and Escrow Statute working together create an antitrust violation," *id.* A8, and concluded that there was "no merit to the ***21** plaintiffs [sic] arguments that the MSA and Escrow Statute violate federal antitrust laws." *Id.* A10. As it found no Sherman Act violation, it saw no need to consider the "potential[]" *Parker* "defense" to a violation that did not exist. Pet. App. A7; *see also Fisher v. City of Berkeley,* 475 U.S. 260, 270 (1986) (having found that municipal ordinance is not inconsistent with the antitrust laws, Court "need not address whether, even if the controls were to mandate §1 violations, they would be exempt under the state-action doctrine from antitrust scrutiny.").

The Fifth Circuit's reliance on the Sixth Circuit's decision in *Trident International Corp. v. Kentucky* underscores that it did not reach the *Parker* immunity issue. The Fifth Circuit quoted an entire paragraph from *Trident* in which the Sixth Circuit reasoned that Kentucky had "neither mandated nor explicitly authorized" the PMs to engage in *per se* violations of the antitrust laws following the MSA's execution. Pet. App. A9-10 (quoting *Trident,* 467 F.3d at 557). That quoted paragraph in the *Trident* opinion came right before the Sixth Circuit stated, in no uncertain terms, that "[b]ecause Trident has failed to satisfy the first prong of Sherman Act preemption analysis, *we need not consider the second prong's Parker state-action immunity doctrine.*" *Id.* at 558 (emphasis added).[6] Like the Sixth Circuit, ***22** the Fifth Circuit was thus crystal clear in rejecting Petitioners' antitrust arguments based on its examination of the effects of the MSA and Escrow Statute on competition - without even reaching the issue of *Parker* state-action immunity.

Accordingly, Petitioners have it exactly backwards when they assert that "the court did not dispute the unchallenged proposition that the MSA itself was an agreement in restraint of trade and a *per se* violation of the Sherman Act," and "addressed only whether defendant was entitled to invoke 'state-action' immunity as originally set forth in this Court's decision in" *Parker.* Pet. 12; *see also id.* 17 ("The Fifth Circuit's sole basis for declining to apply the Sherman Act to the MSA was the state-action immunity defense … in *Parker* "). In reality, the Fifth Circuit addressed only the first, antecedent question of whether the MSA was a violation of the Sherman Act - a proposition, for that matter, which went far from "unchallenged."

It is well-established that this Court "do[es] not decide in the first instance issues not decided below.' " *Fitzgerald v. Barnstable Sch. Comm.,* 555 U.S. 246, , 129 S.Ct. 788, 798 (2009) (quoting *National Collegiate Athletic Ass'n. v. Smith,* 525 U.S. 459, 470 (1999)). That prudential rule applies even when the issues may well pique the curiosity of the professoriate. The primary issue in the Petition is an entirely academic question about the contours of *Parker* immunity that is nowhere discussed and nowhere raised by the decision below.

2. Petitioners try to create the impression that the *Parker* immunity issue is relevant by treating ***23** the validity of their antitrust claim as a foregone conclusion. *See, e.g.*, Pet. 12 ("unchallenged proposition that the MSA itself was an agreement in restraint of trade"); *id.* 18 ("an admittedly *per se* illegal agreement between private parties"). As discussed above in the Statement, however, Petitioners' allegations concerning the effect of the MSA on competition do not comport with the facts and have been rejected by every court that has considered similar allegations. As a result, these courts have held that the MSA does not mandate or authorize private or hybrid [7] *per se* violations of the antitrust laws in all cases. *See, e.g., Grand River Enterprises Six Nations, Ltd. v. Beebe,* 574 F.3d at 938-39; *Sanders v. Brown,* 504 F.3d at 919; *KT&G Corp. v. Attorney General of State of Oklahoma,* 535 F.3d at 1132; *Freedom Holdings, Inc. v. Cuomo,* 592 F.Supp.2d at 696.

3. Even if this Court were inclined to consider for the first time in this litigation the state-action immunity issue that Petitioners attempt to raise, it should deny the Petition. Petitioners point to no conflict among the circuits on the applicability of *Parker v. Brown* to state action like that of the predecessor of Respondent Attorney General of Louisiana in signing the MSA on behalf of his state, including the cases in which the MSA itself has been ***24** at issue. [8] Moreover, the question whether *Parker* immunity applies to an agreement that simply provided a common framework for settling litigation between multiple states and private companies has not previously arisen in any other context. Nor, in view of the unique character of the MSA, is it likely to arise in the future. Petitioners do not urge the contrary. Rather, because Petitioners view the MSA as an "abomination," Pet. 37, they ask the Court to single it out for examination and "to offer an authoritative and definitive evaluation of that scheme" in light of federal antitrust law and the Compact Clause, *id.* 37-38 - an evaluation that is unlikely to have any significance beyond the context of the MSA, or within it for that matter.

4. Finally, Petitioners' contention that *Parker v. Brown* immunity should for the first time be held limited in application to actions by a single state that have effects only within that state, Pet. 19-20, has no basis in authority or logic. Even the *Parker* decision itself involved an alleged multi-state restraint - a California program that eliminated price competition among raisin producers, 95 percent ***25** of whose crop was sold in, and had a "substantial effect on," interstate and foreign commerce. 317 U.S. at 359. Moreover, the *Parker* Court relied on the statutory language as well as "the purpose, the subject matter, the context and the legislative history" of the Sherman Act in holding that the state is not a "person" for purposes of the statute. *Id.* at 351-52. The Court noted that "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." *Id.* at 351. The Court concluded that "the Sherman Act … must be taken to be a prohibition of individual and not state action." *Id.* at 352. That Louisiana joined with other states in settling their lawsuits against the major tobacco companies does not affect the Court's holding that the state is not a "person" within the scope of the antitrust laws, nor does it mean that the actions of Louisiana's executive, legislative, and judicial branches in entering into and approving the MSA were not actions of the state.

II. Whether the Fifth Circuit correctly applied this Court's settled rule for assessing whether an interstate agreement violates the Compact Clause does not merit this Court's review.

Nine years ago, this Court denied a certiorari petition which sought review of a Fourth Circuit decision holding that the MSA did not violate the Compact Clause. *Star Scientific, Inc. v. Kilgore,* 537 U.S. 818 (2002). As Petitioners note, the Fifth Circuit merely "adopted" the Fourth Circuit's reasoning, and nothing has happened since 2002 ***26** that warrants a different course now. This Court has not issued any intervening decision that bears on the issue and no

circuit split has arisen - all six courts to have addressed whether the MSA requires congressional approval have held it does not.[9] The absence of any conflict among the courts is unsurprising given the clarity of the governing test, under which congressional approval is required only of those agreements among states that "enhance[] state power *quoad* the National Government." *United States Steel Corp. v. Multistate Tax Comm'n,* 434 U.S. 452, 473 (1978) ("*MTC*"). Petitioners' contention that the Fifth Circuit misapplied that settled law does not merit this Court's review. Certiorari is also unwarranted for another reason: As the district court held, even if the MSA needed congressional consent, Congress provided it. Pet. App. B14-15. Any ruling by this Court on whether the MSA requires congressional approval would thus be purely academic.

1. More than a hundred years ago, this Court recognized that the Compact Clause could not reasonably be read to apply to *every* agreement among multiple states. In *Virginia v. Tennessee,* 148 U.S. 503, 518, 519 (1893), the Court observed that many interstate agreements "can in no respect concern the United States" and concluded that the Compact Clause applies only "to the formation of any ***27** combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." In *MTC*, the Court reiterated that rule, 434 U.S. at 460, and upheld the Multistate Tax Compact, which resulted in reciprocal legislation by more than 20 states and the establishment of a quasi-independent administrative body to coordinate state taxation of certain entities.

The Court found that, although the agreement may have "increase[d] the bargaining power of the member States *quoad* the corporations subject to their respective taxing jurisdictions," it did not "enhance[] state power *quoad* the National Government." *Id.* at 473. The Court recognized that "[g]roup action in itself may be more influential than independent actions by the States," but observed that each of the tax commission's actions could have been taken separately by the individual states themselves. *Id.* Finally, the Court clarified that an interstate agreement does not require congressional approval merely because it "implicates some federal interest"; only agreements that pose "a threat of encroachment or interference through enhanced state power" do so. *Id.* at 479-80 n.33. *See also Northeast Bancorp, Inc. v. Bd. of Governors of Federal Reserve Sys.,* 472 U.S. 159, 175-76 (1985) (reaffirming *MTC*).

2. The MSA does not require Congress's consent under this settled jurisprudence. As the Fifth Circuit explained,
the [MSA] may result in an increase in bargaining power of the States *vis-à-vis* the ***28** tobacco manufacturers, but this increase in power does not interfere with federal supremacy because the [MSA] "does not purport to authorize the member States to exercise any powers they could not exercise in its absence."

Pet. App. A6-7 (quoting *Star Scientific,* 278 F.3d at 360 (quoting *MTC,* 434 U.S. at 473)).

Indeed, as Judge Niemeyer observed for the Fourth Circuit, the MSA "principally operates vertically between each State and the signatory tobacco companies, providing releases from liability to the tobacco companies in exchange for conduct restrictions and payments." *Star Scientific,* 278 F.3d at 360. Such "vertical" agreements between individual states and tobacco companies do not even implicate the Compact Clause. *Id.*

The MSA operates "horizontally" between the States only in providing that third parties will perform certain useful but limited administrative functions. In particular, the MSA requires the parties to select a "Firm" of economic consultants to make certain determinations that are conditions precedent to one of the potential payment adjustments in the MSA, the NPM Adjustment. For example, were there to be a dispute between the PMs and a state as to whether the state's Escrow Statute is a "Qualifying Statute" as defined in Section IX(d)(2)(E), the firm would decide it. *See* MSA §IX(d)(2)(G). In addition, the MSA requires the parties to select an "Independent Auditor" (*i.e.*, an accounting firm) to calculate the exact payments due each year under the MSA from each PM, and their ***29** allocation among the Settling States, according to formulas specified in the MSA. *See id.* §XI. Lastly, the MSA assigns to the National Association of Attorneys General ("NAAG") certain implementing and coordinating functions on behalf of the Settling States, including the monitoring of potential conflicting interpretations of the MSA by courts in the various Settling States. *See id.* §§II(bb); VII(f), (g);

VIII(a), (c). It is difficult even to conceive how states' agreement to use the same economic and accounting experts and their Attorneys General's membership organization to help administer a complex payment mechanism and help ensure consistency in the interpretation of the MSA could be considered to encroach on federal supremacy.

Petitioners' complaint that the MSA binds the states into the future is both misplaced and wildly overblown. *See* Pet. Br. 26, 28; *see also* Amicus Brief of Constitutional Law Scholars ("Amicus Br.") 14-16. The states have agreed to receive significant Annual Payments from PMs in perpetuity in exchange for waiving certain specified claims they had or might in the future have against the PMs. The states have also agreed to have the Firm, the Independent Auditor, and NAAG continue to perform certain implementing and coordinating functions, described above, into the future. The states could have individually settled their lawsuits against the PMs with the same or fully equivalent terms. There is nothing "particularly pernicious" (Amicus Br. 14) about those settlement terms, and nothing about them that remotely encroaches on federal supremacy.

***30** Moreover, as the Fourth Circuit further observed, the MSA took care to ensure that it "does not derogate from the power of the federal government to regulate tobacco. Sections X and XVIII(a) of the agreement specifically anticipate that Congress may, in the future, pass laws regulating tobacco and provides [sic] for adjustments of the [MSA's] terms if that occurs." *Star Scientific,* 278 F.3d at 360. [0] Accordingly, although the MSA undoubtedly touches upon matters of federal "interest," it does not "infringe federal supremacy." *Northeast Bancorp,* 472 U.S. at 176.

3. Petitioners contend that the Fifth Circuit erred in holding that the MSA does not require congressional approval. This Court does not, of course, grant certiorari merely to correct errors by lower courts, and Petitioners' evident dislike for the MSA is hardly reason to make an exception. Petitioners' criticisms of the Fifth Circuit are, in any event, unfounded.

***31** Petitioners' principal contention appears to be that the Fifth Circuit somehow failed to heed the Court's statement in *MTC* that "the pertinent inquiry is one of potential, rather than actual, impact upon federal supremacy." 434 U.S. at 472, *quoted in* Pet. 27. But Petitioners' "potential encroachment" theory is little more than an effort to repackage failed statutory and constitutional arguments in the guise of a Compact Clause claim. In the end, they fail to show how the MSA even potentially encroaches on federal power.

For example, the Fifth Circuit rejected Petitioners' claim that the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. §1334, preempts the MSA because the Agreement's voluntary advertising, promotional, and marketing restrictions do not fall within the scope of the statute's preemption provision, which applies only to any "requirement or prohibition … imposed under State law." Pet. App. A13-14. Petitioners nonetheless argue that the MSA's voluntary advertising restrictions have the "potential" to *encroach* on federal supremacy. Pet. 31-32. But those voluntary advertising restrictions are not now, and never will be, a "requirement or prohibition" that Congress sought to oust. Although those restrictions may touch upon a matter of federal "interest," it is impossible to see how states engaging in conduct Congress chose *not* to preempt "enhances state power *quoad* the National Government." And that is so whether the states engage in that conduct through 46 separate agreements or one master agreement signed by multiple states. *See MTC,* 434 U.S. at 472 ("[t]he number of parties to an ***32** agreement is irrelevant if it does not impermissibly enhance state power at the expense of federal supremacy.").

At bottom, Petitioners' argument appears to be premised on the fact that the MSA touches on a variety of matters that are of federal interest. But, as explained above, this Court in *MTC* expressly held that "[a]bsent a threat of encroachment or interference through enhanced state power, the existence of a federal interest is irrelevant." 434 U.S. at 480 n.33. In sum, the Fifth Circuit's ruling, like the Fourth Circuit's before it, is firmly grounded in this Court's precedents.

Lastly, Petitioners assert that the Fifth Circuit erred because the MSA potentially encroaches upon "sister-state interests." Pet. 33. This error-correction argument also fails on its own terms. First, it is far from clear that Petitioners even have standing to assert state sovereignty interests. *See Tennessee Elec. Power Co. v. TVA,* 306 U.S. 118, 144 (1939).

Second, no state has objected to the MSA, and if such an objection were made, the Court in *MTC* expressly dealt with how it should be resolved:

> Any time a State adopts a fiscal or administrative policy that affects the programs of a sister State, pressure to modify those programs may result. Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause of Art. IV, 2, it is not clear how our federal structure is implicated.

***33** 434 U.S. at 478 (citation omitted). The MSA does not "transgress [] the bounds of the Commerce Clause," the First Amendment, the FCLAA, or the Sherman Act. The "federal structure is" therefore not "implicated," and the Compact Clause did not require congressional consent.

4. Certiorari is not warranted on the question whether congressional approval of the MSA was required by the Compact Clause for an independent reason: Even if congressional consent to the MSA were required, Congress provided it in 1999 when it amended the Medicaid Act to disclaim any federal interest in the moneys received by the states under the MSA in settlement of their claims, *inter alia*, for Medicaid payments made by the states. This Court has long held that "Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined." *Cuyler v. Adams,* 449 U.S. 433, 441 (1981); *see also Virginia v. Tennessee,* 148 U.S. at 521-22. Moreover, "the constitution makes no provision respecting the mode or form in which the consent of congress is to be signified." *Green v. Biddle,* 21 U.S. 1, 85-86 (1823). "The only question in cases which involve that point is, has congress, by some positive act, in relation to such agreement, signified the consent of that body to its validity?" *Id.* at 86. Here, as the district court correctly held (Pet. App. B14-15), the answer is yes.

When Congress amended the Medicaid statute in 1999, it expressly disclaimed any claim for reimbursement of the federal share of Medicaid ***34** payments from MSA settlement payments, stating that the relevant federal rules

> shall not apply to any amount recovered or paid to a state as part of *the comprehensive settlement of November 1998* between manufacturers of tobacco products … and State Attorneys General, ... *[A] State may use amounts recovered or paid to the State as part of a comprehensive … settlement, … for any expenditures determined appropriate by the State.*

42 U.S.C. §1396b(d)(3)(B)(i-ii) (Supp. V 1999) (emphases added). Through this provision, Congress recognized the MSA's existence, disclaimed any federal interest in the moneys received by Louisiana and other states under the agreement, and authorized the states to use MSA funds "for any expenditures determined appropriate." The inference is "clear and satisfactory" that Congress "necessarily consented to the agreement of th[e] States on th[e] subject." *Virginia v. W. Virginia,* 78 U.S. 39, 60 (1870). Were there any doubt that Congress by this enactment approved the States' decisions to enter the MSA, the Conference Report accompanying the Medicaid Act amendment dispels it. The Report expressly stated that Congress's purpose in disclaiming its interest was to avoid needless litigation by providing certainty and finality to the states in their use of the MSA funds. [2]

***35** Petitioners argued below that, notwithstanding the Medicaid amendment's explicit reference to the MSA and the states' use of MSA funds, Congress did not properly "consider[] the substance of the MSA or the Compact Clause implications of its actions" because the 1999 Medicaid amendment was "obscure." C.A. Br. 56. Congress is presumed, however, to be fully aware of its enactments. *See Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 179 (1980). Nor does it matter that Congress acted through an appropriations bill. As noted, the Constitution requires no particular form by which Congress must approve a compact, and Congress "may amend substantive law in an appropriations statute, as long as it does so clearly." *Robertson v. Seattle Audubon Soc.,* 503 U.S. 429, 440 (1992). Petitioners cannot credibly

dispute that Congress amended the Medicaid statute with a specific reference to the MSA, and that the amendment effected a change in law.

The Fifth Circuit did not reach the issue of congressional consent because it concluded - like every other court to address the issue - that no such consent was required. The fact of Congress's consent, however, makes the question presented by Petitioners entirely academic. Even if they were correct that congressional consent were required - and they are not - it would not change the outcome of this case and the continuing validity of the MSA.

*36 CONCLUSION

The petition for a writ of certiorari should be denied.

Footnotes

* Counsel of Record

1 In addition to the decision below and those cited *infra* on page 18, *see Freedom Holdings, Inc. v. Cuomo,* 624 F.3d 38 (2d Cir. 2010); *KT&G Corp. v. Attorney Gen. of State of Oklahoma,* 535 F.3d 1114 (10th Cir. 2008); *Tritent Int l Corp. v. Kentucky,* 467 F.3d 547 (6th Cir. 2006); *North American Trading Co. v. National Ass n of Attorneys Gen.,* Civ. Action No. 01 01600 (D.D.C. Sept. 18, 2001), *aff d*, No. 01 7173 (D.C. Cir. Nov. 25, 2002).

2 As discussed *infra* at 33 35, Congress did in fact consent to the MSA.

3 Petitioner claims that the Second Circuit, in *Freedom Holdings, Inc. v. Spitzer,* 357 F.3d 205 (2d Cir. 2004), "recognized that … 'the MSA is an 'express market sharing agreement …. Pet. 16 17. As the Second Circuit itself later explained, however, it was " a]ccepting plaintiffs' allegations as true, as we were required to do in reviewing a judgment of dismissal. *Freedom Holdings, Inc. v. Cuomo,* 624 F.3d at 45. On remand, the district court, like every other court to consider those allegations, rejected them and entered judgment for the state. *Freedom Holdings, Inc. v. Cuomo,* 592 F.Supp.2d 684 (S.D.N.Y. 2009), *aff d on other grounds*, 624 F.3d 38 (2d Cir. 2010).

4 In general, each OPM pays an amount calculated by multiplying its share of OPM volume (expressed as a percentage) times the OPMs' total payment. MSA §IX(c). The total payment is adjusted each year for changes in total OPM volume, *id.* Exhibit E, which keeps each OPM's per cigarette payment constant from year to year. Payments are also adjusted for inflation.

5 *Amici* Constitutional Law Scholars and Antitrust Law Professors uncritically accept Petitioners' allegations as true, apparently without having any familiarity with the summary judgment record in this case or even the numerous judicial decisions rejecting those allegations. For their part, *amici* Freedom Holdings, Inc. and International Tobacco Partners Ltd. simply repeat some of the same arguments they made in their own unsuccessful antitrust challenge to the MSA. *Freedom Holdings, Inc. v. Cuomo,* 592 F.Supp.2d 684 (S.D.N.Y. 2009), *aff d on other grounds*, 624 F.3d 38 (2d Cir. 2010).

6 Similarly, the Fifth Circuit's reliance on the Eighth Circuit's decision in *Grand River Enter. Six Nations, Ltd. v. Beebe,* 574 F.3d at 936 38, and the Ninth Circuit's decision in *Sanders v. Brown,* 504 F.3d at 908 11, was limited to the portions of those decisions that held there was no *per se* violation of the Sherman Act, and did not include their subsequent discussions of state action immunity

7 A hybrid restraint of trade arises when a state grants a private party "a degree of private regulatory power that allows that party to compel other private actors to follow its pricing or other "private marketing decisions. *Fisher v. City of Berkeley,* 475 U.S. at 267 68.

8 *Amici* Antitrust Law Professors assert that a conflict exists among circuits concerning the relationship among *Hoover v. Ronwin,* 466 U.S. 558 (1984), *California Retail Liquor Dealers Ass n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980), and *Rice v. Norman Williams Co.,* as applied to the antitrust implications of the MSA. Brief at 6 7. No such conflict exists, however, and no court including the Fifth Circuit in this case has shown any confusion in applying those precedents. In any case, even if it were otherwise, this case would not be an appropriate vehicle for clarifying the interaction between *Midcal* and *Rice* because the decision below did not address those decisions.

9 *See Star Scientific,* 278 F.3d at 360; *Mariana v. Fisher,* 226 F. Supp. 2d 575, 586 87 (M.D. Pa. 2002); *PTI, Inc. v. Philip Morris Inc.,* 100 F. Supp. 2d 1179, 1197 98 (C.D. Cal. 2000); *Hise,* 46 F. Supp. 2d at 1210 (allegation of "unlawful confederation); Pet. App. B9 15.

10 Section X addresses the consequences of federal tobacco related legislation enacted on or before November 30, 2002. Section XVIII(a) provides that " i]f any current or future law includes obligations or prohibitions applying to Tobacco Product Manufacturers related to any of the provisions of the Agreement, each Participating Manufacturer shall comply with this Agreement unless compliance with this Agreement would violate such law.

11 Petitioners note several purported factual differences between the MSA and the Multistate Tax Compact at issue in *MTC*, Pet. 26 27, but none of those differences bears on the application of the guiding rules set forth in *MTC*.

12 *See* House Conf. Rep. 106 143, 106th Cong. 1st Sess., Pub. L. No. 106 31, Emergency Supplemental Appropriations, May 14, 1999, 1999 U.S.C.C.A.N. 27.

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PITRE v. CAIN

No. 09-9515

Supreme Court of the United States

August 2, 2010

Reporter
2010 U.S. S. Ct. Briefs LEXIS 2653 *

ANTHONY C. PITRE, Petitioner, v. NATHAN CAIN AND JOHN CRAWFORD, Respondents.

Type: Initial Brief: Appellee-Respondent

Prior History: On Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit.

Counsel

[*1] JAMES D. "BUDDY" CALDWELL, Louisiana Attorney General, S. KYLE DUNCAN, Appellate Chief, Counsel of Record, ROSS W. BERGETHON, ROBERT ABENDROTH, Assistant Attorneys General, LOUISIANA DEPARTMENT OF JUSTICE, Baton Rouge, LA, Counsel for Respondents.

Title

RESPONSE TO PETITIONER'S *PRO SE* CERTIORARI PETITION

Text

QUESTION PRESENTED

Did the district court properly dismiss Pitre's deliberate indifference claim as frivolous under 28 U.S.C. § 1915(e)(2) where his deteriorating health was the direct result of his own refusal--against the advice of prison medical staff--to take his HIV medication?

BACKGROUND

Anthony Pitre is an HIV-positive inmate who was formerly housed at the C. Paul Phelps Corrections Center (PCC) in DeQuincy, Louisiana. Unhappy to have been transferred to PCC in June, 2008, Pitre refused to take his HIV medication in an effort to force a transfer to another facility. Pet. App. F at 5. Pitre made this choice despite repeated warnings from the prison medical staff that doing so would cause his health to deteriorate rapidly. Among the consequences Pitre was advised of were fever, loss of appetite, and extreme fatigue, along with a heightened **[*2]** susceptibility to serious opportunistic infections such as pneumonia and wasting syndrome. Pet. App. C at 2.

As predicted, Pitre eventually experienced symptoms such as hypertension, fever, dizziness, and chronic fatigue, and was twice taken to a local hospital. Pitre demanded reassignment from an outdoor work detail to light-duty status, but prison physician John Crawford, who continuously monitored Pitre's condition via examinations and blood tests, maintained that Pitre should remain on "full duty" status. Pet. App. C at 5. Prison administrators such as Deputy Warden Nathan Cain likewise responded to Pitre's formal and informal complaints by reminding Pitre that his worsening physical condition was the direct result of his refusal to take his HIV medications. *Id.* at 3, 5. Cain did,

however, grant Pitre a transfer from his initial farming job to the lawnmower crew; which worked within the prison compound and consequently kept Pitre closer to medical aid. Pet. App. C at 5-6.

Pitre appealed the denials of his grievances regarding his work status to the Louisiana Department of Corrections in October, 2008. After receiving no response by December, he filed a *pro se* **[*3]** lawsuit under *42 U.S.C. § 1983* in the United States District Court for the Western District of Louisiana. Pet. App. F. Naming Cain and Crawford as defendants, Pitre claimed that they showed deliberate indifference to his serious medical condition by forcing him "to work well beyond [his] physical capability," thus running afoul of the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 5(a). Pitre attached an appendix to his complaint that included prison administrators' responses to his grievances.

A federal magistrate judge recommended that Pitre's complaint be dismissed as frivolous pursuant to *28 U.S.C. § 1915(e)(2)*. The magistrate noted that Pitre, who had been able to perform work with no restriction prior to going off his HIV medications, had admitted in his complaint that his deteriorating health condition was a result of his failure to take those medications. Pet. App. C at 8. Noting that a ruling in Pitre's favor would only "encourage him to continue on this self destructive path," the magistrate concluded that "[a]ll the deleterious symptoms experienced by [Pitre] . . . were caused by **[*4]** his refusal to participate in the therapeutic plan offered by the defendants." *Id.* at 9'. The district court adopted the magistrate's recommendation and dismissed Pitre's case. *Pitre v. Cain,* No. 2:09-1894, Doc. No. 11 (W.D. La. May 27, 2009).

On appeal, the Fifth Circuit affirmed the district court in a short, *per curiam* order adopting the magistrate's reasoning. Pet. App. A. By the time of Pitre's appeal, however, he had in fact been transferred to another facility and resumed taking his medication. Judge Reavley accordingly noted by hand on the court's order denying rehearing that, "[i]f Mr. Pitre has now been transferred from Phelps and will take the medication, it is hoped that he will have no further difficulty." Pet. App. D.

ANALYSIS

A. The magistrate judge properly applied *28 U.S.C. § 1915(e)(2)*

Pitre argues that the magistrate erred by failing to construe the complaint liberally, as required by his *pro se* status. Had the magistrate accepted all of his factual allegations as true and resolved all doubts in his favor, Pitre contends, the magistrate could not have found that his claim was worthy of dismissal **[*5]** under *28 U.S.C. § 1915(e)(2)*.

This argument fails for an obvious reason: the magistrate *did* accept his factual allegations as true and gave Pitre the benefit of the doubt. Pitre's legal claim relies solely on the facts that (a) he had a serious medical condition (unchecked HIV), and (b) he was nonetheless required to perform strenuous outside work. The magistrate accepted these assertions; indeed, there is no dispute that Pitre has HIV and that he was assigned to "full duty" work status. But those facts alone do not establish a deliberate indifference claim.

The critical, determinative fact in this case, as the magistrate recognized, is that Pitre himself caused his symptoms-not prison officials. Had Pitre taken his HIV medicine, as the prison's medical and administrative staff repeatedly urged him to do, he would have been able to work normally. Only by making *himself* sick, in an attempt to force a transfer, was Pitre able to claim that he was too unhealthy to work. The magistrate correctly recognized that allowing Pitre's claim to proceed would only reward him for his own dangerous and deeply misguided behavior. Pet. App. C at 9.

Pitre **[*6]** cannot complain that the magistrate relied on his refusal to take his medicine in formulating her recommendation. The magistrate derived the facts about Pitre's self-injurious behavior directly from documents Pitre attached to his own complaint. *See* *Beanstalk Group Inc. v. AM General Corp., 283 F.3d 856, 858 (CA7 2002)* (documents attached to complaint become part of it for all purposes); *Durning v. First Boston Corp., 815 F.2d 1265, 1267 (CA9 1987), cert. denied, 484 U.S. 944 (1987)* (same). The fact that Pitre refused to take his medicine is

undisputed: Pitre admits that he [n]ever once ma[de] the allegation and/or complaint that, '. . . the defendant's [*sic*] are to blame for the very symptoms about which he now complains.'" Pet. at 9 (quoting magistrate's report at 9).

Also informing the magistrate was Dr. Crawford's repeated recommendations that Pitre was medically suitable for the full-duty list. The law is well established that an inmate's disagreement with a doctor's medical judgment is not enough to prove deliberate indifference in violation of the Eighth Amendment. *Estelle v. Gamble, 429 U.S. 97, 106 (1976).* **[*7]** Dr. Crawford's recommendations were made clear to the magistrate in Pitre's own complaint (through the documents attached thereto), and Pitre does not dispute that Dr. Crawford was fully aware of Pitre's medical status when making those recommendations.

In sum, the district court, acting on the magistrate's recommendation, was well within its discretion under § 1915(e)(2) to dismiss Pitre's complaint as frivolous. The magistrate correctly recited the applicable standard of review, *see* Pet. App. C at 6-7, and correctly applied that standard to find that Pitre's injuries were caused not by the defendants' deliberate indifference to his condition, but by his own actions. *Id.* at 8-9. The Fifth Circuit acted consistently with this Court's precedents in affirming the district court's judgment.

B. Pitre's second Question Presented was never addressed by the lower courts

Pitre characterizes his second question as concerning the "constitutionality of working conditions of those inmates who are afflicted with the AIDS virus." Pet. at 13. He warns that, as a result of the Fifth Circuit's decision in his case, "[i]t is now constitutionally permissible for prison **[*8]** officials in Texas, Louisiana, and Mississippi to force inmates with a serious medical condition, namely the (AIDS) [*sic*] virus, to perform physical labor that exceeds their strength . . ., causing unnecessary and wanton infliction of pain . . . ." Pet. at 15. Pitre's statement is simply mistaken.

The magistrate duly noted that, "if a prison official assign[s] an inmate to work detail . . . know[ing] that such an assignment could exacerbate a serious physical ailment, then such a decision could constitute deliberate indifference in violation of the Eighth Amendment." Pet. App. C at 8 (quoting *Mendoza v. Lynaugh, 989 F.2d 191, 194 (CA5 1993))* (internal quotation marks omitted). But the magistrate's recommendation focused instead on the fact that Pitre's condition was exacerbated *solely* by his own actions. Pet. App. C at 9. Any speculation on the magistrate's part about the general Eighth Amendment implications of work assignments for HIV-infected inmates would have been unnecessary, and would have amounted only to dictum. The Fifth Circuit likewise based its opinion on Pitre's own refusal to take his medications. Pet. App. A at 1.

Pitre's second question **[*9]** presented is therefore not properly before the Court for review. *See Youakim v. Miller, 425 U.S. 231, 234 (1976)* (per curiam) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]."). Moreover, because Pitre is no longer an inmate at PCC and has resumed taking his medication, *see* Pet. App. E, his claim for injunctive relief is now moot. In short, this case does not remotely involve the sort of "exceptional circumstances" this Court requires to consider an issue not decided below. *See Boumediene v. Bush, 553 U.S. 723, , 128 S. Ct. 2229, 2263 (2008)* (providing that departure from the Court's normal rule of declining to address issues unresolved below is appropriate in "exceptional circumstances").

* * *

This case is an illustration of *28 U.S.C. § 1915(e)(2)* accomplishing its intended purpose--screening out patently frivolous suits by indigent inmates before they can consume scarce judicial and government resources. Pitre's deliberate indifference claim is undermined by the simple fact that he--not the defendants--was responsible for the medical issues **[*10]** resulting from refusing his HIV medication. The district court properly dismissed the case as frivolous, and the Fifth Circuit correctly applied this Court's precedents in affirming the district court.

CONCLUSION

This Court should deny Pitre's petition for writ of certiorari.

Respectfully submitted,

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Dated: August 2, 2010

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2009 WL 3090454 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Terrance Jamar GRAHAM, Petitioner,
v.
STATE OF FLORIDA, Respondent.
Joe Harris SULLIVAN, Petitioner,
v.
STATE OF FLORIDA, Respondent.

Nos. 08-7412, 08-7621.
September 21, 2009.

On Writs of Certiorari to the Florida First District Court of Appeal

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1 Interest of State *Amici

Juvenile violence in the United States has increased dramatically over the past half-century. The State *amici* have, and have always had, primary responsibility for meeting this daunting problem. As the United States Department of Justice observed over a decade ago:

> States are well along in developing innovative approaches to the vexing problem of juvenile violence while still maintaining, for the majority of juvenile law violators, a system of juvenile justice that preserves the hopeful aspects of a system premised on the malleability of youth.

But States also have the regrettable duty of punishing, remedying, and preventing the terrible crimes that some juveniles commit. Such crimes are presented in these cases: the beating and brutal rape of a 72-year-old woman by the 13-year-old Sullivan, and the violent armed robberies perpetrated by the 16-year-old Graham. [2]

Ninety percent of the States have retained life-without-parole as an available sentence for certain violent juvenile offenders. Thankfully, only rare cases warrant that severe sanction, and the States ***2** themselves vary on when it may

be imposed on juveniles. The State *amici* have an overarching interest in retaining the discretion to calibrate juvenile sentences. Only if left free to do that can the States continue to respond to the evolving challenge of juvenile violence.

Summary of Argument

No one wants to believe that young people can commit horrible crimes. But sometimes they do. And no one wants to consider whether they should serve lengthy prison terms. But States must consider it, since they are responsible to their own citizens for protecting them, for deterring crime, for assuaging the victims, and for punishing the guilty. Consequently, as Part I explains, the Eighth Amendment leaves States considerable latitude in deciding how to sentence violent juvenile offenders.

It is a rare and agonizing decision to sentence a juvenile to life-without-parole. But rare does not mean unconstitutional. Rather, rarity is an index of mercy - of reluctance to take this severe step. And yet, as Part II describes, States have overwhelmingly made the reasoned legislative choice that certain crimes - such as rape, robbery and kidnapping - are so morally reprehensible, so damaging to victims, and so undermine a community's sense of security, that the law's second-most severe sentence should be available, even if the offender is a juvenile. The District of Columbia and the federal government have done so as well. And even the few States that expressly disallow juvenile life-without-parole sentences ***3** would nonetheless permit lengthy mandatory sentences of up to 50 years.

Finally, as Part III explains, politically-accountable state legislatures are the ones that should weigh such painful choices, and they have done so vigilantly. The best example is the kaleidoscope of state transfer and waiver provisions through which juveniles may become subject to adult penalties. Through those mechanisms, States have grappled profoundly with every facet of juvenile violence - such as an offender's age, maturity, psycho-social development, criminal background, and potential for rehabilitation. States thus expose juveniles to a possible life-without-parole sentence only in carefully considered circumstances in which deterrence and punishment outweigh rehabilitation.

Far from condemning such a choice, this Court has tacitly approved it. In *Roper v. Simmons,* 543 U.S. 551 (2005), the Court reasoned that States had deterrence options for violent juveniles other than the death penalty. The Court deemed it "worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." *Id.*, at 572. The Court should not now interpret the Eighth Amendment to remove the States' power to impose this sanction on violent juvenile criminals such as the Petitioners.

***4 Argument**

I. Outside The Death-Penalty Context, The Eighth Amendment Strongly Defers to State Sentencing Judgment.

How severe should criminal sentences be? Should the guilty be eligible for parole? If so, when? Should sentencing aim primarily to reform, punish or deter? It is "properly within the province of legislatures, not courts" to ponder these questions. *Harmelin v. Michigan,* 501 U.S. 957, 998 (1991) (Kennedy, J., concurring) (quoting *Rummel v. Estelle,* 445 U.S. 263, 275-76 (1980)). [3] This Court "do[es] not sit as a 'superlegislature' to second-guess" the hard sentencing choices that fall to state legislatures. *Ewing v. California,* 538 U.S. 11, 29 (2003) (op. of O'Connor, J.). And squarely within their responsibilities is the agonizing subject presented in these cases: how severely to sentence violent juvenile offenders.

The Court's death-penalty cases have little to say about the issue. Life-without-parole "cannot be compared with death." *Harmelin,* 501 U.S., at 996 (op. of Court). As Justice Stewart once observed, "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." ***5** *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976) (op. of Stewart, J.). The Court has refused to extend death-penalty analysis to life-without-parole sentences. [4] Cases such as *Roper, supra*, then, provide marginal assistance in gauging juvenile prison terms, "[b]ecause

a sentence of death differs in kind from any sentence of imprisonment, *no matter how long.*" *Rummel,* 445 U.S., at 272 (emphasis added). [5]

Every State carefully considers juveniles' age, maturity, and background before trying them as adults. *See infra* Part II.A. But the Eighth Amendment does not directly regulate state discretion over such matters. *See, e.g., Harmelin,* 501 U.S., at 994-95 (op. of Court) (holding that Eighth Amendment does not require consideration of mitigating factors in non-capital sentencing). At most, juvenile non-capital sentences must satisfy a narrow proportionality principle that "forbids only extreme sentences … 'grossly disproportionate' to the crime." *Harmelin,* 501 U.S., at 997, 1001 (Kennedy, J., concurring) (and collecting cases); *see* ***6** *also Ewing,* 538 U.S., at 21 (op. of O'Connor, J.). Such review is ill-adapted for drawing lines at particular sentence lengths, ages, or stages of psycho-social development. [6]

Gross proportionality implicitly allows the different States to adopt a variety of approaches to juvenile sentencing. Comparing juvenile sentences across state lines may provide some limited analytical guidance [7] - here, for instance, it underscores the widespread availability of life-without-parole for violent juvenile crime, and hence the relative *proportionality* of the sentence. *See infra* Part II.A. But even if one State imposes, ***7** nationally, the most stringent juvenile sentences, that alone does not render them grossly disproportionate for Eighth Amendment purposes. [8]

This restrained review affords States wide latitude in deciding how severely to punish violent juvenile crime in particular. The Court has emphasized that, for Eighth Amendment purposes, "nonviolent crimes are less serious than crimes marked by violence or the threat of violence." *Solem,* 463 U.S., at 292-93. [9] Thus States may decide that direct violent assaults against persons - even by juveniles - merit especially severe penalties. [0] And offenses may be deemed serious even if they are merely related to other violent crime. In sum, States may "with reason conclude that the threat posed to the individual and society by" violent ***8** crimes "is momentous enough to warrant the deterrence and retribution of a life sentence without parole." *Harmelin,* 501 U.S., at 1003 (Kennedy, J., concurring).

When States calibrate juvenile sentences they make "a normative judgment about deserved punishment [that] rests on a moral foundation, not a scientific one." Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences,* 10 J. L. & Fam. Stud. 11, 72 (2007) ("Feld"). It is thus a task lying at the core of politically-accountable state sovereignty. This Court has a "longstanding […] tradition of deferring to state legislatures in making and implementing such important policy decisions." *Ewing,* 538 U.S., at 24 (op. of O'Connor, J.) (collecting cases).

II. In the Vast Majority of States, Violent Juveniles May Be Tried as Adults and Sentenced to Life-Without-Parole.

The sentencing landscape over the last half-century shows that a super-majority of States have decided that life-without-parole should remain available for violent juvenile criminals. Such sentences are rare, of course, and should be. But 90% of the States have deliberately retained this severe measure for dealing with juvenile violence.

Petitioners in both cases have framed their arguments solely in terms of *Roper*'s death-penalty ***9** analysis. [2] But, as Part I *supra* explains, that is the wrong test for non-capital juvenile sentences. In that context, the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin,* 501 U.S., at 1001 (Kennedy, J., concurring) (quoting *Solem,* 463 U.S., at 288). Consequently, the following survey of sentencing policies and trends will serve double duty.

First, it will demonstrate that, even under the stricter standards Petitioners have incorrectly adopted, there is no "objective indicia of consensus" that life-without-parole is disproportionate for violent juvenile offenders. *See Roper,* 543 U.S., at 564. To the contrary, any objective measure based on legislative enactments points overwhelmingly in the opposite direction. Second, and more to the point, the data will demonstrate that such sentences are not grossly

disproportionate to violent crimes committed by juveniles generally - and certainly not to the beating and brutal rape of a 72-year-old woman perpetrated by Sullivan, nor to the violent armed robberies perpetrated by Graham. [3] In sum, States have a "reasonable basis for believing" that life-without-parole for violent juvenile crime "'advance[s] the goals of [their] criminal justice systems in [a] substantial way.'" ***10** *Ewing,* 538 U.S., at 28 (op. of O'Connor, J.) (quoting *Solem,* 463 U.S., at 297 n.22).

A. Legislation in Forty-Five States Allows Life-Without-Parole for Violent Juvenile Offenders.

The raw data from legislative enactments demonstrate an overwhelming judgment that life-without-parole is appropriate for certain juveniles who commit violent crimes. Overall, forty-five States have decided that juvenile offenders may be tried as adults and sentenced to life-without-parole. While they understandably do not highlight the point in their briefs, the Petitioners in both *Graham* and *Sullivan* broadly accept - if somewhat understate - these figures. *See* Brief for Petitioner at App'x C, *Graham v. Florida,* No. 08-7412 (U.S. Jul. 16, 2009); Brief for Petitioner at 49-50, *Sullivan v. Florida,* No. 08-7621 (U.S. Jul. 16, 2009). The State data break down as follows.

(1). Seven States allow the sentence for homicide crimes only.

The following six States allow life-without-parole sentences for juveniles convicted of homicide crimes only:

(1). Connecticut mandates automatic transfer of juveniles to adult court at age 14 for a capital felony, Class A or B felony or arson murder, Conn. Gen. Stat. Ann. § 46b-127 (2009), exposing them to a possible life-without-parole sentence for a capital felony, *id.* § 53a-35a (2008).

***11** (2). Hawaii allows judicial waiver of a minor at any age for murder and attempted murder in the first and second degrees, Haw. Rev. Stat. Ann. § 571-22(d) (2006), mandating a life-without-parole sentence upon conviction of murder or attempted murder in the first degree, *id.* § 706-656(1) (1993). [4]

(3). Maine mandates a bind-over hearing for juveniles at any age, Me. Rev. Stat. Ann. tit. 15 § 3101(4) (2003), exposing them to a potential life-without-parole sentence for murder, *id.* tit. 17-a § 1251 (2006).

(4). Massachusetts automatically excludes from juvenile jurisdiction a 14-year-old charged with first degree murder, Mass. Gen. Laws Ann. ch. 119 § 74 (2008), opening up a possible life-without-parole sentence, *id.* ch. 265 § 2 (2008).

(5). New Jersey mandates transfer for certain juveniles 14 or older, N.J. Stat. Ann. § 2A:4A-26 (2009), permitting a life-without-parole sentence, *id.* § 2C:11-3(b)(5) (2009), for murder where the victim is a law enforcement officer, *id.* § 2C:11-3(b)(2) (2009), or where ***12** the victim was under age 14 and was sexually assaulted, *id.* § 2C:11-3(b)(3) (2009).

(6). New Mexico defines a "serious youthful offender" as "an individual fifteen to eighteen years of age who is charged with and indicted or bound over for trial for first degree murder," N.M. Stat. § 31-18-15.2(A) (1996), thus allowing a life-without-parole sentence, *see id.* § 31-18-14 (2009) (amended by 2009 N.M. Laws, ch. 11, Sec. 1) (abolishing death penalty but providing that "the defendant shall be sentenced to life imprisonment or life imprisonment without possibility of release or parole"). [5]

(7). Vermont allows judicial transfer even from ages 10 to 13, Vt. Stat. Ann. tit. 33, § 5204 (2007), thus exposing juveniles to a potential life-without-parole sentence for first or second degree murder, *id.* tit. 13, § 2303 (2005).

13** ***(2). Thirty-eight States also allow the sentence for non-homicide crimes.

The following thirty-nine States additionally [6] provide that juveniles may be sentenced to life-without-parole for non-homicide violent crimes, such as sexual assault, burglary, armed robbery, and kidnapping:

(1). Alabama allows transfer to adult court of a juvenile from age 14, Ala. Code § 12-15-203 (2009), thus permitting a life-without-parole sentence for felony offenses, including burglary and rape, *id.* §§ 13A-5-9(c)(3), (4) (2000); 13A-7-5 (2006); 13A-6-61 (2000).

(2). Arizona allows, and sometimes mandates, adult prosecution of juveniles age 14 and older, Ariz. Rev. Stat. § 13-501 (2009), thus exposing them to a potentially mandatory natural life sentence for certain violent sexual assaults, *see id.* § 13-1423 (2009).

(3). Arkansas allows juvenile transfer from age 14, Ark. Code Ann. § 9-27-318 (2003), and so permits a life-without-parole sentence for multiple crimes including kidnapping, rape ***14** and aggravated robbery, *id.* § 5-4-501(c)(1)(b), (c)(2) (2009).

(4). California allows adult prosecution of persons under age 18, Cal. Penal Code § 1170.17 (2004), thus permitting life-without-parole upon multiple convictions of various non-homicide sexual assault and robbery crimes, *id.* §§ 667.7(a), (b) (2007).

(5). Delaware requires adult prosecution of juveniles for various crimes, including attempted murder, rape, assault, kidnapping and robbery, Del. Code Ann. tit. 10, §§ 1010(a)(1); 921(2)(a) (2008), thus allowing life-without-parole for attempted murder or rape, *id.* tit. 11 §§ 636; 531; 773; 4205(b) & (j) (2008).

(6). Florida makes juveniles of any age subject to indictment for crimes punishable by death penalty or life imprisonment, Fla. Stat. Ann. § 985.56 (2007), and thus makes life-without-parole available for certain sexual batteries, *id.* § 794.011(3) (2002), and certain burglaries, *id.* § 810.02(2) (2007).

(7). Georgia allows transfer for juveniles age 13 and 14 for aggravated battery and life imprisonment crimes, Ga. Code Ann. § 15-11.30.2(4) (2000), thus allowing life-without-parole for rape, *id.* § 16-6-1(b) (2006), and mandating it upon second conviction for various "serious violent felonies," including armed robbery, kidnapping, rape, and aggravated sexual battery, *id.* § 17-10-7(b)(2) (1994).

***15** (8). Idaho provides discretionary transfer for juveniles of any age for crimes including murder, robbery, rape, and assault, Idaho Code §§ 20-508; 20-509 (2007), thereby making available life sentences for robbery and rape, *id.* §§ 18-6503, 18-6104 (2009).

(9). Illinois allows juvenile transfer at age 13 and mandates it at age 15, 705 Ill. Comp. Stat. 405/5-805(1)-(3) (2007), thus exposing juveniles to a possible natural life for certain sexual assaults, 730 Ill. Comp. Stat. 5/5-8-1(a)(2.5), (d)(4) (2009).

(10). Indiana requires transfer of "child" for felony prosecution, Ind. Code § 31-30-3-6(1) (2008), and thus makes available life-without-parole upon multiple convictions for various crimes, including sexual battery, robbery, and burglary (if each committed with a deadly weapon), *id.* § 35-50-2-8.5(a) (2009).

(11). Iowa allows transfer of juveniles age 14 and older, Iowa Code § 232.45(6), permitting natural life imprisonment for Class A felonies, including kidnapping and sexual abuse, *id.* §§ 902.1 (2003); 710.2 (2009), 709.2 (2003).

(12). Louisiana allows adult prosecution of juveniles age 14 and older, La. Child. Code art. 305 (2004); art. 857(A) (2004), thus permitting life-without-parole sentences for *15* year olds convicted of aggravated rape and aggravated

kidnapping, La. Rev. Stat. Ann. §§ 14:42(D)(1) (2007); 14:44 (2007); *see* ***16** La. Child. Code art. 857(B) (2004) (14-year-old transferee may only be imprisoned to age 31).

(13). Maryland provides discretionary transfer for a juvenile of any age for crimes punishable by death or life imprisonment, Md. Code Ann., Cts. & Jud. Proc. §§ 3-8A-06(a)(2) (2001); 3-8A-03(d)(1) (2001), and thus makes a juvenile subject to life-without-parole for first degree rape, Md. Code Ann., Crim. Law § 3-303(d)(2) (2009).

(14). Michigan allows waiver for felonies committed by juveniles 14 and over, Mich. Comp. Laws §§ 712A.4 (2002)); 769.1 (1) (2000); 764.27 (2000), and thus permits life-without-parole sentences for kidnapping, *id.* § 750.349(3) (2007), armed robbery, *id.* § 750.529 (2004), carjacking, *id.* § 750.529a(1) (2004), and recidivist controlled substances offenses, *id.* § 333.7413(1) (2001).

(15). Minnesota provides discretionary transfer for juveniles 14 or older, Minn. Stat. § 260B.125(1) (2007), allowing mandatory life-without-parole for certain sex offenses, *id.* §§ 609.055 (2009); 609.3455(2) (2009).

(16). Mississippi allows transfer for juveniles 13 or older, Miss. Code Ann. § 43-21-157 (2009), thus exposing them to potential mandatory life-without-parole sentences for recidivist violent offenses, including sex crimes and robbery, *id.* §§ 47-7-3(1)(a) (2009); 99-19-81 (1977); 99-18-83 (1977).

***17** (17). Missouri has discretionary transfer for juveniles 12 or older, Mo. Rev. Stat. 3 211.071(1) (2009), and so allows a mandatory life-without-parole sentence for persistent sexual offenders, *id.* § 558.018 (2009), and for some drug offenses, *id.* §§ 195.222 (2004); 195.223 (2004), and for persistent drug offenders, *id.* §§ 195.214 (2004); 195.218 (2004).

(18). Montana allows transfer from age 12 for certain felonies (from age 16 for others), Mont. Code Ann. § 41-5-206(1)(a), (b) (2007), thus allowing a life-without-parole sentence, *id.* §§ 41-5-2503(1)(a) (1999); 46-18-202(2) (2007), for crimes such as aggravated kidnapping, *id.* § 45-5-303 (1995), nonconsensual sexual intercourse, *id.* § 45-5-503 (2007), and aggravated assault while in official detention, *id.* § 46-18-220 (2001). [7]

(19). Nebraska allows discretionary prosecution for juveniles under age 16, Neb. Rev. Stat. 33 43-247 (2008); 43-276 (2008), thereby authorizing a life-without-parole sentence, *id.* §§ 29-2204 (2002); 28-105 (2002), for all class IA, and IB felonies, including first and second degree murder, kidnapping and sexual assault of a child, *id.* §§ 28-303 (2008); 28-304 (2008); 28-313(2) (1977); 28-319.01 (2009).

***18** (20). Nevada excludes from juvenile jurisdiction certain sexual assault and firearm crimes at age 16 for previously-adjudicated delinquents, certain felonies on school property resulting in death or great bodily harm for any age, and other recidivist crimes for any age, Nev. Rev. Stat. § 62B.330(b)-(e) (2004), [8] thus permitting life-without-parole sentences for, *inter alia*, certain sexual assaults, *id.* § 200.366(2)-(4), battery with the intent to commit sexual assault, *id.* § 200.400(4), and habitual criminal offenses, *id.* §§ 207.010(1)(b)(1); 207.012(1)(b)(1).

(21). New York provides generally that "a person less than sixteen years old is not criminally responsible for conduct," N.Y. Penal Law § 30.00(1) (2008), thus allowing a mandatory life-without-parole sentence for a sixteen-year-old convicted of terrorism crimes involving a class A-I felony such as first-degree kidnapping, *id.* §§ 490.25(d) (2008); 135.25 (2009). [9]

***19** (22). New Hampshire allows juvenile transfer from age 13, N.H. Rev. Stat. Ann. §§ 628:1(II) (2004); 169-B:24(II) (2004), and thus permits life-without-parole for multiple convictions of sexual assault, *id.* § 651.6(III)(e) (2009).

(23). North Carolina provides that a juvenile 13 or older may be sentenced to life-without-parole for violent habitual offenses, N.C. Gen. Stat. § 14-7.12 (2007), for a second conviction of first degree rape or sexual assault, *id.* § 15A-1340.16B(a) (2007), or for committing a Class B1 felony while wearing or possessing a bullet proof vest, *id.* § 15A-1340.16C (2007). *See* N.C. Gen. Stat. § 7B-2200 (2007).

(24). North Dakota requires adult prosecution of juveniles 14 and older for certain crimes, N.D. Cent. Code §§ 27-20-34 (2007); 12.1-04-01 (1981), permitting life-without-parole for gross sexual imposition, *id.* §§ 12.1-20-03 (2009); 12.1-32-01(1) (1997).

(25). Ohio makes juveniles 14 or older eligible for discretionary transfer, Ohio Rev. Code Ann. § 2152.10(B) (2002), allowing them to be sentenced to life-without parole for rape under certain circumstances, *id.* §§ 2152.12 (2000); 2907.02 (2007), 2971.03 (2007).

(26). Oklahoma allows juveniles ages 14 or older to be prosecuted and sentenced as adults, Okla. Stat. tit. 10A, §§ 2-5-204; 2-5-206 (2009), thus permitting mandatory life- ***20** without-parole on second offense of forcible sodomy and rape, *id.* tit. 21, § 51.1a (2009).

(27). Oregon does not allow life-without-parole for juveniles transferred to adult court, *see* Or. Rev. Stat. Ann. § 161.620 (2009), but would allow the sentence for 15- to 17-year-old juveniles direct-charged, *id.* § 137.707(1) (2009), for crimes such as aggravated murder and third-strike Class A felony sex crimes, *id.* §§ 163.150(3) (2009); 137.719(1) (2003).

(28). Pennsylvania allows, and in many cases requires, adult transfer of juveniles ages 14 and over, 42 Pa. Cons. Stat. §§ 6355(a) (2000); 6302 (2000), allowing life-without-parole sentences for third-offense violent crimes and for certain rapes, *id.* § 9714(2) (2007); 18 Pa. Cons. Stat. § 3121(e)(2) (2000); 61 Pa. Cons. Stat. § 331.21(a) (1999).

(29). Rhode Island allows a juvenile of any age to be tried as an adult for crimes punishable by life, R.I. Gen. Laws § 14-1-7 (1990), making a life-without-parole sentence available for a third-offense crime of violence involving a firearm, *id.* § 11-47-3.2(a) (2000).

(30). South Carolina allows juveniles 14 or older to be tried as adults for serious felonies, S.C. Code Ann. § 63-19-1210 (2008), exposing them to life-without-parole sentences for committing, or aiding in committing, first-degree burglary, criminal sexual battery on minors under 11, and second conviction of crimes including robbery, burglary, kidnapping and criminal sexual conduct, *id.* ***21** §§ 16-1-40 (2003); 16-11-311(B) (1995); 16-3-655(A)(1) (2008), 17-25-45 (2009).

(31). South Dakota allows adult transfer of felony-charged juveniles 10 and older (requiring it at age 16), S.D. Codified Laws §§ 26-11-4 (1997); 26-11-3.1 (2006); 22-3-1 (2005), thus permitting life-without-parole for all Class A, B and C felonies, including kidnapping and rape, id. §§ 22-22-1 (2005); 22-19-1 (2005); 22-6-1 (2005); 22-15-4 (2004).

(32). Tennessee allows adult transfer of any juvenile for serious crimes, Tenn. Code Ann. § 37-1-134 (a)(1) (2006), thus mandating life-without-parole sentences for repeat violent offenses including rape and aggravated burglary, *id.* § 40-35-120(g) (1995);

(33). Utah allows certification to adult court of juveniles 14 and older charged with felonies, Utah Code Ann. § 78A-6-703 (2008); 78A-6-602(3) (2008); 76-2-301 (1973), permitting a life-without-parole sentence for crimes including aggravated kidnapping and sexual assault, *id.* §§ 76-3-406 (2009); 76-5-302(3) (2007); 76-5-405(2) (2009).

(34). Virginia allows adult transfer for juveniles 14 or older charged with felonies, Va. Code Ann. § 16.1-269.1 (1997), making them eligible for life-without-parole for third offense of crimes such as rape and armed robbery, *id.* § 53.1-151(B1) (1993).

(35). Washington allows adult transfer of juveniles 8 or older, ***22** Wash. Rev. Code §§ 13.40.110 (2009); 9A.04.050 (1975), exposing them to life-without-parole sentences for multiple convictions of class A felonies, *id.* §§ 9.94A.570 (2000); 9.94A.505 (2009).

(36). West Virginia mandates for certain serious offences adult transfer of juveniles 14 and older, and allows transfer of juveniles of any age, W. Va. Code § 49-5-10(b)-(e) (2001), allowing a life-without-parole sentence for kidnapping, *id.* § 61-2-14a(a) (1999).

(37). Wisconsin generally allows transfer of juveniles age 14 and older, while mandating transfer of any juveniles for certain crimes, Wis. Stat. §§ 938.18 (2009); 938.183 (2009), and thus permits a life-without-parole sentence for "persistent repeat" felony offenses, *id.* §§ 939.62(2m)(c) (2005); 973.014 (1998).

(38). Wyoming allows transfer of juveniles 13 and older, Wyo. Stat. Ann. § 14-6-237 (2004), permitting life-without-parole sentences for recidivist sex offenders, *id.* § 6-2-306(d) (2007).

(3). Only four States specifically disallow life-without-parole, while still allowing lengthy mandatory terms.

Only four States - Colorado, Kansas, Kentucky, Texas - specifically disallow juvenile life- ***23** without-parole sentences for any crime.[20] Even so, these States would allow juveniles to be sentenced to mandatory prison terms of up to 50 years before parole eligibility. *See, e.g.,* Tex. Penal Code § 12.31 (2009); Tex. Gov't Code § 508.145(b) (2009) (imposing mandatory life on juveniles convicted of capital felony, with parole available only after serving "40 calendar years"); Colo. Rev. Stat. Ann. § 18-1.3-401(4)(b)(I) (2009) (same for class 1 felonies); Kan. Stat. Ann. 21-4635(b) (2004) (allowing mandatory sentence of 50 years for first degree murder upon finding of aggravating factors).

****24 (4). Both the District of Columbia and the federal government allow juvenile life-without-parole for non-homicide crimes.***

The judgment of the vast majority of States to allow life-without-parole sentences for violent juvenile crime is reinforced by the District of Columbia and the federal government, both of which allow such sentences for homicide and violent non-homicide crimes. The District of Columbia allows filing of a delinquency petition without reference to a juvenile's age. *See* D.C. Code Ann. § 16-2305 (2005). While a juvenile convicted in the District of first degree murder may not receive life-without-parole, *id.* § 22-2104 (2001), juveniles are nonetheless eligible for life-without-parole sentences for the murder of a law-enforcement officer, *id.* § 22-2106 (2002), for terroristic first-degree murder, *id.* § 22-3153(a) (2002), for aggravated first-degree sexual abuse, *id.* § 22-3020(a) (2001), and for recidivist crimes of violence, *id.* § 22-1804a(a)(2) (2001).

The United States allows adult prosecution of juveniles age 15 or older for crimes of violence and certain controlled substance and firearm offenses. 18 U.S.C. § 5032 (1996). Adult prosecution is authorized for 13-year-olds for specified crimes within federal maritime or territorial jurisdiction, including murder, manslaughter, certain aggravated sexual abuse offenses, armed robbery, and assault. *See id.* (citing 18 U.S.C. §§ 113(a)-(c); 1111; 1113; 2111; 2113; 2241(a), (c)). These transfer provisions expose juveniles as young as 13 years old to mandatory life-without-parole sentences for ***25** multiple violent felony convictions. *See* 18 U.S.C. § 3559(c)(1), (c)(2)(F) (2006).[2] [22]

B. Evolving Transfer Provisions Show that States Have Consciously Toughened Juvenile Sentencing.

Illuminating the raw data from state legislation are the statutory mechanics making juveniles eligible for life-without-parole. Juvenile offenders may be tried as adults generally through three "transfer" or "waiver" mechanisms: judicial waiver, legislative offense exclusion, and prosecutorial direct-file. *See generality* Feld, *supra,* at 38-39 (discussing mechanisms); Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?,* Juvenile Justice Bulletin, Aug. 2008, at 1-2 ("Redding") (same); *see also* Parts II.A. 1 & II.A.2, *supra* (detailing state transfer laws). ***26** Through such provisions, States make a conscious election respecting juvenile punishment: "[w]aiver of juvenile court jurisdiction presents the *stark choice* between treating a youth in the juvenile system and punishing him in the criminal justice system." Feld, *supra,* at 38 (emphasis added). [23] The evolution of state transfer mechanisms over the past several decades evidences an unmistakable "nationwide policy shift toward transferring juvenile offenders to the criminal court." Redding, *supra,* at 2. [24]

"The evolution in youth violence and homicide rates in the late 1980s and early 1990s caused almost every state to revise its laws to transfer more juveniles in criminal court." Feld, *supra,* at 40. Scholars in this area report that, from 1979 to 2003, the number of States requiring *automatic* transfer from juvenile to adult court rose from 14 to 31. *See* Redding, *supra,* at 1 (citing B. Steiner & C. Hemmens, *Juvenile waiver 2003: Where are we now?,* 54(2) Juvenile and Family Court Journal 1-24 (Spring 2003)). Another scholar observes that "[i]n a three-year period, between 1992 and 1995, ***27** forty jurisdictions enacted or expanded provisions for juvenile waiver to adult court." Logan, supra, at 688 (citing Melissa Sickmund *et al.,* U.S. Dep't of Justice, Juvenile Offenders and Victims: 1997 Update on Violence 29). [25] Symptomatic of deeper sociological and philosophical debates over juvenile punishment, *see infra* Part III, such trends show States deliberately "adopt [ing] punitive laws to transfer more and younger offenders to criminal courts and to punish them more severely." Feld, *supra,* at 34; *see also* Redding, *supra,* at 1 (observing that expansion of transfer laws was part of "legal reforms designed to get tough on juvenile crime").

These trends explain why juvenile offenders in a super-majority of States are, today, more readily subject to life-without-parole sentences. Whereas "prior to the 1970s, virtually no states imposed [life-without-parole] sentences," movement toward greater severity has altered the landscape - so dramatically, in fact, that in one scholar's reckoning:

> judges now sentence youths to [life-without-parole] three times as frequently as they did in 1990. The average age at which juveniles committed the crimes for which courts impose [life-without-parole] sentences is ***28** sixteen years, but children as young as thirteen years of age receive such sentences.

Feld, supra, at 69-70. This juvenile sentencing trend coincides with an overall increase in life-without-parole sentences for all offenders. *See, e.g.*, Ashley Nellis & Ryan S. King, No Exit: The Expanding Use of Life Sentences In America 4-6, 8-9 (The Sentencing Project) (July 2009) (reporting that over last quarter-century, the number of individuals serving life sentences has quadrupled, and that between 1992 and 2008 the number serving life-without-parole sentences has tripled). [26]

Death-penalty opponents have encouraged these juvenile sentencing trends by "provid[ing] bipartisan support for [life-without-parole] sentences as an alternative to capital punishment." Feld, *supra,* at 69 (citing Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment,* 119 Harv. L. Rev. 1838 (2006)). Life-without-parole "is seen as a sentencing compromise by both ends of the political spectrum," because it promises strong deterrence without the death penalty's political and moral baggage. Logan, *supra,* at 690 n.37. This Court has itself taken a similar view, observing in *Roper* that "the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." 543 U.S., at 572.

Finally, confirmation of these sentencing trends comes also from opponents of juvenile life-without- ***29** parole. Even those who decry sentencing any juvenile to life-without-parole admit that sentencing trends have headed toward greater

severity. For instance, Amnesty International / Human Rights Watch candidly recognizes "[t]he dramatic increase in the imposition of life without parole sentences" on juvenile criminals:

> [S]tates have by no means abandoned the use of life without parole for child offenders: the estimated rate at which the sentence is imposed on children nationwide remains at least three times higher today than it was fifteen years ago.

Amnesty International / Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 2-3 (2005). [27] Scholars opposed to the practice similarly admit to contrary developments, such as the reality that "[c]ourts regularly uphold [life-without-parole] sentences and extremely long terms of imprisonment imposed on twelve-, thirteen-, fourteen-, or fifteen-year-old youths." Feld, *supra,* at 67 (and collecting eases).

III. State Legislatures Are Best Situated to Set Juvenile Sentencing Policies.

Calibrating juvenile sentences implicates profound political, sociological, philosophical and moral issues. Consequently, actors accountable to the people should be the ones to shoulder, and answer for, this difficult task. This is always where ***30** our nation has deliberated the delicate issues presented by juvenile crime and punishment. [28] Thus, in 1996 the U.S. Department of Justice could report that

States are well along in developing innovative approaches to the vexing problem of juvenile violence while still maintaining, for the majority of juvenile law violators, a system of juvenile justice that preserves the hopeful aspects of a system premised on the malleability of youth.

O.J.J.D.P. REPORT, *supra,* at iii. Given their accumulated wisdom and political accountability, weighing the application of juvenile life-without-parole sentences should remain firmly within the States' discretion.

A. Officials Who Calibrate Juvenile Sentencing Must Remain Directly Accountable to Their Citizens.

It is a simple fact that our nationwide trend toward stringent juvenile sentences has grown out of considered legislative responses to increased ***31** violent juvenile offenses. [29] The unfortunate but undeniable reality is that the United States has higher rates of juvenile crime than most Western nations. [30] But the incidence and nature of juvenile crime has varied over time, and will continue to ***32** fluctuate. [3] Only politically-accountable state (and federal) representatives have the necessary flexibility and incentives to adjust juvenile sentences to changing circumstances. Consequently, it is to those same representatives that pleas to mitigate or enlarge - or abolish - juvenile life-without-parole sentences are properly made. *See, e.g.*, Feld, *supra,* at 76-81 (discussing state legislative consideration).

Political accountability is critical here, because adjusting juvenile sentences is not a mere bookkeeping exercise. It is instead a delicate endeavor bound up with competing philosophies of crime and punishment. Movement toward stricter sentences over recent decades thus "represents both a reaction to the increasingly serious nature of juvenile crime and a fundamental shift in juvenile justice philosophy." O.J.J.D.P. Report, *supra,* at xi.

Well-known are the longstanding debates over "root cause" versus responsibility-based theories of crime, and over rehabilitative versus retributive approaches to punishment. [32] As juvenile sentencing ***33** scholar Barry Feld has explained, "[t]he ideology, structure, and practices of juvenile justice evolved over time in a politically contested context." Feld, *supra,* at 16-17. Consequently, the U.S. Department of Justice accurately described the last several decades' trend towards stricter juvenile punishment as "a fundamental philosophical departure, particularly in the handling of serious

and violent juvenile offenders" that has "resulted in dramatic shifts in the areas of jurisdiction, sentencing, correctional programming, confidentiality, and victims of crime." O.J.J.D.P. REPORT, *supra,* at xi. It is precisely because "the Eighth Amendment does not mandate adoption of any one penological theory," *Harmelin,* 501 U.S., at 999 (Kennedy, J., concurring), that the Constitution leaves to the accumulated wisdom of State actors the resolution of these profound questions.

B. States Have Crafted Juvenile Sentencing Policies that Wisely Balance Justice with Mercy.

The States have been at the forefront of confronting the delicate issues presented in these cases. For instance, in 2006 the Colorado Legislature adopted a somewhat more rehabilitative sentencing model by lowering the maximum sentence for a juvenile convicted of a class 1 felony from mandatory life-without-parole to mandatory life with parole possible after 40 years. *See* 2006 ***34** Colo. Legis. Serv. Ch. 228 (H.B. 06-1315) (July 1, 2006) (amending, *inter alia,* Colo. Rev. Stat. Ann. § 18-1.3-401(4)(b) (2009)). In doing so, Colorado embraced some of the same philosophical premises about juvenile psycho-social development that Petitioners themselves advocate. *See id.* Ch. 228 §1 (reciting legislative declarations); and see Brief for Petitioner at 11-41, *Sullivan v. Florida,* No. 08-7621 (U.S. Jul. 16, 2009). [33] Texas, too, has recently amended its penal law to remove mandatory juvenile life-without-parole for a capital felony. *See* 2009 Tex. Sess. Law Serv. CA. 765 (S.B. 839) (Sept. 1, 2009) (amending Tex. Penal Code § 12.31 (2009)). Instead, Texas now imposes a mandatory life sentence with parole eligibility after 40 years. *See* Tex. Gov't Code § 508.145(b) (2009). [34]

***35** Of course, legislative developments such as those in Colorado and Texas lie at the margins of the nationwide picture. [35] Other States - such as Alaska, Delaware, and Nevada - have recently gone in the opposite direction by toughening their juvenile transfer laws. [36] But the overall picture, as described *supra* in Part II.A, is most telling: 90% of the States continue to allow life-without-parole sentences for a wide variety of violent crimes, as do the District of Columbia and the federal government.

And there is a deeper lesson to draw from State legislative developments: the States are well equipped to face the challenges of juvenile sentencing. States have carefully adjusted, and will ***36** continue to adjust, their sentencing policies to the continually changing incidence of juvenile crime. States have carefully weighed, and will continue to weigh, the nature of juvenile culpability, punishment, rehabilitation, and deterrence in all their dimensions - philosophical, moral, sociological, and scientific.

The most concrete confirmation of this is found in the kaleidoscope of state transfer provisions through which juveniles may become subject to adult sentences. *See generally* Parts II.A.1 & II.A.2, *supra* (detailing state transfer provisions). These mechanisms dramatize the States' profound investment in the problems of juvenile crime. Unsurprisingly, the States' approaches vary considerably. They allow, and sometimes mandate, juvenile transfer for adult prosecution at a wide range of ages for an array of offenses, reflecting "[t]he inherent nature of our federal system." *Harmelin,* 501 U.S., at 999 (Kennedy, J., concurring) (quoting *Solem,* 463 U.S., at 291 n.17).

But most importantly, the transfer provisions are concrete evidence of State expertise in juvenile sentencing. They show that the States have crafted mechanisms for addressing - with both realism and hope, rigor and compassion - the terrible dilemmas associated with sentencing juveniles for terrible crimes.

Ohio's transfer provision provides an excellent example of this sort of evenhanded sensitivity. *See generally* Ohio Rev. Code Ann. § 2152.12 (2000). In considering certain transfers, a juvenile court must deem the following factors to favor transfer:

***37** • The nature of the harm done to the victim, *id.* § 2152.12(D)(1-2);

• Whether "the child's relationship with the victim facilitated the act charged," *id.* § 2152.12(D)(3);

• Whether "[t]he child allegedly committed the act charged for hire or as a part of a gang or other organized criminal activity," *id.* § 2152.12(D)(4);

• Whether the crime involved certain uses of a firearm, *id.* § 2152.12(D)(5);

• The child's juvenile record and whether "[t]he results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system," *id.* § 2152.12(D)(6-7);

• Whether the "child is emotionally, physically, or psychologically mature enough for the transfer," *id.* § 2152.12(D)(8); and

• Whether "[t]here is … sufficient time to rehabilitate the child within the juvenile system," *id.* § 2152.12(D)(9).

But the court must consider the following factors as *against* a transfer:
• Whether "[t]he victim induced or facilitated the act charged," *id.* § 2152.12(E)(1);

• The nature of the child's responsibility and whether "the child was under the negative influence or coercion of another person," *id.* § 2152.12(E)(2-3);

***38** • The absence of physical harm to person or property, *id.* § 2152.12(E)(4);

• Whether "[t]he child is not emotionally, physically, or psychologically mature enough for the transfer," and whether "[t]he child has a mental illness or is a mentally retarded person, *id.* § 2152.12(E)(6-7); and

• Whether "[t]here is sufficient time to rehabilitate the child within the juvenile system and the level of security available in the juvenile system provides a reasonable assurance of public safety." *Id.* § 2152.12(E)(8).

While Ohio's transfer statute is unusually articulate, the state transfer mechanisms are filled with such requirements. Far from showing the States' thoughtless cruelty towards juvenile offenders, they are instead compelling evidence of their sensitivity, flexibility, and realism in dealing with juvenile violence.

Conclusion

When to be merciful to a juvenile who has committed a terrible crime? When to punish? what weight to give deterrence? What weight rehabilitation? And, most difficult of all: when to rule out the possibility of release? No one wants the responsibility for answering these agonizing questions, but they must be answered. The Constitution leaves that arduous but necessary task to the collective wisdom of the States and their citizens.

***39** The Court should affirm the decisions of the Florida First District Court of Appeal.

Footnotes

FN

* Counsel of Record

1 Patricia Torbet *et al.*, State Responses to Serious and Violent Juvenile Crime iii (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention) (July 1996) ("O.J.J.D.P. REPORT).

2 *See* Brief of Respondent at 4 5, *Sullivan v. Florida,* No. 08 7621 (U.S. Jul. 16, 2009); Brief of Respondent at 6 9, *Graham v. Florida,* No. 08 7412 (U.S. Jul. 16, 2009).

3 *See also Solem v. Helm,* 463 U.S. 277, 290 (1983) (explaining that the Eighth Amendment affords "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes).

4 *See Harmelin,* 501 U.S., at 996 (op. of Court) (rejecting argument that, simply because life without parole is "the second most severe known to the law, it should be constitutionally equated with death); *Roper,* 543 U.S., at 568 (explaining that " b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it *with special force*) (emphasis added).

5 *See also Solem,* 463 U.S., at 295 (explaining "the death penalty is different from other punishments in kind rather than degree); *Rummel,* 445 U.S., at 272 (observing that " t]his theme, the unique nature of the death penalty for purposes of Eighth Amendment analysis, has been repeated time and time again in our opinions) (collecting cases).

6 *See, e.g., Harmelin,* 501 U.S., at 1000 01 (Kennedy, J., concurring) (reasoning that the Court's "decisions recognize that it] lack s] clear objective standards to distinguish between sentences for different terms of years); *see also Rummel,* 445 U.S., at 1139 40 (observing that the relatively "bright lines between different *types* of punishments are "considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years); see *also Harris v. Wright,* 93 F.3d 581, 584 (9th Cir. 1996) (explaining that "capital punishment aside, there's no constitutional (or rational) basis for classifying punishment in distinct, ordinal categories).

7 *See, e.g., Harmelin,* 501 U.S., at 1005 (Kennedy J., concurring) (noting that inter and intra state comparisons are "appropriate only in the rare ease in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality); *see also id.*, at 999 1000 (explaining that " s]tate sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise); *Ewing,* 538 U.S., at 23 (op. of O'Connor, J.) (agreeing that proportionality "d oes] not mandate comparative analysis) (quotations omitted).

8 *See, e.g., Rummel,* 445 U.S., at 281 (explaining that " e]ven were we to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly would render Rummel's punishment 'grossly disproportionate to his offenses or to the punishment he would have received in the other States).

9 *See also Harmelin,* 501 U.S., at 1002 (Kennedy, J., concurring) (quoting *Solem,* 463 U.S., at 296) (reasoning that issuing a bad check "one of the most passive felonies a person could commit is relatively non serious, given it "involve s] neither violence nor threat of violence).

10 *See, e.g., Solem,* 463 U.S., at 297 (observing that prior three strike felonies "were nonviolent and none was a crime against a person).

11 *See, e.g., Harmelin,* 501 U.S., at 1002 03 (Kennedy, J., concurring) (deeming cocaine possession violent for Eighth Amendment purposes given a "direct nexus between illegal drugs and crimes of violence).

12 *See* Brief for Petitioner at 25 27, *Graham v. Florida,* No. 08 7412 (U.S. Jul. 16, 2009); Brief for Petitioner at 8, *Sullivan v. Florida,* No. 08 7621 (U.S. Jul. 16, 2009).

13 *See Brief of Respondent* at 4 5, *Sullivan v. Florida,* No. 08 7621 (U.S. Jul. 16, 2009); Brief of Respondent at 6 9, *Graham v. Florida,* No. 08 7412 (U.S. Jul. 16, 2009).

14 A minor convicted of murder or attempted murder in the second degree receives a mandatory sentence of life imprisonment with the possibility of parole. But a second degree murder sentence may be enhanced to life without parole if "the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, or if the minor was previously convicted of first or second degree murder in Hawaii or an equivalent crime in another State. *Id.* §§ 706 656(2); 706 657 (Supp. 2008).

15 The previous version of N.M Stat. § 31 18 14 provided "if the defendant has not reached the age of majority at the time of the commission of the capital felony for which he was convicted, he may be sentenced to life imprisonment but shall not be punished by death. The recently amended 31 18 14 no longer distinguishes between minors and adults, but specifically retains a possible life without parole sentence for both. *See also id.* § 31 18 15.3(D) (1993) (providing "court *may* sentence the serious youthful] offender to Less than, but not exceeding, the mandatory term for an adult, if guilty of first degree murder) (emphasis added).

16 Juvenile transferees in these States are also eligible (unless otherwise noted) for life without parole for homicide crimes to the same extent as adults. For instance, in addition to the non homicide crimes discussed *infra*, Delaware requires adult prosecution of juveniles for murder, Del Code Ann. tit. 10, §§ 1010(a)(1); 921(2)(a) (2008), thus requiring a sentence of life without parole for first degree murder, *id.* tit. 11, §§ 636; 4209(a) (2008), and permitting that sentence for second degree murder, *id.* tit. 11 §§ 635; 4205(b) & (j) (2008).

17 Montana permits, but does not mandate, juvenile life without parole for homicide. *See id.* §§ 46 18 219(1)(a)(i) (2001); 46 18 222(1) (2007).

18 Additionally, a juvenile court has discretion to certify as an adult a juvenile age 14 or older charged with an offense punishable as a felony, and is required to certify a juvenile age 14 or older charged with certain violent sexual assault or firearm crimes. *Id.* §§ 62B.390(1), (2) (2004).

19 *See also id.* § 70.00(5) (2009) (allowing life without parole sentence for sixteen year old convicted of second degree murder); *cf id.* § 30.00(2) (2009) (allowing 13 , 14 , or 15 year old to be found criminally responsible for second degree murder); § 70.05(2) (a) (2009) (mandating maximum term of life imprisonment for juvenile offender convicted of second degree murder).

20 (1). Colorado, Colo. Rev. Stat. Ann. § 18 1. 3401(4)(b) (2009) (changing law in 2006 to mandatory life sentence with possibility of parole after 40 years).
(2). Kansas, Kan. Stat. Ann. § 21 4622 (2004) (removing sentence in 2004).
(3). Kentucky, Ky. Rev. Stat. Ann. § 640.040(1) (1998); *Shepherd v. Commonwealth,* 251 S.W.3d 309, 320 21 (Ky. 2008) (interpreting § 640.040(1) to allow only life without parole for 25 years for Class A felony).
(4). Texas, Tex. Penal Code § 12.31 (2009) (amended effective September 1, 2009, to remove possibility of life without parole for capital felony); *see also* 2009 Tex. Sess. Law Serv. Ch. 765 (S.B. 839) (Sept. 1, 2009).
Alaska makes parole available for any crime, whether committed by adults or juveniles. See ALASKA Stat. § 12 55 015(g) (2009) (providing for mandatory parole eligibility).

21 Additionally, 17 year olds may enlist in the United States Military, *see* 10 U.S.C. § 505(a) (2008), and are thus eligible for life without parole, *id.* § 856a (2000), for crimes including murder, child rape, and other crimes for which a court martial may impose a life sentence, *id.* §§ 918 (2000); 920 (2007); *see also United States v. Christian,* 63 M.J. 205 (2006) (generally discussing life without parole sentences under military law).

22 A bill pending before a House subcommittee, the "Juvenile Justice Accountability and Improvement Act of 2009, would require the United States to provide juvenile offenders periodic opportunities for parole or supervised release "not less than once during the first 15 years of incarceration, and not less than once every 3 years thereafter. H.R. 2289, 111th Cong. § 5 (considered as such by House subcommittee, June 9, 2009). The bill would also withhold certain federal funds from any States that did not establish such a parole system. *Id.* § 3.

23 *See also, e.g., State v. Rauch,* 13 P.3d 324, 333 (Haw. 2000) (reasoning that juvenile transfer provisions "clearly evince] a legislative policy regarding the relative severity of juvenile crime).

24 *See also* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles,* 33 Wake Forest L. Rev. 681, 688 (1998) ("Logan) (explaining that " w]ith these changes *i.e.* to state transfer laws] has come a dramatic expansion in the scope and number of juvenile offenders eligible, or indeed required, to be prosecuted in adult court).

25 *See also* Patricia Torbet *et al.*, State Responses to Serious and Violent Juvenile Crime 3 9 (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention) (July 1996) ("O.J.J.D.P. Report) (documenting "trend from 1992 95 that " m]ore serious and violent juvenile offenders are being removed from the juvenile justice system in favor of criminal court prosecution).

26 Report available at http:// www.sentencingproject.org/doc/publications/inc noexit.pdf.

27 Report available at http:// www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.

28 *See, e.g.*, Feld, *supra,* at 12 17 & nn. 3, 17, 21 (discussing history of juvenile court system) (citing, *inter alia*, David S. Tannenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction, in* A Century of Juvenile Justice 42, 46 (Margaret K. Rosenheim *et al.* eds. 2002); John Sutton, Stubborn Children: Controlling Delinquency in the United States 122 (1988); Ellen Ryerson, The Best Laid Plans: America's Juvenile Court Experiment 22 (1978)).

29 *See, e.g.*, Human Rights Watch, *supra,* at 15 (reporting that " s]tarting in the mid 1980s, the United States experienced a steep and troubling increase in violent crime, including violent crime by adolescents); Feld, *supra,* at 29 (observing that a "sharp spike in juvenile arrests for violence and homicide occurred between 1986 and 1994 and that " t]he overall arrest rates of all youths for violent index crimes increased nearly two thirds (66%)) (and collecting sources); Logan, *supra,* at 681 n.1 (reporting that " b]etween 1983 and 1992, juveniles accounted for 25% of the increase in murders, forcible rapes, and robberies and " b]etween 1988 and 1992, the number of juveniles arrested for murder increased by 51% (as opposed to 9% for adults)) (and collecting sources)); O.J.J.D.P. Report, *supra,* at xi (reporting in 1996 that " n]early every State has taken legislative or executive action in response to escalating juvenile arrests for violent crime and public perception of a violent juvenile crime epidemic).

30 *See, e.g.,* Charles D. Stimson & Andrew M. Grossman, Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens 21 22 (Heritage Foundation, Center for Legal and Judicial Studies Aug. 2009) ("Adult Time for Adult Crimes) (reporting that the United States "ranks highly in every category of juvenile crime statistics) (citing statistical evidence from Division for Policy Analysis and Public Affairs, United Nations Office on Drugs And Crime, Seventh United

Nations Survey of Crime Trends and Operations of Criminal Justice Systems (1998 2000) 99 100, 154 155 (2004), *available at* http://wwwundoc.org/pdf/crime/seventh survey/7pv.pdf); World Health Organization, World Report on Violence and Health 28 29 (2002), *available at* http:// whqlibdoc.who.int/hq/2002/9241545615.pdf)).

31 *See, e.g.*, Feld, *supra,* at 12 & n.1 (noting "oscillating nature of youth crime policies) (and citing Thomas J. Bernard, The Cycle of Juvenile Violence (1992)); Adult Time for Adult Crimes, *supra,* at 19 21 (noting that, according to U.S. Department of Justice, "between 1994 and 2004, the arrest rate for juveniles for violent crimes fell 49 percent, only to see a 2 percent uptick in 2005 and then a 4 percent gain in 2006) (citing Howard Snyder, *Juvenile Arrests 2006*, Juvenile Justice Bulletin, Nov. 2008, at 1)).

32 *See, e.g.*, Feld, *supra,* at 25 42 (chronicling the philosophical and sociological debates over juvenile punishment) (and collecting sources); Logan, *supra,* at 685 86 (discussing these debates and observing that " i]n recent years … juvenile justice has experienced a sea change in philosophy and practice); Adult Time for Adult Crimes, *supra,* at 19 20 (observing that " t]he root causes of this epidemic have been debated, studied, tested, and analyzed for decades).

33 Similarly, in 2007 a state commission recommended that the North Carolina Legislature adopt certain changes to its juvenile sentencing policy based on a "more rehabilitative model. *See* Report on Study of Youthful Offenders at IV(l), cmt. (a) (North Carolina Sentencing and Policy Advisory Comm'n) (March 2007), *available at* www.nccourts.org/Courts/CRS/Councils/spac/Documents/yo finalreporttolegislature.pdf; *see also* Feld, *supra,* at 80 81 (discussing North Carolina commission proposal). A bill entitled the "Youth Accountability Act (H.B. 1414) is currently pending in a House committee and, if adopted, would raise the age of an adult from 16 to 18 over a period of years, but would still require mandatory transfer of anyone over 13 for a Class A felony. The current text of the bill and a summary of action on the bill can be found at: http:// www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl? Session 2009&BillID H1414.

34 Bills pending in the Michigan Legislature would remove the possibility of juvenile life without parole. *See* H.B. 4518, 4594 95; S.B. 173 176, 1999 Leg., 95th Sess. (Mich. 2009), *analysis available at* http:// www.legislature.mi.gov.

35 *See, e.g.*, Feld, *supra,* at 77 78 (observing that only " a] few state legislatures have taken some initial steps towards mitigating juvenile sentencing, and discussing only Colorado as eliminating mandatory life without parole); Redding, *supra*, at 1 (observing that, while most States have toughened juvenile transfer laws over the past three decades, "*very* recently, some States have reduced the scope of transfer laws) (citing Bishop, *Injustice and irrationality in contemporary youth policy,* 3 Criminology & Public Policy 633 44 (2004)).

36 *See, e.g.,* Feld, *supra,* at 77 & n.362 (discussing enactment of more stringent juvenile transfer provision in Alaska (2005)) (referring to 2005 amendment to Alaska Stat. § 41.12.030(a)); 74 Del. Laws c. 106, §§ 28, 33 (2003) (adding robbery first degree and assault first degree to those crimes requiring adult prosecution of any juvenile); Nev. Senate Bill No. 235, § 2 (enacting new chapter 62B of the Nevada Revised Statutes related to juvenile transfer hearings) (eff. Oct. 1, 2009) (text and commentary available at http:// www.leg.state.nv.us/75th2009/Bills/SB/SB235 EN.pdf).

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2010 WL 2866116 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Arnold SCHWARZENEGGER, in his official capacity as Governor of the State of California, et al., Petitioners,
v.
ENTERTAINMENT MERCHANTS ASSOCIATION, et al., Respondents.

No. 08-1448.
July 19, 2010.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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*i QUESTIONS PRESENTED

California Civil Code sections 1746-1746.5 prohibit the sale of violent video games to minors under 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. The respondent industry groups challenged this prohibition on its face as violating the Free Speech Clause of the First Amendment. The court of appeals affirmed the district court's judgment permanently enjoining enforcement of the prohibition. The questions presented are:

1. Does the First Amendment bar a state from restricting the sale of violent video games to minors?

2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 666 (1994), is the State required to demonstrate

a direct causal link between violent video games and physical and psychological harm to minors before the State can prohibit the sale of the games to minors?

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***iii** TABLE OF AUTHORITIES

Federal Cases

1 Interest of State *Amici

The *amici* states are vitally interested in protecting the welfare of children and in helping parents raise them. The Ninth Circuit's decision in this case unreasonably restricts their authority to do that. Contrary to the Ninth Circuit's decision, states may - consistent with the First Amendment and this Court's longstanding precedents - prevent minors from buying or renting without parental approval a defined class of video games which invite players to commit digital homicide, torture, and rape. The *amici* states therefore have an interest this matter.

Introduction and Summary of Argument

In 1975, a cutting-edge video game console allowed players to bounce an electronic ball back and forth on a television screen by rotating small knobs. This was *Pong.* Things had changed by 2003. That year, a popular game called *Postal*[2] invited players to:

• Burn people alive with gasoline or napalm;

• Decapitate people with shovels and have dogs fetch their severed heads;

• Beat police to death while they beg for mercy;

***2** • Kill bald, unshaven men wearing pink dresses (in an "expansion pack" called *Fag Hunter*);

• Slaughter nude female zombies;

• Urinate on people to make them vomit; and,

• Shoot players with a shotgun that has been silenced by ramming it into a cat's anus. [2]

Postal^2 is made by a company called *Running With Scissors*, which promotes the game with the tag line: "[R]emember … it's only as violent as you are!" [3]

The makers of *Postal*^{2} likely never intended its hyperbolic violence to be taken seriously. Ten-year-olds, however, may fail to grasp the satiric content in an exploding cat. With that in mind, California ***3** enacted a modest restriction in 2005 designed to prevent minors from buying games like *Postal*^{2}. The law reaches only games that afford players a "range of options … [which] includes killing, maiming, dismembering, or sexually assaulting an image of a human being," and, in addition, that meet an "obscene-as-to-minors" test. *See* Pet. 2; Cal. Civ. Code §§ 1746-1746.5. [4] California does not prevent adults from buying such games, however, nor does it bar a parent or guardian from buying them for minors. Pet. App. 96a.

A panel of the United States Ninth Circuit Court of Appeals held California's law infringes minors' freedom of speech. Pet. 3-4. The court applied strict scrutiny. *See* Pet. App. 27a-34a. It rejected the more lenient standard from *Ginsberg v. New York,* 390 U.S. 629 (1968), which affords government greater leeway to restrict distribution of indecent materials to minors. *See* Pet. App. 15a-23a.

Contrary to the Ninth Circuit's decision, the First Amendment does not bar California's law. Unlike other measures the Court has struck down, California leaves adult speech untouched. It also precisely delineates the materials subject to restriction. California has not simply barred minors from buying "violent" games. Instead, it restricts a disturbing subgenre of games that encourages players to commit graphic acts of ***4** homicide, rape, and sadism. This Court's precedents allow states to restrict commercial dissemination to minors of erotic materials. *See, e.g., Ginsberg,* 390 U.S. 629; *F.C.C. v. Pacifica Found.,* 438 U.S. 726 (1978). Just as states may keep minors from buying *Penthouse* magazine, states may also keep them from buying *Postal*^{2}. At bottom, then, the Ninth Circuit artificially limited *Ginsberg* and its progeny, and thus curtailed states' authority to place certain hyper-violent games out of juveniles' direct grasp. [5] *See infra* Part I.

California's law falls squarely within the limits on juvenile freedoms which this Court has upheld. In fundamental realms - such as voting, marriage, contracts, privacy, travel, juries, sentencing, and speech - states may (and sometimes must) treat minors in ways that would be inconceivable for adults. California's law is situated within this sensible and laudable tradition. If a state may restrict a minor's right to vote or to marry, then it may also restrict her ability to purchase graphically ***5** violent video games. If a state may not impose the death penalty on minors - because they are "more vulnerable … to negative influences and outside pressures," *Roper v. Simmons,* 543 U.S. 551, 569 (2005) - then a state may also keep them from buying games which invite them to commit digital atrocities. *See infra* Part II.

At bottom, California's law permissibly seeks to reinforce the authority of parents. Limits on juvenile freedoms find their strongest justification when they simply help parents guide their own children as they see fit. California's law does this. It wants parents, and not the marketplace, to raise children. States may assist parents in many ways - for instance, by enacting curfews, by requiring parental consent to medical procedures, or by barring children from suing parents.

In the same way, states may keep children from buying video games that encourage them to play at being sadists. *See infra* Part III.

States that do so betray no hostility to juvenile rights. Rather, they recognize that "[c]hildren have a very special place in life which law should reflect." *May v. Anderson,* 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). The First Amendment does not bar states from enacting a commonsense regulation such as California's, which bans no speech, which affects no adults, which carefully delineates its reach, and which reinforces parents' authority to police the products of popular culture their children consume.

***6 Argument**

I. Minors do not have a First Amendment right to buy graphically violent material against their parents' wishes.

A state commits a cardinal sin against the First Amendment by "reduc[ing] the adult population … to … only what is fit for children." *Butler v. Michigan,* 352 U.S. 380, 383 (1957). California's law, however, does nothing of the sort. It simply restricts minors' unmediated commercial access to certain graphically violent video games. But it prevents no adult from buying or renting such games. It does not even stop minors from playing them. Rather, the law helps ensure that parents - and not the marketplace - ultimately decide whether their children play a game, such as *Postal*[2], in which players are encouraged to urinate on their victims before burning them alive.

The First Amendment permits California's commonsense measure. "It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 212 (1975) (citing *Ginsberg,* 390 U.S. 629). Moreover, California's restriction is confined to "relatively narrow and well-defined circumstances," as the First Amendment requires, *see Erznoznik,* 422 U.S., at 213 (citing *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676 (1968); *Rabeck v. New York,* 391 U.S. 462 (1968)), because it leaves adult speech untouched and because it targets a delineated class of materials.

***7 A. California's law leaves adult speech untouched.**

First, California's law reaches only minors. It curtails their direct commercial access to a defined class of materials, while not in any way restricting or burdening the production of such materials or their sale to adults. *Cf, e.g., United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 815 (2000) (observing that "targeted blocking [of indecent communications] enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners"). The law thus avoids burdening *adult* speech, a defect which has often led the Court to invalidate as poorly tailored laws designed to protect minors.

It is thus nothing like the Michigan law in *Butler*, which imposed a blanket ban on public dissemination of literature with "a potentially deleterious influence upon youth." 352 U.S., at 383. Nor is it like the law, struck down in *Sable Communications, Inc. v. F.C.C.,* 492 U.S. 115, 126-31 (1989), that sought to protect minors from indecent telephone messages by banning them outright. *See id.*, at 131 (explaining that the ban "has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear"); *see also Bolger v. Young's Drug Prod. Corp.,* 463 U.S. 60, 73-74 (1983) (invalidating broad restriction on contraceptive advertisements because it "purg[ed] all mailboxes of unsolicited material that is entirely suitable for adults"). Nor, finally, is it like speech restrictions ***8** that, while seeking to protect minors from indecent content, incidentally burden adult speech. *See, e.g., Ashcroft v. A.C.L.U.,* 542 U.S. 656, 660 (2004) (finding law burdened adult speech by requiring credit card or other means of age verification); *Playboy,* 529 U.S., at 826 (finding law burdened adult speech by forcing cable operators to time-channel content); *Reno v. A.C.L.U.,* 521 U.S. 844, 882 (1997) (finding law chilled adult speech by criminalizing transmission of indecent messages to minors).

California's law avoids the tailoring problems the Court condemned in those cases. It has neither the intent nor the effect of infantilizing the video game options of adults. Instead, by preventing juveniles from purchasing certain hyper-violent games, it simply empowers parents to decide what is "fit for [their] children." *Butler,* 352 U.S., at 383; *see infra* Part III.

B. California's law is limited to games that invite players' participation in graphic sadism.

Second, California's law is valid because it defines the restricted class of materials with the precision the First Amendment demands. It does not, for instance, bluntly restrict "violent" games. *Cf., e.g., Erznoznik,* 422 U.S., at 213-14 (explaining that an ordinance broadly targeting "nudity," as opposed to "sexually explicit nudity," would be overbroad). Rather, it removes from minors' immediate reach only games that cast players as participants in disturbing acts of sadistic violence - *i.e.*, games in which a player is invited to "kill[], ***9** maim[], dismember[], or sexually assault[] an image of a human being," Cal. Civ. Code § 1746(d)(1) (2006), and which fail an "obscene-as-to-minors" test drawn from the Court's precedents. *Id.*, at § 1746(d)(1)(A)(i)-(iii). *See, e.g., Ginsberg,* 390 U.S., at 646; *Miller v. California,* 413 U.S. 15, 24 (1973). [6]

California's restriction thus falls comfortably within the leeway afforded government by precedents such as *Ginsberg, Interstate Circuit*, and *Pacifica.* Those cases teach that,

> because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults.

Interstate Circuit, 390 U.S., at 690 (citing *Ginsberg,* 390 U.S. 629). Such restrictions further a state's interests in supporting parental authority and in minors' own well-being. *See, e.g., Ginsberg,* 390 U.S., at 639-40; *Pacifica,* 438 U.S., at 749; *see also infra* Parts II &III.

***10** The Court has sustained restrictions like California's on concluding it was "not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Ginsberg,* 390 U.S., at 641. That analysis does not require any "scientific" demonstration of potential harm flowing to minors from the restricted materials. *See, e.g., id.*, at 642-43 (explaining that "[w]e do not demand of legislatures 'scientifically certain criteria of legislation' ") (quoting *Noble State Bank v. Haskell,* 219 U.S. 104 (1911)); *cf. F.C.C. v. Fox Tele. Stations, Inc.,* 129 S. Ct. 1800, 1813 (2009) (explaining that "[t]here are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them").

California's law finds particularly strong support in *Pacifica.* There, the Court sustained F.C.C. discipline of a radio station for airing a profane (but not legally obscene) monologue during an afternoon broadcast. 438 U.S., at 739-40, 748-51. That government action was allowed to safeguard minors and their parents' authority, despite the fact that it made the speech less accessible to adults. *See id.*, at 750 & n.28 (observing that F.C.C. action "does not by any means reduce adults to hearing only what is fit for children" because "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words") (citing *Butler,* 352 U.S., at 383). In contrast to the sensitive issue of burdening *adult* speech, however, the Court thought it uncontroversial that the government ***11** could bar *minors*' commercial access to such materials:

> Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children.

438 U.S., at 749-50 (citing *Ginsberg,* 390 U.S., at 640, 639).

California has done precisely what *Pacifica* deemed permissible under the First Amendment. It has defined a class of materials deemed harmful to minors and said that commercial sellers are "prohibited from making [such] … materials available to children." *Pacifica,* 438 U.S., at 749-50. The First Amendment permits this modest regulation and the Ninth Circuit erred by ruling otherwise.

C. Neither precedent nor logic support limiting *Ginsberg-Pacifica* to erotic materials.

In this case, the lower courts resisted application of the *Ginsberg-Pacifica* line based on the artificial rationale that those cases apply to sexually themed material only. *See* Pet. App. 15a-23a, 53a-58a, 86a-89a. But that limitation is neither inherent in those cases nor consistent with their underlying logic.

To begin with, in those cases the Court spoke in terms broader than the merely erotic. For instance, *Ginsberg* approvingly quoted a New York case that ***12** described a state's interest in "preventing distribution to children of *objectionable material*" and of "books recognized to be suitable for adults." 390 U.S., at 636 (quoting *Bookcase, Inc. v. Broderick,* 218 N.E.2d 668, 671 (N.Y. 1966)) (emphasis added). Indeed, in a case decided the same day as *Ginsberg*, the Court described *Ginsberg* as allowing states to "regulate the dissemination to juveniles of … *material objectionable as to them* [.]" *Interstate Circuit,* 390 U.S., at 690 (emphasis added). *Pacifica* likewise spoke, not merely of sexual language, but of language that was "excretory," "vulgar," "indecent," "offensive," "shocking," "unseemly," and "not conforming to generally accepted standards of morality." *See, e.g.*, 438 U.S., at 739, 740 & n.14, 747-50. In the same vein, Justice Powell's concurrence explained that "speech from which society may attempt to shield its children is not limited to that which appeals to the youthful prurient interest." *Id.*, at 758 (Powell, J., concurring in part and concurring in the judgment).

Second, the laws in *Ginsberg* and *Interstate Circuit* themselves encompassed certain violent content. For instance, the New York law in *Ginsberg* restricted depictions, not only of sexual matters, but also of "sadomasochistic abuse," defined as "flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume." *See* 390 U.S., at 646 (app'x) (quoting N.Y. Penal Law § 484-h(1)(e) (1965)). Focusing even more pointedly on violence, the Dallas ordinance in *Interstate Circuit* restricted certain materials "[d]escribing or portraying brutality, ***13** criminal violence or depravity." 390 U.S., at 691-92 (app'x) (quoting Dallas Civ. & Crim. Ord. § 46A-1(f)(1) (1960)). To be sure, neither decision specifically addressed these provisions. But neither did the Court suggest that those laws' violence-related components would be invalid to the extent they embraced more than purely erotic materials.

Finally, the underlying logic of these cases rejects confining them to erotic materials. *Ginsberg-Pacifica* drew strongly on the states' interest in reinforcing parental authority. *See, e.g., Ginsberg,* 390 U.S., at 639 (explaining that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"). Consequently, the Court reasoned that parents "are entitled to the support of laws designed to aid discharge of that responsibility." *Id.; see also infra* Part III. It would be arbitrary, however, to confine this state interest to sexual themes. The graphically interactive violence kept from minors' direct grasp by California's law is "as potentially degrading and harmful to children as representations of many erotic acts." *Pacifica,* 438 U.S., at 758 (Powell, J., concurring in part and concurring in the judgment). Parents, in other words, have just as keen an interest in guarding their children from *Postal*[2] as from *Penthouse*, and laws like California's may help them do so.

***14** II. California's Law Falls Within Traditional State Limits on Minors' Freedoms.

The law has never been blind to the fact that children are not adults. In fundamental realms - such as voting, marriage, contracts, privacy, travel, juries, sentencing, and speech - states may (and sometimes must) treat minors in ways that

would be inconceivable for adults. California's law is situated squarely within this sensible and laudable tradition. It betrays no hostility to minors' constitutional rights, but rather recognizes that "[c]hildren have a very special place in life which law should reflect." *May v. Anderson,* 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring); *see also Bellotti v. Baird,* 443 U.S. 622, 633 (1979) (plurality op.) (observing that "[t]he Court long has recognized that the status of minors under the law is unique in many respects").

Few rights are more fundamental than the rights to vote, to marry, to serve on a jury, or to contract. Yet states have traditionally limited minors' ability to participate in these basic forms of citizenship. *See, e.g., Roper v. Simmons,* 543 U.S. 551, 581-587 (2005) (app'x B, C & D) (cataloguing state laws establishing minimum ages for voting, jury service, and marriage without parental or judicial consent); Restatement (Second) of Contracts § 14 (1981) (discussing limitations on minors' right to contract). [7]

***15** Even minors' control over their own bodies may often be restricted. Minors cannot unilaterally consent to most medical procedures. [8] In the same vein, parental consent laws may curtail minors' ability to have an abortion, subject to judicial bypass. *See Bellotti,* 443 U.S., at 643. And a minor may undergo heightened drug-screening protocols because his "school-related privacy interest, when compared to the privacy interests of an adult, has different dimensions." *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls,* 536 U.S. 822, 840 (2002); *see also New Jersey v. T.L.O.,* 469 U.S. 325, 340 (1985) (observing that the school context "requires some easing of the restrictions to which searches by public authorities are ordinarily subject"); *and see Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 656-57 (1995) (explaining that, "[p]articularly with regard to medical examinations and procedures, … 'students within the school environment have a lesser expectation of privacy than members of the population generally' ") (quoting *T.L.O.,* 469 U.S., at 348 (Powell, J., concurring)).

Other examples abound. Minors do not have a right to jury trials in delinquency proceedings. *See* ***16** *McKeiver v. Pennsylvania,* 403 U.S. 528, 545-51 (1971) (plurality op.). Curfew laws across the country permissibly restrict minors' right to travel. *See, e.g., Hutchins v. Dist. of Columbia,* 188 F.3d 531, 538 (CA DC 1999) (en banc plurality op.); *Qutb v. Strauss,* 11 F.3d 488, 492 (CA5 1993). [9] Statutory rape laws regulate minors' consensual sexual relations. *See, e.g., State v. Granier,* 765 So.2d 998, 1001 (La. 2000) (explaining that "[t]he policy underlying such a statute is a presumption that, because of their innocence and immaturity, juveniles are prevented from appreciating the full magnitude and consequences of their actions"). [0] Even the Court's sexual autonomy jurisprudence, rooted in adult privacy, is nonetheless limited by this special vulnerability of minors. *See, e.g., Lawrence v. Texas,* 539 U.S. 558, 578 (2003) (observing that "[t]he present case does not involve minors").

Juvenile impressionability has shaped the Court's Eighth Amendment jurisprudence. Recognizing that " '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults,' " the Court has exempted minors from the death penalty and from life-without-parole sentences for non-homicide ***17** crimes. *See Roper,* 543 U.S., at 569 (quoting *Johnson v. Texas,* 509 U.S. 350, 367 (1993)); *see also Graham v. Florida,* 130 S. Ct. 2011, 2034 (2010). As the Court reiterated last term in *Graham*, juveniles " 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.' " 130 S. Ct., at 2026 (quoting *Roper,* 543 U.S., at 569-70).

Juvenile speech is not immune from these well-established limitations. For instance, while minors retain First Amendment rights in public schools, officials may sometimes *ban* their speech. *See, e.g. Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 513 (1969) (holding that officials may suppress student speech if it will "materially and substantially disrupt the work and discipline of the school"). The Court has recognized that "[i]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Vernonia,* 515 U.S., at 656 (quoting *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 683 (1986)). Such censoring of adult speech would obviously fail. *See, e.g., Cohen v. California,* 403 U.S. 15 (1971); *see also Morse v. Frederick,* 551 U.S. 393, 405-06

(2007) (commenting that the Court's case law has "acknowledged that schools may regulate some speech 'even though the government could not censor similar speech outside the school' ") (quoting *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 266 (1988)). And yet, drawing on *Ginsberg*, the Court

> ***18** has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children.

Fraser, 478 U.S., at 684 (discussing *Ginsberg,* 390 U.S. 629, and *Bd. of Educ. v. Pico,* 457 U.S. 853, 871-872 (1982)). Nor has the Court artificially confined this principle to erotic material, but has validated states' concern to protect children "from exposure to sexually explicit, indecent, or lewd speech" as well as "vulgar and offensive spoken language." *Fraser,* 478 U.S., at 684 (discussing *Pacifica,* 438 U.S. 726); *see also supra* Part I.

California's law is thus no outlier: it falls within a tradition of permissible limitations on juvenile rights. "[Y]outh-blindness," this Court's case law teaches, "is not a goal in the allocation of constitutional rights" because "failing to take children's particular attributes into account in many contexts … would be irresponsible." *Ramos v. Town of Vernon,* 353 F.3d 171, 179-80 (CA2 2003) (citing, *inter alia*, Laurence Tribe, American Constitutional Law § 16-31, at 1589 (2d ed. 1988)). This is one of those contexts. If a state may restrict a minor's right to vote or to marry, then it may also restrict her right to purchase graphically violent video games. If a state may not impose the death penalty on minors - because they are "more vulnerable … to negative influences and outside pressures," *Roper,* 543 U.S., at 569 - then a state may also keep them from buying games which invite them to commit digital atrocities.

***19 III. California's law falls within a tradition of state reinforcement of parental authority.**

Limits on juvenile freedoms find their strongest justification when they assist those persons - namely, parents - who have a far higher claim to authority over children than the state. *See, e.g., Bellotti,* 443 U.S., at 637 (plurality op.) (explaining that "the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors"). California's law does precisely this. It wants parents, and not the marketplace, to police children's participation in the graphic violence enacted and encouraged by certain video games. Its modest regulation, then, does not suppress speech or impose a paternalistic restraint on children, but instead aims to "support the right of parents to deal with the morals of their children as they see fit." *Ginsberg,* 390 U.S., at 639 & n.7 (quoting Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391, 413 n.68 (1963)).

Respect for parental authority has shaped the Court's jurisprudence. The truth that "[t]he child is not the mere creature of the state," *Pierce v. Soc'y of Sisters,* 268 U.S. 510, 535 (1925), is a fixed star in constitutional interpretation. "[T]he interest of parents in the care, custody, and control of their children … is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville,* 530 U.S. 57, 65 (2000); *see also Bellotti,* 443 U.S., at 639 & n.18 (plurality op.) (suggesting the Court's decisions recognize "a ***20** constitutional parental right against undue, adverse interference by the State") (and citing, *inter alia, Pierce, supra; Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Prince v. Massachusetts,* 321 U.S. 158 (1944); *Ginsberg, supra*).

These basic precepts have influenced how the Court measures juvenile rights. *See, e.g., Parham v. J.R.,* 442 U.S. 584, 602 (1979) (explaining that "[o]ur jurisprudence historically has reflected Western civilization['s] concepts of the family as a unit with broad parental authority over minor children"). For instance, the Court has understood that state authority in the school context derives, in important part, from parental authority. *See, e.g., Vernonia,* 515 U.S., at 654 (observing that "a parent 'may … delegate part of his parental authority … to the tutor or schoolmaster of his child' ") (quoting 1 W. Blackstone, Commentaries on the Laws of England 441 (1769)); *see also Morse,* 551 U.S., at 413-16 (Thomas, J., concurring) (discussing role of *in loco parentis* doctrine). That helps explain why school officials may subject minors to more intrusive searches or censor their speech. *See, e.g., Vernonia,* 515 U.S., at 655 (observing that "we have

acknowledged that for many purposes school authorities ac[t] *in loco parentis*"); *Fraser,* 478 U.S., at 683 (emphasizing that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse").

The same principle has also shaped the Court's understanding of juvenile rights outside schools. For instance, it explains why a court may be ***21** required to weigh the advisability of parental consultation in deciding whether to authorize a minor's abortion. *See Bellotti,* 443 U.S., at 648 (plurality op.) (explaining that a court "may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby"); *see also Lambert v. Wicklund,* 520 U.S. 292, 295-96 (1997) (per curiam) (discussing *Bellotti*). *Bellotti* underscored that "[l]egal restrictions on minors, *especially those supportive of the parental role*, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Id.*, at 638-39 (plurality op.) (emphasis added); *see also Ohio v. Akron Ctr. for Reprod. Health,* 497 U.S. 502, 520 (1990) (op. of Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ.) (observing that "[i]t is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature"). For the same reasons, the Court has recognized the state's "undoubtedly substantial" interest in "aiding parents' efforts to discuss birth control with their children." *Bolger,* 463 U.S., at 73 (citing *H.L. v. Matheson,* 450 U.S. 398, 410 (1981); *Bellotti,* 443 U.S., at 637).

Critically, the Court's *Ginsberg-Pacifica* line of cases has upheld restrictions on juvenile speech by drawing on this interest in reinforcing parental authority. *See supra* Part I (explaining centrality of *Ginsberg-Pacifica*); *see also Bellotti,* 443 U.S., at 639 & n.18 (plurality op.) (placing *Ginsberg* in the ***22** historical line of parental authority cases); *Fraser,* 478 U.S., at 684 (identifying in *Ginsberg* and *Pacifica* the *in loco parentis* doctrine). *Ginsberg* itself emphasized that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." 390 U.S., at 639. It therefore reasoned:

> [t]he legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.

Id.; see also Pacifica, 438 U.S., at 749 (reiterating that the state's interest in supporting parental authority "justified the regulation of otherwise protected expression"). As Justice Powell explained in his *Pacifica* concurrence, the state may prevent dissemination of vulgar speech to children and thereby "leav[e] to parents the decision as to what speech of this kind their children shall hear and repeat[.]" *Id.*, at 758 (Powell, J., concurring).

State and local governments act on this interest in reinforcing parental authority in many ways. Laws in numerous jurisdictions, similar to the New York law in *Ginsberg*, support parents' role in policing children's exposure to sexually themed materials. Local curfew ordinances more broadly ***23** reinforce parental supervision of juveniles. *See supra* Part II (discussing curfew laws). [2] As the Colorado Supreme Court explained, drawing directly from this Court's reasoning in *Bellotti:*

Courts have recognized that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them. […] [C]ontrolling a minor's freedom of movement after 10:00 p.m. reinforces parental authority and encourages parents to take an active role in supervising their children.

People in interest of J. M., 768 P.2d 219, 223 (Colo. 1989) (relying on factors in *Bellotti,* 443 U.S., at 622-23). [3]

***24** Falling in the same category are state laws requiring parental consent for medical treatment. *See supra* Part II (discussing medical consent laws); *see also, e.g., In re Estate of K.E.J.,* 887 N.E.2d 704, 716 (Ill. App. 1 Dist. 2008) (observing the "well established legal fact that in the majority of circumstances, a parent can give binding consent to medical treatment for a child"). Similarly, when states limit a minor child's ability to sue a parent for negligence, they do so to protect both parental authority and family harmony. *See, e.g., Owens v. Auto Mut. Indem. Co.,* 177 So. 133 (Ala. 1937); *Dubay v. Irish,* 542 A.2d 711 (Conn. 1988); *Mroczynski v. McGrath,* 216 N.E.2d 137 (Ill. 1966); *Walker v. Milton,* 268 So.2d 654 (La. 1972). As a Texas court recently explained, this parental-immunity defense "prevent[s] the disruption or distortion of parental decision-making within the 'wide sphere of reasonable discretion which is necessary … to provide nurture, care, and discipline for their children[.]' " *Sepaugh v. LaGrone,* 300 S.W.3d 328, 333 (Tex. App. - Austin 2009, pet. filed Mar. 26, 2010).

In sum, an abiding respect for parental authority has shaped the Court's understanding ***25** that juvenile rights cannot always be absolute. Numerous state and local laws are premised on this understanding. California's law falls squarely within this longstanding, praiseworthy, and constitutional exercise of state authority. Children are creatures of their parents, not the state, but states may help parents fulfill their duties toward children. States do so by enacting curfews, or by requiring parental consent to medical procedures, or by preventing children from suing parents. States may also take the more modest step of keeping children from buying, without parental consent, video games that encourage them to pretend they are sadists.

***

Over three decades ago, this Court explained that "[b]ookstores and motion picture theaters … may be prohibited from making indecent material available to children." *Pacifica,* 438 U.S., at 749 (citing *Ginsberg,* 390 U.S., at 640, 639). California's law does nothing more than that. It does so, furthermore, not to impose a paternalistic morality on children, but rather to help parents raise children according to their own good sense. Parents' concern over which cultural products their children consume does not arbitrarily stop with sex. It extends to violence, and in particular to the disturbingly interactive form of digital sadism targeted by California's law. States may help parents shield their children from these materials without violating the First Amendment.

***26 CONCLUSION**

The Court should reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Footnotes

1 *See* http://www.time.com/time/covers/1101050523/console timeline/ (last visited July 8, 2010) (*Time* magazine timeline of video game development featuring Atari's 1975 release of the home version of *Pong*, which "introduce d] at home video games to the masses).

2 *See generally* http://www.postalnetwork.org (last visited July 8, 2010) (summarizing the game); *see also* http:// www.ggmania.com/full.php3? show 5521 (last visited July 8, 2010) (*Gameguru* review, reporting that "one of the surprises in this game was the urination element).

3 *See* http://www.amazon.com/Postal 2 Pc/dp/B00008RGR5/ref sr 1 1? ie UTF8&s videogames&qid 1278606957&sr 8 1 (last visited July 8, 2010) (identifying manufacturer's product description); *see also* http:// www.postalnetwork.org/postal2/ overview.shtml (last visited July 8, 2010) (official game overview announcing that " t]he game is as violent as you are!). *Postal*^{2} has won numerous awards, including first place for "Most Violent Video Game Ever (AskMen.com 2009), fifth place for "Goriest Headshots (*Gamepro* 2009), and first place for "Top Ten Games You Can't Show Mom (*Gametiger* 2004). *See* http://www.runningwithscissors.com/awards and honors (last visited July 8, 2010).

4 The obscene as to minors test is drawn from *Ginsberg v. New York,* 390 U.S. 629, 646 (1968), and more generally from the Court's obscenity jurisprudence. *See infra* Part I.

5 Other courts have made the same mistake. *See, e.g., Entm t Software Ass n v. Swanson,* 519 F.3d 768 (CA8 2008); *Interactive Digital Software Ass n v. St. Louis,* 329 F.3d 954 (CA8 2003); *American Amusement Mach. Ass n v. Kendrick,* 244 F.3d 572 (CA7 2001); *Entm t Merchants Ass n v. Henry,* No. CIV 06 675 C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007); *Entm t Software Ass n v. Granholm,* 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entm t Software Ass n v. Foti,* 451 F. Supp. 2d 823 (M.D. La. 2006); *Entm t Software Ass n v. Hatch,* 443 F. Supp. 2d 1065(D. Minn. 2006); *Entm t Software Ass n v. Blagojevich,* 404 F. Supp. 2d 1051 (N.D. Ill. 2005); *Video Software Dealers Ass n v. Maleng,* 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

6 California's law would require games containing the defined violent content to meet all of the following descriptions: (1) "A reasonable person, considering the game as a whole, would find it appeals to a deviant or morbid interest in minors ; (2) "It is patently offensive to prevailing standards in the community as to what is suitable for minors ; and (3) "It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors. *See* Pet. 2; Pet. App. 96a.

7 *See also, e.g.*, Colo. Rev. Stat. § 13 22 101 (2009); Fla. Stat. ch. 743.07 (2009); Idaho Code § 29 101 (2010); Iowa Code § 599.1 (2009); Kan. Stat. Ann. § 38 101 (2009) (generally addressing limits on minors' capacity to contract).

8 *See, e.g.*, Ala. Code § 22 8 4 (2009); Cal. Fam. Code § 6922 (2004); Del. Code Ann. tit. 13, § 707 (2009); Me. Rev. Stat. Ann. tit. 22, § 1503 (1998); N.Y. Pub. Health Law § 2504 (2005) (generally addressing parental consent to medical procedures).

9 *See also generally* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 553 58 (1997) (discussing curfew ordinances).

10 *See also, e.g.*, Ala. Code §§ 13A 6 70, 13A 6 61 (2009); Cal. Penal Code § 261.5 (2008); Fla. Stat. ch. 800.04 (2009); Haw. Rev. Stat. § 707 730 (2009); Md. Code Ann., Crim. Law §§ 3 302 3 308 (2009) (generally addressing statutory rape and minors' age of consent).

11 *See generally* 93 A.L.R.3d 297 (1979) (discussing prevalence of statutes or ordinances prohibiting sale of obscene materials to minors); *see also, e.g., Commonwealth v. Rollins,* 799 N.E.2d 1287, 1289 90 (Mass. App. Ct. 2003) (addressing application of Mass. Gen. Laws ch. 272, § 31 (2000)); *Athenaco, Ltd. v. Cox,* 335 F. Supp. 2d 773, 778 & n.2 (E.D. Mich. 2004) (addressing constitutionality of Mich. Comp. Laws § 722.675 (2002)); *State v. Anderson,* 540 So.2d 974 (La. App. 2 Cir. 1989) (addressing application of La. Rev. Stat. Ann. § 14:91.11 (1989)).

12 Such laws are more commonly enforced than one might suspect. One scholar reports that, in 2004, there were 137,400 arrests for curfew violations nationwide. *See* Miriam Aroni Krinsky, *Disrupting the Pathway from Foster Care to the Justice System A Former Prosecutor s Perspectives on Reform*, 48 Fam. Ct. Rev. 322, 332 (2010).

13 Other state supreme courts have followed the same rationale. *See, e.g., Sale ex rel. Sale v. Goldman,* 539 S.E.2d 446, 449 & n.5 (W. Va. 2000) (upholding city curfew ordinance whose stated purpose was to "reinforce and promote the role of the parent in raising and guiding children); *City of Panora v. Simmons,* 445 N.W.2d 363, 370 (Iowa 1989) (upholding city curfew ordinance based in part on rationale that it "acts to make parents the primary agent of enforcement and "could be said 'to promote family life by encouraging children to be at home) (quoting Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. Penn. L. Rev. 66, 67 (1958)); *City of Milwaukee v. K.F.,* 426 N.W.2d 329, 337 39 (Wis. 1988) (rejecting argument that municipal curfew interfered with parental authority).

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No. 16-712

In the Supreme Court of the United States

OIL STATES ENERGY SERVICES, LLC, PETITIONER,

v.

GREENE'S ENERGY GROUP, LLC, ET AL.,

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* EVOLUTIONARY INTELLIGENCE LLC SUPPORTING PETITIONER

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QUESTION PRESENTED

Does *inter partes* review—an adversarial process used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents—violate the Constitution by extinguishing private property rights through a non-Article III forum without a jury?

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

As Petitioner shows, Congress was dismissive of patentees' Seventh Amendment right to jury trial when it authorized the Patent Trial and Appeals Board (PTAB) to displace civil juries from their traditional fact-finding role in cases seeking to extinguish private property. Unfortunately, such disregard of patentees' right to trial by jury also runs rampant throughout the lower federal courts.

Amicus Evolutionary Intelligence LLC was the victim of such disregard in a recent district court decision finding two of its patents ineligible for protection on "abstractness" grounds. In the PTAB, those patents had survived nine *inter partes* reviews and a full trial. But in subsequent litigation, the district court concocted key factual conclusions out of whole cloth, then used those conclusions as the basis for invalidating the patents and thus dismissing *amicus*'s infringement suit against several corporate behemoths (including Apple, Facebook, and Sprint) *on the pleadings*. Unfortunately, the Federal Circuit affirmed based on the district court's made-up factual conclusions.

Evolutionary Intelligence is planning to file a petition for certiorari in this Court, challenging the lower courts' decisions on (among other things) Seventh Amendment grounds. The company therefore has a strong interest in this Court's resolution of the Seventh Amendment issue presented in this case, as it could substantially affect the outcome of its own case in this Court.

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[1] No one other than *amicus* and its counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk.

SUMMARY OF ARGUMENT

As Petitioner's brief makes clear, the Question Presented in this case includes two independent components: (1) whether *inter partes* review by the PTAB violates the constitutional separation of powers between the Executive and Judicial Branches, and (2) whether Congress's decision to assign to the PTAB mandatory fact-finding functions traditionally undertaken by civil juries violates patentees' Seventh Amendment rights. See Petition i. While *amicus* agrees with Petitioner that *inter partes* review is unconstitutional for both reasons, *amicus* urges the Court—whatever it does with the separation-of-powers issue—to rule for Petitioner on its Seventh Amendment claim.

I. Such a ruling is necessary to address and correct widespread violations of patentees' Seventh Amendment rights throughout the patent system. For example, in the wake of this Court's two recent decisions on patent eligibility— *Alice Corp. Pty. Ltd.* v. *CLS Bank International*, 134 S. Ct. 2347 (2014), and *Mayo Collaborative Services* v. *Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012)—district courts have routinely eliminated the right to a jury trial on factual issues bearing on that issue. As in *amicus*'s own pending case, they have done that by issuing increasingly routine "pleading dismissals" of infringement actions based on the alleged "abstractness" of the claimed invention. And, as in *amicus*'s case, those decisions are usually affirmed by the Federal Circuit—apparently because many of its judges believe such resolutions are more efficient than jury trials.

But efficiency is no answer to a Seventh Amendment objection. And, just as invalidation via *inter partes* review violates a patent holder's Seventh

Amendment right to jury trial, so too does invalidation via judicial fact-finding on questions bearing on a claimed invention's eligibility for patent protection.

An invention's eligibility for patenting under Section 101 of the Patent Code, 35 U.S.C. 101, centers primarily on whether it is "useful," as opposed to a mere statement of a law of nature or, as in *Mayo* and *Alice,* an "abstract" principle. And the history of the founding and immediate post-founding eras establishes that the issue of usefulness—and any specific factual issues bearing on that issue—is fact question for the jury. See, *e.g., Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (noting historical standard for determining scope of right to jury trial). Accordingly, like the invalidity issues Congress authorized the PTAB to decide in the statutory scheme at issue here, factual issues bearing on the "usefulness" of a claimed invention are subject to the patentee's Seventh Amendment right to jury trial.

II. A decision from this Court abrogating PTAB invalidations based on their violation of the Seventh Amendment will go a long way to dispel the widespread misunderstanding in the lower federal courts of how that Amendment applies in patent cases generally. Indeed, the principle that the Seventh Amendment requires a jury to resolve factual questions of the sort that would have been tried to a jury before, during and shortly after the founding era is sufficient to resolve this case. As this Court explained in *Markman*, "there is no dispute that infringement cases"—including issues related to validity—"today must be tried to a jury, as their predecessors were more than two centuries ago." 517 U.S. at 377. And although claim construction is a legal question within the exclusive province of the court, *id.* at 372, 388, that can only

mean that factual issues are reserved for a jury when parties request one. Therefore, just as it violates the Seventh Amendment to subject patentees to summary dismissal based on eligibility facts concocted by a district judge, so too it violates that Amendment to compel patentees to submit to *inter partes* review of patent validity with federal government officers sitting as triers of fact.

A decision to that effect will send a powerful signal to the entire patent bench and bar that, regardless of the perceived efficiency of lodging fact-finding responsibility elsewhere, patentees, like all other holders of property rights, are fully protected by the Seventh Amendment.

ARGUMENT

I. The Seventh Amendment issue embedded in the Question Presented has serious implications for other areas of patent law.

As Petitioner explains, *inter partes* review by the Patent and Trademark Office over a patentee's objection violates the Seventh Amendment right to trial by jury. Pet. Br. i, 50–58. This court should rule for Petitioner on that ground because resolving the Seventh Amendment issue will help prevent similar Seventh Amendment violations in other areas of patent law. For example, in the wake of *Alice* and *Mayo,* judges have routinely violated the Seventh Amendment by depriving patentees of jury trials on factual issues bearing on patent eligibility.

A. Post-*Alice*, district courts have routinely invalidated patents based on their own views of disputed factual issues, thereby taking those issues away from juries.

For over 160 years,[2] this Court has recognized that the requirement that a claimed invention be "useful" within the meaning of 35 U.S.C. 101 precludes patents on certain categories of innovations, including "abstract ideas." *Alice*, 134 S. Ct. at 2354; *accord, e.g.*, *Gottschalk* v. *Benson*, 409 U.S. 63, 67 (1972) (contrasting "useful structures" with "abstract principles"). To separate "useful" inventions from abstract ideas, *Alice* mandates a two-step analysis. *Alice*, 134 S. Ct. at 2356–2357. The first step is to ask whether the claimed invention contains or is based upon an abstract idea. *Id.* at 2355. If it does, the second step is to

[2] See *O'Reilly* v. *Morse*, 56 U.S. (15 How.) 62, 112–120 (1854); *Le Roy* v. *Tatham*, 55 U.S. (14 How.) 156, 174–175 (1853).

determine whether the patent claims nevertheless contain an "'inventive concept' sufficient to 'transform' the claimed abstract idea into a patent-eligible application"—that is, something that is truly "useful." *Id.* at 2357 (quoting *Mayo*, 132 S. Ct. at 1289). Applying this framework, the court in *Alice* concluded that the patent at issue was based on an abstract idea, *id.* at 2355–2357, and that its implementation of the idea was *not* sufficiently innovative to be useful and, hence, patentable. *Id.* at 2357–2360.

1. Both steps of the *Alice* and *Mayo* analysis—*i.e.*, (1) whether an invention is based on an abstract idea and (2) whether any abstract idea is implemented in a sufficiently innovative way—frequently entail disputed factual questions on issues related to the invention's usefulness. These disputes are properly presented to a jury when parties demand one, rather than to a judge, and in any event must be resolved through fact-finding rather than at the complaint stage. But since *Alice,* numerous district courts have misinterpreted those decisions as allowing them to ignore these basic rules.

A recent decision invalidating *amicus*'s own patent exemplifies the problem. In *Evolutionary Intelligence, LLC* v. *Sprint Nextel Corp.*, the defendants moved for dismissal of *amicus*'s patent infringement suit (or for judgment on the pleadings) on the ground of patent invalidity, arguing that the patent claimed non-patentable abstract ideas. 137 F. Supp. 3d 1157 (N.D. Cal. 2015). The district court granted the motion by determining as a *factual* matter that the invention— methods for improving the processing of information through dynamic updating, based upon events occurring in locations and times external to a computer or

smart phone—were not "useful" under the *Alice* framework. *Id.* at 1164. But the court's factual conclusions resolved disputed issues that should have been resolved by a jury or, at a minimum, by summary judgment after discovery.

- The core practical innovation of *amicus*'s patent is that (among other things) it enables a cell phone traveling through different neighborhoods or cities to be advised of, say, the ten closest restaurants currently serving breakfast. The district court analogized this technology to an undisputedly non-patentable guidebook with a list of restaurants and opening hours. *Id.* at 1167. But a reasonable jury could have concluded that, as a factual matter, the "static" information in a guidebook is fundamentally different from—and far less useful than—the "dynamic" information provided by a list that is tailored, through real-time interactions with sources external to the apparatus, to the consumer's needs.

- Likewise, the district court in *Evolutionary Intelligence* claimed that calculating the effects of the historical interactions of globally distributed software components in order to provide better search results was no different from the supposed practice—neither defined by the court nor mapped to the steps of the claim limitations—of a "local barista or bartender who remembers a particular customer's favorite drink." *Id.* Here again, a reasonable jury could find the analogy inapt: Can a barista really be cognizant of the many unknown events happening at unknowable times, in cities around the

> world? Or is the four-function calculator non-patentable merely because those same baristas and bartenders could add, subtract, multiply and divide in their head?

3. Not surprisingly, other courts have squarely rejected this kind of logic, even after *Alice*. See, *e.g.*, *Wavetronix LLC* v. *Iteris, Inc.*, No. A-14-CA-970-SS, 2015 U.S. Dist. LEXIS 6993, at *17 (W.D. Tex. Jan. 22, 2015). But many have embraced it by determining patent invalidity as a factual matter based on the pleadings alone—thereby stripping disputed factual issues from the jury and letting a judge decide them instead.[3] Those decisions go far beyond the judicial role contemplated by *Alice* and *Mayo*, where the lower court decisions had been reached on summary judgment.[4]

Such "pleading dismissals," made in the face of disputed, material factual questions bearing on patent eligibility, have become widespread. Since *Alice,* over

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[3] See, *e.g.*, *OIP Technologies, Inc.* v. *Amazon.com, Inc.*, 788 F.3d 1359, 1364 (Fed. Cir. 2015) (affirming grant of motion to dismiss based on analogy between automated user-specific price adjustment and manual price adjustment by store owners); *Appistry, Inc.* v. *Amazon.com, Inc.*, No. C15-311, 2015 U.S. Dist. LEXIS 90004, at *7 (W.D. Wash. July 9, 2015) (granting judgment on the pleadings based on analogy at pleadings stage between computer farming and military processes); *TDE Petroleum Data Solutions, Inc.* v. *AKM Enterprise, Inc.*, No. H-15-1821, 2015 U.S. Dist. LEXIS 121123, at *21 (S.D. Tex. Sep. 11, 2015) (granting motion to dismiss based on factual determination of insufficient connection to a computer), affirmed 657 F. App'x 991 (2016).

[4] *Alice* 134 S. Ct at 2353 ("[T]he parties filed cross-motions for summary judgment on whether the asserted claims are eligible for patent protection under 35 U.S.C. §101."); *Mayo*, 566 U.S. 66, 76 ("[T]he District Court ultimately granted summary judgment in Mayo's favor.").

half of all motions for dismissal on the pleadings under § 101 succeed.[5] Indeed, of the more than 520 opinions during that time that have cited 35 U.S.C. 101 and contained the term "abstract idea,"[6] many of these have resolved a patentee's claim on the pleadings. This is a new phenomenon: *no* district court in the two years prior to *Mayo* granted such relief at that stage. Indeed, the issue was almost never considered.[7]

In short, even though *Alice* and *Mayo* were decided on summary judgment motions, they have been misinterpreted to allow determinations of disputed facts by judges based on the pleadings. As one commentator put it, the consequence is that judges themselves are resolving disputed factual issues—"looking beyond the allegations in the complaint" and making "historical observations about alleged longstanding commercial practices and deciding whether the claimed invention is analogous to such practices."[8] That shift deprives patentees not only of a trial on triable factual issues

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[5] See Robert R. Sachs, *Alice Brings A Mix of Gifts for the Holidays*, Bilski Blog (Dec. 23, 2016), available at: http://www.bilskiblog.com/blog/2016/12/alice-brings-a-mix-of-gifts-for-2016-holidays.html; Edward Tulin and Leslie Demers, *A Look At Post-Alice Rule 12 Motions Over The Last 2 Years*, Law360 (Jan. 27, 2017), available at: https://www.law360.com/articles/882111/a-look-at-post-alice-rule-12-motions-over-the-last-2-years.

[6] This is based on a search of published and unpublished opinions, examining Article III courts only.

[7] As before, this statement is based on a search of published and unpublished Article III opinions.

[8] David Boher, *In a Rush to Invalidate Patents at Pleadings Stage, Are Courts Coloring Outside the Lines?*, Patentlyo (July 1, 2015), available at: https://patentlyo.com/patent/2015/07/invalidate-pleadings-coloring.html.

and of the opportunity to defend their patents based on an adequate record.

Some courts and judges have acknowledged—trumpeted, even—that disputed issues of fact are being resolved at the pleadings stage, ignoring the obvious procedural and constitutional concerns with that practice. See, *e.g.*, *OIP Technologies*, 788 F.3d at 1364 (Mayer, J., concurring); *TDE Petroleum Data Sols.*, 2015 U.S. Dist. LEXIS 121123, at *21. Even former Chief Judge Mayer of the Federal Circuit recently acknowledged this trend, justifying it as a legitimate, efficient response to "vague and overbroad" patents. *OIP Technologies*, 788 F.3d at 1364 (Mayer, J., concurring).

B. Just as invalidation via *inter partes* review violates a patent holder's Seventh Amendment right to jury trial, so too does invalidation via judicial fact-finding on questions bearing on eligibility.

As noted, the trend of lower courts deciding disputed factual questions bearing on patent eligibility without a jury extends *Alice* and *Mayo* beyond their apparent intent. And extending these decisions to let courts resolve factual questions as if they were legal questions violates the Seventh Amendment.

1. As noted above, *both* steps in the two-part *Alice/ Mayo* inquiry go to whether the invention is "useful" under 35 U.S.C. 101. As to the first step, the very definition of an "abstract idea" is one that lacks any "tangible embodiment."[9] Thus, what differentiates a useful innovation from an abstract idea is its concrete

[9] Black's Law Dictionary 11 (10th ed. 2014).

application. As to the second step, as explained in *Alice*, an invention has "to supply a 'new and *useful*' application of the idea in order to be patent eligible." 134 S. Ct. at 2357 (quoting *Benson*, 409 U.S at 67).

Usefulness is a quintessential issue of fact. To take just one example, whether searching an internet database for cases based on their citations is a new and useful application of the case reporter system is a question of fact. The answer to that question may be disputed by the parties, and therefore the finder of fact—the jury if requested—must decide it. The question is not a legal one answerable on pleadings alone.

2. The history of the founding and pre-founding eras also establishes that, like the invalidity issues in this case, the issue of usefulness—and any specific factual issues bearing on that issue—are fact issues for the jury. As this Court has noted, the Seventh Amendment preserves all the rights to trial by jury in civil cases that existed at the founding. U.S. Const. Amend. VII; *accord Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) ("[T]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted.") (quoting *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657 (1935)).

As Petitioner and other *amici* note, moreover, under English common law, juries routinely decided whether an invention was useful, in addition to other validity-related issues.[10] For example, in the 1785 case

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[10] Pet. Br. 56 ("Juries likewise resolved numerous disputed questions of fact about patents, such as … whether the invention was useful[.]"); Br. for H. T. Gómez-Arostegui and S. Bottomley as *amici curiae* in support of neither party ("Legal Historians Brief") at 16 (same).

Rex v. *Arkwright*, the prosecution claimed that the invention was of no use. I Decisions on the Law of Patents for Inventions 29, 39 (K.B. 1785) (Buller, J.) (charging jury). The King's Bench instructed the jury that one of the questions to be addressed was whether the invention was in fact useful. *Id.* (Buller, J.); see also *Hill* v. *Thompson*, I Decisions on the Law of Patents for Inventions 299, 301 (Ct. Chancery 1817) (charging jury). And this inquiry was sometimes searching: One jury concluded that an invention qualified as "useful" for some purposes but not others. *Haworth* v. *Hardcastle*, I Decisions on the Law of Patents for Inventions 485, 488–489 (Ct. Common Pleas, After Mich. Township 1833) (discussion between court and jury).

As noted in *Markman*, the historical evidence of practice at the founding can also be "buttressed" by American practice shortly afterward. 517 U.S. at 382. And several American cases following the Seventh Amendment's ratification reaffirm that juries were routinely instructed on usefulness, and therefore that usefulness—and all subsidiary factual questions—was considered a jury issue.

For example, as Circuit Justice in 1817, Justice Story instructed a patent jury that the plaintiff must show that his invention is "a useful invention." *Lowell* v. *Lewis*, 15 F. Cas. 1018 (C.C. Mass. 1817) (Story, J., Circuit Justice) (charging jury); see also *Earle* v. *Sawyer*, 8 F. Cas. 254, 256 (C.C.D. Mass. 1825) (Story, J., Circuit Justice) (charging jury that an invention "must also be useful, that is, it must not be noxious or mischievous, but capable of being applied to good purposes"). Three years later, Justice Washington gave similar jury instructions on usefulness. *Kneass* v.

Schuylkill Bank, 14 F. Cas. 746, 748 (C.C.D. Pa. 1820). (Washington, J., Circuit Justice) (charging jury).

In short, because juries ruled on usefulness at the founding, patentees today have a Seventh Amendment right to have juries decide similar questions today. This is true whether the overarching issue turns on *Alice* step one—whether a claimed invention contains or is based on an abstract idea—or *Alice* step two—whether the claimed invention provides a new and useful application of that idea.

It follows that the modern post-*Alice* trend described above—in which district courts routinely make their own factual assessments of a claimed invention's usefulness, even at the pleading stage—is a massive violation of patentees' Seventh Amendment rights. In both scope and importance, that violation of the Seventh Amendment is at least as significant as the violation Congress committed when it decided to lodge involuntary fact-finding authority as to other validity-related issues in the PTAB rather than in civil juries overseen by Article III courts.

II. The Court should rule in Petitioner's favor based at least in part on its Seventh Amendment claim.

The principle that the Seventh Amendment permits parties to demand jury trials on factual questions of the sort that would have been tried to a jury before and during the founding era is sufficient to resolve this case—regardless of how the Court resolves Petitioner's Article III arguments. And a decision from this Court relying on the Seventh Amendment to reject PTAB patent invalidations on *inter partes* review would go a long way to dispel the widespread misunderstanding in lower federal courts about the proper application of that Amendment in patent cases.

1. This Court has long held that the Seventh Amendment applies in a wide array of modern statutory contexts, "require[ing] a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Curtis* v. *Loether*, 415 U.S. 189, 194 (1974). In so holding, the Court has also emphasized that the original "thrust of the Amendment was to preserve the right to jury trial as it existed in 1791[.]" *Id.* at 193. In many areas of law, application of the Seventh Amendment implies an "analog[y] to common-law causes of action ordinarily decided in English law courts in the late 18th century[.]" *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 42 (1989); see also *City of Monterey* v. *Del Monte Dunes at Monterey*, 526 U.S. 687, 708 (1999) (citing *Markman*, 517 U.S. at 376); *Tull* v. *United States*, 481 U.S. 412, 417 (1987).

As explained above, however—and as Petitioners' opening brief ably demonstrates, see Pet. Br. 51–57—no such analogy is necessary in the context of patent disputes. Factual issues related to patent validity have

been tried to juries under the common law since early in the 17th Century, including at the time of the founding. At a minimum, the factual questions that arise in modern patent litigation are the direct descendants of—and "close statutory analogues" to—patent questions that juries would have resolved in 1791. *Id.* at 57. Either way, patent litigation falls squarely within the ambit of the Seventh Amendment.

That history guarantees a right to jury trial as to most issues addressed in modern patent litigation, whether in the district courts or before the PTAB. As this Court explained in *Markman*, "there is no dispute that infringement cases"—including validity-related issues"—must be tried to a jury, as their predecessors were more than two centuries ago." 517 U.S. at 377. Although *claim construction* (like interpretation of other written instruments) is a legal question within the exclusive province of the court, *id.* at 372, 388, that can only mean that *factual* issues are reserved for the jury when parties request one.[11]

Ultimately, that undisputed principle is all this Court needs to resolve this case. If patent validity questions were tried to juries in 1791 as part of infringement cases (as they clearly were) and if, as this Court stated in *Markman*, "infringement cases today must be tried to a jury," 517 U.S. at 377, then it violates the Seventh Amendment to compel patentees to submit to *inter partes* review of patent validity with

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[11] See also *Teva Pharmaceuticals USA, Inc.* v. *Sandoz, Inc.*, 135 S. Ct. 831, 837–838 (2015) (resolution of factual issues may be necessary before claim construction, and are reviewed for clear error); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 479 (1962) (plurality opinion) (noting Seventh Amendment right to have jury decide facts in equitable suit); *Beacon Theatres* v. *Westover*, 359 U.S. 500, 503–504 (1959) (same).

federal government officers sitting as triers of fact. It does so just as surely as subjecting patentees to summary dismissal based upon judge-created facts.

Moreover, the Seventh Amendment resolves this case whatever the appropriate resolution of the Article III issue raised by Petitioners. Applying well-settled Seventh Amendment principles here would break little new legal ground, if any. This Court, therefore, need take no position on the potentially broader, more complicated question of what types of disputes may be resolved by agencies rather than Article III courts.

2. Application of Seventh Amendment principles in this case will also deter the lower courts from ignoring patentees' jury rights in other contexts.

As explained above, lower courts systematically underenforce patentees' rights to jury trials by making factual findings without juries—concerning, for example, whether a patent claims an "abstract idea." What this suggests is that, much as the Federal Circuit long overlooked the distinction between review of legal and factual conclusions in patent cases, see *Teva Pharms.*, 135 S. Ct. 831, lower courts have forgotten that the Seventh Amendment prevents them from resolving disputed factual issues in patent cases just as in any other circumstance. The technical complexity of many patent cases is no excuse for resolving them in a way other than the one mandated by the Constitution.

Although patent eligibility is not directly at issue here, the Seventh Amendment aspects of this case present an opportunity to reiterate the need for lower courts to pay attention to jury trial rights in patent cases. Deciding this case on Seventh Amendment grounds thus promises to safeguard the Seventh Amendment rights of patent holders generally.

CONCLUSION

The decision below should be reversed, based on its violation of Petitioner's Seventh Amendment rights.

Respectfully submitted,

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No. 16-1391

In the Supreme Court of the United States

KEVIN MARILLEY; SALVATORE PAPETTI; SAVIOR PAPETTI, on behalf of themselves and similarly situated,

Petitioners,

v.

CHARLTON H. BONHAM, in his official capacity as Director of the California Department of Fish & Game,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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June 22, 2017

QUESTION PRESENTED

A state may not impose "any higher taxes or excises" on nonresidents "than are imposed by the State upon its own citizens." *Ward* v. *Maryland*, 79 U.S. 418, 430 (1870). A limited exception to that rule may apply when differential fees are necessary to compensate the state for "expenditures from taxes which *only* residents pay." *Toomer* v. *Witsell*, 334 U.S. 385, 399 (1948) (emphasis added). The Fourth Circuit has held that when a state claims that that exception applies, *all* taxes and fees paid to the state by affected nonresidents must be taken into account. *Tangier Sound Waterman's Ass'n* v. *Pruitt*, 4 F.3d 264, 267 (4th Cir. 1993). Accordingly, the question presented here is:

May California impose discriminatory fees on nonresident fishermen who pay income and other taxes to California?

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INTRODUCTION AND INTEREST OF *AMICUS*[1]

One of the liberties protected by the Constitution is the right to do business in other states, free from discrimination. That right is enshrined in the Privileges and Immunities Clause, Art. IV, § 2, one of the handful of individual rights that the Framers saw fit to safeguard even before the Bill of Rights was adopted. In fact, ensuring the opportunity to do business out-of-state on equal terms with a state's residents was one of the principal motivations for holding the Constitutional Convention in the first place. But the Ninth Circuit has condoned California's violation of that right.

California has enacted a set of commercial-fishing license fees that require nonresidents to pay several times more for those licenses than residents. Its system is explicitly discriminatory, harshly regressive, and intentionally protectionist. Under decisions of this Court and the Fourth Circuit in substantively identical circumstances, that is impermissible: States must charge commercial-fishing license fees equally to residents and nonresidents alike, or else bear the burden of

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[1] No one other than *amicus curiae* and its counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. *Amicus* provided notice to all parties pursuant to Supreme Court Rule 37.2(a), and all parties have consented to this filing.

justifying their discrimination (which California made little real effort to do below).

But an *en banc* majority of the Ninth Circuit quite literally imposed the opposite rule. Not only did it uphold California's discrimination, but it supported its holding with guesstimates and rough calculations of state finances that the state itself had never supplied. The result is conflict between two federal circuits, and an open door for new methods of discrimination that the Constitution has always forbidden.

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, files briefs in the courts, and produces the *Cato Supreme Court Review*.

Cato objects to California's use of discriminatory license fees to deny opportunity to nonresident fishermen, and to the Ninth Circuit's reasoning that condones it. This Court should grant review and reverse.

STATEMENT

This case presents the Court with an exceptionally clear-cut example of a state that discriminates against business conducted there by nonresidents. The California Fish and Game Code, which governs fees for commercial fishermen in state waters, explicitly classifies fishermen by state residence—listing one set of fees for residents and a different, higher set of fees for nonresidents. See Cal. Fish & Game Code §§ 7852(a), (b) (commercial fishing licenses); 7881(b), (c) (vessel registrations); 8280.6(a) (Dungeness crab permits); 8550.5(a)(1), (2) (herring net permits). That is the essence of facial discrimination. See *Toomer* v. *Witsell*, 334 U.S. 385, 396–97 (1948) (observing that similar differential fishing license fees "plainly and frankly discriminate against non-residents"); see also *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison, Me.*, 520 U.S. 564, 575–76 (1997) (explaining that a state law is facially discriminatory when "[i]t is not necessary to look beyond the text of this statute to determine that it discriminates") (applying the Commerce Clause).

Under that system of discriminatory fees, nonresident commercial fishermen must pay two to four times as much as residents, a differential totaling $2,000 to $4,000 each year. See Pet. App. 30a (M. Smith, J., dissenting). The burden of discriminatory fees, moreover, falls most heavily on nonresident fishermen who only derive a portion of their fishing income from California waters (or who earn only a modest living in their chosen profession). For them,

the added fees are potentially enough to make California fishing uneconomical.

Compare the added fees to the named Petitioners' California tax payments. California requires nonresidents whose income "derive[s] from sources within this state" to file California income taxes. Cal. Rev. & Tax Code § 17041(i)(1)(B); see also *id.* § 17041(b)(1) ("There shall be imposed for each taxable year upon the taxable income of every nonresident . . . a tax[.]"); 18 Cal. Code Regs. § 17951-2 ("Income from sources within this State includes . . . income from a business, trade, or profession carried on within this State."). Nonresident fishermen, including the named Petitioners, accordingly file California income taxes and pay the amount assessed. Petitioners Savior Papetti, Salvatore Papetti, and Kevin Marilley testified in their depositions that over their decades of fishing, they have filed California income tax returns "'every year'" they were required to. Pet. App. 24a–25a.

The income the named Petitioners earn by fishing in California, however, is not large. See Pls.' Supp. Excerpts of Record at 758 (Doc. 19-3) (deposition testimony regarding Mr. Marilley's income in California). As a result, the state has never assessed any tax liability from Savior, and has taxed Salvatore and Mr. Marilley only three times each. Even in those years, the amounts that California required them to pay are small. Salvatore has paid a grand total of $3,256 in his years of fishing; Mr. Marilley, $4,159. Pet. App. 24a–25a. Yet in comparison, Salvatore,

Savior, and Mr. Marilley respectively pay $3,915.50, $2,062, and $3,674.50 more *each year* than they would if they were California residents. Pet. App. 30a (M. Smith, J., dissenting). Petitioners' incomes, in other words, are rarely large enough for California to tax at all, but California saddles them with thousands of dollars of extra fees annually, now amounting in aggregate to many times more than the total of their state income tax bills.

The same problem appears when one looks at nonresident fishermen more generally. According to data submitted by California's own witness, 775 nonresident fishermen purchased California commercial fishing licenses in FY 2011, and paid taxes on approximately $24 million in income—an average of approximately $31,000 each. Pet. App. 12a; *id.* 38a–39a (M. Smith, J., dissenting). Even making the unlikely assumption that their income was evenly distributed, California required an average nonresident fisherman to pay 10 percent of his in-state income, more or less, in extra fees.

These figures, importantly, include only the self-selecting group of nonresident fishermen who *do* find it economical to fish in California despite the discriminatory fees: They leave out an unknown number of nonresident fishermen who may *want* to fish in California but whom the state has driven off. At the margin, particularly for fishermen of limited means or a small stake in California waters, the result is a heavy disincentive against commercial fishing in the state. That, in turn, means less competition for

California resident fishermen, and less opportunity for their nonresident counterparts.

The record indicates that discouraging commercial fishing by nonresidents was exactly what California wanted. As the district court showed (and as Judge Smith repeated in his dissent), the legislative history of the fee differentials contains strong evidence of protectionist intent. Pet. App. 86a–88a; see also *id.* 34a–35a (M. Smith, J., dissenting). The California Department of Fish and Game referred to one version of the bill creating discriminatory fees for Dungeness crab as "'an attempt to . . . control competition to California fishermen and processors from out of state,'" and to the final enrolled law as "'an industry sponsored bill to prevent out-of-state commercial fishermen from moving into California and getting an undue share of the California Dungeness crab resource[.]'" *Id.* 86a.

Use of licensing and permitting requirements to cartelize favored occupations and protect them from competition is nothing new. Government entities use those tools regularly—and perhaps increasingly so. See generally Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Pub. Pol'y 209 (2016); Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L.

Rev. 1093 (2014).[2] But California, by some measures, is among the worst state offenders in its imposition of burdensome licensing requirements, "costing its would-be workers an average of $300 in fees, 549 days in education and experience and one exam over the 62 occupations it licenses." See Dick M. Carpenter, *et al.*, *License to Work: A National Study of Burdens from Occupational Licensing* 18, Inst. For Justice (2012).

SUMMARY OF ARGUMENT

This Court has held for more than a century that the Privileges and Immunities Clause prohibits states from discriminating against nonresidents who wish to do business in-state. See, *e.g.*, *Chalker* v. *Birmingham & N. W. Ry. Co.*, 249 U.S. 522, 527 (1919); *Ward* v. *Maryland*, 79 U.S. 418, 430 (1870). The Supreme Court has *twice* applied that rule to prohibit states from discriminating against nonresident fishermen by charging them higher license fees than residents. *Mullaney* v. *Anderson*, 342 U.S. 415 (1952); *Toomer*, 334 U.S. at 385. There is no dispute in this case that, on its face, California's discriminatory fishing license regime conflicts with that rule. The *only* question is whether California has justified its discrimination in some way—a question on which California bears the burden of proof. *Sup. Ct. of Va.* v. *Friedman*, 487 U.S. 59, 68 (1988).

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[2] As shown by the Petition, California is not even alone in using license fees to discriminate against nonresident fishermen. Pet. at 32–33.

The Ninth Circuit majority held that California's discriminatory fees serve the permissible purpose of compensating the state for its expenses in regulating commercial fishing. That holding was error, and creates a conflict with both this Court and the Fourth Circuit. See *Toomer*, 334 U.S. 385; *Tangier Sound Waterman's Ass'n* v. *Pruitt*, 4 F.3d 264 (4th Cir. 1993). The circuit split created by the Ninth Circuit majority opens the door for expanded discrimination by California and other states, to the detriment of economic liberties and the Union's economic fabric.

ARGUMENT

I. California's Fee System Infringes the Fundamental Right to Do Business Across State Lines

States use their licensing regimes to cartelize favored local businesses: That is well understood. This Court in recent years has recognized the anticompetitive effects of state licensing regimes and the importance of subjecting them to judicial scrutiny—for example, under federal antitrust law. *N.C. Bd. of Dental Examiners* v. *FTC*, 135 S. Ct. 1101 (2015) (only case yet in which *amicus* filed a brief supporting the federal government). But one cartelization tool that has long been considered categorically off-limits for states is shielding in-state business from competition against nonresidents. California's commercial-fishing licensing fees facially conflict with that rule.

The principle that states cannot further their parochial economic interests by walling themselves off from each other is one of the main ways that the Constitution protects economic liberties.[3] This Court has treated a form of that rule as implicit in the Commerce Clause. See *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 273 (1988) ("[T]he Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."); *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 193 n.9 (1994) (justifying that rule based on the original understanding of the Commerce Clause). But the Privileges and Immunities Clause makes the rule textually clear: It "guarantees to citizens of State A [the right] of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer*, 334 U.S. at 396. Accordingly, "a citizen of State A who ventures into State B" to pursue business enjoys "the same privileges which the citizens of State B enjoy." *Id.* at 395; see also *Chalker*, 249 U.S. at 527 ("Under the federal Constitution a citizen of one state is guaranteed the right to enjoy in all other states

[3] It has also long been considered one of the most important guarantors of the nation's economic union, which allows largely free flow of labor, goods, and services across state lines. Economic discrimination by states against each other under the Articles of Confederation, in fact, "was the immediate cause, that led to the forming of" the Constitutional Convention. *Gibbons* v. *Ogden*, 22 U.S. 1, 223 (1824) (Johnson, J., concurring).

equality of commercial privileges with their citizens[.]").

When a state discriminates by denying equal business rights to nonresidents, the Privileges and Immunities Clause assigns the state the burden of showing that its treatment of nonresidents is "closely drawn" to fulfill a substantial state objective. *Friedman*, 487 U.S. at 68. This Court has relied on that rule to strike down a wide range of state business regulations that deny nonresidents the equal right to compete. See *id.* (limitation on admission of nonresident attorneys to the bar); *Sup. Ct. of N. H.* v. *Piper*, 470 U.S. 274 (1985) (prohibition on bar membership by out-of-state attorneys); *Hicklin* v. *Orbeck*, 437 U.S. 518, 529 (1978) (discriminatory government leasing rule). That principle applies in the context of state spending and business contracting, where the Privileges and Immunities Clause's protections are broader in some respects than the Commerce Clause's. *United Bldg. & Const. Trades Council of Camden Cty. & Vicinity* v. *Mayor & Council of City of Camden*, 465 U.S. 208, 221 (1984) (explaining that discriminatory state contracting rules that do not violate the Commerce Clause still "may be called to account under the Privileges and Immunities Clause"); see also Pet. App. 36a n.2 (M. Smith, J., dissenting).

As especially relevant here, the right to do business on equal terms in another state entails not just opportunity to pursue one's calling there, but protection against "being subjected … to taxes more

onerous than the citizens of the latter State are subjected to." *Lunding* v. *N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998) (quotes omitted); see also *Ward*, 79 U.S. at 430 (explaining that under the Privileges and Immunities Clause nonresidents are "exempt from any higher taxes or excises than are imposed by [a] State upon its own citizens"). State discrimination against nonresidents that takes the form of discriminatory monetary exactions has also been repeatedly invalidated in this Court. See, *e.g.*, *Lunding*, 522 U.S. 287 (denial of alimony tax deductions to nonresidents); *Austin* v. *New Hampshire*, 420 U.S. 656 (1975) (four percent tax on nonresidents' locally-derived income); *Mullaney* v. *Anderson*, 342 U.S. 415 (1952) (discriminatory commercial-fishing license fees); *Toomer*, 334 U.S. 385 (same); *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) (state income tax exemptions that were available to residents but not nonresidents); *Chalker*, 249 U.S. 522 (differential tax on railroad construction that was four times higher for nonresidents than residents); *Ward*, 79 U.S. 418 (requirement that nonresidents purchase additional permit to sell goods other than locally-produced agricultural products).

In fact, some of this Court's seminal cases concerning that aspect of the Clause arose in the very context of this case: states imposing discriminatory fees on nonresident commercial fishermen. Coastal states have long tried to favor in-state fishing industries by burdening or excluding nonresident competitors—and continue to do so to this day, in

California and elsewhere. See Pet. at 32–33. But in *Toomer* v. *Witsell*, 334 U.S. 385, and *Mullaney* v. *Anderson*, 342 U.S. 415, this Court reviewed South Carolina and Alaska laws that set one license fee on resident commercial fishermen and another, higher fee on nonresidents, and invalidated both. As a result of *Toomer* and *Mullaney*, when discriminatory fees on nonresident commercial fishermen are challenged under the Privileges and Immunities Clause, they have consistently been invalidated both by lower-federal[4] and state courts.[5]

Viewed in historical perspective, then, it is not unusual that California would try to make it harder for nonresident fishermen to conduct their business in California waters. What is new here is that the *en banc* Ninth Circuit has allowed California to get away with it.

II. The Ninth Circuit's Reasoning Guts the Privileges and Immunities Clause's Protections

There is no real question in this case that California denies Petitioners the right to do business on equal terms with California residents. Indeed,

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[4] *E.g.*, *Connecticut ex rel. Blumenthal* v. *Crotty*, 346 F.3d 84 (2d Cir. 2003); *Tangier Sound*, 4 F.3d 264; *Brown* v. *Anderson*, 202 F. Supp. 96 (D. Alaska 1962); *Gospodonovich* v. *Clements*, 108 F. Supp. 234 (E.D. La. 1951); *Russo* v. *Reed*, 93 F. Supp. 554 (D. Me. 1950).

[5] *E.g.*, *State* v. *Carlson*, 191 P.3d 137 (Alaska 2008); *Salorio* v. *Glaser*, 93 N.J. 447, 461 A.2d 1100 (1983).

every judge involved in this case has agreed that it does, including those in the *en banc* majority. *See* Pet. App. 9a–10a. The critical question, then, is whether California has borne its burden of justifying discrimination as "closely drawn" to fulfill a substantial state objective. *Friedman*, 487 U.S. at 68.

The state has not done so. In holding to the contrary, the *en banc* majority took Supreme Court dicta recognizing a qualification to the Privileges and Immunities Clause, stretched it beyond recognition, and used it to authorize conduct that has always been treated as forbidden.

A. The majority's opinion conflicts with decisions of this Court and the Fourth Circuit

The *en banc* majority purported to apply this Court's decision in *Toomer*, which holds that when a state discriminates against nonresident commercial fishermen by imposing discriminatory fees, the differential offends the Clause unless nonresident fishermen "constitute a peculiar source of the evil at which the statute is aimed." 334 U.S. at 398. The *Toomer* Court suggested in dicta that such a circumstance might exist when additional fees on nonresidents are necessary to "compensate the State for any added enforcement burden [nonresidents] may impose or conservation expenditures from taxes *which only residents pay*." *Id.* at 399 (emphasis added).

California did not argue that nonresident fishermen impose any unique enforcement burden

justifying additional fees. Instead, it argued simply that it was entitled to extract extra money from nonresidents in order to support regulatory expenditures related to commercial fishing. Pet. App. 36a (M. Smith, J., dissenting) ("California elected to put all of its eggs in the second basket, as it never asserted, much less provided any evidence, that nonresident commercial fishermen impose any added enforcement or management burden on the State.").

The *en banc* majority agreed. It characterized California's regulatory expenditures as a "subsidy" for commercial fishermen, Pet. App. 10a, 13a–14a, 20a–22a, and held that the need to "compensate" the state for that subsidy justifies California's imposition of extra fees on nonresident fishermen, Pet. App. 22a.[6] It

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[6] The notion that California's conservation efforts are a subsidy on commercial fishermen is itself a highly doubtful proposition. Although the *en banc* majority calculated a sum of California's "enforcement, management, and conservation activities benefitting commercial fishers," Pet. App. 11a, it stands to reason that some regulatory expenditures benefit the regulated industry and some do not. Much fishery regulation is inefficient, reducing yields without achieving conservation or sustainability goals. See generally Jonathan H. Adler & Nathaniel Stewart, *Learning How to Fish: Catch Shares and the Future of Fishery Conservation*, 31 UCLA J. Envtl. L. & Pol'y 150 (2013). Some regulatory expenses may be intended to serve political purposes other than benefiting the industry, or stakeholders—sport fishermen, charter boat operators, ocean shippers—other than commercial fishermen. At a minimum, in order to demand compensation for a supposed subsidy, California should be expected to *prove* how particular regulatory activities benefit the

then undertook a series of rough mathematical calculations intended to show that the discriminatory fees accomplished that purpose. Pet. App. 10a–14a, 19a–22a.

The majority's holding is impossible to reconcile with the plain text of *Toomer*. California's conservation expenses are funded in part from general tax revenues, *id.* 5a, including income and sales taxes. See *id.* 40a (M. Smith, J., dissenting).[7] And those are not "taxes which only residents pay." *Toomer*, 334 U.S. at 399. It is undisputed that the named Petitioners *do* file California income taxes for the income they earn in California waters each year, and that they pay whatever California assesses, just like California resident fishermen do. Pet. App. 24a–25a. California also never disputed that, as one might predict, when Petitioners are in California they pay sales and other

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targeted industry in a cost-effective manner, rather than simply adding up the spending of particular state departments.

[7] The majority exaggerated the state's reliance on tax revenues for fishery management. Of the $20 million in annual fishery management expenses estimated by the majority, Pet. App. 11a (adding estimates from the chief of the Department of Fish ang Game's Law Enforcement Division and Director of Administration), only $4.5 million came from the general fund, while more than $13.2 million came from the Fish and Game Preservation Fund. See Excerpts of Record 3:513 (Doc. 12-4) (breakdown of administrative costs); *id.* 4:575 (9th Cir. Doc. 12-5) (breakdown of enforcement costs). The Preservation Fund, in turn, comes largely from user fees—including the discriminatory license fees themselves. See *id.* 4:496 (breakdown of Preservation Fund revenue).

taxes that support fishery conservation. Pet. App. 40a (M. Smith, J., dissenting).

The named Petitioners' tax payments thus place this case outside the scope of the exception identified in *Toomer*: If a state tax is not paid "*only*" by residents, then there is no basis for the state to demand extra compensation from nonresidents in the form of licensing fees. 334 U.S. at 399 (emphasis added). Subsequent Supreme Court authority confirms that *Toomer* means what it says. See *Austin*, 420 U.S. at 665 (invalidating tax on nonresidents that was "not offset . . . by other taxes imposed upon residents *alone*") (emphasis added).

Besides conflicting with *Toomer*, the majority decision splits with the Fourth Circuit, which has applied *Toomer* according to its express terms. In *Tangier Sound Waterman's Association* v. *Pruitt*, the court addressed Virginia's discriminatory commercial-fishing license fees. The Commonwealth relied on *Toomer* in defense, citing it "for the proposition that it may impose a tax or fee on nonresidents to compensate for moneys spent for conservation efforts which benefit resident and nonresident alike but which, absent that fee or tax on nonresidents, would be paid for wholly by residents, by their contribution to the general fund of the Commonwealth." 4 F.3d at 267. The court rejected that argument, explaining that "the evidence here simply does not bring the application of the statute within that portion of *Toomer*." *Id.*

Specifically, the evidence in *Tangier Sound* did not demonstrate that the Commonwealth had considered *all* of the fees and taxes paid by the nonresident fishermen. *Id.* "While these . . . taxes *may be less than those paid by resident commercial fisherman*, they are nevertheless a factor . . . to be accounted for in bringing the statute within this interpretation of this portion of *Toomer.* No evidence before us indicates that this has been done." *Id.* (emphasis added). The Commonwealth, in other words, had to *prove* that it considered *all* taxes and fees paid by nonresidents, *regardless* of amount, or it could not rely on *Toomer* to justify discrimination.

The Ninth Circuit's holding conflicts with *Tangier Sound* in several distinct ways.

First, and most obviously, the Fourth and Ninth Circuits reached substantively inconsistent results on indistinguishable facts. In both cases a state imposed higher fees on nonresident fishermen without considering all of the taxes they paid, then defended the discrimination based on *Toomer*. The Fourth Circuit held that the discrimination was invalid under the Privileges and Immunities Clause, while the Ninth Circuit upheld the state's treatment of nonresidents. That irreconcilable divergence creates a straightforward circuit split for the Supreme Court to resolve. *See* S. Ct. R. 10(a) (review appropriate when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

Second, the Ninth Circuit split from this Court and the Fourth Circuit by shifting the burden of proof. This Court's Privileges and Immunities Clause jurisprudence places the burden on the *state* to justify discrimination. *Friedman*, 487 U.S. at 68. *Tangier Sound* accordingly asked whether the Commonwealth had taken all taxes and fees into account, and invalidated the discriminatory fees because "[n]o evidence before us indicates that this has been done." 4 F.3d at 267.

Although the *en banc* majority acknowledged that California should bear the burden, its reasoning showed that in actually placed the burden on Petitioners. Pet. App. 8a–9a; *id.* 29a (M. Smith, J., dissenting) (explaining that "the majority improperly transposes the evidentiary burden"). Just as in *Tangier Sound*, the state never argued that it had taken into account all the taxes and fees paid by nonresident fishermen. California's appellate briefing never discussed the amount of income taxes paid by nonresident fishermen, nor did it mention sales taxes or other sources of revenue nonresident fishermen pay to the state. See Cal. Opening Br. (9th Cir. Doc. 12-1). It certainly did not undertake any of the calculations necessary to prove "equality of treatment between resident and nonresident." *Tangier Sound*, 4 F.3d at 267. The *en banc* majority instead supplied such an analysis *sua sponte*, providing page after page of its own back-of-the-envelope analysis. Pet. App. 10a–14a,

19a–22a.[8] The majority faulted Petitioners for failing to bring sufficient proof of their tax payments, *id.* 23a, which they had no obligation to do. *Id.* 45a (M. Smith, J., dissenting) ("[A]ny purported lack of evidence on the tax liability of nonresident fishermen is a strike against California, not against the plaintiffs.").

In the Fourth Circuit, in other words, when the state fails to provide proof justifying discrimination against nonresidents, it loses. In the Ninth Circuit, the court provides the argument *for* the state, making the relevant calculations and scouring the record for evidence to support them even when the state has not. That, too, is a plain conflict of authority.

Third, the majority's explanation why it did not consider the named Petitioners' income tax payments significant enough for the state to take into account—that they could be disregarded as "*de minimus* [sic]," Pet. App. 23a—creates conflicts of its own. *Toomer* itself attached no importance to the exact amount of state tax particular nonresidents might have paid. *Toomer*, 334 U.S. at 399. Nor did the Fourth Circuit in *Tangier Sound*; to the contrary, it held that tax

[8] The majority was explicit that the calculations were its own, not the state's. See Pet. App. 19a ("[W]e may calculate at a general level the benefit provided by California and the appropriate compensation from nonresident fishers"); *id.* 20a ("We will assume, as a rough estimate, that commercial fishers as a whole benefited from the states' subsidy in proportion to the amount they paid in fees."); *id.* 21a ("We may also calculate the subsidies provided to the two specific fisheries for which California charges fee differentials[.]").

payments by nonresident fishermen must be taken to account even when they are "less than those paid by resident commercial fisherman." *Tangier Sound*, 4 F.3d at 267. To hold that some tax payments are too small to count for Privileges and Immunities Clause purposes therefore diverges from *Toomer* and *Tangier Sound*.

The rule of *Toomer* and *Tangier Sound* makes more sense than the majority's *de minimis* rule. If nonresident fishermen pay taxes when they engage in their in-state business, they do not free-ride on the state budget, and so there is no need for them to "compensate" the state. *Toomer*, 334 U.S. at 399. By the same token, if the state considers the taxable activity of nonresident fishermen to be negligible, it should not be able to assert that their in-state business imposes a burden on the state that justifies discriminatory fees.

At the very least, the tens of millions of dollars in total income tax paid by nonresident fishermen are surely not *de minimis*, Pet. App. 12a; *id.* 38a–39a (M. Smith, J., dissenting), yet the majority's rule allows California to disregard the total because the named Petitioners' own payments were small. And then there is the puzzling fact that under the majority's approach a nonresident fisherman who pays *more* in taxes than most residents must also pay extra for his license—all supposedly to "compensate the State" for "conservation expenditures from taxes which only residents pay," *Toomer*, 334 U.S. at 399—simply

because others' tax payments are smaller. There is no logic in any of this.

For all of these reasons, the Ninth Circuit's *en banc* decisions diverges from this Court's Privileges and Immunities Clause precedents, and creates a split with the Fourth Circuit's more faithful approach. Review is warranted on that basis alone.

B. The Ninth Circuit's reasoning opens the door for discrimination in many other contexts

The conflicts between the Ninth Circuit's decision and the prior Supreme Court and Fourth Circuit decisions in *Toomer* and *Tangier Sound* provide ample justification for this Court to grant review. What makes review particularly important is that the Ninth Circuit's decision establishes a roadmap for other states to discriminate against nonresidents in a variety of additional contexts.

The Ninth Circuit majority opinion rests on the assumption that whenever a state spends money regulating a licensed occupation, it "subsidizes" the license holders, and can use license fees to extract extra money from nonresidents who (in the aggregate) pay less in taxes. Pet. App. 22a. That presents states with a potentially extraordinary opportunity. Virtually every licensed occupation, presumably, is subject to regulation that the Ninth Circuit would now consider a "subsidy." It seems unexceptionable to predict that in most professions where residents and nonresidents compete, the nonresidents will generally

earn most of their income out-of-state and so pay less state income tax. At a minimum, the total taxes paid by the residents will surely exceed the total paid by nonresidents. And if those premises are true, then a state can virtually *always* impose extra fees on nonresidents on the theory that they are not paying as much to support the state's regulations as residents do.

It will not take much imagination for states to take that opportunity. Given the proliferation of occupational licensure, it is easy to see how California's methods for discrimination against fishermen could be exported to other industries now requiring licenses or permits. California, for example, now requires occupational licenses for many professions where business is likely to cross state lines—for example, building and construction contractors, animal trainers, garden and tree workers, and vehicle drivers and operators. *License to Work*, *supra*, at 44–45. Every member of those professions who does not live in California should consider himself on notice that the state now has vastly expanded discretion to raise his fees to levels that make in-state activity unprofitable. Nor would it be difficult for a state to identify new industries where it spends heavily on regulation and enforcement and create additional licensing requirements, each one more expensive for nonresidents.

Judge Smith's dissent points to one example. California now licenses truck drivers, *id.* at 45, and spends heavily on air quality regulation. Pet. App.

47a–48a. It is only a small step from the Ninth Circuit's *en banc* majority opinion to a new law multiplying the license fees for nonresident drivers.

Just as is the case here, the burden will always fall most heavily on nonresidents who do a small amount of in-state business. For them, doing an ounce of in-state business would bring on a pound of taxation, and put their livelihoods at risk. It goes without saying that states could use that rationale to put a veneer of fairness on economic protectionism and schemes to exclude nonresidents.

Imposing that kind of disproportionate burden on out-of-state competitors will create disincentives for doing business across state lines, less competition, and ruptures in the nation as an economic union. This Court should not let that stand without review.

CONCLUSION

The Court should grant certiorari and reverse the decision of the Ninth Circuit.

Respectfully submitted,

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2017 WL 1756929 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Janice K. BREWER, et al., Petitioners,
v.
ARIZONA DREAM ACT COALITION, et al., Respondents.

No. 16-1180.
May 1, 2017.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Governor Jeb Bush as Amicus Curiae Supporting Petitioners

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*i QUESTION PRESENTED

Can an executive order that purports to grant legal immigration status without congressional authorization preempt State law?

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***1** INTRODUCTION AND INTERESTS OF *AMICUS*

This case perfectly illustrates the principle that even when the Nation's leaders in the Executive branch want to do the right thing, they have to do it the right way. The President cannot change statutory law without Congress, nor can he override the laws of the States without first going through procedures necessary to act with the force of law. As this Court has made clear, "[t]he Constitution … is concerned with means as well as ends," and "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Horne v. Dep't of Agric.,* 135 S. Ct. 2419, 2428 (2015) (quotes omitted). That rule applies in immigration law no less than elsewhere.

Our immigration system is a mess. *Amicus* Governor Jeb Bush - a longtime advocate of humane, practical, economically-driven immigration reform, and the co-author of a book on the subject - has described it as "incredibly cumbersome, complex, opaque, sometimes capricious, and downright bureaucratic."[2] Its weaknesses undermine the rule of law, generate tremendous human suffering, and starve the Nation's ***2** economy of both low-and high-skill labor. Governor Bush's substantive views on immigration policy are not aligned in many respects with what he considers the unduly harsh and counterproductive immigration policies of some other conservatives. He has been critical, in particular, of Arizona's handling of some immigration issues.

Governor Bush nonetheless believes that those policy debates should play out on the field of federal legislation. Real reform requires action by Congress, and executive actions such as President Obama's Deferred Action for Childhood Arrivals ("DACA") program only make the crisis worse in the long run.

It is always tempting for a President to take action to remedy what he sees as public needs that Congress has failed to address. As an immigration reformer (and a former State executive), Governor Bush understands that desire very well. Yet immigration is certainly not the first occasion when the President has wished to pursue his vision of the good beyond

what Congress has enabled, and it assuredly will not be the last. The surest protection for our liberty and welfare lies in the constitutional procedures and structures that uphold the rule of law.

*3 STATEMENT

President Obama implemented DACA by executive order in 2012. DACA orders deferral of removal proceedings for a category of non-citizens who entered the United States illegally as children and who meet certain conditions. App. 17-18. DACA's thrust closely resembles the Development, Relief, and Education for Alien Minors Act ("DREAM Act"), which has been repeatedly introduced in recent Congresses but never enacted. See, *e.g.*, DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011); DREAM Act of 2010, H.R. 6497, S. 3992, S. 3963, 111th Cong. (2010); DREAM Act of 2007, S. 774, 110th Cong. (2007).

In addition to avoiding removal proceedings, individuals subject to DACA may receive federal Employment Authorization Documents ("EADs") from the Department of Homeland Security ("DHS"). App. 15, 18. EADs issued pursuant to DACA are referred to as "(c)(33)" EADs. *Id.* at 19. [3]

Arizona requires driver's license applicants to "submit proof satisfactory to the [Arizona Department of Transportation ('Department')] that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. Ann. § 28-3153(D). Before DACA, Arizona treated all EADs as acceptable for that purpose. App. 19.

*4 In response to DACA, Arizona Governor Janice K. Brewer issued Arizona Executive Order 2012-06, *Re-Affirming Intent of Arizona Law In Response to the Federal Government's Deferred Action Program* (Aug. 15, 2012) ("Order 2012-06"). Order 2012-06 announced Arizona's policy that DACA should not be considered as conferring legal authorization on any non-citizen, and so does not provide grounds for provision of any State benefit conditioned on legal status. App. 18. [4] As a result, the Department announced that it would not accept (c)(33) EADs for purposes of issuing drivers licenses. App. 19.

Respondents sued Governor Brewer and the other Petitioners, alleging that Arizona's refusal to accept (c)(33) EADs in support of driver's license applications violates the Equal Protection Clause of the Fourteenth Amendment and is preempted by federal immigration law. [5]

*5 The Ninth Circuit's controlling opinion issued on February 2, 2017, upon denial of Petitioners' petition for rehearing en banc. App. 1-2; see also *id.* 2-13 (Kozinski, J., joined by O'Scannlain, Bybee, Callahan, Bea, and N.R. Smith, dissenting from denial of rehearing). The panel declined to resolve Respondents' equal protection theory. *Id.* at 29, 33-34. Instead, the panel held that Arizona's refusal to accept (c)(33) EADs for driver's licenses "encroaches on the exclusive federal authority to create immigration classifications and so is displaced by the [Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.* ('INA')]," App. 34, and is therefore preempted.

SUMMARY OF ARGUMENT

Governor Bush is a longtime supporter of legal immigration and a reformed immigration system. Comprehensive immigration reform should include a number of elements - reorienting immigration to encourage foreign workers, improved border security, and a greater role for the States, to name a few. But it also should include a path to legal residency for immigrants now in the country illegally, including those covered by DACA. In that respect, Governor Bush agrees with some of the former Administration's policy goals and disagrees with some of Arizona's.

But the Constitution did not permit President Obama to override Arizona law by executive order. A *6 program like DACA, which purports to change legal rights and (according to the Ninth Circuit) preempt State law has to be passed by

Congress. Otherwise, it is not law. For similar reasons, a President's unilateral announcement of policy cannot prevent States from going their own way.

That conclusion follows from the separation of powers, which the Framers of the Constitution considered the Nation's most important guarantee of liberty. The President must work with Congress to make law, rather than by himself, and cannot will out of existence the laws of sovereign States. Although Governor Bush believes DACA would be good policy, it must be enacted in "the constitutional way." *Horne,* 135 S. Ct. at 2428.

*7 ARGUMENT

I. The Nation Urgently Needs Immigration Reform.

The American immigration system is broken: On that, virtually everyone agrees. [6] The current system not only disserves the economic interests that immigration is supposed to further, but has precipitated both a humanitarian crisis and a challenge to the rule of law. Governor Bush considers it essential that the federal government act to restore rationality, orderliness, justice, and compassion.

The Nation needs legal immigration. A confluence of factors threatens a shortage of both low-skilled workers to do jobs that many American citizens are unwilling to take, see *Immigration Wars* 80-82, and the high-skilled workers and entrepreneurs on whom our economic predominance depends, *id.* at 82-83, 89-92. An immigration system driven by economics and the national interest *should* favor individuals with the skills and drive to contribute to our "nation of immigrants." But our current system is not designed to let those people in.

Instead, we have a system largely directed at unifying aliens in other countries with their family members here. Nearly two-thirds of the one million lawful ***8** immigrants admitted into the United States each year do so through family preferences. See *Immigration Wars* 19-20; William A. Kandel, *U.S. Family-Based Immigration Policy* 1, Congressional Research Service (2014). The options for individuals without family connections, who are simply in search of freedom, work, and safety, are relatively few. Roughly 13 percent of immigrants come for work purposes, and 11 percent as refugees. *Immigration Wars* 19. More than 13 *million* foreign applicants compete in a lottery for only 50,000 remaining slots each year. *Id.* The literal fact of the matter is that "[w]hile past immigrants 'waited their turn in line,' there is no line in which most of those aspiring to become Americans can wait with any realistic hope of gaining admission." *Id.* at 24 (emphasis omitted).

In a world teeming with individuals eager to work and desperate for life in America - where immigrant labor is in demand - putting the process for legal immigration out of reach creates incentives for people to take their chances with the law. "Like any other valuable good or service, immigration operates according to supply and demand." *Id.* at 17. Distortions created by current immigration policy thus exacerbate the "black market": illegal immigration. *Id.*

Part of the problem is lack of security. As the sudden influx of tens of thousands of young Central American refugees in 2014 proved, it is too easy for aliens to arrive on American soil illegally. See *Border Disorder.* We focus too little on interdiction strategies ***9** that stop human traffickers before they reach our borders and that deny them any profit for conspiring to break our laws. *Id.; Immigration Wars* 51-53 (advocating efforts to combat drug and human smuggling cartels in Mexico). The federal government likewise has not sufficiently invested in enforcing its immigration laws domestically. *Immigration Wars* 108. The removal process for individuals who are detained, moreover, is in many ways the worst of all possible worlds: cumbersome for all involved, yet full of loopholes. See *Border Disorder.* Many individuals subject to removal proceedings are released from custody during their hearing processes, never to be tracked down and removed as they should be. *Id.* Nonetheless, so long as the root legal and economic causes persist, improved security and enforcement is not the whole solution.

Governor Bush has long been at the forefront of those urging comprehensive immigration reform, and his writings suggest a number of proposals for action. Two are especially illustrative in this case.

First, Governor Bush has recommended creating a path to legal status for immigrants now here illegally. *Immigration Wars* 40-47. For those who entered illegally as adults and have been otherwise law-abiding, he has proposed a path not to citizenship, but to legal residency - on condition that they submit to fines or community service as punishment for unlawful entry. *Id.* at 43. For those who entered as children, though, ***10** he believes they should have the opportunity to obtain citizenship. *Id.* at 46.

Those proposals resemble DACA and the unenacted DREAM Act. The resemblance is not coincidental: Governor Bush has written that "the ideas encompassed in the DREAM Act and President Obama's executive order [DACA] should be made part of fundamental immigration reform." *Id.* at 45. In advocating eventual citizenship for children who were brought to the country illegally, Governor Bush goes *beyond* DACA and the DREAM Act. *Id.* at 46 ("[W]e would go further than President Obama's policy by creating a clear and definite path to citizenship."). He is also in disagreement in some respects with Arizona. See, *e.g., id.* at 212.

Second, Governor Bush has recommended that Congress give the States a greater role in immigration policy. "Our federalist system envisions policy differences among the states, reflecting different needs and priorities[.] In particular, states have varying needs, interests, and priorities when it comes to immigration." *Id.* at 32. Agricultural States, States with high-tech sectors, States that offer generous welfare benefits, States like Arizona that place special emphasis on enforcement of immigration laws - all would benefit, potentially, from more flexibility in how they treat immigrants.

***11 II. Immigration Reform Must Be Accomplished Through Constitutional Channels.**

Notwithstanding the urgency of immigration reform, many of the needs Governor Bush outlined in his book remain unaddressed by Congress. The human and economic costs of that inaction are considerable. But all of Governor Bush's proposals call for changes *through legislation.* "[T]he law must be enacted by Congress, no matter how maddeningly onerous the legislative process may be." *Id.* at 110-11.

Therein lies the problem with DACA, which is not a creation of any federal statute. Congress has repeatedly rejected proposals to grant class-wide legal status for illegal immigrants who arrived as children, see Pet. at 6, and has granted the President discretion to award work permits to aliens only in specifically delineated circumstances, see *id.* at 7-8. Congress has certainly not granted the President discretionary authority to confer the status of "authorized presence" on aliens who entered the country illegally. *Id.* at 17-18. The (c)(33) EADs that the Ninth Circuit held the Department must accept are an invention of the Executive branch alone. The Ninth Circuit's decision to give DACA binding effect that preempts Arizona law thus implies either (1) that the President can make federal law by executive order without Congress, or (2) that States can see their police powers overridden by federal policies that are not law.

Either interpretation is offensive to the constitutional order. The most important guarantor of liberty ***12** in the Constitution is its separation of powers: As the Framers knew, "[c]oncentration of power in the hands of a single branch is a threat to liberty." *Clinton v. City of New York,* 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); see also The Federalist No. 47, at 301 (Madison) (C. Rossiter ed. 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands … may justly be pronounced the very definition of tyranny.") For that reason, the Framers divided power against itself - State and federal, executive and legislative - to ensure that it never could be concentrated in that way. [7] As James Madison put it:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.

The Federalist No. 51, at 323 (James Madison). By the same token, threats to the separation of powers ultimately threaten the people. However sympathetic DACA's aims might be - and Governor Bush sympathizes deeply - the President has no unilateral authority to override the laws of the States.

***13 A. The President Cannot Confer Lawful Immigration Status By Executive Order.**

The process for making federal law is well-known and precisely crafted. Both Houses of Congress must pass the same bill and present it to the President, who may sign it, allow it to become law through inaction, or issue a veto (which a supermajority of Congress can override). U.S. Const. art. I, § 7, cl. 2. Neither House can may make law acting by itself. *I.N.S. v. Chadha,* 462 U.S. 919, 946 (1983) (holding that the "legislative veto" is unconstitutional). Nor can the President unilaterally excise provisions from the laws that Congress enacts. *Clinton,* 524 U.S. 417. The President's authority to take any action at all " 'must stem either from an act of Congress or from the Constitution itself.' " *Medellin v. Texas,* 552 U.S. 491, 524 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 585 (1952)). The notion that the President can make domestic law *by himself* is anathema.

It follows that DACA is not law, and that giving it legal effect aggrandizes the President at the expense of Congress and the States. In holding to the contrary, the Ninth Circuit committed a serious error and split from the Fifth Circuit's decision in *Texas v. United States,* which held that federal law does not permit the President to "reclassif[y] … millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits" 809 F.3d 134, 184 (5th Cir. 2015), *aff'd by an equally divided* ***14** *court,* 136 S. Ct. 2271 (2016). Review of the Ninth Circuit's decision is called for on that ground alone.

Two complementary doctrines underscore that DACA cannot be accorded legally binding effect. One derives from Justice Jackson's concurrence in *Youngstown,* which set out a three-part analysis for scope of presidential power. 343 U.S. at 634-38 (Jackson, J., concurring); see also *Medellin v. Texas,* 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area."). Under that framework, the President's powers are at their height when Congress has specifically delegated power, ambiguous when Congress's distribution of power is unclear, and at their "lowest ebb" when Congress has (expressly or impliedly) denied him power. *Youngstown,* 343 U.S. at 634-38.

This is not a case where Congress has specifically delegated authority to the President: The Ninth Circuit searched the INA for authority relevant to this case and found nothing of significance. See Pet. 17-18; App. 6-8 (Kozinski, J., dissenting). Nor is it a case of ambiguity, for Congress has legislated extensively and set out the President's authorities in detail. That leaves DACA in the third category, where the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject." ***15** *Youngstown,* 343 U.S. at 637-38. Just to state the test is to show that granting legal status to illegal immigrants is not within the President's inherent powers.

Another relevant doctrine derives from modern administrative law. This Court has recognized at least since *United States v. Mead Corp.* that Congress sometimes delegates the power to act with the force of law to the President or an executive agency. 533 U.S. 218, 226-27, 229 (2001). But even when such a delegation occurs, the executive must employ formal procedural methods - such as formal adjudication, notice-and-comment rulemaking, or the like - to ensure that a particular act carries legal force. *Christensen v. Harris County,* 529 U.S. 576, 587 (2000). Even if Congress delegated authority to the President to determine who is legally in the country and who should be permitted to work here (and it did not), there is no reason to suppose that Congress would have permitted the President to do so by executive order as opposed to a DHS rulemaking. A delegation of authority to act with the force of law by proclamation, with no formal process at all, would be extraordinary.

It does no good to invoke the President's prosecutorial discretion. [8] Even if prosecutorial discretion permits the President not to enforce immigration law against categories of illegal immigrants - a position in ***16** tension with the Take Care Clause of the Constitution, art. II, § 3 - it does not permit the President to award legal rights. See *Texas,* 809 F.3d at 167 ("Declining to prosecute does not transform presence deemed unlawful by Congress into lawful presence and confer eligibility for otherwise unavailable benefits based on that change."). A prosecutor's discretion about whom to prosecute is just that; it does not actually change anyone's status as a lawbreaker. The President's discretion as a prosecutor therefore does not extend to awarding EADs to illegal immigrants and cannot justify the panel's holding.

Distinguishing prosecutorial discretion from lawmaking is critical for another reason: Developing policy through prosecutorial discretion does not work. As the dissent below emphasized, "[p]residential power can turn on and off like a spigot; what our outgoing President has done may be undone by our incoming President acting on his own." App. 12 (Kozinski, J., dissenting). Because it can be reversed at the turn of an election, a President's mere discretion leaves the beneficiaries of DACA "in a continuing state of uncertainty by conferring no definite or permanent legal status," thus perpetuating the problem it is intended to solve. *Immigration Wars* 45; *id.* at 112.

It can even make permanent solutions *harder* to reach. Because executive orders are temporary, real solutions to our immigration crisis have to come from legislation. In today's climate, Governor Bush believes, they will also have to be bipartisan. The need ***17** for bipartisan legislation should eventually create an opportunity for comprehensive reform - provided, that is, the President exercises leadership. But DACA purported to enact President Obama's set of solutions without involving either Congress or Republicans. It was not leadership; it was a crutch to create the *illusion* of leadership while avoiding the substance. *Id.* at 111-12. By obviating the process of legislative debate and compromise, it simultaneously allowed Congress to avoid its responsibility to make the laws, and undermined the call for Congress to act. The real business of governing requires more than that, and the law should not reward Congress or a President for taking the easy way out.

To have legal effect, a program like DACA needs to be passed by Congress. This Court should therefore clarify that DACA is not federal law, and so not binding on Arizona.

B. State Laws Can Only Be Preempted By Federal Acts That Carry The Force Of Law.

If DACA is not law (and as explained above, it cannot be) then the Ninth Circuit's decision implies that presidential pronouncements can preempt States even though they are not law. If that were true, it would be "a brazen renegotiation of our federal bargain." App. 11 (Kozinski, J., dissenting). As Arizona's Petition explains, an exercise of its police powers - for example, the issuance of driver's licenses - can be preempted only by clearly established federal law. ***18** Pet. 15 (citing *Wyeth v. Levine,* 555 U.S. 555, 565 (2009)); see also *Arizona v. United States,* 132 S. Ct. 2492, 2501 (2012); *DeCanas v. Bica,* 424 U.S. 351, 356-64 (1976).

To have preemptive effect under the Supremacy Clause, an act of the federal government must be a "Law[] of the United States … made in Pursuance" to the Constitution. U.S. Const. art. VI, cl. 2. The process for making such laws is the same process described above, involving bicameralism, presentment, and the President's signature or an override of his veto. App. 11 (Kozinski, J., dissenting) ("The political branches of the federal government must act together to overcome state laws."). There is no room for preemption by executive order alone.

This Court's cases underscore the point. *Medellin v. Texas* addressed the preemptive effect of a presidential "Memorandum for the Attorney General" providing that the United States would " 'discharge its international obligations' " under the Vienna Convention " 'by having State courts give effect to' " a decision by the International Court of Justice. 552 U.S. at 497-98. The United States urged that the Memorandum bound State courts pursuant to the President's "power 'to establish binding rules of decision that preempt contrary state law.' " *Id.* at 523 (quoting Brief for United States as *Amicus Curiae* at 5, *Medellin v. Texas,* 552 U.S. 491 (2008) (No. 06-984)). But even in that case

- which implicated the Nation's foreign relations, where the President's inherent authority is near ***19** its apex - the Court held that the President has "authority … to execute the laws, not make them." *Id.* at 532. It therefore found no preemption of State law.

A similar issue arose in *Barclays Bank PLC v. Franchise Tax Board of California,* where a litigant "point[ed] to a series of Executive Branch actions, statements, and *amicus* filings" as adding up a federal position with preemptive effect. 512 U.S. 298, 328 (1994). As in this case, the Executive branch had proposed that Congress pass legislation that would have had preemptive effect. *Id.* at 329. This Court rejected that argument because the documents were "merely precatory." *Id.* at 330. It explained that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional [an] otherwise valid, congressionally condoned" State regulation. *Id.* at 330.

That straightforward rule of law is critical, not just to ensure proper respect for Congress as a coordinate branch of government, but also to protect federalism, which is just as critical in immigration law as in other contexts. As this Court has emphasized, "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' " *New York v. United States,* 505 U.S. 144, 181 (1992). In a large, diverse Nation like ours, federalism provides the additional advantage of allowing States to tailor their laws to local needs, sentiments, and policy preferences.

***20** Governor Bush, to repeat, believes that DACA is good policy. Nonetheless, a President's view of good policy is not enough to override State law. The Ninth Circuit's violation of that bedrock principle demands this Court's review.

CONCLUSION

The Court should grant certiorari and reverse the decision of the Ninth Circuit.

Footnotes

1 No one (including a party or its counsel) other than *amicus curiae* Governor Jeb Bush and his counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. Governor Bush provided notice to all parties pursuant to Supreme Court Rule 37.2(a), and all parties have consented to the filing of this brief.

2 See Jeb Bush & Clint Bolick, *Immigration Wars: Forging an American Solution* xii (2013) ("*Immigration Wars*).

3 A complete list of EAD codes is available on the DHS website. See DHS, Employment Authorization (available at https://tinyurl.com/13e36d3) (last visited Apr. 30, 2017).

4 Arizona's decision was supported by the plain terms of DACA itself. " T]he memorandum announcing the program state d] that it 'confers no substantive right, immigration status or pathway to citizenship because 'only the Congress, acting through its legislative authority, can confer these rights. App. 5 (Kozinski, J., dissenting) (quoting DHS Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012)).

5 The Supremacy Clause provides that " the federal] Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Const. art. VI, cl. 2.

6 A fuller discussion of these issues appears in Governor Bush's public writings. See *Immigration Wars;* Jeb Bush & Clint Bolick, *The Solution to Border Disorder,* Wall St. J., Jul. 23, 2014 ("*Border Disorder*).

7 "So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary. *Clinton,* 524 U.S. at 450 (Kennedy, J. concurring).

8 See App. 4 (Kozinski, J., dissenting) ("The panel in effect holds that the enforcement decisions of the President are federal law.).

2016 WL 1639728 (U.S.) (Appellate Brief)
Supreme Court of the United States.

TRINITY LUTHERAN CHURCH OF COLUMBIA INC., petitioner,
v.
Sara Parker PAULEY, Director of the Missouri Department of Natural Resources.

No. 15-577.
April 21, 2016.

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

Brief of Amici Curiae Council for Christian Colleges and Universities, Association of Catholic Colleges and Universities, General Conference of Seventh-Day Adventists and Seventeen Individual Religious Colleges and Universities Supporting Petitioner

Gene C. Schaerr, S. Kyle Duncan, SCHAERR DUNCAN LLP, 1717 K Street NW, Suite 900, Washington, DC 20006, (202)787-1060, GSchaerr@Schaerr-Duncan.com.

*i QUESTION PRESENTED

Does the exclusion of religious institutions from otherwise generally available government aid violate the Free Exercise and Equal Protection Clauses?

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*iv TABLE OF AUTHORITIES

***1** INTRODUCTION AND INTERESTS OF *AMICI*

At first blush, this may appear to be a case about the demands of the First and Fourteenth Amendments in the narrow context of religious primary and secondary education. After all, the petitioner is a church that sought (limited) state assistance in connection with its school playground. And the denial of that assistance was based on a state law - one of many Blaine Amendments adopted in various states in the late 1800s and early 1900s - designed precisely to thwart public assistance for Catholic primary and secondary schools.

For two reasons, though, the resolution of this case has substantial implications for American religious higher education, represented here by three *amid* associations that collectively represent hundreds of U.S. religious colleges and universities, and by a number of individual institutions, all described in the Appendix. [2] First, whatever principle this Court applies in determining ***2** whether Missouri has violated the federal Constitution in denying the assistance at issue here will likewise apply to disputes about governments' ability to discriminate against religious colleges and universities in the allocation of myriad forms of government assistance. Second, on a variety of topics, there exists in today's society an apparently escalating conflict between religious and secular norms, combined with a reduced cultural commitment to neutrality and pluralism. That dynamic creates a heightened risk that, as with the Blaine amendments of yesteryear, those opposed to some of the values widely embraced by today's religious colleges and universities will seek to exclude them from a variety of governmental programs - including some that are critical to these institutions' ability to carry out their educational missions.

That risk to religious higher education is made even more potent by a common misinterpretation of *Locke v. Davey,* 540 U.S. 712 (2004). In holding that a state could exclude ministerial training from a generally available scholarship program without running afoul of the First and Fourteenth Amendments, *Locke* reasoned that the religious discrimination at issue there was justified by a long-standing tradition - going back to the founding era - of avoiding governmental funding of ministerial training. Unfortunately, as this case illustrates, *Locke* has been misunderstood by some courts

and governments as authorizing more *general* discrimination against religious institutions in government assistance or contracts. And that mistaken reading of *Locke* appears to underlie a number of recent decisions by government functionaries excluding or threatening to exclude religious institutions - including religious colleges - from otherwise generally available government programs.

***3** Only this Court can re-establish *Locke's* narrow scope and thus protect religious institutions of all kinds - including colleges and universities - from the kinds of discriminatory policies approved in the decision below and others like it. And the Court can do so by reaffirming a neutrality principle, consistent with *Locke,* forbidding religious discrimination in the allocation of government benefits and contracts in all but the narrowest of circumstances.

STATEMENT

This case presents a classic example of discrimination against a religious institution in the allocation of government benefits or contracts.

1. The Learning Center, a preschool owned by petitioner Trinity Lutheran Church, applied for state funding to purchase recycled tires for resurfacing a playground. Pet. App. 97a-99a. In so doing, petitioner identified the numerous secular benefits the resurfacing would provide to the preschoolers who use the playground. Pet. Cert. 5-7; Pet. Br. 3-7. Petitioner applied for funding through a competitive process to The Missouri Department of Natural Resources (DNR). Pet. Cert. 7; Pet. Br. 6. But invoking the Missouri Constitution, the DNR nonetheless denied petitioner's application solely because petitioner is a church rather than a secular organization.

2. Missouri's Constitution contains a "Blaine Amendment," which forbids government funding to "aid … any church, sect, or denomination of religion." Mo. Const. Art. I § 7. The original effect - and apparent goal[3] - of such Blaine Amendments was to promote ***4** the Protestant faith through public schooling while denying funding for Catholic schools.

But this case is not about government favoring one religion, like Protestants. Rather, in this case DNR understood Missouri's Blaine Amendment as forcing DNR to withhold funding that is widely available to secular preschools from preschools run by churches of *any* faith. See Pet. Resp. 1-2; Pet. App. 153a.

3. Trinity Lutheran sued DNR, asserting claims under the Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause. See Pet. App. 116a (complaint). The district court dismissed these claims based on this Court's 2004 decision in *Locke v. Davey* 540 U.S. 712 (2004). Pet. App. 34a, 51a-52a. The district court claimed petitioner's request presented "antiestablishment concerns … at least comparable to those relied on by the Court in *Locke.*" Pet. App. 54a. The court acknowledged those concerns did not necessarily rise to an Establishment Clause violation. But it nevertheless claimed they were sufficient to justify excluding petitioner from participating in the grant program. Pet. App. 56a

4. A majority of the Eighth Circuit affirmed. Pet. App. 1a, 5a-12a. Judge Gruender dissented, finding that the antiestablishment interests were near their pinnacle in *Locke,* and that the antiestablishment interests in this case were not as strong. Pet. App. 28a. He doubted that the *Locke* Court would have considered "a state's interest in not rubberizing a playground surface with recycled tires" as a strong Establishment Clause interest. Pet. App. 29a. While acknowledging that the precise boundaries of *Locke* are "far from clear," he concluded that the district court should not have dismissed petitioner's claims. Pet App. 30a-31a.

***5** SUMMARY OF ARGUMENT

I. The decisions below - and others like them around the country - represent a serious and even existential threat to U.S. religious higher education. For if the church in this case can be discriminated against based on its religious character, so also can a religious college or university be discriminated against in the allocation of government-related benefits that are critical to its success - such as student loans and grants, tax exemptions, accreditations and research contracts.

The resulting weakening of religious higher education would be an enormous loss. As Congress has recognized, religious colleges provide unique social benefits. Beyond academic excellence, these institutions offer students superior opportunities to integrate community service into their educations, to enjoy the physical and emotional safety that generally prevail in communities bound together by a common religious ethic, and to learn in an atmosphere of greater philosophical and political diversity than that offered in most secular institutions. See, *e.g.,* 154 Cong. Rec. H7658-03 (2008) (community service); 20 U.S.C. § 1011a(a)(2) (diversity). Accordingly, the mere existence of religious colleges and universities adds valuable diversity to higher education in general. See *id.*

Unfortunately, in addition to the decisions in this case, other courts and governments have interpreted this Court's decision in *Locke v. Davey* as a license to discriminate against religious educational institutions based on their religious character. For example, the Kentucky Supreme Court recently relied upon *Locke* in upholding the application of Kentucky's Blaine Amendment to prohibit tax-exempt bond financing of a pharmacy school at a religious college. ***6** *University of the Cumberlands v. Pennybacker,* 308 S.W.3d 668 (Ky. 2010). The court claimed that, under *Locke,* governments can rely upon "antiestablishment interests" to prohibit *any* governmental financial benefit to religious colleges - even where such a prohibition results in rank religious discrimination. *Id.* at 680. And of course, the denial of such generally available benefits harms religious higher education by putting religious institutions at a substantial disadvantage compared to their secular counterparts.

II. To prevent further harm to religious higher education, *amici* respectfully ask this Court to clarify that *Locke* is not, after all, an open invitation to discriminate against religious institutions based on their religious character. Or, as Judge Gruender put it, "*Locke* did not leave states" - or other governmental or quasi-governmental entities - "with unfettered discretion to exclude the religious from generally available public benefits." Pet. App. 26a.

Instead, as a general rule, the proper standard for adjudicating claims of the sort raised here - and in *University of the Cumberlands* - is strict neutrality between religious and secular groups. Governments can depart from this general rule and discriminate against religious institutions *only* when such discrimination falls squarely within a well-established tradition going all the way back to the adoption of the First Amendment, as the Court held it did in *Locke.* Otherwise, the First and Fourteenth Amendments require that religious schools - like petitioner and *amici* - be treated no worse than their secular counterparts. As this Court put it in *Employment Division v. Smith,* 494 U.S. 872, 877 (1990), "[t]he government may not … impose special disabilities on the basis of religious views or religious status."

***7 ARGUMENT**

I. Religious Colleges And Universities, Which Benefit Society In Numerous Ways, Would Suffer Serious Harm Under The Misinterpretation Of *Locke* Embraced By The Courts Below And Other Courts And Agencies.

The Court's decision in this case is exceptionally important, not just to the development of constitutional doctrine, but also for its practical impact on religious colleges and universities throughout the Nation. In numerous ways, these institutions benefit American higher education and, hence, American society. But the lower court's erroneous and overbroad interpretation of *Locke* - an interpretation similar to those adopted by other courts and government agencies - would justify governmental discrimination against religious colleges across a range of important matters. Such discrimination would seriously weaken those colleges, perhaps driving some out of higher education altogether, and would thereby threaten the many benefits they provide.

A. Religious colleges and universities bring unique benefits - including much-needed diversity - to American higher education.

Religious institutions of higher education provide unique benefits to American society. To be sure, they offer students scholastic opportunities competitive with (and often superior to) those at non-religious schools, whether private or public. But beyond academic excellence, religious colleges and universities offer students advantages that often are not as readily available in secular institutions. Three of those are (1) the opportunity for students to naturally integrate community service into their education; (2) the greater ***8** physical safety offered by communities bound together by a common religious ethic; and (3) a broader diversity of philosophical and political perspectives among professors and students.

1. Congress recognized the value of religious colleges and universities in enabling students to integrate community service into their educational pursuits when it enacted the Higher Education Opportunity Act of 2008, Public Law 110-315 (2008). Among other things, that law requires that accrediting bodies "respect the … religious missions" of colleges and universities. *Id.* Moreover, noting that "[t]he time to recognize and encourage an increased commitment to public service is now," the House Report on that Act specifically mentioned as one of its policy rationales the increasing number of students at religious colleges who serve religious missions or perform other kinds of service. See 154 Cong. Rec. H7658-03 (2008). That comment reflects the reality that creating enhanced opportunities for community service is one key respect in which those colleges contribute to the common good. [4]

Nor is it an accident that religious colleges tend to foster community service. Students and professors in these institutions are far more likely to accept the injunctions ***9** in their foundational religious texts, traditions and teachings to take care of the foreigner, the poor and the needy. [5] And they are more likely to embrace the challenging principle that the value of one's life is measured not primarily by what one achieves in a secular occupation, but by how well one serves others. [6]

Thus, for instance, a sociology major in a Jewish college might find inspiration in the Book of Exodus to study and address the plight of refugees from war-torn lands. [7] Or a student in a Muslim school might be led by the Quran to investigate the factors influencing immigration, and then look for opportunities to serve local immigrants. [8] Or a Catholic law student might be moved by the New Testament to provide *pro bono* assistance to unwed mothers or crisis pregnancy centers. [9]

***10** In fact, studies show that students at religious colleges tend to spend more of their time in community service than students at non-religious colleges, public or private. [0] Students at such colleges frequently take time off from their educations for domestic or overseas public service, thanks in part to institutional policies and accommodations designed to encourage such service. [2] It is also common for students who don't serve ***11** traditional missions to volunteer in foreign countries while studying abroad. [3]

All such humanitarian work serves not only to benefit specific religious groups, but also to reduce cultural divides between nations and religions. That too benefits both students and the world community.

2. Religious colleges and universities also provide some of the safest places for learning and academic inquiry. For instance, in a recent study of campus safety, Regent University, Summit University and Brigham Young University - all private, religious institutions - were named the safest in the nation. [4] Indeed, of the top twenty-five safest universities, eighteen (or 72 percent) are religious. [5] And colleges classified ***12** as "most religious" consistently report much lower rates of sexual assault than the national average. [6]

Accordingly, for students and parents concerned about physical safety, religious colleges and universities can be a very attractive option. [7] And the mere existence of such options in the market for higher education helps ensure that other institutions place greater emphasis on student safety.

3. Perhaps most importantly, religious colleges contribute substantially to the diversity of American higher education. In most religious traditions, the call to faith is a challenge to think and live differently from the rest of society. From the Islamic command to "[b]e in the world as if you were a stranger or traveler" to Jesus' command that his disciples be "a light to the world," [8] people of faith are encouraged to transcend ***13** the cultures in which they live. Throughout the Nation's history, this effort to live differently has suffused numerous religious schools - compelling them, for example, to help lead the fight against slavery and racial discrimination. [9] Thus, it should come as no surprise ***14** that educational institutions founded and run by religious groups offer perspectives and emphases that differ, sometimes dramatically, from those offered by other educational institutions.

One illustration of that diversity is found in studies of professors' political affiliations and views. Overwhelmingly, most professors who teach in colleges and universities consider themselves politically "liberal." [20] And in one study of political donations by professors affiliated with some 150 colleges and universities, only nine were classified as having an average donation rating at or to the "right" of what the study deemed the political center. [2] Each of these nine more centrist ***15** schools - as measured by their professors' political views - has some religious affiliation. On the other hand, Brandeis University, which also boasts a long religious heritage, attracts professors whose donations are, on average, the 23rd most liberal of the collection of 150 colleges. [22] In short, religious colleges and universities have value in part because they tend to attract professors and students from across the political spectrum, rather than from one part of it.

Because of this reality, religious colleges are more likely than most to provide students extensive exposure to the full range of political views. And that includes not only the more "conservative" views that, for whatever reason, are missing in many non-religious institutions, but also more progressive views, leavened by religious perspectives.

The diversity that religious colleges add has long been understood and valued by Congress. As it said in the Higher Education Opportunity Act, "[i]t is the sense of Congress that [] the diversity of institutions and educational missions is one of the key strengths of American higher education." 20 U.S.C. § 1011a(a)(2). Consistent with that view, the provision further urged that "individual institutions of higher education have different missions and each institution should design its academic program in accordance with its educational goals." *Id.*

In short, just as this Court has recognized that racial diversity and other forms of diversity are valuable ***16** in any given educational institution, see *Grutter v. Bollinger,* 539 U.S. 306, 343 (2003), Congress has recognized that diversity *among* educational institutions is valuable in higher education as a whole.

It is not difficult to see how these unique benefits offered by religious colleges and universities could be gravely imperiled by the overbroad view of *Locke* espoused by the lower courts in this case. That mistaken interpretation could justify governments at any level in excluding religious institutions from otherwise available benefits such as student loan programs. It could even allow accrediting agencies to disqualify religious institutions based on their unique religious views. Such unfair discrimination, grounded in a misreading of *Locke,* would place those institutions at a severe disadvantage compared to their secular counterparts, eroding the needed diversity that these institutions bring to American higher education. And this is why *amici* are deeply concerned about the lower courts' decisions in this case.

B. Recent misinterpretations of *Locke* and related Establishment Clause precedents would permit governmental discrimination against religious colleges across a range of important matters.

The Eighth Circuit is not alone in misinterpreting *Locke.* In cases arising out of the inevitable interactions between government and religious schools, other courts, governments and agencies have also read *Locke* far too broadly, as countenancing general discrimination against religious institutions in access to otherwise generally available public benefits and contracts.

***17** 1. To succeed in their missions, religious universities and colleges must regularly interact with governments at every level. Indeed, many of the *essential* aspects of operating any school of higher education - such as obtaining necessary permits, becoming and remaining accredited, or finding loans for students - are regulated in whole or in part by governmental bodies. [23] Such regulation also governs financial and other benefits such as academic recognition and benefits paid with taxpayer dollars. [24] And of course, religious colleges are subject to other regulations applicable to colleges and universities generally - such as the federal Clery Act, which requires all colleges to report many details regarding on-campus crime, [25] and state and local environmental regulations. [26]

***18** These realities make the overbroad reading of *Locke* by the court below and others highly dangerous to religious schools. Such a reading offers a blueprint for governments to use Blaine Amendments or similar laws to deny benefits or even necessary approvals to religious colleges and universities - either because they are religious, or because they adhere to tenets with which the governmental bodies disagree. [27]

2. One area of immediate concern to many religious colleges is the tax-exempt bond financing that is generally available to institutions of higher education. Expressly relying on *Locke,* the Kentucky Supreme Court recently upheld the application of a Blaine Amendment to prohibit tax-exempt bond financing of a pharmacy school at a religious college. *University of the Cumberlands v. Pennybacker,* 308 S.W.3d 668 (Ky. 2010). The Court claimed that "antiestablishment interests" in prohibiting a.nj'funding to religious colleges are akin to the interests regarding the hiring of clergy in *Locke. Id.* at 680. And, much like the lower courts in this case, the Kentucky Supreme Court concluded that the financial benefit inherent in tax-exempt financing violated that state's Blaine Amendment, and that this discrimination against a religious college was allowed by *Locke.*

Such an extension of *Locke* allows local governments - including courts - to penalize religious colleges simply for being religious. It is thus a formidable ***19** threat to the diversity and other benefits these institutions offer.

3. Other courts - including several federal circuits - have likewise read *Locke* as validating a general hostility to religion as a legitimate "anti-establishment interest." Courts have thus found that governments have a legitimate interest in forbidding the following types of benefits to religious schools:

• state scholarship funds used for both religious and secular primary and secondary schools, see *Eulitt exrel. Eulitt v. Maine Dept. of Educ.,* 386 F. 3d 344, 349 (1st Cir. 2004);

• the use of school buildings for religious services after hours, even when secular groups are allowed to make analogous use of the buildings, see *Bronx Household of Faith v. Bd. of Educ.,* 750 F.3d 184, 187-188 (2d Cir. 2014), *cert. denied,* U.S. (2015);

• publicly funded placements of at-risk youth in social service programs that include religion, see *Teen Ranch Inc. v. Udow,* 479 F.3d 403, 409-412 (6th Cir. 2007); and

• acceptance of religion classes at religious schools in satisfaction of course requirements for college admission, see *Ass'n of Christian Schs. Int'l v. Stearns,* 362 F. App'x 640, 645-646 (9th Cir. 2010).

Such decisions are of great concern to religious colleges and universities, for they imply that governments have a legitimate, general "anti-establishment interest" in treating religious institutions *worse* than similarly situated secular institutions. Rather than embracing pluralism, this approach reflects a return to ***20** the forced orthodoxy and sectarian bias of the Blaine Amendment era.

4. A related area of concern is equal access to tax exemptions and other financial benefits. The Solicitor General put this issue on the table in this Court just last year when asked at oral argument whether a religious school's tax exemption could be revoked based on its beliefs and practices about marriage. His forbidding response was that "it is going to be an issue." [28] And it certainly will be "an issue" if *Locke* provides as broad a mandate for religious discrimination as the lower courts in this case believed.

Some have even advocated denying religious colleges other forms of taxpayer assistance, such as government contracts, Pell grants, and student loans. [29] For example, a California State Assembly bill introduced earlier this year would prohibit students from using "Cal Grants" - funds provided to low income students who might not otherwise be able to afford a higher education - at any institution that has applied for a waiver by the U.S. Department of Education from Title IX's nondiscrimination requirements. [30] Although the religious exemption from Title IX has been ***21** available for decades, and is deemed essential to many schools' ability to operate in accordance with their religion, religious colleges in California may soon lose state financial benefits - available to non-religious institutions - simply for invoking that established federal right.

Whether tax-exempt status and other generally available benefits will be available for religious colleges largely depends on how this Court interprets *Locke.* For reasons detailed below, this Court should explain that *Locke* in no way sanctions the kind of blatant religious discrimination represented by these calls to end various benefits to religious institutions.

5. Accreditation is another area of concern. True, as noted previously, an important provision of the 2008 Higher Education Opportunity Act requires accreditation bodies to "respect" religious colleges' "religious missions." [3] Nevertheless, calls for accreditation bodies to ignore religious missions and impose contrary secular norms continue. [32] And a broad interpretation of *Locke* would embolden those who seek to deprive religious colleges of accreditation based on the good-faith pursuit of their religious missions. [33]

***22** One recent example is the debate involving the president of Gordon College, who signed a letter advocating for "banning discrimination" through an executive order while at the same time allowing exemptions from that order - so that "an extension of protection for one group not come at the expense of faith communities." [34] The response to this thoughtful letter was swift: At least one local government canceled an important contract with the college, [35] the media criticized it for its stance on historical Christian principles of sexual morality, and its regional accreditation was called into question. [36] While the college was eventually able to maintain its accreditation, the episode was a stark reminder that a broad reading of *Locke* would make it easier for the enemies of religious colleges - in ***23** a variety of circumstances - to attack their accreditation.

If *Locke* were interpreted to allow governments or quasi-government agencies like accrediting bodies to discriminate against religious colleges, the consequences would be sweeping. Under this reading of *Locke,* students (and their parents) would find less diversity in the marketplace of higher education. And the upshot would likely be increased social strife over religion and religion-related issues, as ever-more intrusive governments seek to penalize religious colleges for not pursuing whatever objectives the government deems most important at the time. Such "divisiveness based upon religion [would] promote[] social conflict, sapping the strength of government and religion alike." *Van Orden v. Perry,* 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

***24 II. This Court Should Adopt A Neutrality Principle Under Which Religious Discrimination In The Allocation Of Government Benefits Is Constitutionally Permissible Only In The Kinds Of Narrow Circumstances Presented In *Locke*.**

Principles already established in this Court's precedent mark a roadmap for avoiding the problems outlined above. As this case is far outside the realm of *Locke,* the relevant case law dictates that the proper rule in this case and others like it a rule of genuine neutrality between secular and religious organizations.

A. Whether or not *Locke* was correct, its holding was expressly limited to the denial of government funding for training clergy, and its reasoning supports a general principle of neutrality in access to government benefits.

Some of the *amici* here have previously expressed skepticism about the rule adopted in *Locke.* [37] But whether or not *Locke* was correctly decided, its approval of religious discrimination was expressly limited to the specific type of discrimination there. And in other respects, *Locke supports* a general rule of neutrality as between secular and religious institutions.

1. The issue in *Locke* was whether a state that offered scholarships for students seeking almost all college degrees could deny such scholarships to students seeking a degree in devotional theology, *i.e.,* training for the ministry. 540 U.S. at 715. In ruling that Washington could forbid that specific use of its scholarships, the Court found that the funding of devotional degrees ***25** is a form of funding for training ministers, the avoidance of which the Court deemed a legitimate "anti-establishment interest." *Id.* at 722.

In support, the Court cited early state constitutions demonstrating the widespread nature of this concern at the Nation's founding. 540 U.S. at 723. Because prohibiting the funding of ministers is a classic antiestablishment interest, the Court held, "[t]he State's interest in not funding the pursuit of devotional degrees is substantial." *Id.* at 725. That specific interest, the Court held, justified the religious discrimination challenged in that case - that is, denying funds for ministerial training. And the Court explicitly limited its holding to those facts, declining to "venture further into this difficult area." *Ibid.*.

2. Still, three aspects of *Locke's* subsidiary reasoning support a general rule of neutrality as between non-religious and religious institutions.

First, as noted, the Court held that only a very narrow interest - avoiding the funding of ministerial training - could justify the religious discrimination in Washington's scholarship program. The court did not rely upon a general interest in avoiding the "promotion" or "endorsement" of religion, or even a general principle of avoiding any form of direct or indirect financial assistance to religion. Thus, the holding and rationale of *Locke* are entirely compatible with a general rule of neutrality in governmental benefits.

Second, in its historical analysis the Court made clear that the only cognizable "anti-establishment interests" are those that are grounded in the history of the founding period. Unlike funding for ministers, there is no evidence that funding of religious activity in general was viewed as an improper establishment ***26** of religion, much less funding of religious schools. To the contrary, there is ample evidence that religious schools and other educational efforts *did* receive substantial public funding and other assistance during the early part of our Nation's history. [38]

This aspect of *Locke* makes clear the error of lower court decisions - such as *University of the Cumberlands, Bronx Household of Faith, Teen Ranch* and *Association of Christian Schools International* - that rely upon "anti-establishment interests" that are not grounded in the history of the founding period. Indeed, *Locke* refutes the idea that there exists some general interest in avoiding *any* assistance to religion - in the form of tax-exempt financing, see *University of the Cumberlands, supra,* in the use of publicly owned facilities, see *Bronx Household of Faith, supra,* in contracts with social service agencies that include a religious component in their services, see *Teen Ranch, supra,* or in allowing religion courses

taught by religious institutions to satisfy college admissions requirements, see *Ass'n of Christian Schools, supra.* Under the reasoning of *Locke,* none of these interests is a cognizable "anti-establishment interest," because none of ***27** them has a legitimate grounding in the history of the founding period.

Third, Locke noted *with approval* that the Washington program funded many programs run by religious schools - such as religion classes taken while pursuing a *non*-ministerial degree. *Id.* at 724-25. Indeed, the Washington scholarship program openly allowed "students to attend pervasively religious schools" on state-funded scholarships, as long as they weren't seeking ministerial degrees. *Id.* at 724. Thus, the Court concluded that, in the administration of the Washington program, there was no evidence of a *general* hostility to religion. *Id.*

By negative inference, that reasoning casts further doubt on decisions like *University of the Cumberlands* and others that have treated *Locke* as legitimizing general anti-religious bias in public benefits. Indeed, that reasoning strongly suggests that such evidence would have made the Washington program invalid - either under the Free Exercise Clause, the Equal Protection Clause, or both. See *id.* at 718 (discussing plaintiffs' constitutional theories). As explained below, except where a specific, history-based anti-establishment interest is at stake, those clauses require that government be neutral as between religious and non-religious institutions.

***28 B. Except where religious discrimination is protected by a clear tradition going back to the founding period, the First and Fourteenth Amendments require genuine religious neutrality in the allocation of governmental benefits.**

Because *Locke* cannot justify the religious discrimination at issue here, general principles of neutrality control this and analogous cases. That is true whether the government excludes all religious groups from a state benefit, or only certain religious groups.

1. In a string of decisions culminating in *Good News Club v. Milford Central School,* this Court has consistently held that there is "no valid Establishment Clause interest" in denying religious groups access to limited public forums. 533 U.S. 98, 113 (2001). And the same principle applies to otherwise generally available funding. See *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 838-46 (1995). Indeed, allowing religious groups equal access to such funding on neutral terms is "a significant factor in *upholding* governmental programs in the face of Establishment Clause attack[.]" *Good News Club,* 533 U.S. at 114 (quoting *Rosenberger,* 515 U.S. at 839 (1995)) (emphasis added).

Echoes of this neutrality principle are found in more recent Establishment Clause opinions. For example, the four dissenting Justices in *Town of Greece v. Galloway* noted that "our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian." 134 S.Ct 1811, 1841-42 (2014). And so too here: "Our public institutions" - including all the governmental bodies that allocate benefits or contracts - "belong no less" to the religious than to the ***29** non-religious. And accordingly, there should be no discrimination between religious and secular institutions in the allocation of such benefits.

2. Settled free speech and free exercise doctrine also requires that both speech and actions undertaken for religious reasons not be treated adversely merely because of their religiosity. See *Good News Club,* 533 U.S. at 114. As this Court has put it, "[t]he government may not … impose special disabilities on the basis of religious views or religious status." *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 877 (1990). Rather, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral [] and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 533 (1993) (citing *Smith,* 494 U.S. at 877 (1990)).

This is no less true when religious individuals seek to use religion in pursuing ends that others may pursue through secular means. For example, in *Good News Club* - and without disagreement from the dissent - the Court explained that, if a school district's policy allowed a group to meet with a goal of improving "the welfare of the community" by reading

Aesop's Fables, the district must allow other groups to pursue the same goal through religious means. 533 U.S. at 108110. Likewise, in *Lamb's Chapel v. Center Moriches Union Free School Dist.,* the Court concluded that, because the school district's policy generally allowed the kind of presentation requested there - a presentation about family values - the school district could not refuse to allow the presentation solely because of its religiosity. 508 U.S. 384, 393-394 (1993).

***30** 3. The same principle obviously applies to religious higher education. Consider for example a rule making the tax-exempt status of religious colleges and universities contingent on their hiring professors irrespective of religious belief. Such a rule would not be neutral between religious and secular private colleges: Secular colleges could still use *their* chosen criteria - which would be secular in nature - in making employment decisions, while religious colleges would be unable to use the criteria of greatest importance to their chosen missions. Such a rule would thus penalize colleges for making religiously driven choices - just as anti-Catholic bias fueled earlier, misguided applications of the Blaine Amendments.

This too would violate the First Amendment. As the Court noted in *Hosanna-Tabor,* conditioning governmental benefits on such hiring practices would "interfere[] with the internal governance" of religious schools, "depriving the [school] of control over the selection of those who will personify its beliefs." *Hosanna-Tabor v. EEOC,* 132 S.Ct 694, 706 (2012). Further, as Justices Alito and Kagan noted in *Hosanna-Tabor,* "[f]orcing a group to accept certain members may impair [its ability] to express those views, and only those views, that it intends to express." *Id.* at 712 (quoting *Boy Scouts of America v. Dale,* 530 U.S. 640, 648 (2000)). Justices Alito and Kagan noted that these principles apply "with special force [] to religious groups" - which plainly includes religious colleges and universities. See *id.*

These concerns are implicated, moreover, whether a government *mandates* that all colleges comply with a chosen norm - in our example, religious neutrality in hiring - or instead uses monetary *incentives* that make it difficult for the school to operate if it refuses ***31** on religious grounds to accept that norm. A broad interpretation of *Locke* would interfere with these rights by making the institutional autonomy of religious organizations subservient to the secular norms of the day.

The Court, moreover, said nothing to the contrary in *Christian Legal Society v. Martinez,* in which a public law school was allowed to require a Christian group, as a condition of public benefits, to abandon religious criteria for its leaders. 130 U.S. 2971 (2010). The majority in *Christian Legal Society* addressed the school policy on the assumption that it was applied equally to *all* school groups. *Id.* at 2982-2984. Different considerations would have applied had the decision hinged on whether the group was singled out because of its religious character. See *Good News Club,* 533 U.S. at 114; *Rosenberger,* 515 U.S. at 828; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 533 (1993) (strict scrutiny for non-neutral treatment of religion).

4. This case is a textbook example of neutrality's importance. Petitioner seeks funding through a grant program akin to the programs at issue in *Rosenberger, Good News Club,* and *Lamb's Chapel.* In this case, as in those cases, petitioner seeks to achieve the same end as its secular counterparts: providing a safer playground for children.

Of course, neutrality does not require the state to allow religious benefactors to use state resources for *unapproved* secular purposes - say, a church attempting to use the tire funding here to retrofit cars. But neutrality requires that both secular and religious applicants be able to use the benefit to achieve the same goal - here, resurfacing a playground. And it does not ***32** matter whether religion will be spoken of on the playground any more than it mattered to the on-campus club in *Rosenberger* or the after-school programs in *Good News Club* and *Lamb's Chapel.*

In short, by refusing to allow petitioner to participate in the program at issue here on the same terms as secular organizations, the government discriminates on the basis of religion just as surely as the governments did in those cases. And because there is no cognizable "anti-establishment interest" here - that is, no anti-establishment interest with a pedigree going back to the founding period, as in *Locke* - that discrimination violates the First and Fourteenth Amendments.

C. At a minimum, unless the benefit would directly fund essentially religious activity, the Constitution requires that people and institutions of faith be treated no worse than other people and institutions.

But even if the Court were unwilling to cabin *Locke* in that manner, the Court should still hold that, except for the rare situation presented there, religious neutrality is required unless the government benefit would directly fund essentially religious activity.

Obviously, the causal chain between government benefits and religion can be long or short. For example, no court or commentator of which *amici* are aware disputes that individuals may use tax refunds, Earned Income Tax Credits, or income from a government job to benefit churches. At the other end of the spectrum, no one would suggest that the Constitution permits the federal government to pay directly for printing of churches' proselytizing materials.

***33** From an Establishment Clause perspective, moreover, "direct benefits" - money given directly to a church because of its religiosity - are obviously of greater concern than "incidental benefits" - money that eventually wends its way into the institution's coffers, or is given to the institution for secular reasons. See *Board of Ed. v. Mergens,* 496 U.S. 226, 260-61 (1990) (Kennedy, J., concurring in part and in the judgment). But, as even the dissent in *Rosenberger* recognized, *indirect* aid, given evenhandedly to both religious and non-religious individuals, is "simply not within the contemplation of the Establishment Clause's broad prohibition." *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 881 (1995) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ, dissenting). That is, indirect assistance does not raise any cognizable anti-establishment interest.

Accordingly, aside from the rare situation in *Locke,* a government benefit that does not directly advance an institution's essentially *religious* mission raises no conceivable Establishment Clause concerns - and thus cannot possibly justify religious discrimination in the allocation of governmental benefits or contracts. For example, a student's use of a taxpayer-funded Pell Grant or scholarship to pursue a mathematics degree at a religious university raises no Establishment Clause concerns whatsoever: Any encounters with religion at the university are not part of the *government's* purpose in awarding the grant or scholarship, which therefore cannot be considered "direct aid" to ***34** the university's essentially religious mission. [39] Accordingly, in such circumstances, to discriminate against a religious organization in access to such a benefit is a clear violation of the First and Fourteenth Amendments. See *Rosenberger,* 515 U.S. at 881 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ, dissenting). [40]

***35** This is precisely such a case of indirect, incidental aid. As petitioner explains more fully, it seeks the funding at issue here for the same purposes as any secular preschool. Pet. Br. 4. And whether or not it receives the funding, its religious and other teachings will go on in exactly the same way. Excluding petitioner from that funding thus violates both the Free Exercise Clause and the Equal Protection Clause, even under the broadest plausible reading of the Establishment Clause.

*36 CONCLUSION

Petitioner and Judge Gruender are correct: Missouri's denial of funding for playground resurfacing merely because petitioner is religious is unconstitutional. In ruling for petitioner, this Court should reaffirm the principles of neutrality mandated by the First and Fourteenth Amendments. This will protect religious colleges and universities from the kind of governmental religious discrimination that would threaten those institutions' viability and, hence, the many benefits they bring to American higher education.

For all these reasons, and those explained by petitioner, the decision below should be reversed.

*1a APPENDIX: Interests of Particular *Amici*

Associations

The Association of Catholic Colleges and Universities (ACCU) is the collective voice of Catholic higher education in the United States. ACCU's membership includes 196 accredited Catholic institutions of higher learning in the United States, comprising more than 90 percent of such institutions. ACCU's affiliate members include associations of Catholic colleges and universities sponsored by particular religious orders. ACCU's mission includes strengthening the mission and character of Catholic higher education, and ACCU is often involved in educating the general public on issues relating to Catholic education.

The Council for Christian Colleges and Universities (CCCU) is an international association of Christ-centered colleges and universities. The CCCU's mission is to advance the cause of Christ-centered higher education and to help member institutions transform lives by faithfully relating all areas of scholarship and service to biblical truth. Headquartered in Washington, D.C., the CCCU is comprised of 142 institutions located in the United States across 33 states, all of which are either regionally accredited colleges and universities with curricula rooted in the arts and sciences or seminaries. In addition, the CCCU has another 35 institutions with Christian missions located in 20 countries around the world. CCCU institutions educate over 450,000 students each year and have graduated almost two million alumni.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents over 81,000 congregations ***2a** with more than 19 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,400 congregations with more than 1.1 million members. It operates twelve institutions of higher learning throughout the United States. The Seventh-day Adventist Church has long supported the separation of church and state. However, it has a strong interest in making sure that maintaining such a separation does not become a basis to discriminate against religious organizations.

Individual Religious Colleges and Universities

Azusa Pacific University (APU) has been developing disciples and scholars since 1899. It is a comprehensive Christian, evangelical university, dedicated to excellence in higher education, and to making a positive impact on society. The main campus is northeast of Los Angeles, with several other locations throughout California. Total student enrollment exceeds 6,800. APU offers more than 40 areas of undergraduate study, 19 master's degree programs, and four doctorates. Many of its students rely on government sponsored loans and grants to pay for their tuition and other educational expenses. APU thus has a strong interest in preventing state discrimination against religious individuals and entities in the distribution of government benefits.

Biola University (Biola), located in Southern California, is a fully accredited national University carrying on a tradition of educational excellence that dates back over 100 years. Biola's mission is to provide biblically centered education, scholarship and service - equipping men and women in mind and character to influence the world for the Lord Jesus Christ. The ***3a** University now encompasses seven schools: School of Arts and Sciences, Talbot School of Theology, Rosemead School of Psychology, Cook School of Intercultural Studies, Crowell School of Business, School of Education and School of Science, Technology and Health. Biola offers 4 baccalaureate degrees in 40 majors, 20 masters and 8 doctoral degrees. Biola's commitment to academic excellence is firmly rooted in its adherence to an in-depth, knowledgeable and living Christian faith. Each year, over 6,300 students find Biola's unique blend of faith and learning conducive to their academic and vocational goals.

Brigham Young University (BYU) is an institution of higher education in Provo, Utah, that is founded, supported, and guided by The Church of Jesus Christ of Latter-day Saints (LDS Church). BYU's mission is to assist individuals in their quest for perfection and eternal life. BYU aims to provide an education that is spiritually strengthening, intellectually

enlarging, and character building, leading to lifelong learning and service. Members of the BYU community rigorously study academic subjects in the light of the restored gospel of Jesus Christ. More than 30,000 undergraduate and graduate students attend classes and study on BYU's campus, and many thousands more are enrolled in BYU's continuing education courses. BYU confers annually approximately 8,000 undergraduate and graduate degrees through 10 colleges, and offers bachelor's degrees in more than 180 academic programs, master's degrees in more than 60 programs, and doctorates in 26 programs. BYU is part of the LDS Church's educational system, which serves more than one million young adults and others worldwide.

***4a** Brigham Young University-Hawaii (BYU-Hawaii) is an institution of higher education located in the town of Laie, on the North Shore of Oahu, Hawaii. BYU-Hawaii was originally established by The Church of Jesus Christ of Latter-day Saints in 1955 as the Church College of Hawaii, the name by which it was known until 1974. The mission of Brigham Young University-Hawaii is to integrate both spiritual and secular learning, and to prepare students with character and integrity who can provide leadership in their families, their communities, their chosen fields, and in building the kingdom of God. BYU-Hawaii is an undergraduate university with an enrollment of approximately 2,700 students who represent over 70 different countries and cultures from the Pacific Rim, the U.S. mainland, and other parts of the world. BYU-Hawaii is part of the LDS Church's educational system.

Brigham Young University-Idaho (BYU-Idaho) is an institution of higher education in Rexburg, Idaho, that is founded, supported, and guided by The Church of Jesus Christ of Latter-day Saints. Its mission is to develop disciples of Jesus Christ who are leaders in their homes, the LDS Church, and their communities. It achieves this objective by building testimonies of the restored gospel of Jesus Christ and encouraging living its principles; providing a quality education for students of diverse interests and abilities; preparing students for lifelong learning, for employment, and for their roles as citizens and parents; and maintaining a wholesome academic, cultural, social, and spiritual environment. BYU-Idaho is part of and plays a unique and distinctive role within the LDS Church's educational system, which serves more than one million young adults and others worldwide. Formerly a two-year institution known as Ricks College, BYU-Idaho ***5a** now offers an array of certificates, associate, and bachelor degrees to a worldwide student body. A three-track admission system allows the school to serve a total on-campus enrollment of 30,000 students each year, with another 9,900 students participating in its Online Degree program. In addition, a pre-matriculation program titled Pathway has an annual enrollment of 23,000.

Loma Linda University (LLU) is a Seventh-day Adventist educational health-sciences institution with 3,000 students located in Southern California. LLU is comprised of seven schools and the Faculty of Religion. More than 55 programs are offered by the schools of Allied Health Professions, Dentistry, Medicine, Nursing, Pharmacy, Public Health and the Graduate School. LLU offers curricula ranging from certificates of completion and associate in science degrees to doctor of philosophy and professional doctoral degrees.

Liberty University (Liberty) is an evangelical Christian institution of higher education located in Lynchburg, Virginia. Founded by Dr. Jerry Falwell in 1971, Liberty maintains the vision of its founder by developing Christ-centered men and women with the values, knowledge and skills essential to impact the world. Through its residential and online programs, services, facilities and collaborations, Liberty educates men and women who will make important contributions to their workplaces and communities, follow their chosen vocations as callings to glorify God, and fulfill the gospel's Great Commission. With a residential enrollment of 14, 500 students and a total enrollment exceeding 110,000, Liberty is now the largest private, nonprofit university in the nation, the largest university in Virginia, and the largest Christian university in the world. Liberty offers undergraduate, ***6a** graduate (master's and doctoral level), and professional programs in more than 547 unique programs of study, including programs in business, counseling, divinity, education, engineering, law, nursing and medicine. Known as “the Flames,” Liberty is a member of the Big South Conference and has 20 NCAA Division I athletic programs.

The University of Notre Dame is a Catholic academic community of higher learning, animated from its origins by the Congregation of Holy Cross. The University is dedicated to the pursuit and sharing of truth for its own sake. As a Catholic university, one of its distinctive goals is to provide a forum where, through free inquiry and open discussion, the various lines of Catholic thought may intersect with all the forms of knowledge found in the arts, sciences, professions, and every other area of human scholarship and creativity. In 2015, the University conferred over 3,500 undergraduate, graduate and professional degrees.

Oklahoma Christian University (OC) began in 1950 as Central Christian College (with an enrollment of 97). OC has grown into a comprehensive Christian university serving almost 2,600 students. Affiliated with the churches of Christ, OC's students are committed to academic and spiritual excellence. OC's close-knit community creates a culture where students, faculty and staff go the extra mile for each other. OC's professors teach from a Christian worldview and are fiercely dedicated to high standards of scholarship.

Oklahoma Wesleyan University (OKWU), an evangelical Christian university of The Wesleyan Church, models a way of thought, a way of life, and a way of faith. It is a place of serious study, honest questions, and critical engagement, all in the context of a liberal ***7a** arts community that honors the Primacy of Jesus Christ, the Priority of Scripture, the Pursuit of Truth, and the Practice of Wisdom. OKWU has as a goal for all members of the university community to work to promote healing and wholeness in a broken culture and hurting world. Unapologetic in its commitment to the truth of Christ and the truth of Scripture, OKWU models a way of thought, a way of life, and a way of faith.

Oral Roberts University (ORU) is a private Christian university with a mission to build Holy Spirit- empowered leaders through whole person education to impact the world with God's healing. ORU's fulfillment of its mission includes providing a “whole person education” which develops students in spirit, mind, and body, to prepare them to be professionally competent leaders who are spiritually alive, physically disciplined, socially adept, and intellectually alert. As a comprehensive university dedicated to student outcomes, ORU offers more than 76 undergraduate majors, as well as 12 master's-level programs and two doctoral degrees. Faculty members educated at the nation's top graduate schools serve as academic, professional and spiritual mentors to students. ORU's Tulsa campus is home to students from all 50 U.S. states and 86 international countries. ORU and its students also deliver the whole person distinctive to all inhabited global regions through distance learning, study abroad, educational partnerships, missions and outreach work, all anchored in a Christian worldview.

Patrick Henry College (PHC) is dedicated to providing a broad-based baccalaureate education that stresses content, the imitation of excellence, the pursuit of knowledge, and the exercise of the whole range ***8a** of talents that God has given to students. PHC prepares Christian men and women to lead our nation and shape our culture with timeless biblical values and fidelity to the spirit of the American founding. Educating students according to a classical liberal arts curriculum and training them with apprenticeship methodology. Located in Virginia, PHC provides academically excellent baccalaureate level higher education with a biblical worldview.

Regent University (Regent) strives to serve as a leading center of Christian thought and action to provide excellent education through a Biblical perspective and global context, thereby equipping Christian leaders to change the world. Although Regent is not affiliated with any denomination or church, traditional Biblical Christianity permeates all that Regent does. Classes at Regent are taught from a Biblical perspective, and all employees - from Regent's President and Trustees to its groundskeepers and custodians - are required to be Christians and to affirm in writing their agreement with the University's Statement of Faith

Southern Virginia University is an independent private college located in Buena Vista, Virginia. Founded in 1867 and renewed in 1996, Southern Virginia is dedicated to exceptional liberal arts education in a faith-supportive environment in harmony with the values of The Church of Jesus Christ of Latter-day Saints. As an independent private college, however, Southern Virginia is not owned or sponsored by the LDS Church. Students at Southern Virginia are committed to being

academically and professionally accomplished, spiritually rooted, service-oriented, and self-reliant. Southern Virginia is open to students of all faiths and backgrounds who are seeking academic ***9a** excellence in an LDS environment of high moral and ethical standards.

Union University is an academic community, affiliated with the Tennessee Baptist Convention, equipping persons to think Christianly and serve faithfully in ways consistent with its core values of being excellence-driven, Christ-centered, people-focused, and future-directed. These values shape its identity as an institution that prioritizes liberal arts based undergraduate education enhanced by professional and graduate programs. As the oldest institution affiliated with Southern Baptist life, Union's mission is to provide Christ-centered education that promotes excellence and character development in service to Church and society. This mission is accomplished in more than 100 programs of study on three campuses. Nearly 4,000 highly qualified students enroll at Union each year from over 40 states and 30 countries. Led by a faculty of outstanding teachers and scholars, students pursue baccalaureate, master's, education specialist, and doctoral degrees.

Wheaton College is an explicitly Christian, academically rigorous, fully residential liberal arts college and graduate school located in Wheaton, Illinois. Established in 1860, Wheaton is guided by its original mission to provide excellence in Christian higher education, and offers more than 40 undergraduate degrees in the liberal arts and sciences, and 14 graduate degrees.

William Jessup University, located in the suburbs of Sacramento, California, offers over 50 different programs and 20 different majors. Since its founding as a Bible college during the great depression, William Jessup's vision has been that its graduates will be ***10a** transformed and will help redeem world culture by providing notable servant leadership; by enriching family, church and community life; and by serving with distinction in their chosen career. William Jessup was the first private four-year university in the greater Sacramento area and the first evangelical Christian College between Fresno and Redding.

Footnotes

1 No one other than *amici,* their members and counsel authored any part of this brief or made a contribution to fund its preparation or submission. Counsel for all parties have consented to the filing of this brief in communications on file with the Clerk.

2 The associational *amici* are: The Association of Catholic Colleges and Universities, The Council for Christian Colleges and Universities and The General Conference of Seventh day Adventists. The individual *amici* are: Azusa Pacific University, Biola University, Brigham Young University, Brigham Young University Hawaii, Brigham Young University Idaho, Loma Linda University, Liberty University, The University of Notre Dame, Oklahoma Christian University, Oklahoma Wesleyan University, Oral Roberts University, Patrick Henry College, Regent University, Southern Virginia University, Union University, William Jessup University and Wheaton College.

3 See generally Steven K. Green, *The Blaine Amendment Reconsidered,* 36 Am. J. Legal Hist. 38 (1992).

4 Indeed, many state and federal programs encourage college students to provide such service. See, *e.g.,* Corp. for Nat'l and Cmty. Serv., *National Service in Your State (2014 2015),* http://www.nationalservice.gov/impact our nation/state profiles (providing information for national and state service initiatives focused on incentivizing and promoting young adults between the ages of eighteen to twenty four to combine education and community outreach).

5 See, *e.g.,* Deuteronomy 10:18 19 ("He executes justice for the fatherless and the widow, and loves the sojourner, giving him food and clothing. Love the sojourner, therefore; for you were sojourners in the land of Egypt.).

6 See, *e.g.,* St. John of the Cross, *Dichos* 64 ("At the evening of life, we shall be judged on our love.), quoted in *Catechism of the Cathohc Church,* art. 1022.

7 See, *e.g.,* Exodus 22:21 ("Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt.).

8 See, *e.g.,* Quran 17:26 ("Give … to the needy and the wayfarers.).

9 See, *e.g.,* Matthew 25:35 40 (Jesus's command to treat "the least of these as if they were Jesus himself); James 1:27 ("Religion that is pure and undefiled before God and the Father is this: to visit orphans and widows in their affliction, and to keep oneself unstained from the world.).

10 See Elizabeth Weiss Ozorak, *Love of God and Neighbor: Religion and Volunteer Service Among College Students,* 44 Rev. of Religious Research 285, 289 91 (2003) (college students were far more likely to engage in volunteer activity when they were actively religious and participated in religious worship); Thomas A. Trozzolo & Jay W. Brandenberger, *Religious Commitment and Prosocial Behavior: A Study of Undergraduates at the University of Notre Dame,* 2 Center for Social Concerns 1, 3 4 (2001) (positive correlation between religious university and prosocial behavior, including volunteer work).

11 George S. Wood, *Faith Development of Christian College Students Engaged in a One Month Study Abroad Mission Trip,* Doctoral Dissertations of Ball State University (1999); See Kathryn A. Tuttle, *The Effects of Short term Mission Experienced on College Students Spiritual Growth and Maturity,* 4NS Christian Education Journal 123 (2000) (Series 2); Adventures, https:// www.adventures.org/trip8/?prg passport (last visited April 15, 2016); Orphan Outreach, http://www.orphanout reach.co/ mission trips/short term mission trips.asp (last visited April 15, 2016); Brigham Young University, *Percentage of Students who Have Served Missions,* http://yfacts.byu.edu/Article?id 264 (last visited April 15, 2016).

12 See La Sierra University Student Missions, https://lasierra.edu/missions/ (last visited April 15, 2016); Office of Campus Ministries, Andrews University *Missions,* https://www.andrews.edu/cm/change/missions/about/ (last visited April 15, 2016); Brigham Young University, *Mission Deferments,* https://admissions.byu.edu/mission deferments (last visited April 18, 2016).

13 See R. Michael Paige, Gerald W. Fry, Elizabeth M. Stallman, Jasmina Josic, and Jae Eun Jon, *Study Aboard for Global Engagement: The Long Term Impact of Mobility Experiences,* 20 Intercultural Education 529 (2009); Global Volunteers, https://globalvolunteers.org/students/ (last visited April 15, 2016); Megan Heise, *Tips for College Students Before, During, and After Volunteering Abroad,* Go Overseas (July 16, 2013), http://www.gooverseas.com/blog/tips college students volunteer abroad; Princeton Review, *The Gap Year Experience: A Life Changing Opportunity,* http://www.princetonreview.com/study abroad/college abroad/gap year (last visited April 20, 2016).

14 Tanya Loudenback, *The 25 safest college camp uses in America,* Business Insider (Jan. 12, 2016), available at: http:// www.businessinsider.com/safest college campuses in america 2016 1.

15 *Id. see also* Niche, *Safest College Campuses,* available at: https://colleges.niche.com/rankings/safest colleges/ (another permutation of same rankings). The sources for these numbers include Department of Education data reported under the Clery Act, as well as students' self reported perceptions of safety. *Id.* (under the link " s]ee how this rating was calculated).

16 EDSmart, College Sexual Assault Statistics of Top Ranked Schools 2015 http://www.edsmart.org/college sexual assault statistics top ranked schools/#stats (last visited April 20, 2016).

17 Indeed, for these and other reasons, even though there are few American colleges in the Islamic faith tradition, Muslim students are increasingly flocking to universities run by other faiths. See, *e.g.,* Richard Pérez Peña, *Muslims From Abroad Are Thriving in Catholic Colleges,* N.Y. Times (Sep. 2, 2012), available at: http://www.nytimes.com/2012/09/03/education/muslims enroll at catholic colleges in growing numbers.html (noting fondness of Muslim students for "the prevalence of … single sex dorms and "a place where talk of religious beliefs and adherence to a religious code are accepted and even encouraged).

18 See also Bonnie Louise Kuchler, *One Heart: Universal Wisdom from the World s Scriptures* 110 (2003) (citing a hadith of an Islamic scholar that encourages to " b]e in the world as if you were a stranger or traveler); Avi Lazerson, *Holiness and Judaism,* Jewish Magazine (2001) (online publication), http://www.jewishmag.com/39mag/holy/holy.htm (interpreting the Torah to direct Jews to "liv e] in this world, marrying, procreating, working and at the same time not to be affected by the daily worldly occurrences); Matthew 5:14 15 (Jesus commands his followers to be a "light to the world); David Peterson, *Worship and Ethics in Romans 12,* 44 Tyndale Bulletin 271, 282 (1993) http://www.tyndalehouse.com/TynBul/ Library/TynBull 1993 44 2 04 Peterson WorshipInRom12.pdf (interpreting Romans 12:2 to direct Christians to "yield to the power of God and his norms, rather than to the influence of this age and its norms.); Chris Wright, *What Difference Does Religion Make?* 14 (2002) (interpreting Dhammapada 171 to instruct Buddhists that the "way to end unhappiness and suffering is to stop clinging to things of the world]).

19 For example, Yale College, then a religious school, produced numerous prominent abolitionists. Yale, Slavery, and Abolition, *The Story of Yale Abolitionists* (last visited April 18, 2016), http://www.yaleslavery.org/Abohtionists/abolit.html; see also Bertram Wyatt Brown, *American Abolitionism and Religion,* Divining America: National Humanities Center (last visited April 18, 2016), http://nationalhumanitiescenter.org/tserve/nineteen/nkeyinfo/amabrel.htm (detailing the involvement of religion generally in the fight against slavery). Later, most historically black colleges and universities were established by churches. Inspired by their religious beliefs, current and former students of these colleges (including Reverend Martin Luther King, Jr.) played a critical role in the civil rights movement. *Id.;* see also Rich Tucker, *How MLK s Faith Influenced His Public Life,* The

Daily Signal (Jan. 20, 2014), http://dailysignal.com/2014/01/20/mlks faith influenced public life/; Jill Silos Rooney, *The Civil Rights Movement, HBCUs, and You,* HBCU Lifestyle (Feb. 1, 2014), http://hbculifestyle.com/hbcu civil rights movement. Today, religious schools continue to fight modern day slavery in foreign lands. See, *e.g.,* Giulia Segreti, *Religious leaders in rare union with pledge to fight slavery,* Financial Times (Dec. 3, 2014 10:18 AM), http://www.ft.com/cms/s/0/438d5d48 7ac4 11e4 b630 00144feabdc0.html; Amy Harrison, *BYUstudents Gght global issue of human trafficking,* The Daily Universe (Jan. 15, 2013), http://universe.byu.edu/2013/01/15/byu students fight global issue of human trafficking1.

20 Cf., *e.g.,* James C. Phillips, *Why Are There So Few Conservatives and Libertarians in Legal Academia? An Empirical Explanation of Three Hypothesis,* 39 Harv. J. L. Pub. Pol. 153, 154 nn. 2 4 and accompanying text (2016) (documenting overwhelmingly liberal affiliation of professors in social science and law); PascalEmmanuel Gobry, *How academia s liberal bias is killing social science,* The Week (Dec. 17, 2014), http://theweek.com/article/index/273736/how academiasliberal bias is killing social science.

21 Crowdpac.com, *How hberal or conservative is your university?,* available at: https://www.crowdpac.com/games/lookup/universities (last visited April 20, 2016). For a reference point, the scale utilized by the study suggests that all but two of 334 cataloged Republican candidates for federal office are right of political center, and all 263 Democratic candidates are left of political center. *See* Crowdpac.com, *Candidates,* available at https://www.crowdpac.com/candidates (last visited April 20, 2016).

22 Crowdpac.com, *Brandeis University,* available at: https://www.crowdpac.com/games/lookup/universities?name Brandeis %20University.

23 See, *e.g.* Washington State Dept. of Health, *Food Worker Card,* available at: http://www.doh.wa.gov/CommunityandEnvironment/Food/FoodWorkerandIndustry/FoodWorkerCard (all workers must have food permits); Department of Education, *Overview of Accreditation in the United States,* http://www2.ed.gov/admins/finaid/accred/accreditation.html#Overview (last visited April 18, 2016); SFGate, Feds take over student loan program from banks, (Mar. 30 2010), available at: http://www.sfgate.com/business/networth/article/Feds take over student loan program from banks 3193888.php.

24 See, *e.g.,* Federal Student Aid, *Federal Pell Grants,* available at: https://studentaid.ed.gov/sa/types/grants scholarships/pell. And in order to receive Title IV funds, schools must sign a Program Participation Agreement. 34 C.F.R. § 668.14. In addition, schools must report survey date to the Integrated Postsecondary Education Data System (IPEDS). See IPEDS, *Form, Instructions, FAQs, Narrative Edits and Import Specifications,* available at: https://surveys.nces.ed.gov/ipeds/visresults.aspx.

25 20 U.S.C. § 1092 (f).

26 See, *e.g.,* Cal. Code Regs tit. 24 (containing building codes).

27 This is not to suggest that all Blaine Amendments can or should be interpreted to ban financial aid or aid of any sort to religious schools. But the same constitutional interpretation that would enable Missouri to use a Blaine Amendment to deny funding for using recycled tires to refurbish a playground could likely be used to allow any government to deny to religious colleges this plethora of essential governmental services and benefits.

28 Transcript of Oral Argument on Question 1 at 36 38, *Obergefell v. Hodges,* 135 S.Ct. 2584 (No. 14 566) (2015); *see also Obergefell,* 135 S. Ct at 2626 (Roberts, C.J., dissenting).

29 See Letter from Stanley Carlson Thiess, et al. to President Obama, Sep. 10, 2015, available at: http://www.irfalliance.org/wp content/uploads/2015/09/Letter to President to maintain OLC memo 9 10 2015.pdf; Susan M. Shaw, *Federal Funding Is Not a Form of Religious Liberty* Huffington Post (Dec. 17, 2015, 2:40PM), available at: http://www.huffingtonpost.com/susan m shaw/federal funding is not religious liberty b 8813740.html.

30 Assemb. B. 1888, 2015 2016 Leg. (Cal. 2016).

31 Higher Education Opportunity Act, Public Law 110 315 (2008), *codified at* 20 U.S.C. § 1099b(c), (a)(4)(A).

32 Some have even suggested that schools obtaining routine waivers from the Department of Education should be subject to accreditation complaints. See, e.g., Andy Birkley, *Dozens of Christian schools win Title IX waivers,* The Column (Dec. 1, 2015), available at: http://thecolu.mn/21270/dozens christian schools win title ix waivers ban lgbt students.

33 See, *e.g., id.;* Peter Conn, *The Great Accreditation Farce,* The Chronicle of Higher Education (June 30, 2014), http://chronicle.com/article/The Great Accreditation Farce/147425/; Parker Wishik, *Gay Student Expelled from U. the Cumberlands; School May Lose Funding,* N.Y. Times (May 4, 2006), available at: http://www.nytimes.com/uwire/uwire HYNC050420062147263.html; Elizabeth Reiner Piatt, *Bad Apples: The "Right to Discriminate in Schools,* Public Rights, Private Conscience Project (Dec. 16, 2015) available at: http://blogs.law.columbia.edu/publicrightsprivateconscience/2015/12/16/bad apples the right to discriminate in schools.

34 Letter from Joel C. Hunter, et al. to President Obama, July 1, 2014, available at: http://bit.ly/ExemptionLetter.

35 The local school district voted to end a long standing partnership with the college under which its education students did their student teaching in the district. Oliver Ortega, *Lynn public schools sever relationship with Gordon College,* Boston Globe (Aug. 30, 2014) available at: https://www.bostonglobe.com/metro/2014/08/29/lynn public schools sever relationship with gordon college/aw1KwO4RGVpn284rR1jTgO/story.html.

36 Matt Rocheleau, *Accrediting agency to review Gordon College,* Boston Globe (July 11, 2014), available at: http://bit.ly/AgencytoReview.

37 See Brief of Amici Curiae Religious Colleges and Universities, *Locke v. Davey,* 540 U.S. 712 (2004).

38 See, *e.g.,* Jonathan Wright, *Shapers of the Great Debate on the Freedom of Religion: A Biographical Dictionary* 195 (2002) (describing government funding of religious schools under the 1819 Civilization Fund Act, 3 Stat. 516 17 (1819)); *Quick Bear v. Leupp,* 210 U.S. 50, 78 (1908) (noting that "the Government for a number of years has] made contracts for sectarian schools for the education of the Indians, and rejecting First Amendment challenge to that practice). See also Northwest Ordinance (1787) ("Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.).

39 To be sure, the *college* in that circumstance may well consider training mathematicians as part of its religious mission. But unlike preparing students to conduct religious services, training students to be mathematicians is not *essentially* religious that is, it has substantial secular significance regardless of its religious significance, and thus would not trigger Establishment Clause scrutiny. See *Locke,* 540 U.S. at 724 25 (noting variety of religious activities the scholarships at issue there could be used for); *Rosenberger,* 515 U.S. at 839 ("We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.).

40 Indeed, even if the student were using the Pell Grant or scholarship to train for the ministry, there would still be no plausible Establishment Clause violation. That is because a grant or scholarship given to a student would properly be viewed as directly assisting the *student,* not the institution the student attends. See Federal Student Aid, Federal Pell Grants, available at: https://studentaid.ed.gov/sa/types/grants scholarships/pell (noting funds may be paid directly to the student); *Locke,* 540 U.S. at 724 25 (noting students in the Washington program may attend theology courses) That is no doubt why the majority in *Locke* carefully avoided any suggestion that awarding the scholarship in that case to a student studying for the ministry would actually *violate* the Establishment Clause. To the contrary, the Court noted that with respect to state aid, "the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution. 540 U.S. at 722.v There is no federal provision that would require, much less justify, limiting Pell Grants or federal student loans in the manner at issue in *Locke.*

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2017 WL 1030889 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

RAVALLI COUNTY REPUBLICAN CENTRAL COMMITTEE, et al., Petitioners,
v.
Linda MCCULLOCH, Montana Secretary of State, et al.

No. 16-806.
March 16, 2017.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Amicus Curiae Montana Republican Party Supporting Petitioners

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*i QUESTION PRESENTED

As explained in the petition, the Ninth Circuit below concluded that a state political party must affirmatively prove that a state's open primary system severely burdens its associational rights. This contradicts the Fourth Circuit, which held that an open primary burdens these First Amendment rights as a matter of law, without a requirement of affirmative proof.

The question presented centers on this conflict:

Whether state-mandated open primaries, which require members of a political party to join with nonmembers when selecting party nominees, severely burden a party's First Amendment associational rights as a matter of law.

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***1** INTRODUCTION AND INTERESTS OF *AMICI*

As a matter of common sense, mandatory open primaries severely burden the First Amendment rights of political parties by forcing them to associate with voters who may not share their interests. In an apparent effort to avoid this common-sense conclusion, the Ninth Circuit's holding below requires political parties to present *empirical* evidence that their associational rights have *actually* been severely burdened as a predicate to seeking constitutional relief.

That decision effectively obliges political parties to wait until outsiders have successfully infiltrated their party nomination processes to seek enforcement of their First Amendment rights. This court-imposed moratorium on the right of free association has the potential to skew election outcomes and severely alter primary candidate messaging. Most importantly, this decision impermissibly interferes with political parties' ability to determine who will participate in the selection of their standard bearers. It is thus not surprising that the Fourth Circuit has already rejected the Ninth Circuit's holding restricting the associational rights of parties.

Amicus Montana Republican Party ("Party") has experienced firsthand the distortive impact of the Ninth Circuit's decision and the compulsory open primary system it has entrenched. The Party - which ***2** was previously a party to this action but had to drop out for unrelated reasons - seeks to unite Montana citizens who share its conservative political values in support of common political goals identified by Party members. Like petitioners, and like the Hawaii Democratic Party that was the subject of a similar Ninth Circuit ruling, the Party seeks to exclude from the candidate nomination process voters who do not share its values. Moreover, in its bylaws, the Party has officially advocated for a closed primary election system that would restrict access to the Party primary ballot to registered Republicans. If Montana law allowed it to exclude non-affiliated voters, the Party would immediately do so.

The Ninth Circuit's decision severely restricts the ability of the Party and political parties around the nation to enable "citizens to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). Specifically, it impedes the Party's ability to exclude from the candidate nomination decision those who do not share - or, worse still, are openly antagonistic toward - the Party's goals. By prohibiting parties from determining who will participate in the nomination process, the Ninth Circuit decision and the mandatory open primary it enables interfere "at the 'crucial juncture' at which party members traditionally find their

collective voice and select their spokesman." *Id.* at 586 (quoting *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208 (1986). Such interference imposes a severe burden on the Party's associational rights as a matter of law. This Court should grant the petition to reiterate that fundamental principle.

*3 STATEMENT

Montana mandates that the two major political parties nominate their general election candidates through the state-administered open primary election. Mont. Code Ann. 13-10-601(1). The State prepares and indiscriminately provides each voter with a set of primary ballots that includes one ballot for each party. *Id.* 13-10-209(1)(a). Voters fill out one party's primary ballot and discard the rest. *Id.* 13-10-301(2). Montana does not record voter registration, nor does it provide any other means for political parties to determine who selects the party's ballot. Pet. App. 59. The candidate who receives a plurality of the votes recorded on the party's ballot is the party's general election nominee. Mont. Code Ann. 13-1-103.

Under this system, political parties in Montana are unable to restrict participation in their candidate nomination process. They can neither prevent hostile voters from filling out the party ballot nor identify those hostile voters after the fact. See Pet. App. 59. Montana law likewise prohibits political parties from selecting their nominees through a process administered by the party. Mont. Code Ann. 13-10-601(1).

This statutory structure subjects the Party and its candidates to strategic crossover voting. Organizations antagonistic to the Party can encourage their members to select the Party's primary ballot in order to nominate candidates that reflect those organizations' views rather than those of the Party's base. Pet. App. 68-69. They can also strategically vote for a Republican primary candidate who will be less competitive in the general election. Republican candidates in Montana have already been targeted by this type of "party-raiding." Pet. App. 68-69. For example, unions ***4** that overwhelmingly support Democratic candidates have publicly lobbied "those who usually vote Democratic" to "vot[e] in the GOP primary to support the Republican that most clearly reflects their views." Pet. App. 68-69.

Petitioners challenged Montana's mandatory open primary law as applied to them as a violation of their constitutional right to free association. Petitioners argued that by preventing the Republican Party Committees from selecting their candidates through an exclusive process, Montana law forces parties to associate with voters who do not share their interests in violation of the First Amendment. Pet. App. 20. But the district court declined to remedy petitioners' First Amendment grievances. Pet. App. 17. The court determined that whether a primary election law severely burdens the associational rights of political parties is a question of fact rather than a question of law. Pet. App. 40-43. Applying this standard, the court held that because petitioners did not present empirical evidence showing the likelihood of crossover voting in Montana, they were not entitled to relief. Pet. App. 44-47. The Ninth Circuit summarily affirmed the disposition of the district court based on its recent decision in *Democratic Party of Hawaii v. Nago,* 833 F.3d 1119 (9th Cir. 2016).

*5 REASONS FOR GRANTING THE PETITION

This case warrants the Court's review for several reasons. First, the Ninth Circuit's decisions in this case and in *Nago* create a square circuit split on the issue of whether, as a matter of law, an open primary severely burdens the associational rights of a political party. Second, the Ninth Circuit's decisions conflict in principle with decisions of this Court. Third, the issue presented is of national importance; indeed, our political process demands that parties choose who will represent them as candidates without state interference.

I. The Ninth Circuit's decisions in *McCulloch* and *Nago* conflict with Fourth Circuit precedent.

As noted previously, the decision in this case was based upon the Ninth Circuit's holding in *Nago* that Hawaii's open primary requirement does not violate a political party's First Amendment rights unless the party can provide affirmative evidence of harm - a showing that the State's "open primary system severely burdens its associational rights." 833 F.3d at 1124. But both Ninth Circuit decisions conflict with the Fourth Circuit's decision in *Miller v. Brown,* 503 F.3d 360 (4th Cir. 2007).

1. In *Miller,* the Fourth Circuit held unconstitutional a Virginia statute as applied to the Virginia Republican Party because the statute violated the party's associational rights. *Miller,* 503 F.3d at 372. The court first found the statute facially constitutional, but only because it had one saving component: the statute made "available to political parties multiple options for restricting their candidate selection process to individuals of their choosing." *Id.* at 368. Facially, the statute therefore did not require "forced association." ***6** *Id.* at 367 (quoting *Jones,* 530 U.S. at 581). However, the decision also made clear that, if Virginia had mandated an open primary without alternatives for restricting the party's candidate selection process, the statute would have proved unconstitutional by virtue of "the special place" and "special protection" the First Amendment "accords[] the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.' " See *id.* at 364-365, 368 (quoting *Jones,* 530 U.S. at 575).

The Montana statute requires just that - an open primary that restricts political parties' candidate selection process. Unlike *Miller,* the Montana statute offers no alternative, no redeeming component. Yet the Ninth Circuit required - unlike *Miller* - that the party *prove* a counterfactual, that is, that the open primary altered the selection of the person "who best represents the party's ideologies and preferences." *Miller,* 503 F.3d at 365 (quoting *Jones,* 530 U.S. at 575).

Although the Fourth Circuit rejected the facial challenge in *Miller,* the court's holdings on the as-applied challenge inherently conflict with the Ninth Circuit's decision in this case. The Virginia statute in *Miller,* despite allowing alternatives to the open primary, prescribed that the incumbent determine the method by which the party selected its candidates. *Id.* at 368-370. The court reasoned, therefore, that the State all but forced the party to hold an open primary by requiring the *incumbent* - a person who likely represented his or her own reelection interests instead of the party's interests - to choose the party's method. *Id.* at 369-370. As a matter of law, the requirement was a severe burden on the political party's right of association. *Id.* This requirement disregarded the party's First Amendment rights to free association in the ***7** same manner as if the State had forced the party to select its candidates using only an open primary.

2. The decisions of the two circuits conflict. Under the Ninth Circuit's reasoning in *Nago,* for example, the First Amendment challenge in *Miller* would have failed. The party in *Miller* presented no evidence, or at least the court relied on none, of a quantifiable harm to the party. Thus, the legal principle adopted by the Fourth Circuit - that " 'forcing a political party to select its nominee solely by open primary' would severely burden the party's associational rights" - would prove insufficient in the Ninth Circuit. See *id.* at 368 (quoting *Miller v. Brown,* 465 F. Supp. 2d 584, 591 (E.D. Va. 2006)).

Similarly, using its analysis in *Miller,* the Fourth Circuit would have found Montana's mandatory open primary statute unconstitutional. First, the *Miller* court reviewed the findings of the district court *de novo,* treating whether the law burdened the party's First Amendment rights as a question of law. *Id.* at 364. Second, the Fourth Circuit held that constructively requiring a political party to hold an open primary is unconstitutional even when there are alternatives available. *Id.* at 368-371. Given that the court found that an indirect "forced association" violates the First Amendment, the Fourth Circuit would certainly find that an overt ban on alternative primary systems violates a political party's right of association.

Thus, although the Fourth Circuit held the Virginia statute void only as applied to the Virginia Republican Party, the two opinions are diametrically opposed.

***8 II. The Ninth Circuit's decision conflicts in principle with this Court's First Amendment precedents.**

The Ninth Circuit's decision also runs counter to precedents of this Court, which establish that States may not infringe political parties' First Amendment right to free association by forcing them to allow nonparty members to participate in party nomination processes. By failing to find Montana's mandatory open primary unconstitutional as a matter of law, *Nago* and *McCulloch* conflict with this well-established principle.

A. Montana's mandatory open primary imposes forced association.

This Court has recognized that "[r]epresentative democracy … is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Jones,* 530 U.S. at 574. Crucial to citizens' ability to associate for the "common advancement of political beliefs," *Kusper v. Pontikes,* 414 U.S. 51, 56 (1973), are political parties and the party candidate nomination process. Moreover, "[t]he moment of choosing the party's nominee … is 'the crucial juncture at which the appeal to common principles may be translated into concerted action.' " *Jones,* 530 U.S. at 575 (quoting *Tashjian,* 479 U.S. at 216). As a result, this Court has "vigorously affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.' " *Id.* (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.,* 489 U.S. 214, 224 (1989)).

***9** 1. Although States have broad power to "structur[e] and monitor[] the election process, including primaries," *Jones,* 530 U.S. at 572, that power is subject to " 'the limits established by the First Amendment rights of the State's citizens,' including the freedom of political association." *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 451-452 (2008) (quoting *Eu,* 489 U.S. at 222); *Jones,* 530 U.S. at 573 ("[W]e have continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution."). This freedom of association "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party of United States v. La Follette,* 450 U.S. 107, 122 (1981). Political parties therefore have a First Amendment "right to associate with the persons whom they choose and to refrain from associating with persons whom they reject." *Washington State Grange,* 552 U.S. at 463; *Jones,* 530 U.S. at 574. Because the nomination "process often determines the party's positions on the most significant public policy issues of the day," this Court has made clear that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Jones,* 530 U.S. at 575.

Decisions considering the constitutionality of various primary election regimes establish that States cannot force political parties to associate with non-affiliated voters in the nomination process. For example, the Court has said that one "constitutionally crucial" characteristic of a valid primary system is that "[p]rimary voters are not choosing a party's nominee." *Id.* at 586. Conversely, a primary system that "in effect, ***10** chooses the parties' nominees" is constitutionally suspect. *Washington State Grange,* 552 U.S. at 452. Such forced association constitutes a severe burden, triggering strict scrutiny, which States can overcome only by showing that the regulation in question is narrowly tailored to achieve a compelling state interest. *Id.* at 451.

In *Jones,* for example, this Court declared California's blanket primary unconstitutional because it "force[d] political parties to associate with - to have their nominees, and hence their positions, determined by - those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." 530 U.S. at 577. In that case, California law required that candidates of all parties appear on a single blanket primary ballot made available to all voters. *Id.* at 570. The candidates who received the most primary votes would be the party nominees. *Id.* In striking the law down, the Court "c[ould] think of no heavier burden on a political party's associational freedom" than the forced association that "adulterate[d] [the parties'] candidate-selection process - the 'basic function of a political party' - by opening it up to persons wholly unaffiliated with the party." *Id.* at 581-582 (quoting *Kusper,* 414 U.S. at 58).

In *La Follette,* the Court likewise rebuffed, on similar grounds, Wisconsin's attempt to compel the Democratic National Committee to seat delegates to its convention who were legally bound to vote in accordance with the results of the State's open primary election. 450 U.S. at 119, 126. Because the party did not want to associate with non-Democrats in the nomination process, Wisconsin's efforts to force that association was a "substantial intrusion into the associational freedom of members of the … Party." *Id.* at 126.

***11** That *La Follette* did not pass on the constitutionality of Wisconsin's open primary is irrelevant. Its holding is ultimately the same: States severely burden political parties when they compel them to associate with nonparty members in the candidate nomination process.

2. Regrettably, Montana's mandatory open primary does exactly that. It is undisputed that "Montana requires the two major parties to participate in this [open primary] system." Pet. App. 59. Section 13-10-60 explicitly requires that every political party with a candidate for a statewide office who received the equivalent of five percent of the votes for the most recent governor "shall nominate its candidates for public office" by the state-run open primary. Mont. Code Ann. 13-10-60. It is further undisputed that Montana does not require or provide for partisan registration, nor does it record voters' choice of primary ballot. App. *59.*

Together, these features of Montana's system foreclose every avenue by which the Party could limit its nomination process exclusively to its members. Because the Party is legally required to nominate general election candidates through the state-run primary, it may not nominate a candidate through a member-exclusive primary funded and administered by the Party. Moreover, since Montana law requires that all voters receive every political party's ballot and that voters' choice of ballot be kept private, the Party cannot prevent nonmembers from filling out its ballot or exclude the ballots of nonmembers. Mont. Code Ann. 13-10-601(1). All of this boils down to a single conclusion: the Party must either nominate its candidate through a primary election that forces the Party to associate with ***12** voters it would rather exclude, or risk exclusion from the general election ballot.

In this sense, the Montana primary is the functional equivalent of the California blanket primary found unconstitutional in *Jones.* Just as the California primary confronted political parties with the prospect of "being saddled with an unwanted, and possibly antithetical, nominee," *Jones,* 530 U.S. at 579, the Montana primary forces the Party to nominate its candidate through a primary election in which any voter may select a Republican ballot.

The issue that *Jones* addressed was not just that all candidates appeared on the same ballot; it was that the parties had no way to restrict participation in the critical nomination process to party members. *Id.* at 575-577. Indeed, a California Republican in a heavily Democratic California district could easily approximate the results of Montana's separate ballot policy by voting for the most conservative Democratic candidate for each office. The primary format is somewhat different but the results are the same. This suggests that any differences between Montana's compulsory open primary and the blanket primary struck down in *Jones* are formal only.

In addition, by making its open primary the mandatory nomination process, Montana forces political parties to endorse nominees selected through a process that violates the associational rights recognized in *La Follette.* 450 U.S. at 120-126. This forced association violates the First Amendment as applied in that and other decisions.

3. In this case, the district court attempted to distinguish *Jones* based on the *Clingman* plurality's suggestion ***13** that, in Oklahoma's semi-closed primary, "anyone [could] 'join' a political party merely by asking for the appropriate ballot at the appropriate time." App. 49 (quoting *Clingman v. Beaver,* 544 U.S. 581, 591 (2005)). Selecting a ballot alone was a permissible way to show party affiliation in *Clingman* because the party wanted to expand its nomination process to as many nonmembers as possible. 544 U.S. at 584-585, 593-594. But where, as here, the Party has affirmatively expressed its desire to *limit* primary election participation to its own members, the First Amendment requires that the Party be able

to do so. Moreover, any suggestion that selecting a Republican ballot is always sufficient to show Republican affiliation ignores this Court's repeated concern with the phenomenon of "party raiding." See, *e.g., Jones,* 530 U.S. at 572; *Rosario v. Rockefeller,* 410 U.S. 752 (1973).

While Montana does not keep a registry of party registration, this does not mean the judiciary may unilaterally determine that filling out the GOP ballot is sufficient evidence of a person's Republican leanings. Such a determination would violate this Court's mandate that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *La Follette,* 450 U.S. at 123-124. In other words, because "[t]he Party's determination of the boundaries of its own association … is protected by the Constitution," *Tashjian,* 479 U.S. at 224, it is the *Party's* prerogative to decide whether merely filling out its ballot automatically qualifies a person as a Republican. Here, petitioners have determined that it does not, and that determination is protected by the First Amendment's free association guarantees.

4. This case is also fundamentally different from cases in which the Court has upheld minor primary ***14** election regulations. To be sure, the Court has allowed States to disrupt the nomination process and substitute their own systems for selecting general election candidates. The price, however, is that the State may not coerce a *party* to consider candidates who advance to the general election under the state's alternative system as "nominees" of the party. See, *e.g., Washington State Grange,* 552 U.S. at 452.

Consider for example Washington State's "blanket primary," in which all primary candidates appear on a single ballot and the two candidates who receive the most votes advance to the general election, regardless of party preference. *Id.* at 447-448. The Court upheld this system precisely because "[t]he law never refer[red] to the candidates as nominees of any party, nor does it treat them as such." *Id.* at 453. Similarly, when a plurality of the Court upheld Oklahoma's semiclosed primary, it pointed out that the law did not "compel the [party]'s association with unwanted members or voters." *Clingman,* 544 U.S. at 587 (citing *Jones,* 530 U.S. at 577). In *Clingman,* moreover, the Oklahoma law at issue allowed *parties* to decide whether to allow unaffiliated voters to participate in their primaries. *Id.* Crucially, therefore, the political parties retained the "authority to exclude unwanted members." *Id.* at 590.

A law limiting primary participation to party members and independents is fundamentally different from the Montana statute, which forces parties to allow nonmembers to participate in *their* nomination processes. Unlike Washington's blanket primary, the Montana statute expressly mandates that a party "*shall* nominate its candidates for public office" through that primary. Mont. Code Ann. 13-10-601(1) ***15** (emphasis added). The parties therefore have no option but to accept the ballots of all voters - they have neither the means to prevent nonmembers from using their ballots nor the ability to identify who is participating in their nomination process.

In short, this Court's free association decisions establish that political parties have a constitutionally protected right to decide who can participate in selecting party nominees. Though States may adopt minor restrictions to protect the integrity of the political process from vagaries, such as party raiding, they may not *force* political parties to nominate their candidates through processes that fail to distinguish party members from nonparty members. Under this Court's precedents, Montana's primary system interferes with petitioners' right to exclude nonmembers from its nominating process, and it therefore severely burdens petitioners' right to free association.

B. Under this Court's decisions, forcing political parties to associate with nonmembers in nominating a party candidate is a severe burden as a matter of law.

By treating the question of what constitutes a severe burden on a political party's associational rights as a factual matter, dependent on the production of empirical data showing party raiding is likely, the Ninth Circuit gave short shrift to First Amendment principles in three central ways. First, as shown below, the precedent of this Court suggests that forcing a political party to associate, in its nomination process, with voters it would rather exclude is a severe burden *per se.* Second, the Ninth Circuit's narrow fixation on evidence discussed in prior decisions of this Court caused it to ignore the

principles those cases establish. ***16** Last, the Court has never held that claims of crossover voting must be substantiated by empirical evidence.

1. This Court has long treated laws that result in forced association severely burdensome as a matter of law. The Court held, for example, that Wisconsin's attempt to force the Democratic Party to seat delegates legally required to vote in conformity with the State's open primary was itself a "substantial intrusion into the associational freedom of members of the … Party." *La Follette,* 450 U.S. at 126 (footnote omitted).

The *Clingman* plurality's discussion of *Timmons v. Twin Cities Area New Party,* 520 U.S. 351 (1997), a decision that upheld Minnesota's prohibition on fusion candidates, is also instructive. The *Clingman* plurality stated that in *Timmons* "[t]he burdens were not severe because the [political party] and its members remained free to govern themselves internally" and because Minnesota had not "compelled it to associate with voters of any political persuasion." 544 U.S. at 589-590 (citing *Jones,* 530 U.S. at 577). The implication is that when States do "compel[] [parties] to associate with voters of any political persuasion," the burden is inherently severe. *Id.* at 590.

Likewise, in *Tashjian,* the Court held that Connecticut impermissibly "burden[ed] the First Amendment rights of the [Republican] Party" merely by "enforc[ing] … its closed primary system." 479 U.S. at 225. The Court did not require evidence of the likely number of independent voters who would vote Republican if permitted. Instead, it stated simply that "[t]he nature of [the Republican Party's] First Amendment interest is evident." *Id.* at 214.

***17** Contrary to the Ninth Circuit's decision below, *Jones* only further demonstrates that forced association is a severe burden as a matter of law. For one, *Jones* rejected the Ninth Circuit's assessment that the burden was not severe because the risk of party raiding was slight, noting that a single election could either destroy a party or else "severely transform it." 530 U.S. at 579. The Court could think of "no heavier burden on a political party's associational freedom" than a statute that forced political parties to " adulterate their candidate-selection processes." *Id.* at 581-582. Describing *Jones,* the Court later stated, "California's blanket primary, we concluded, severely burdened the parties' freedom of association because it forced them to allow nonmembers to participate in selecting the parties' nominees." *Washington State Grange,* 552 U.S. at 445-446. These statements show that the Court identified the burden, *not* from factual evidence, but from the inherent nature of forced association.

2. The Ninth Circuit's focus on ancillary factors, such as *Jones* 'passing reference to survey data, is also misplaced. In *Nago,* the case on which *McCulloch* is based, the Ninth Circuit observed that the *Jones* Court discussed data regarding the number of voters who planned to vote in the other party's primary, and that experts had called cross voting "inevitable." App. 7. Because the Court mentioned this evidence, the Ninth Circuit concluded that the question of burden must be a factual matter. App. 9.

This narrow view of the right to association ignores the more salient themes in *Jones* and other free association cases. Those cases establish that because the prospect of crossover voting alone is sufficient to alter candidate messaging, see, *e.g.,* ***18** *Jones,* 530 U.S. at 579-580, it is sufficient to establish a severe burden as a matter of law.

3. This conclusion is buttressed by decisions of this Court upholding primary election schemes designed to *curb* crossover voting. This Court has held that preventing crossover voting, also known as "party 'raiding,' " is a compelling state interest sufficient to support primary election restrictions. *Rosario,* 410 U.S. at 760-761. But never has the Court required that crossover voting have *actually* occurred.

For example, when this Court first recognized party raiding as a compelling state interest, it referenced the "*potential* disruptive impact" of crossover voting. *Id.* at 761 (quoting *Rosario v. Rockefeller,* 458 F.2d 649, 653 (2d Cir. 1972)) (emphasis added). The *Rosario* Court thus required no *evidence* that party raiding was likely to occur - it relied only on the State's well-founded concerns on that score: "The purpose of New York's delayed-enrollment scheme, we are told,

is to inhibit party 'raiding,' whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Id.* at 760.

Similarly, *Clingman* justified the state's interest in preventing party raiding - "the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election" - in purely hypothetical terms. The plurality pointed to two hypothetical problems of party raiding: First, "if the outcome of the Democratic Party primary were not in doubt," Democrats *could* vote for a third-party candidate who appears likely to split the Republican vote in the general election. 544 U.S. at 596. Second, a Democratic candidate *could* defect to a third ***19** party, taking otherwise loyal Democrats with the candidate. *Id.* Here again, the Court did not require the State to produce empirical data about the likelihood of crossover voting to justify these important concerns.

4. To require political parties to offer such data, as the Ninth Circuit has now done, would impose an unfair double standard. As this Court has recognized, the "evil" of party raiding "b[ears] on 'the integrity of the electoral process.' " *Storer v. Brown,* 415 U.S. 724, 731 (1974) (quoting *Rosario,* 410 U.S. at 761). To the extent the state of Montana has failed to "temper [] the destabilizing effects" that crossover voting produces, *Clingman,* 544 U.S. at 596, political parties in Montana must be able to exercise their constitutional right of association to "protect themselves 'from intrusion by those with adverse political principles,' " *La Follette,* 450 U.S. at 122 (quoting *Ray v. Blair,* 343 U.S. 214, 221-222 (1952)). Because Montana prohibits parties from doing that, the Ninth Circuit's decision conflicts in principle with this Court's decisions, and for that reason too merits this Court's review.

***20 III. This Court's intervention is badly needed to protect the integrity of political parties throughout the Nation.**

Practical considerations also demand this Court's review. As previously noted, this Court has affirmed that "[r]epresentative democracy … is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Jones,* 530 U.S. at 574. Yet the Ninth Circuit has now attempted to sidestep this Court's precedent in a way that could seriously injure political parties around the nation. Indeed, turning the First Amendment issue into a fact question is problematic and would likely require that a party's rights be violated for at least one election cycle.

To be sure, the Ninth Circuit reasoned in *Nago* that this Court relied on quantitative evidence in *Jones,* and it strongly suggested that the Hawaii Democratic Party could not carry its burden without similar data. But demanding this type of evidence would likely require a political party to show that a different *outcome* occurred *because of* the open primary format. Such evidence would necessitate at least one election cycle in which members of a political party were not able to choose their preferred candidate. Indeed, even if a party could collect some pre-election evidence, it seems likely that, under the Ninth Circuit's reasoning, the court would discount such evidence if it showed only a small percentage of cross-party voting. But many elections are determined by a very small margin, and the political party could only challenge the court's factual determination after the fact - after the injury occurred.

***21** This burden is beyond what the First Amendment will allow because, as this Court has reasoned, "a single election in which the party nominee is selected by nonparty members could be enough to destroy the party." *Jones,* 530 U.S. at 579. The Court gave the example of the 1860 presidential election, where, "if opponents of the fledgling Republican Party had been able to cause its nomination of a proslavery candidate in place of Abraham Lincoln, the coalition of intraparty factions forming behind him likely would have disintegrated, endangering the party's survival." *Id.*

Moreover, as this Court reasoned in *Jones,* "the deleterious effects" of an open primary "are not limited to altering the identity of the nominee." *Jones,* 530 U.S. at 579. "Even when the person favored by a majority of party members prevails, he will have prevailed by taking somewhat different positions - and, should he be elected, will continue to take somewhat different positions in order to be renominated." *Id.* at 579-580. Indeed, the Court was so sure this would happen that it was "unnecessary to cumulate evidence of this phenomenon." *Id.* at 580. This party transformation would occur because,

by "regulating the identity of the parties' leaders," it would "interfere with the parties' decisions as to the best means to promote [their] message." *Id.* (quoting *Eu,* 489 U.S. at 231 n.21). This could also occur because, in coalescing around its general election candidate, a party may shift its ideologies and preferences to those of the successful primary candidate. [2]

***22** Moreover, even if it could secure reliable pre-election data that cross-party voting was likely to occur, a political party could not show injuries that prove more subtle than an outright altering of the election outcome - such as a blurring of the party's message. These subtle transformations of a political party's message would be impossible to prove pre-election and nearly impossible post-election. Thus, the Ninth Circuit's opinion requiring a political party to present quantitative evidence of harm to its associational rights would leave political parties without a remedy in many cases of genuine harm. And, in cases where the political party has evidence that its rights were severely burdened, the remedy would come too late, and the party's message and future could prove unalterably different.

CONCLUSION

This Court has long recognized that "[t]here is simply no substitute for a party's selecting its own candidates." *Jones,* 530 U.S. at 581. In addition to conflicting with the Fourth Circuit, the Ninth Circuit's narrow view of this Court's First Amendment precedents all but ignores that fundamental principle and the decisions of this Court.

Accordingly, the petition for certiorari should be granted, and the Ninth Circuit's decision reversed.

Footnotes

1 No one other than *amici,* their members, and counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk. Counsel for respondents received timely notice of intent to file this brief, as required by Rule 37.2.

2 See, *e.g.,* Rick Pearson, *Sen. Mark Kirk: The Republican Party Has Changed,* Chicago Tribune, Dec. 22, 2016 (statements by Senator Kirk, R Ill, that the Republican Party is "now … one and the same with Donald Trump).

2017 WL 382690 (U.S.) (Appellate Brief)
Supreme Court of the United States.

ADVOCATE HEALTH CARE NETWORK, et al., Petitioners,
v.
Maria STAPLETON, et al.
Saint Peter's Healthcare System, et al. , Petitioners,
v.
Laurence Kaplan.
Dignity Health, et al., Petitioners,
v.
Starla Rollins.

Nos. 16-74, 16-86, 16-258.
January 24, 2017.

On Writs of Certiorari to the United States Courts of Appeals for the Third, Seventh and Ninth Circuits

Brief of the General Conference of Seventh-Day Adventists as Amicus Curiae Supporting Petitioners

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***i** QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 ("ERISA") governs employers that offer pensions and other benefits to their employees. "Church plans" are exempt from ERISA's coverage. 29 U.S.C. §§ 1002(33), 1003(b)(2). For over thirty years, the three federal agencies that administer and enforce ERISA - the Internal Revenue Service, the Department of Labor, and the Pension Benefit Guaranty Corporation - have interpreted the church plan exemption to include pension plans maintained by otherwise qualifying organizations that are associated with or controlled by a church, whether or not a church itself established the plan.

The question presented is whether the church plan exemption applies so long as a pension plan is maintained by an otherwise qualifying church-affiliated organization, or whether the exemption applies only if, in addition, a church initially established the plan.

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***1** INTRODUCTION AND INTERESTS OF *AMICUS*

As Petitioners persuasively explain, the decisions under review in this case create for Petitioners the very risks of unconstitutional government interference that Congress intended to eliminate in passing the 1980 amendments to ERISA. See Pet. Br. 55-59. As a result of those decisions, and numerous lawsuits filed in their wake, those risks are now faced not just by Petitioners, but by virtually *every* church-related retirement plan, and virtually every church or churchrelated entity affiliated with such a plan.

Amicus General Conference of Seventh-day Adventists (the Church) and its affiliated healthcare systems are a prime example. The General Conference is the highest administrative level of the Seventh-day Adventist Church and represents more than 154,000 congregations with more than 19.8 million members worldwide, including 6,300 congregations and more than 1.2 million members in the United States. In the United States, the Church also operates the Adventist hospital system, one of the largest in the country, with 84 hospitals employing 126,000 people, plus more than 300 clinics and other facilities. Each year the system handles more than 600,000 inpatient admissions, and millions of outpatient visits.

***2** Late last year, one of the Church's largest healthcare operations, Adventist Health System, and the Administrative Committee of the retirement plan covering virtually all Church and Adventist health employees, were sued in a class action on grounds similar to those in the cases now before the Court. While the Church is confident in its legal position

- in part because the retirement plan was established and is still operated by the Church itself - this lawsuit and, more generally, the legal theories adopted by the three decisions now before the Court are of great concern to the Church.

First, the mere process of litigating such claims is not only expensive, but intrusive. For example, it will likely require examination of such sensitive *religious* questions as which Adventist entities are properly considered part of the "church," and which fall outside the "church." Such inquiries necessarily trench upon the First Amendment right, long recognized by this Court, of "religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.' " *Serbian Eastern Orthodox Diocese for the United States of Am. & Can. v. Milivojevich,* 426 U.S. 696, 721-22 (1976). Here, as in *NLRB v. Catholic Bishop of Chicago,* "[i]t is not only the conclusions that may be reached by the [government] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry[.]" 440 U.S. 490, 502 (1979). If adopted by this Court, the legal theories underlying the three decisions ***3** now under review will require government authorities to adjudicate just such questions, and thereby "dangerously undermine … religious autonomy." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 132 S. Ct. 694, 715 (2012) (Alito, J., concurring). And that would be bad for all churches, religious denominations, and religiously affiliated organizations.

Second, in the aggregate, litigation of these claims against numerous religious healthcare systems creates a substantial risk of interdenominational discrimination based, at bottom, on religious doctrine, polity, or both. While the Church is likely to end up on the favorable end of that discrimination on the particular issue here, the Church has a far greater, long-term interest in protecting *all* religious bodies against such discrimination. The Church thus has a powerful interest in reinforcing this Court's long-standing teaching that, consistent with the First Amendment, "one religious denomination cannot be officially preferred over another," that is, a government may not " 'pass laws which aid one religion' or that 'prefer one religion over another.' " *Larson v. Valente,* 456 U.S. 228, 246 (1982). That bedrock principle should apply not only when specific religious denominations or practices are singled out for burdens or advantages, but also when laws interact with a denomination's history or beliefs to produce discriminatory effects. See *id.* at 230, 246, 253. Indeed, as *Valente* shows, the denominational nondiscrimination principle demands uniform treatment even when the government tries to ***4** *accommodate* religious practices, not only when it burdens them. See *id.* As Justice O'Connor put it in *Board of Education of Kiryas Joel Village School District v. Grumet,* a "law prohibiting the consumption of alcohol may exempt sacramental wines, but it may not exempt sacramental wine use by Catholics but not by Jews." 512 U.S. 687, 715-16 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

Here again, any departure from that principle would be devastating, not just for Petitioners, but for all churches and denominations.

STATEMENT

An understanding of how those principles apply in this case requires a rudimentary understanding of ERISA's "church plan" exemption, its history, and its interpretation by the federal agencies that administer ERISA as well as the decisions under review.

1. When Congress enacted ERISA in 1974, it included exemptions from the statute's otherwise broad coverage of private retirement plans. One of those exemptions was for "church plans." See 29 U.S.C. § 1003(b)(2). ERISA originally defined "church plan," as relevant here, as "a plan established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1954[.]" 29 U.S.C. § 1002(33)(A) (1974).

Congress intended that exemption to vindicate the constitutionally protected independence of churches, ***5** which it feared ERISA might otherwise compromise. As the Senate committee report put it:

> The committee is concerned that the examinations of books and records that may be required in any particular case as part of the careful and responsible administration of the insurance system might be

> regarded as an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities.

S. Rep. No. 93-383 at 81 (1973).

2. Congress's intent to protect churches from administrative scrutiny was threatened three years after ERISA was enacted. In 1977, the IRS considered application of the "church plan" exemption to "religious orders" of Roman Catholic nuns "whose principal activity is the operation of hospitals [.]" Gen. Counsel Memorandum, GCM 37266, 1977 WL 46200, at *1 (I.R.S. Sept. 22, 1977) (interpreting ERISA's parallel provisions in the Internal Revenue Code at 26 U.S.C. § 414(e)). The IRS determined that the exemption required the agency to determine whether the religious orders were themselves "churches." *Id.* at *3.

That question, the IRS felt, "is necessarily one of fact and must be decided on a case by case basis." *Id.* And to answer it, the agency would inquire into church structure and doctrine: while some religious orders, "especially those of the Catholic Church, will often have many of the characteristics of a 'church [,]' ***6** … because of their intimate organizational relationship with the Catholic Church," *id., qualifying* as a church would require the religious order to show that it "is an integral part of a church and carries out … the *religious* functions of the church." *Id.* at *4.

The IRS proceeded to answer its question in the negative. Nuns, the IRS held, "are not priests and therefore cannot perform all the sacerdotal functions of the Catholic Church that are peculiar to priests." *Id.* at *5. While they "administer certain sacraments" to patients in the hospitals they operate, the agency considered those functions "*incidental* to [their order's] principal function of operating a health facility." *Id.* (emphasis added). Operating hospitals "is not a religious function as that term is commonly understood," *id.*; thus "because their principal activity is not religious, the orders are not churches." *Id.;* see also *id.* at *6 ("[W]hile these activities are functions of the Catholic Church, they are not 'church functions' as that phrase is used in the Code and Regulations since they are not religious.").

3. Congress recognized that the IRS's ruling contravened Congress's purpose of avoiding government intrusion in church affairs. Congress therefore amended ERISA's church plan exemption in 1980 to overrule the IRS's decision and prevent the agency's error from being repeated.

Congress did so through two amendments to ERISA, which work in tandem. First, Congress provided ***7** that employees of church-affiliated organizations would be considered employees of the church. See 29 U.S.C. § 1002(33)(C)(ii); see also *id.* § 1002(33)(C)(iv) (providing that an organization is associated with a church if it "shares common religious bonds and convictions with that church"). Second, Congress provided that a church plan "includes a plan maintained by an organization … the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits … for the employees of a church[.]" *Id.* § 1002(33)(C)(i). The net result is that a plan "maintained" for the benefit of employees of church-affiliated groups is a church plan, whether or not the affiliated group is itself a "church."

As the IRS recognized in 1983, that definition obviates administrative inquiries into whether a given organization is a "church." Upon a simple finding that a group maintaining a retirement plan is "affiliated" with a church, there is no need to evaluate the religious qualifications of group members or the religious significance of the functions they perform. Gen. Counsel Memorandum, GCM 39007, 1983 WL 197946, at *4 (I.R.S. July 1, 1983).

4. For more than three decades, courts, federal agencies, and religious institutions have operated under that view. That understanding has spared the government and religiously affiliated organizations from wrangling over questions of doctrine and polity - to the mutual benefit of church, state, and the members ***8** of the public employed or served by religious organizations.

That happy consensus has been upset by the three circuit court opinions under review in this case. *Kaplan v. Saint Peter's Healthcare Sys.,* 810 F.3d 175 (3d Cir. 2015); *Stapleton v. Advocate Health Care Network,* 817 F.3d 517 (7th Cir. 2016); *Rollins v. Dignity Health,* 830 F.3d 900 (9th Cir. 2016). According to those decisions, ERISA has always defined "church plan" as a plan both "established" and "maintained" by qualifying organizations. *Kaplan,* 810 F.3d at 180; *Stapleton,* 817 F.3d at 523; *Rollins,* 830 F.3d at 905. While only "churches" could either establish or maintain a "church plan" under the original text, "[t]he 1980 amendments provided an alternate way of meeting the *maintenance* requirement by allowing plans maintained by church agencies to fall within the exemption." *Kaplan,* 810 F.3d at 180 (emphasis added). But the lower court decisions also held that the 1980 amendments did not touch the requirement that a retirement plan be "*established*" by a church, not merely an affiliated group, to be a "church plan." *Kaplan,* 810 F.3d at 180 (emphasis added); *Stapleton,* 817 F.3d at 523; *Rollins,* 830 F.3d at 906.

Church-affiliated groups that establish *and* maintain their own retirement plans, in other words, must once again prove they are themselves "churches" to gain the benefit of the ERISA exemption. That means that the questions of church doctrine, polity, and administration that the IRS answered in 1977 (and that ***9** Congress hoped to obviate in 1980) are again matters for the government to resolve - with potentially vast financial consequences for churches, affiliated organizations, their employees, and the needy persons they all serve.

Petitioners argued below that that interpretation creates concerns under the Religion Clauses that should be avoided. The courts below noted that Congress sometimes expressly distinguishes between churches and affiliated organizations, and so declined to apply constitutional avoidance principles to the implicit distinction here. *Kaplan,* 810 F.3d at 186-87; *Stapleton,* 817 F.3d at 531; *Rollins,* 830 F.3d at 911. If churches do not like the inquiry that this interpretation demands, the courts held, they should structure their retirement plans differently. *Kaplan,* 810 F.3d at 186; *Stapleton,* 817 F.3d at 532; *Rollins,* 830 F.3d at 912.

***10** SUMMARY OF ARGUMENT

As Petitioners have persuasively explained, their interpretation of the "church plan" exemption provisions - like the interpretation followed by the relevant federal agencies - is compelled by those provisions' language, history and purpose. See Pet. Br. 21-46. But a powerful additional reason forecloses the contrary interpretation adopted by the three decisions under review in this case. That interpretation would create enormous constitutional concerns, and would therefore run afoul of the principle that, "[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988); accord *Northwest Austin Mun. Utility Dist. No. One v. Holder,* 557 U.S. 193, 197 (2009) ("[The Court's] usual practice is to avoid the unnecessary resolution of constitutional questions."); *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 78 (1994) ("It is … incumbent upon us to read the statute to eliminate [constitutional] doubts [.]").

Here, there is no serious suggestion that the interpretation advanced by Petitioners "is plainly contrary to the intent of Congress." And the contrary reading by the courts below raises two serious risks of unconstitutional government action.

***11** I. One is a risk of unconstitutional interdenominational discrimination. Churches and religious denominations exhibit varying degrees of integration with their affiliated healthcare operations and retirement plans. Because the Seventh-day Adventist Church and its healthcare operations and retirement plans lie at the "highly integrated" end of that spectrum, those plans would qualify for an ERISA exemption even under the approaches adopted by the three decisions under review. Yet that high degree of integration is driven largely by Adventist doctrine and polity - including authoritative teachings of the Church's leading founder, Ellen G. White. The relatively low degree of integration seen in some other religious healthcare systems is likewise largely driven by religious doctrine and polity. Accordingly, these interdenominational differences in the degree of *integration* are driven by interdenominational differences in *doctrine.*

And that, in turn, means that a legal standard that relies upon the degree of integration in determining entitlement to a religious exemption - as the decisions below do - will end up discriminating among denominations based upon doctrinal differences.

That result would run afoul of this Court's consistent teaching that, under the First Amendment, government may not adopt policies that "aid one religion' or that 'prefer one religion over another.' " *Valente,* 456 U.S. at 246. Those principles apply not only where specific religious denominations or practices are singled out for burdens or advantages, but ***12** also where government action produces discriminatory effects. *See id.* at 230, 246.

Those principles are especially applicable where, as here, the government acts to accommodate religious practices or institutions. When the government exempts a particular kind of religious activity from regulation, it must do so as to *all* denominations that engage in that activity - even when the religious framework for the activity varies from denomination to denomination. See, *e.g., Bd. of Educ. of Kiryas Joel,* 512 U.S. at 715-16 (O'Connor, J., concurring in part and concurring in the judgment).

The decisions under review do not comply with that principle. Instead, they would create an ERISA exemption for the retirement plans of institutions using one kind of structure, but deny that exemption to similar religious institutions that, "as a matter of policy," have structured their operations differently. *Valente,* 456 U.S. at 246 n.23. Under *Valente* and its progeny, such a result violates the First Amendment.

II. The decisions under review also pose a substantial threat of unconstitutional intrusion into " 'the power of religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.' " *Serbian Eastern Orthodox Diocese,* 426 U.S. at 721-22. The resulting "church autonomy" doctrine prohibits government from intruding unnecessarily into religious institutions' organizational and managerial choices. See *Hosanna-Tabor,* 132 S. Ct. 694 at 706.

***13** The lower courts' position conflicts with those principles because of its premise, namely, that Congress and courts can permissibly distinguish between retirement plans of church institutions based on issues of church organization and hierarchy. But distinguishing retirement plans based on whether they were "established" by a church means deciding whether any particular church-affiliated institution is *itself* a "church," just as the IRS did before ERISA was amended in 1980. Such an analysis inherently raises grave constitutional concerns because it would impede "a religious group's right to shape its own faith and mission," and likely lead to "government involvement in … ecclesiastical decisions." *Id.* at 706 (Alito, J., concurring).

To the extent Petitioners' interpretation of ERISA's "church plan" exemption raises concerns about large healthcare institutions and retirement plans disingenuously calling themselves "church-related" merely to avoid the costs and burdens of ERISA compliance, that concern can easily be addressed in other, less intrusive ways. One way would be a "safe harbor" for any non-profit healthcare operations that hold themselves out to the public as religious. See, *e.g., Universidad Central de Bayamon v. NLRB,* 793 F.2d 383, 402 (1st Cir. 1985) (Breyer, J.) (applying this analysis in context of religious college exemption from National Labor Relations Act); *Univ. of Great Falls v. NLRB,* 278 F.3d 1335, 1344 (D.C. Cir. 2002) (same). Just as religious colleges and universities incur significant ***14** financial and reputational costs when they publicly acknowledge their religiosity, so too religious healthcare providers incur substantial costs that, by themselves, deter disingenuous claims of religiosity and church affiliation. That reality eliminates any need to adopt the intrusive - and constitutionally problematic - analysis employed by the courts below.

RGUMENT

I. The courts of appeals' narrow reading of the "church plan" exemption would create a serious and unnecessary risk of unconstitutional interdenominational discrimination.

Many religious denominations operate health care systems, and many of them - including those of the *amicus* Church - have been the subject of lawsuits similar to the ones now before the Court.[2] Those systems are organized in significantly different ways, differences reflecting not just managerial choices, but differences in religious doctrine and polity. Yet, according to the decisions under review, those differences in organization have great legal significance for the retirement plans offered by religious health care systems. Those decisions thus introduce a risk of unconstitutional ***15** discrimination between religious denominations - one that could be avoided by treating retirement plans more evenhandedly, as Petitioners urge.

A. For reasons of religious doctrine and polity, some religious denominations - such as the Seventh-day Adventists - exhibit a high degree of integration between the church and its health care systems.

The Seventh-day Adventist hospital system lies at one end of the spectrum. It is one of the largest hospital systems in the country, with 84 hospitals employing 126,000 people, plus more than 300 clinics and other facilities.[3] Each year the system handles more than 600,000 inpatient admissions, and over 13 million outpatient visits.[4] Compared with other religious hospital systems, the Adventist hospital system exhibits ***16** an especially high degree of integration between hospital administration and the Church. This includes the retirement and health benefit plans offered to employees.

1. The principal reason for this high level of integration is the unique significance that Adventist Church doctrine places on health care. For Seventhday Adventists, operating hospitals is not just one of many "brand[s] of good works in which the Christian should engage," but is itself a religious act that Adventists are specifically commanded to perform.[5]

As one Seventh-day Adventist doctor put it, "[o]ur medical program came to us by divine revelation."[6] And that revelation came through Ellen G. White - a founder of the Seventh-day Adventist Church, whom Adventists believe had the gift of prophesy. She had a series of visions revealing that Adventists were to establish hospitals: on Christmas Day, 1865, she learned that "[o]ur people should have an institution of their own, under their own control, for the benefit of the diseased and suffering among us who wish to have health and strength that they may glorify God in ***17** their bodies and spirits, which are His."[7] She announced that revelation at the General Conference of the Church in May 1866, and the first Seventh-day Adventist health facility, which later became the world-famous Battle Creek Sanitarium, was established later that year.[8]

White's writings repeatedly emphasize that establishing a network of health facilities ("sanitariums," as she often called them) is a central part of the Church's mission. "Sanitariums are to be established all through our world," she wrote, "and managed by a people who are in harmony with God's laws [.]"[9] Indeed, she taught that "[t]he establishment of sanitariums is a *providential arrangement,* whereby people from all churches are to be reached" and taught Adventist doctrine, and thus "made acquainted with the truth for this time."[0]

White's visions thus teach Seventh-day Adventists that church hospitals are a uniquely important ***18** method of spreading the Church's teachings and preparing the world for Christ's return. The Church's "object in the establishment of these institutions is that the truth for this time may through them be proclaimed."[2]

Working for those hospitals, furthermore, was to be a uniquely important part of the missions of individual Adventists. White thus taught that "[m]edical missionary work is the right hand of the gospel." [3] She even intimated that the health care mission would ultimately be the Church's principal, and perhaps *only,* form of ministerial work. [4]

***19** 2. In keeping with the importance of health care to the Church, integrating doctrine and administration into Seventh-day Adventist hospitals is a matter of great importance. The General Conference of Seventh-day Adventists, the governing body of the entire Church, has a medical section, the Department of Health Ministries, which is responsible for assisting the entire church membership in living the Church's health-related teachings. [5] In addition, the Church employs a parallel system for managing its hospitals and other medical institutions. That system relies upon regional Unions, which together make up the General Conference. [6]

Under the leadership of its regional Unions in the United States, the Church has established five systems of Adventist health care covering regions or local groups of affiliated medical centers. [7] Health Ministries staff are responsible for ensuring integration between the Church and Adventist health care facilities ***20** "through memberships on boards, inspections, assistance in recruiting personnel, cooperation with community programs, and support for spiritual ministries including the work of chaplains." [8]

Adventist hospitals thus function as a "branch of the church," "strongly denominational in character and operated by those who know and understand the goals and objectives of the church." [9] And the institutions' scientific and medical functions subserve their spiritual purposes, not the other way around. [20]

By the same token, the Church cannot maintain its involvement with hospitals that are not operated in close consistency with the Church's teachings. Indeed, the Church separated from its one-time crown jewel, the Battle Creek Sanitarium, in part over doctrinal disputes with Dr. John Harvey Kellogg, the hospital's leader. [2]

***21** The Church thus works to ensure that its hospitals are largely administered by Seventh-day Adventists. [22] In turn, these church members run the hospital consistently with church teachings - including, for example, Saturday Sabbath observance - and integrate the church's teachings into patient care. [23]

3. For similar reasons, this same integration is reflected in the organization of the retirement and health benefit plans available to employees of these Adventist healthcare institutions. In keeping with the unique integration of health care with the Church's other activities, the retirement plan protecting workers at the Church's hospitals was originally created by the Church itself long before ERISA was enacted, and has been controlled by the Church's governing bodies for more than a century.

The General Conference of Seventh-day Adventists established the first retirement fund for Church workers in 1910. [24] This fund, called the "Sustentation Fund," was originally designed to function like a charity. [25] By the 1930s, the Fund had taken on the characteristics of a pension, with defined payment formulas and dedicated funding from Church institutions, ***22** including the sanitariums. The Fund's operations were described in a series of booklets published at intervals by the General Conference.

Changes to the Sustentation Fund were made by the General Conference itself, in cooperation with a committee of its North American Division known as the Committee on Administration. In 1967, the General Conference voted to divide the Fund into four separate retirement funds, including a Hospital Retirement Fund dedicated to the Church's health care workers. [26] The North American Division voted to adopt the Hospital Retirement Fund the next day - and in

doing so noted that "all Seventh-day Adventist hospitals are subordinate units of the General Conference of Seventh-day Adventists[.]" [27]

The Church has continued to operate its hospital retirement plans after ERISA's enactment, and up to the present. That control is reflected, for example, in revised Hospital Retirement Plan documents adopted by the North American Division in 1979 and 1980. [28] ***23** Although the Division chose to fund the Plan consistently with ERISA's requirements, [29] the Church has operated the Plan as a "church plan" under ERISA since the 1980s - and received an IRS ruling to that effect in 1992. Today, the Plan is administered by the Church's Adventist Retirement Board, whose members are all appointed by the North American Division. [30]

In short, it is difficult to imagine a retirement plan more deeply integrated with a major religious body than the Adventist Hospital Retirement Plan.

B. Any attempt to distinguish among the various religious organizations and their related health care systems would raise serious constitutional concerns.

Under the decisions under review, because Seventh-day Adventist health care facilities - and the Hospital Retirement Plan serving their workers - are tied especially closely to the Church, the Hospital Retirement Plan could well have a different status under ERISA than retirement plans of other religious health ***24** systems. Under those decisions, that difference would ultimately flow from religious doctrine, *i.e.,* from the centrality of health care to the Seventh-day Adventist Church as opposed to certain other denominations. And that creates a constitutional problem: it would likely violate the First Amendment's prohibition on interdenominational discrimination to deny a "church plan" exemption to denominations whose religious doctrine and polity do not require as high a degree of integration as the Seventh-day Adventist system.

1. As this Court has long held, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another"; *i.e.,* that the government may not " 'pass laws which aid one religion' or that 'prefer one religion over another.' " *Valente,* 456 U.S. at 246; *Bd. of Educ. of Kiryas Joel,* 512 U.S. at 715 (O'Connor, J., concurring in part and concurring in the judgment) ("Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."). Any law that "grant[s] a denominational preference" is thus "suspect," and subject to strict scrutiny. *Valente,* 456 U.S. at 246; see also *Sklar v. C.I.R.,* 282 F.3d 610, 619 (9th Cir. 2002).

That principle applies not only in circumstances where certain religious denominations or practices are singled out for burdens or advantages, but also when laws interact with a denomination's history or beliefs to produce discriminatory effects. In *Valente,* for example, this Court considered a state statute that ***25** imposed certain registration and reporting requirements on charitable organizations but exempted religious organizations that solicit more than 50 percent of their funds from non-members. 456 U.S. at 230. The statute's terms were neutral, yet the Court held that it "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents." *Id.* at 246.

In so holding, the Court observed that the "principal *effect* of the fifty per cent rule is to impose the registration and reporting requirements … on some religious organizations but not on others." *Id.* at 253 (emphasis added). The *causes* of that distinction, moreover, would inevitably be rooted in doctrine and polity:
[T]he provision effectively distinguishes between "well-established churches" that have "achieved strong but not total financial support from their members," on the one hand, and "churches which are new and lacking in a constituency, or which, *as a matter of policy,* may favor public solicitation over general reliance on financial support from members," on the other hand.

Id. at 246 n.23 (emphasis added). For that reason, the Court held, the rule created a risk of entangling politics and religion, and so offended the Establishment Clause. *Id.* at 252-53 (discussing *Lemon v. Kurtzman,* 403 U.S. 602 (1971)).

***26** As *Valente* also shows, denominational nondiscrimination demands uniform treatment of denominations, not only when the government burdens religious practices, but when the government acts to accommodate them. The charitable exemption in *Valente* applied to some denominations but not others; it was therefore suspect. *Id.* That is because, when the government exempts a particular kind of religious activity from regulation, it has to do so as to *all* denominations that engage in it - even when the religious framework for the activity varies from denomination to denomination. *Bd. of Educ. of Kiryas Joel,* 512 U.S. at 715-16 (O'Connor, J., concurring in part and concurring in the judgment) ("A state law prohibiting the consumption of alcohol may exempt sacramental wines, but it may not exempt sacramental wine use by Catholics but not by Jews.").

2. In contrast to these bedrock teachings, the panel decisions in this case imply that Congress attempted to accommodate religious practices by creating an ERISA exemption for certain retirement plans closely affiliated with churches, but that it failed to extend that exemption to similar religious institutions that, "as a matter of policy," structure their operations differently. *Valente,* 456 U.S. at 246 n.23. Whatever distinctions between churches and affiliated organizations might be acceptable in other cases, *Kaplan,* 810 F.3d at 186-87; *Stapleton,* 817 F.3d at 531; *Rollins,* 830 F.3d at 911, the distinction here strongly resembles the kind of discrimination among denominations ***27** - and the threat of entanglement between government and religion - that this Court invalidated in *Valente.*

Here, as Petitioners have persuasively shown (at 21-46), applying the ERISA "church plan" exemption uniformly to church-based healthcare systems across the spectrum of religious polity and corporate structure is entirely consistent with "the intent of Congress" - as expressed in both statutory language and legislative history. See *Edward J. DeBartolo,* 485 U.S. at 575. And for reasons explained above, interpreting that exemption to apply only to religious healthcare systems at one end of that spectrum would "raise [a] serious constitutional problem," *id.,* specifically, the kind of denominational preference condemned in *Valente.* As a matter of constitutional avoidance, this Court should seek to interpret ERISA in a way that does not raise serious constitutional concerns. And that is a powerful reason to adopt the relevant federal agencies' (and Petitioners') reading, and reject that of the courts below. [3]

***28 II. The courts of appeals' narrow reading would create a serious and unnecessary risk of unconstitutional interference in religious organizations' autonomy.**

The lower courts' reading of the "church plan" exemption also creates a serious risk of unconstitutional interference with religious institutions' autonomy. This Court has long held that "religious freedom encompasses 'the power of religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.' " *Serbian Eastern Orthodox Diocese,* 426 U.S. at 721-22 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America,* 344 U.S. 94, 116 (1952)). This "church autonomy" doctrine, which has roots in both the Free Exercise Clause and the Establishment Clause, see *Hosanna-Tabor,* 132 S. Ct. at 706, prohibits a government from unnecessarily interfering - directly or indirectly - in religious institutions' organizational and managerial choices. As long as there is an objective affiliation between a retirement plan and the church, and especially where that affiliation is made clear to the public, the church autonomy doctrine counsels strongly against distinguishing the retirement plans of religious organizations based on the degree or legal form of that affiliation.

1. This Court's precedents establish that the religion clauses are not concerned with whether a particular institution is organized as a "church" or in some ***29** other way, but with whether it is engaged in religious activity. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 524 (1993) (Free Exercise Clause protects "conduct motivated by religious beliefs"); see also *Spencer v. World Vision, Inc.,* 633 F.3d 723, 728 (9th Cir. 2011) (O'Scannlain, J., concurring). Those precedents accordingly limit government interference with religious institutions having a wide array of organizational forms, and with varying degrees of affiliation with any denomination's clerical leadership.

That is because an organization's legal form and relationship with a church do not bear on whether the organization is engaged in religious activity. Unincorporated religious congregations and their governing bodies enjoy protections under the religion clauses, of course, but so do churches organized and governed through corporate forms, see *Church of the Lukumi Babalu Aye,* 508 U.S. 520; as do church-owned corporations operating affiliated entities such as schools, *Hosanna-Tabor,* 132 S. Ct. 694, *rev'g* 597 F.3d 769, 772 (6th Cir. 2010) (referring to defendant as an "ecclesiastical corporation"); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327 (1987) (gymnasium operated by church-affiliated corporation). A corporation (and certainly a non-profit corporation) deserves protection under the religion clauses when it provides religion-related services to members of a religious community. See *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 309 F.3d 144 (3d Cir. 2002).

***30** Those holdings follow from the fact that behind every organization - incorporated or not, religiously affiliated or not, profit-seeking or not - are human beings, whose individual religious liberties must be respected. *Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751, 2768 (2014). When individuals are engaged in religious activity, free exercise and anti-establishment principles make no distinction between the legal forms and organizational structures they choose.

Within a church hierarchy, moreover, questions of how the church chooses to organize itself are outside the purview of secular courts. In *Serbian Eastern Orthodox Diocese,* for example, the Illinois Supreme Court had evaluated - and purported to invalidate as *ultra vires* - the church's decision to separate one diocese into three. 426 U.S. at 720-21. This Court reversed, holding that a court may not substitute its own reading of a church's "constitutions" for that of the church's own governing body. *Id.* at 721. The contrary rule would require a court to "engag[e] in a searching and therefore impermissible inquiry into church polity." *Id.* at 722.

2. By the same token, this and other courts steer clear of distinguishing between activities of religiously motivated institutions based on whether they appear to carry religious significance. As this Court has said, "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment[.]" ***31** *New York v. Cathedral Acad.,* 434 U.S. 125, 133 (1977). For that reason, "[i]t is well established … that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms,* 530 U.S. 793, 828 (2000) (plurality).

This Court also avoids evaluating whether the functions of particular entities within a church's overall organization are sacred or secular. See *Corp. of Presiding Bishop,* 483 U.S. at 336 (declining to apply such an analysis to a church-owned gymnasium). Such determinations, the Court has held, are not within a secular court's competence, while a church's expectation that a court might *try* to decide them could interfere with the church's autonomy:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Id. (footnote omitted). See also *Catholic Bishop of Chicago,* 440 U.S. at 502 (rejecting a standard for NLRB jurisdiction that would "necessarily involve inquiry into the good faith of the position asserted by the ***32** clergy-administrators and its relationship to the school's religious mission"). [32]

Similarly, when a church's agent or employee has religious authority or undertakes religious functions, it does not matter that it also has secular functions - or indeed, that it *primarily* performs secular activity. In *Hosanna-Tabor* for example, this Court treated a church's schoolteacher as a "minister" even though "her religious duties consumed only 45 minutes of each workday, and … the rest of her day was devoted to teaching secular subjects." 132 S. Ct. at 708. Because she was

ordained by her church and performed ***33** religious functions, the Court declined either to require that she perform "exclusively" religious functions to be treated as a minister, *id.* at 708-09, or to rest its analysis on "the relative amount of time [she] spent performing religious functions[.]" *Id.* at 709. [33]

3. The lower courts' position in the cases at issue here conflicts with those principles. An important premise of those decisions is that Congress and courts can permissibly distinguish between retirement plans ***34** of church-affiliated institutions based on church organization and hierarchy. But distinguishing retirement plans based on whether they were "established" by a church means deciding whether any given church-affiliated institution is *itself* a "church," just as the IRS did before ERISA was amended in 1980. GCM 37266, 1977 WL 46200, at *3 ("Thus, the question presented is whether the subject religious orders are 'churches.' ").

There is no way to conduct that analysis without raising grave constitutional concerns. Consider the dilemma of a court required to decide whether a particular religiously affiliated health care institution constitutes a church. The court would have little choice but to consider such things as whether the institution is a locus of decision making on doctrinal matters, whether members of its denomination consider it to have independent religious significance, the religious qualifications of its management, the extent of supervision by outside legal authorities, the extent to which it incorporates religious rites and observance into its functions, and so on. Indeed, that is precisely what the IRS did before ERISA was amended. See *id.* at *5-*6.

In such a legal regime, the court also could hardly help applying a different analysis to health care institutions of congregational denominations - composed of independent and autonomous communities - than it applies to hierarchical ones. But that means a court could easily develop a test in the context of a case involving a congregational domination that would turn ***35** out to be utterly unworkable in the context of a hierarchical one, or vice versa. Perhaps the court would feel compelled to conclude that, while some institutions affiliated with congregational denominations are themselves churches, institutions affiliated with (but not controlled by) hierarchical denominations cannot be. Or perhaps it would distinguish the "religious orders" of hierarchical religions, see *id.* at *3, from lay bodies that answer to church leadership.

It is hard to imagine anything more offensive to this Court's conception of the Religion Clauses. It would presage exactly the same "secular control [and] manipulation" of religious institutions that this Court has always cautioned against. *Kedroff,* 344 U.S. at 116. Indeed, it would threaten the guarantees of both Religion Clauses: the Free Exercise Clause, because it would impede "a religious group's right to shape its own faith and mission," and the Establishment Clause, because it would lead to "government involvement in … ecclesiastical decisions." *Hosanna-Tabor,* 132 S. Ct. at 706.

After all, the Religion Clauses do not distinguish between the different legal forms religious individuals and communities might choose when they organize. See *Hobby Lobby,* 134 S. Ct. at 2768. To the contrary, those clauses categorically prevent courts from intruding upon a church's organizational and management decisions. See, *e.g.,* ***36** *Serbian Eastern Orthodox Diocese,* 426 U.S. at 720-22. [34] And they categorically prevent both "church and state" from "litigating in ***37** court about what does or does not have religious meaning." *Cathedral Acad.,* 434 U.S. at 133. [35] But legal questions of "church" status - the issue the respondents here insist courts must decide - present those very dilemmas. [36]

Beyond the intrusion of courts into religious self-governance lie secondary consequences for churches. Contrary to the courts below, see *Kaplan,* 810 F.3d at 186; *Stapleton,* 817 F.3d at 532; *Rollins,* 830 F.3d at 912, religious affiliation, the organization of religious bodies, and allocation of religious authority are not supposed to be matters of enormous legal consequence. It is only a short step from high-stakes "trolling" by courts "through … [an] institution's religious beliefs," *Mitchell,* 530 U.S. at 828, to a religious institution's changing "the way [it] carrie[s] out what it understood to be its religious mission" in order to ***38** anticipate or avoid judicial oversight. *Corp. of Presiding Bishop,* 483 U.S. at 336 & n.14. And when that happens, the fears that animated the Religion Clauses come to fruition.

4. Those who favor a narrower reading of ERISA's "church plan" exemption often cite fears that large healthcare institutions and their affiliated retirement plans will disingenuously call themselves "church-related" merely to avoid the costs and burdens of ERISA compliance. See, *e.g.,* Brief for AARP and the National Employment Lawyers Association in Support of Appellees Urging Affirmance, *Kaplan v. Saint Peter's Healthcare Sys.,* 810 F.3d 175 (3d Cir. 2015) (No. 15-1172) (decrying widespread "perversion of the church plan exemption"). But concerns about false claims of religiosity are not unique to this context, and indeed have always been viewed as a necessary cost of religious liberty, which has helped prevent and sooth sectarian conflict throughout our history. See, *e.g., Sherbert v. Venter,* 374 U.S. 398, 407 (1963).

Moreover, if false claims to an exemption are deemed particularly problematic in this context, courts and agencies could easily deal with that risk in the same way that the First and D.C. Circuits have dealt with a similar risk in the analogous context of religious colleges and universities. For example, in *Uniuersidad Central de Bayamon v. NLRB,* the First Circuit rejected the NLRB's assertion of jurisdiction over a "Catholic-oriented" university that had refused ***39** to bargain with a union representing university faculty. 793 F.2d at 402 (Breyer, J.). Citing this Court's analysis in *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, then-Judge Breyer concluded that the First Amendment concerns applicable to "pervasively sectarian" schools apply with equal force to entities that provide a "basically" secular education but that "maintain[] a subsidiary religious mission." *Bayamon,* 793 F.2d at 398-400. Just as the NLRB's attempts to distinguish between "completely religious" and "religiously-associated" primary schools failed to pass First Amendment muster in *Catholic Bishop,* the agency's ad hoc efforts to disaggregate the religious from the non-religious elements of the university in *Bayamon* implicated the same "kind of 'entanglement' - arising out of the inquiry process itself." *Id.* at 401. In light of these concerns, then-Judge Breyer instead evaluated factors such as whether the entity in question "holds itself out" to the public as a religious institution and is affiliated with or controlled by a church or other religious organization. *Id.* at 399-400, 403. The D.C. Circuit adopted a similar approach in *University of Great Falls v. NLRB,* 278 F.3d at 1344, which looked, among other things to whether an institution "holds itself out to students, faculty and community as providing a religious educational environment" and "is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference ***40** to religion." *Id.* at 1343 (quotation marks omitted) (citing *Bayamon* and *Catholic Bishop*).

The same principles apply here. Just as religious colleges and universities incur certain costs when they publicly acknowledge their religiosity, so too religious healthcare providers incur costs that, by themselves, deter disingenuous claims of religiosity and church affiliation. As with religious colleges, some potential patients won't be treated by a religious healthcare provider; some potential employees won't work there, and some potential donors won't donate, simply because of the institution's religiosity or its affiliation with a church that isn't favored by the potential patient, employee or donor. See *Great Falls,* 278 F.3d at 1344; *Bayamon,* 793 F.2d at 398-400. As with a college or university, therefore, a healthcare provider already has ample incentives *not* to claim a religious character or affiliation falsely.

Accordingly, as in the religious college context, any concern about false claims of religious affiliation by healthcare providers and their retirement plans can be adequately addressed simply by requiring that the provider hold itself out to the public as religiously affiliated and that it in fact be affiliated with a bona fide religious body of some kind. Because neither of these facts is disputed in the cases here, any concerns that the providers now before the Court might falsely claim a religious affiliation can be dismissed.

***41 CONCLUSION**

In sum, all the considerations that support exempting church plans from ERISA support interpreting that exemption broadly. In any event, given the constitutional doubts about an interpretation of ERISA that sets the statute at war with religious liberty principles, this Court should interpret the "church plan" exemption to avoid such a conflict.

For those reasons and others cogently explained by Petitioners, the decisions below should be reversed.

Footnotes

1 No one (including a party or its counsel) other than the *amicus curiae,* its members and counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief in communications on file with the Clerk.

2 See *Sheedy v. Adventist Health System Sunbelt Healthcare Corp., et al.,* No. 6:16 cv 1893 (M.D. Fla., filed Oct. 28, 2016).

3 Adventist Health Policy Association, "Member Profiles, available at http://adventisthealthpolicy.org/member profiles.

4 *Id.;* see also Adventist Health System, "About Us, available at http://www.adventisthealthsystem.com/page.php?section about; Adventist HealthCare, "About Us, available at http://www.adventisthealthcare.com/about/#.WIDlPBsrJpk; Adventist Health, "About Us, available at https://www.adventisthealth.org/pages/about us.aspx; Kettering Health Network, "About Us, available at http://www.ketteringhealth.org/aboutus/.

5 Francis D. Nichol, *The Genius and Scope of Our Medical Work No. 1,* Ministry (Aug. 1949).

6 Dunbar W. Smith, *Why a Seventh day Adventist Medical Work?,* (Part II), Ministry (March 1964).

7 1 Testimonies for the Church 492 (1868).

8 Smith, *supra* n. 6.

9 Medical Ministry 25 (1932); see also Manuscript 30 (1905). ("In our work of preaching the gospel, we are to establish small sanitariums in many places.).

10 Counsels on Health 470 (1923).

11 7 Testimonies for the Church 104 (1902) ("These institutions, rightly conducted, will be the means of bringing a knowledge of the reforms essential to prepare a people for the coming of the Lord, before many that otherwise it would be impossible for us to reach.).

12 Medical Ministry 207; see also 7 Testimonies for the Church 59. ("God's methods of treating disease will open doors for the entrance of present truth.); Medical Ministry 26 (describing the sanitariums as "agencies in the fulfillment of God's great purposes for the human race).

13 7 Testimonies for the Church 59; see also *Review & Herald* June 21, 1906, ¶ 22 ("Let us remember that one most important agency is our medical missionary work.).

14 Counsels on Health 533 ("I wish to tell you that soon there will be no work done in ministerial lines but medical missionary work.).

15 See General Conference, Adventist Health Ministries, available at http://healthministries.com/.

16 Health Ministries, North American Division of Seventh day Adventists, "History, Mission & Organization, available at http://www.nadhealthministries.org/article/16/about us/history mission and organization.

17 The systems are Kettering Health Network, Adventist Health, Adventist HealthCare, Loma Linda University Health, and Adventist Health System. See Jane Allen Quevedo, *A Legacy of Health & Healing: Stories of Early Adventist Health Care* vii (2016).

18 See Health Ministries, History, Mission & Organization, *supra* n. 16.

19 William P. Dysinger, *In His Medical Institutions,* Ministry (Feb. 1977).

20 See John D. Rogers, *Health Evangelism: Putting the Right Arm to Work No. 2,* Ministry (Dec. 1950).

21 See Smith, *supra* n. 6.; Gary Land, *Historical Dictionary of the Seventh day Adventists* 145 (2d ed. 2014).

22 Dysinger, *supra* n. 19.

23 Herman C. Ray, *Sabbathkeeping in our medical institutions,* Ministry (Jan. 1962).

24 General Conference Committee Minutes, Nov. 28, 1910, Book at pp. 304 06.

25 *Id.*

26 General Conference Committee Minutes, Oct. 24, 1967, at 67 239.

27 North American Division Committee on Administration Minutes, Oct. 25, 1967, at 67 152 161.

28 North American Division Committee on Administration Minutes, Apr. 4, 1979, at 79 41 42; North American Division Committee on Administration Minutes, Sept. 25, 1980, at 80 93 94.

29 See, *e.g.,* Jan. 1992 Plan Booklet § 7.5.

30 The Seventh day Adventist Hosp. Ret. Plan, as amended and restated effective Jan. 1, 2012, at 1. Moreover, under a 1981 trust agreement, the North American Division Corporation of Seventh day Adventists serves as trustee for the Plan. North American Division Committee on Administration Minutes, Sept. 7, 2010, at 10 233 234.

31 That is not to suggest that denying "church plan treatment in the cases before the Court would necessarily make constitutionally infirm the application of that same exemption to the Hospital Retirement Plan that serves Seventh day Adventist health systems. On the contrary, if the Court were to affirm the decisions below, it should at a minimum leave the door open for a different result as to organizations like the Adventist Church and its retirement plans and health care providers. Needless to say, we reserve all arguments that Adventist health care providers and the Hospital Retirement Plan are distinguishable.

32 Likewise, federal courts of appeals studiously avoid evaluating whether the functions of entities within a church's overall organization are sacred or secular. See, *e.g.*, *Great Falls,* 278 F.3d 1335 (NLRB may not assert jurisdiction over a religious university's employment disputes by determining that the university did "not have a substantial religious character); *Cohen v. City of Des Plaines,* 8 F.3d 484, 490 (7th Cir. 1993) (explaining that "the legitimate purpose of minimizing governmental interference with the decision making processes of a religious organization can extend to seemingly secular activities of the organization); *Espinosa v. Rusk,* 634 F.2d 477, 479, 481 (10th Cir. 1980) (invalidating application of city solicitation ordinance that exempted "solicitations by religious groups solely for 'evangelical, missionary or religious but not secular purposes' because it "involves municipal officials in the definition of what is religious); see also *Spencer,* 633 F.3d at 730 (O'Scannlain, J., concurring) ("If we should not be in the business of determining whether a particular 'activity is religious or secular, our competence to make that determination with respect to a particular 'product or 'service is in serious doubt.).

33 Even the fact of ordination may not be dispositive. See *id.* at 710 (Thomas, J., concurring) (" T]he Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good faith understanding of who qualifies as its ministers.); *id.* at 715 (Alito, J., joined by Kagan, J., concurring) ("What matters is that respondent played an important role as an instrument of her church's religious message and as a leader of its worship activities.).

Likewise, federal courts of appeal and state supreme courts reject invitations to delve into whether the job functions of a particular agent of a religious entity are sufficiently religious to make the agent a minister. See, *e.g.*, *Cannata v. Catholic Diocese of Austin,* 700 F.3d 169, 177 (5th Cir. 2012) (applying ministerial exemption to church music director under *Hosanna Tabor* despite claim that his responsibilities were not "religious in nature); *Coulee Catholic Sch. v. Labor & Indus. Rev. Comm n,* 768 N.W.2d 868, 882 (Wis. 2009) (evaluating a ministerial exemption based on a "functional test, rather than on "whether a majority of the employee's time is spent on quintessentially religious tasks); *Montrose Christian Sch. Corp. v. Walsh,* 770 A.2d 111 (Md. 2001) (holding that limitation of employment law exemption to workers performing "purely religious functions violated the First Amendment).

34 Accord, *e.g.*, *Kedroff,* 344 U.S. at 116 (acknowledging religious organizations' "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.); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem l Presbyterian Church,* 393 U.S. 440, 449 (1969) (warning of hazards of "implicating secular interests in matters of purely ecclesiastical concern.); *Kreshik v. Saint Nicholas Cathedral,* 363 U.S. 190, 191 (1960) (per curiam) (holding that neither the legislature nor the judiciary could permissibly interfere with internal church governance); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater,* 2 F.3d 1514, 1537 (11th Cir. 1993) (holding that city ordinance requiring financial, operational, and organizational disclosures of religious organizations directly violated "the principle that civil authorities must abstain from interposing themselves in matters of church organization and governance); see also Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power,* 84 Iowa L. Rev. 1, 44 (1998) (describing judicial abstention in cases involving "the choice of organizational structure or polity and its administration, including interpretation of a church's organic documents, bylaws, and traditions); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 Colum. L. Rev. 1373, 1414 (1981) ("The right of church autonomy is the right to keep decisionmaking authority over church operations within the church, free of outside control; how that authority is allocated internally is irrelevant. Churches may be hierarchical or congregational, episcopal or democratic, clerical or lay, incorporated or informally associated, a single entity or a network of subsidiaries and affiliates all are entitled to autonomy by the free exercise clause.).

35 Accord, *e.g.*, *Corp. of Presiding Bishop,* 483 U.S. at 336; *Hull Church,* 393 U.S. at 450 (holding that First Amendment forbids civil courts from "determin ing] matters at the very core of a religion the interpretation of particular church doctrines and the importance of those doctrines to the religion.); see also *Colorado Christian Univ. v. Weaver,* 534 F.3d 1245, 1261 (10th Cir. 2008); *Commack Self Serv. Kosher Meats, Inc. v. Weiss,* 294 F.3d 415, 425 (2d Cir. 2002) (New York state laws defining "kosher violated Establishment Clause because they "require d] the State to take an official position on religious doctrine); *Great Falls,* 278 F.3d 1335; *Cohen,* 8 F.3d at 490; *Espinosa,* 634 F.2d at 479, 481.

36 The Church raised these concerns with Congress during the process that led to the 1980 ERISA amendments. 125 Cong. Rec. 10057 (1979).

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2016 WL 6549184 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Greg ABBOTT, in his official capacity as Governor of Texas, et al. petitioners,
v.
Marc VEASEY, et al.

No. 16-393.
October 27, 2016.

On Petition for Writ of Certiorari to the United States Courts of Appeals for the Fifth Circuit

Brief of Amici Curiae Members of Congress Representing States in the Fifth Circuit Supporting Petitioners

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*i QUESTION PRESENTED

As explained in the petition, the Fifth Circuit held that statistical disparity in the preexisting possession of photo identification by members of different races was sufficient to make Texas' Voter ID law incompatible with section 2 of the Voting Rights Act. This brief addresses the first question presented, specifically:

Does Texas' Voter ID law result in the abridgment of voting rights on account of race?

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Cases

1 INTRODUCTION AND INTERESTS OF *AMICI*

Like other voting regulations, voter identification requirements not only help prevent voter fraud, but also foster public confidence in elections - thus facilitating the peaceful, orderly transfer of power that is a hallmark of American democracy. Unfortunately, the decision of the *en banc* Fifth Circuit in this case creates a roadmap for invalidating many such regulations. It does so by basing a violation of Section 2 of the Voting Rights Act - which prohibits certain regulations that have a disparate impact on racial minorities - on little more than the common statistical correlation between race and poverty. Under that rationale, virtually *any* regulation, no matter how beneficial to democratic self-government, that incrementally and indirectly increases the "cost" of voting - in money, time or even inconvenience - is also at risk of invalidation. Accordingly, the decision below will effectively shift to federal judges the People's authority to organize and regulate their own elections.

Amici, a group of elected officials from throughout the Fifth Circuit (and listed in the Appendix), are deeply concerned about the impact of the Fifth Circuit's decision on democratic self-governance in their States, and on the balance of power

between the States and the federal government. Accordingly, *amici* respectfully urge the Court to grant the petition and reverse the decision below.

*2 STATEMENT

To promote greater confidence in the outcome of elections in Texas, Texans of all political persuasions have been clamoring for tighter voter identification requirements since at least 2004. In 2011, the Texas legislature passed a voter identification law, SB 14, which generally requires voters to present an approved photo identification. S.B. 14, 82d Leg., Reg. Sess., 2011 Tex. Gen. Laws 619. At least one of the acceptable documents is available for free - a Texas election identification certification, or "EIC." See Tex. Transp. Code 521A.001(a)-(b) (Department of Public Safety "may not collect a fee" for an EIC); Tex. Health & Safety Code 191.0046(e) (providing that state and local officials "shall not charge a fee" to obtain supporting documents required for an EIC).

Respondents - plaintiffs below - nevertheless alleged that SB 14 "was enacted with a racially discriminatory purpose, has a racially discriminatory effect, … and unconstitutionally burdens the right to vote." Pet. App. 4a (citing *Veasey v. Perry,* Pet. App. 255a). The district court took the extraordinary step of granting discovery into potentially privileged internal legislative correspondence. But no evidence among the thousands of pages of correspondence or hundreds of hours of deposition revealed any discriminatory purpose. A majority of the Fifth Circuit panel thus held that the district court erred in finding that SB 14 was enacted with a racially discriminatory purpose.

Despite the lack of discriminatory purpose, and without reaching the constitutional issues presented by its position, the panel nonetheless invalidated SB ***3** 14 for having a discriminatory *effect* in violation of Section 2. See 52 U.S.C. 10301(a) (proscribing any "voting qualification or prerequisite to voting or standard, practice, or procedure … which results in a denial or abridgement of the right of any citizen … to vote on account of race or color"). The majority's essential rationale was that, because SB 14 imposes some burden (however small) on Texans living in poverty, and because poverty is correlated with race, the law has a racially discriminatory impact. See Pet. App. 285a, 297a.

The Fifth Circuit granted rehearing *en banc* and affirmed the panel's decision, over the dissenting votes of Judges Jones, Jolly, Smith, Owen, Clement, and Elrod. Pet. App. 131a-251a. The *en banc* majority followed the panel's basic rationale - i.e., relying on the correlation between race and poverty to hold that SB 14 has a racially discriminatory impact. Pet. App. 4a, 55a. But in dissent, Judge Jones, joined by Judges Jolly, Smith, Owen, and Clement, explained that the majority's decision departed from the text of Section 2, Pet. App. 195a-204a, and this Court's emphasis in *Thornburg v. Gingles,* 478 U.S. 30, 35 (1986), that a violation can only be based on results flowing from the *law* at issue, rather than from pre-existing conditions. Pet. App. 200a. Judge Elrod, joined by Judge Smith, likewise noted that "there is no evidence in this record that any voter has been denied the right to vote on the basis of his or her race because of its voter ID requirements." Pet. App. 232a.

*4 REASONS FOR GRANTING THE PETITION

As the petition convincingly explains, the Fifth Circuit's decision warrants this Court's review because it (along with a recent Fourth Circuit decision from North Carolina, which also merits review) created a circuit split on the appropriate test for Section 2 discriminatory-effect claims. See Pet. 10, 12-19. In addition, as explained below, the decision below warrants review because, first, its reliance on the general correlation between poverty and race represents a serious misinterpretation of Section 2. Second, such an interpretation would make Section 2 unconstitutional. And third, the decision below creates a roadmap for invalidating a host of other voting regulations that have long been considered uncontroversial.

I. In its reliance on the general correlation between poverty and race, the Fifth Circuit's decision seriously misinterprets Section 2.

Originally, Section 2's language paralleled that of the Fifteenth Amendment, meaning that it originally prohibited only purposeful discrimination. *City of Mobile v. Bolden,* 446 U.S. 55, 60-62 (1980) (plurality opinion). In 1982, however, Congress amended subsection (a) to prohibit states from imposing or applying voting practices "in a manner which results in a denial or abridgment of the right … to vote on account of race or color." 52 U.S.C. 10301(a). Congress also added what is now subsection (b), which provides that

> [a] violation of subsection (a) is established if, based on the totality of the circumstances, it is ***5** shown that the political processes … are not equally open to participation by members of a [protected] class … in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. 10301(b). These changes reflected the belief that requiring Section 2 plaintiffs to show purposeful discrimination leads to " 'unnecessarily divisive … charges of racism on the part of individual officials or entire communities,'… and … 'asks the wrong question.' " *Gingles,* 478 U.S. at 44 (quoting S. Rep. No. 97-417, 97th Cong., 2d Sess. 28, at 36 (1982)).

Under these provisions, the *right* question is whether the law causes minorities to be disproportionately excluded from voting, not why it was enacted. While these statutory changes expanded Section 2 liability, the Fifth Circuit's reliance upon the general correlation between race and poverty took the it far beyond what Section 2 's language can bear. Given the importance of the statute, that error is reason enough for this Court's review.

A. The Fifth Circuit has erroneously interpreted Section 2 to invalidate a voting prerequisite without evidence that it actually "results in" any disparate burden on minority voters.

To establish a violation of Section 2, a challenger must show that the challenged practice proximately caused harm to minority voters. This follows from Section 2 's text, which imposes liability only if a voting practice "imposed … by [the] State … *results in* a ***6** denial or abridgement of the right of any citizen … to vote on account of race or color." 52 U.S.C. 10301(a) (emphasis added). The phrase "results in" indicates that the alleged abridgement must be caused by the state-imposed practice alone, not from disparities in voter participation resulting from other sources. See, *e.g., Frank v. Walker,* 768 F.3d 744 (7th Cir. 2014) (Section 2 does not reach disparities possibly caused by socioeconomic inequalities). Likewise, the concept of "abridgement" "necessarily entails a comparison" with an objective benchmark, because "[i]t makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Reno v. Bossier Parish Sch. Bd.,* 528 U.S. 320, 334 (2000) (*Bossier II*). The Fifth Circuit's violation of these fundamental principles warrants this Court's review.

1. Proximate cause. First, the Fifth Circuit refused to require a showing of proximate cause as reflected, for example, in Justice Brennan's majority opinion in *Thornburg v. Gingles.* Section 2, the Court stated there, "only protect[s] racial minority vote[r]s" from denials or abridgements that are "proximately caused by" the challenged voting practice. 478 U.S. at 50 n.17.

Applying this rule in the vote-dilution context, *Gingles* held that plaintiffs challenging at-large, multi-member districts must show, as a "necessary precondition[]" to establishing a Section 2 violation, that it was the state-imposed voting practice that caused the disparate exclusion of minority candidates from the relevant offices. *Id.* at 50 (involving a multimember ***7** electoral system). Section 2 plaintiffs accordingly must show that any alleged vote dilution is *not* attributable to a general socioeconomic condition - in that case the absence of a minority community "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* If plaintiffs cannot make that

showing, the arrangement at issue - in that case the state-imposed "multi-member form of the district" - "cannot be responsible for minority voters' inability to elect its [*sic*] candidates." *Id.* And if the voting procedure "cannot be blamed" for the alleged dilution, there is no cognizable Section 2 problem because the "results" standard does "not assure racial minorities proportional representation" - only protection against "diminution proximately caused by the districting plan." *Id.* at 50 n.17. It follows that, in the vote denial context, a Section 2 plaintiff must show that the alleged deprivation flows from a state-imposed voting practice rather than some factor not within the State's control.

That is why the Fourth Circuit rejected a Section 2 challenge to Virginia's decision to select school-board members by appointment rather than election. Although there was a "significant disparity … between the percentage of blacks in the population and the racial composition of the school boards," there was "no proof that the appointive process caused the disparity." *Irby v. Va. State Bd. of Elections,* 889 F.2d 1352, 1358 (4th Cir. 2015) (internal quotations removed). Instead, the disparity was attributable only to the reality that blacks were "not seeking school board seats in numbers consistent with their percentage of the population." *Id.* Similarly, the Ninth Circuit ***8** explained that "a § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification *causes* that disparity, will be rejected." *Gonzalez v. Arizona,* 677 F.3d 383, 405 (9th Cir. 2012) (en banc) (emphasis added) (citation and quotation marks omitted), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.,* 133 S.Ct. 2247 (2013).

Here, Plaintiffs have not shown - and the Fifth Circuit did not find - that SB 14 proximately causes the exclusion of minority voters. See also generally *N.C. State Conf. of the NAACP v. McCrory,* 831 F.3d 204 (4th Cir. 2016) (similarly ignoring the issue of proximate cause). At most the Fifth Circuit's analysis shows that *poverty* can sometimes limit voting opportunities. But that is not sufficient under Section 2, especially in the context of a law such as SB 14 that guarantees *free* IDs.[2] And even if there were proof that some minority voters were excluded from the political process - which there is not - plaintiffs did not establish that SB 14 caused the exclusion. Again, under Texas law, every person has an equal right to vote and an equal right to free photo IDs. If some persons freely choose not to take advantage of these opportunities, those private decisions do not implicate Section 2.

***9 2. Objective benchmark.** The Fifth Circuit's failure to apply an objective benchmark is likewise grounds for this Court's review. As part of the proximate causation inquiry, "the comparison must be made with … what the right to vote *ought to be.*" *Bossier II,* 528 U.S. at 334. Moreover, the benchmark for measuring "how hard it should be" must be "objective," not one that is purportedly superior only because it enhances minority voting power or participation. *Holder v. Hall,* 512 U.S. 874, 880 (2008) (Kennedy, J.).

In some cases, "the benchmark for comparison … is obvious." *Id.* For example, the effect of a poll tax can be evaluated by comparing a system with a poll tax to a system without one. In other cases, however, there may be "no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice." *Id.* at 881. If that is so, then "the voting practice cannot be challenged … under § 2." *Id.*

This reading of Section 2 is confirmed by *Holder.* There, the Court rejected a Section 2 challenge asserting that use of a single-member commission instead of a five-member commission resulted in vote dilution. *Id.* at 877-879. The five-member alternative clearly would enhance minority voting strength because the minority community was large enough to elect one out of five commissioners. *Id.* at 878. Nevertheless, the Court held there was "no principled reason why" the five-member alternative ought to be the "benchmark for comparison" as opposed to a "3-, 10-, or 15-member ***10** body." *Id.* at 881. In other words, there was no "objective" benchmark for determining the proper number of commissioners, and hence no basis for a Section 2 violation. In the wake of *Holder,* then, Section 2 plaintiffs must show that the State has deprived minorities of voting opportunity compared to an "objective" alternative, not merely alternatives that would enhance minority participation.

In this case, the Fifth Circuit ignored this requirement. It based its finding of a Section 2 violation entirely on the general correlation between poverty and race. See Pet. App. 4a, 55a. Accordingly, it did not identify - or find it necessary to identify - any objective benchmark for the proper form of voter ID. See also *McCrory,* 831 F.3d at 218 (relying on the same correlations).

Nor could it. The fifty states have chosen a cornucopia of methods to verify voters' identities. *See* Natl Conf. of State Legislatures, *Voter ID Laws,* NCSL (Sept. 26, 2016), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx. Thirty-three states require voters to show some form of ID at the polls. Of those, seventeen require photo ID, while sixteen will accept non-photo ID. When a voter appears without proper ID, moreover, eleven states require voters to take additional steps. The remaining twenty-two states require state officials to act, and the steps required vary state-by-state. Accordingly, "[t]he wide range of possibilities makes the choice inherently standardless." *Holder,* 512 U.S. at 889 (O'Connor, J., concurring in part). In assessing voter ID requirements, then, there simply is "no objective ***11** and workable standard for choosing a reasonable benchmark." *Holder,* 512 U.S. at 881 (Kennedy, J.).

It is no answer to say that Texas's voting practices harm minorities relative to a *conceivable* alternative that would be better for them, such as non-photo ID or no ID at all. That is not how Section 2 works. It is always possible to hypothesize an alternative practice that would increase minority voting rates.

For example, one might speculate that a larger number of minority voters would vote if Texas required no ID and accepted voters' say-so about where they live. Yet Section 2 does not require those alternatives - which would obviously enhance opportunities for voter fraud - for the same reason that *Holder* did not require a five-member commission: "Failure to maximize cannot be the measure of § 2." *Johnson v. Be Grandy,* 512 U.S. 997, 1017 (1994).

Nor do Texas's *prior* laws provide an appropriate benchmark, because such an approach would conflate Section 2 with Section 5. Section 5 proceedings "uniquely deal only and specifically with *changes* in voting procedures," so the appropriate baseline "is the status quo that is proposed to be changed." *Bossier II,* 528 U.S. at 334. Section 2 proceedings, by contrast, "involve not only changes but (much more commonly) the status quo itself." *Id.* Because "retrogression" - whether a change makes minorities worse off - "is not the inquiry [under] § 2," the fact that a state *used* to have a particular practice in place does not make it the benchmark for a Section 2 challenge. *Holder,* 512 U.S. at 884 (Kennedy, J.) (emphasis added); see also ***12** *McCrory,* 831 F.3d at 226 (incorrectly criticizing legislative decision to return law to its previous state).

By ignoring the requirement of an objective benchmark, the Fifth Circuit converted Section 2 into a statute that requires states to adopt *whichever* voting regime would most increase the voting rates and voting power of minorities. This Court rejected this very argument in *Holder,* and it should grant the petition to reiterate its rejection of that corrosive idea.

B. The Fifth Circuit's decision erroneously interprets Section 2 to invalidate a voting prerequisite without any evidence of diminished minority political participation.

Review is also warranted because there was no evidence of decreased political participation by minorities. In vote-denial cases, Section 2 's text and history show that only those voting practices that disproportionately exclude minority voters from the political process are prohibited. It does not require states to affirmatively enhance minority voting rates, as the Fifth Circuit's decision assumes. See, *e.g.*, Pet. App. 75a ("We find no clear error in the district court's finding that the State's lackluster educational efforts resulted in additional burdens on Texas voters.").

First, a violation of Section 2(a) is established when "the political processes … are not equally open to participation by members of a [protected class] … in that its members have less opportunity … to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b). A political process is "equally open to participation" by members ***13** of all races if everyone "has the same opportunity" to vote free from state-created *barriers* that impose

differential burdens. *Frank,* 768 F.3d at 755; see also *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 428 (2006) ("[T]he ultimate right of § 2 is equality of opportunity."). It does not require "electoral advantage," "electoral success," "proportional representation," or electoral "maximiz[ation]" for minority groups. *Bartlett v. Strickland,* 556 U.S. 1, 20 (2009). And an opportunity does not become unequal simply because some groups "are less likely to *use* that opportunity." *Frank,* 768 F.3d at 753. For this reason, laws that provide an equal opportunity satisfy Section 2 regardless of whether they have proportionate outcomes.

Second, Section 2(a) prohibits only voting practices that "result[] in a *denial or abridgment of the right … to vote on* account of race." 52 U.S.C. 10301(a) (emphasis added). This language clarifies that states may enact ordinary race-neutral regulations concerning the time, place, and manner of elections, such as what kind of ballots are used or how voters establish their eligibility. Shouldering these "usual burdens of voting" is an inherent part of democracy. *Crawford,* 553 U.S. at 198 (Stevens, J.). And because such baseline requirements are inherent in the right to vote, they cannot be said to deny or abridge that right.

The same is true of photo ID laws, which, to quote *Crawford,* do not " 'represent a significant increase over the usual burdens of voting.' " ***14** *N.C. NAACP v. McCrory* No. 1:13-cv-658, 2016 WL 204481, at *10 (M.D.N.C. Jan. 15, 2016) (quoting *Crawford*), *reversed in McCrory, supra.* This Court should grant review to reiterate *Crawford's* fundamental holding that asking all voters to assume "the usual burdens of voting" does not violate Section 2.

Third, Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities." *Frank,* 768 F.3d at 753. If Congress wanted to prohibit all disparate effects, it could have said so. As the Seventh Circuit noted, "there wouldn't have been a need for" subsection (b) to ask whether the political process is "equally open," or whether minorities have "less opportunity" to participate. *Id.* at 753 (emphasis and internal quotations removed). Instead, Congress chose terms such as "impose," "denial," "abridgement," "equally open," and "less opportunity" to show that Section 2 targets only the disparate *exclusion* of minority voters caused by the voting practice.

Fourth, the legislative history of the 1982 amendments confirms that Congress meant what it said. "It is well documented" that the 1982 amendments were the product of "compromise." *Holder,* 512 U.S. at 933 (Thomas, J., concurring in the judgment); see, *e.g., id.* at 956 (Ginsburg, J., dissenting); *Thornburg v. Gingles,* 478 U.S. 30, 84 (1986) (O'Connor, J., concurring in the judgment). The original version of the 1982 amendments proposed by the House would have prohibited "all discriminatory 'effects' of voting practices," yet "[t]his version met stiff resistance in the Senate." *Miss. Republican Exec. Comm. v. Brooks,* 469 U.S. 1002, 1010 (1984) (Rehnquist, J., dissenting) (citing H.R. Rep. No. 97-227, at 29 (1981)). The Senate ***15** feared that such a law would "lead to requirements that minorities have proportional representation, or … devolve into essentially standardless and ad hoc judgments." *Id.* Senator Dole stepped in with a compromise, which Congress eventually enacted. *See Gingles,* 478 U.S. at 84 (O'Connor, J., concurring in the judgment). The key to the compromise was that it prohibited states from providing unequal voter opportunity, but it did not require equality of political outcomes. Senator Dole assured his colleagues that, under the compromise, Section 2 would "[a]bsolutely not" allow challenges to a jurisdiction's voting mechanisms "if the process is open, if there is equal access, if there are no barriers, direct or indirect, thrown up to keep someone from voting … or registering …." 128 Cong. Rec. 14133 (1982). Since SB 14 provides voters a choice of IDs that includes one available for free, it would do violence to this legislative compromise to invalidate a voting practice that allows members of all races to have equal "access" to the political process simply because factors that are beyond the control of the government might lead to uneven racial results in voter turnout. Here, moreover, there is no proof that "participation in the political process is depressed among minority citizens" under SB 14 - a basic requirement of a Section 2 claim. *League of United Latin Amer. Citizens v. Clements,* 999 F.2d 831 (5th Cir. 1993).

The Fifth Circuit's theory thus fundamentally rewrites Section 2. It replaces a ban on state-imposed barriers to minority voting with an affirmative duty of state facilitation of minority voting. It converts a prohibition on abridging minority voters' right to vote ***16** into a mandate for boosting minority voting. It transforms a guarantee of equal opportunity

into a guarantee of equal outcomes. And it revamps a law about disproportionate exclusionary effects into a law about *all* disproportionate effects. None of this is consistent with the text or the legislative compromise underlying its passage. [3] That too is ample reason to grant the petition and reverse.

***17 II. Under the Fifth Circuit's interpretation, Section 2 would violate the Constitution.**

The Fifth Circuit's approach would also make Section 2 unconstitutional - another powerful reason to grant review. As Justice Kennedy has repeatedly emphasized, this Court has never confronted whether Section 2 's "results" test complies with the Constitution. See, *e.g., Chisom v. Roemer,* 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) ("Nothing in today's decision addresses the question whether § 2 … is consistent with the requirements of the United States Constitution."); cf. *Georgia v. Ashcroft,* 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) (it would be a "fundamental flaw" to require "consideration[] of race" in order to "compl[y] with a statutory directive" under the Voting Rights Act). Justice Kennedy's pointed reminders underscore that Section 2 's results test already teeters at the edge of constitutionality. Interpreting Section 2 to prohibit Texas's (and North Carolina's) race-neutral voting laws and to require Texas and other states to adopt new laws for the racial purpose of enhancing minority voting - as the Fifth Circuit's reliance on the general correlation between poverty and race implies - pushes Section 2 over the constitutional ledge.

1. If the Fifth Circuit's interpretation of Section 2 were allowed to stand, the statute would exceed Congress's power to enforce the Fifteenth Amendment. The Fifteenth Amendment prohibits only "purposeful discrimination"; it does not prohibit laws that only "resul[t] in a racially disproportionate impact." *City of Mobile,* 446 U.S. at 63, 70 (quoting ***18** *Arlington Heights* v. *Metrop. Housing Dev. Corp.,* 429 U.S. 252, 264-265 (1977)). And this is true whether that disproportionate impact is the result of poverty - as the Fifth Circuit assumed - or other factors.

Of course, Congress has power to "enforce" that prohibition "by appropriate legislation." U.S. Const, amend. XV, § 2. This allows Congress to proscribe more than purposeful discrimination, but - just as with the Fourteenth Amendment - this proscription applies only if the law is a "congruen[t] and proportiona[l]" "means" to "prevent[] or remedy[]" the unconstitutional "injury" of intentional discrimination. *City of Boerne v. Flores,* 521 U.S. 507, 519-520 (1997). The enforcement power does not allow Congress to "alte[r] the meaning" of the Fifteenth Amendment's protections. *Id.* at 519.

Accordingly, if Section 2 - as interpreted by the courts - is not a congruent and proportional effort to weed out purposeful discrimination, but instead requires states to alter race-neutral laws to maximize minority voting participation or render their participation proportional, then Section 2 is not a legitimate effort to "enforce" the Constitution. Rather, it is a forbidden attempt to "change" the Fifteenth Amendment's ban on purposeful discrimination into a ban on disparate effects. *Id.* at 532.

For this reason, in the vote-dilution context, this Court has been careful to interpret Section 2 's "results" test in a way that prohibits redistricting efforts *only* where there is a strong inference of a discriminatory purpose. For example, the first *Gingles* "pre-condition" requires plaintiffs to establish that minority ***19** voters could naturally constitute a "geographically compact" majority in a district adhering to "traditional districting principles, such as maintaining communities of interest and traditional boundaries." *Abrams v. Johnson,* 521 U.S. 74, 91-92 (1997); see *LULAC,* 548 U.S. at 433. Because districts normally encompass identifiable "geographically compact" groups, the failure to draw such a district when a minority community is involved gives rise to a plausible inference of intentional discrimination. Conversely, the Court's interpretation of Section 2 does *not* require states to engage in preferential treatment by deviating from traditional districting principles in order to create majority-minority districts. *LULAC,* 548 U.S. at 434.

The same holds true in the vote-denial context: Section 2 cannot be interpreted to require departure from ordinary race-neutral election regulations in order to enhance minority voting participation. Otherwise Section 2 would exceed the

powers granted to Congress in the Fifteenth Amendment. And that is true whether the existing disparity is the result of poverty or other non-purposeful factors.

2. Interpreting Section 2 to require states to boost minority voting participation - under the guise of economic differences among races - would also violate the Fourteenth Amendment's equal-treatment guarantee. As This Court has held, subordinating "traditional districting principles" for the purpose of enhancing minority voting strength violates that aspect of the Constitution. See *Shaw v. Hunt,* 517 U.S. 899, 905 (1996).

***20** Section 2 thus cannot require states to abandon neutral electoral practices, such as requiring voter ID, for the "predominant" purpose of maximizing minority voter participation. *Miller v. Johnson,* 515 U.S. 900, 916 (1995). Yet requiring states to adjust their race-neutral laws to enhance minority participation rates would require exactly that "sordid business" of "divvying us up by race" through deliberate race-based decision-making. *LULAC,* 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part).

This is especially true of the Fifth Circuit's interpretation since, in its view, any failure to enhance minority voting opportunity constitutes a discriminatory "result." Yet Section 2's text flatly prohibits the pursuit of all such "results," regardless of how strong the State's justification. Cf. *Ricci v. DeStefano,* 557 U.S. 557, 595 (2009) (Scalia, J., concurring)

Interpreting Section 2 to require states to remedy the effects of private choices or societal disparities - including income and wealth differentials - also contravenes the Equal Protection Clause requirement that race-based government action be justified by "some showing of prior discrimination by the *governmental unit* involved." *Wygant v. Jackson Bd. of Educ,* 476 U.S. 267, 274 (1986) (plurality opinion) (emphasis added); see *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 731 (2007) (Roberts, C.J.) ("[R]emedying past societal discrimination does not justify race-conscious government action."). Requiring states to adjust their voting laws because ***21** of private choices - including choices that resulted in disparities of income or wealth - would require just that forbidden course.

3. Because the Fifth Circuit's interpretation thus raises, at a minimum, "serious constitutional question[s]" concerning both Congress's enforcement powers and the Fourteenth Amendment's equal-treatment guarantee, it must be rejected if it is "fairly possible" to interpret Section 2 as outlined above. *Crowell v. Benson,* 285 U.S. 22, 62 (1932). This is particularly true because the Fifth Circuit's interpretation rear-ranges "the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991) (citation omitted). Thus, unless Congress's intent to achieve this result has been made "unmistakably clear in the language of the statute," that interpretation must be rejected. *Id.*

The same conclusion follows from the fact that the Constitution reserves to the States the power to fix and enforce voting qualifications and procedures. See *Inter Tribal Council of Ariz.,* 133 S. Ct. at 2259. If Section 2 truly did authorize the federal judiciary to override state election laws as extensively as the Fifth Circuit claims, Congress, at a minimum, would have needed to say so clearly.

In short, the Court should grant review and reverse the Fifth Circuit's interpretation of Section 2 to ensure that the statute's operation remains within constitutional bounds.

***22 III. By relying upon the general correlation between race and poverty, the Fifth Circuit's approach jeopardizes a wide variety of heretofore uncontroversial voting regulations.**

The majority's approach - especially its reliance on the correlation between race and poverty - not only distorts Section 2 and exceeds constitutional bounds, it also threatens a wide range of voting regulations.

1. As the Seventh Circuit emphasized in *Frank v. Walker,* 768 F.3d 744 (7th Cir. 2014), conflating race with poverty under section 2 threatens to "sweep [] away almost all registration and voting rules." *Id.* at 754. As Judge Jones put it

in her dissent below, "[v]irtually any voter regulation that disproportionately affects minority voters can be challenged successfully under the majority's rationale: polling locations; days allowed and reasons for early voting; mail-in ballots; time limits for voter registration; language on absentee ballots; the number of vote-counting machines a county must have; … [and] holding elections on Tuesday." Pet. App. 194a & n.54; see also Petition 26-27.

2. These concerns are not merely theoretical. As Judge Jones noted, the uncontroversial regulations she identified are *currently* being challenged in courts across the country, precisely based on the general correlation between poverty and race. Pet. App. 194a & n.54.

Judge Jones's list is just the tip of the iceberg. For example, the Sixth Circuit recently applied the Fifth Circuit's reasoning to invalidate a Michigan law eliminating straight-party voting, which allows a voter to ***23** indicate a strictly partisan vote for all candidates of a particular political party, rather than selecting each candidate individually. Only nine states currently provide this option, and Michigan had removed straight-party voting from its ballots in 2015. But the Sixth Circuit held that this change violated Section 2. *Michigan State A. Philip Randolph Institute v. Johnson,* 833 F.3d 656 (6th Cir. 2016). The court speculated that removing the straight-party option might potentially increase wait times and, because of their poverty, discourage some black voters from voting.

Putting aside the potential for bigotry inherent in the suggestion that minority voters are incapable of enduring a mild delay to vote, or that they are not capable of selecting candidates individually, such rulings threaten to force unnecessary and sweeping change on other states. Following the reasoning in the Sixth Circuit's decision, which mirrors the reasoning of the court below, the forty-one states that do not offer straight-party voting options could also be said to be discriminating against minority voters and violating Section 2.

In another recent case, *One Wisconsin Institute v. Thomsen,* 2016 U.S. Dist. LEXIS 100178 (W.D. Wise. Jul. 29, 2016), the court invalidated on the basis of Section 2 a regulation that reduced early voting from twenty days to ten. But under this reasoning, the states that have never allowed early voting are also impermissibly discriminating.

3. The Fifth Circuit's logic would also put into question many States' voter registration systems. For example, only a few states currently offer same-day ***24** registration. But under the Fifth Circuit's reasoning, the vast majority of States that do *not* offer same-day registration are in violation of Section 2 - simply because the absence of such a system imposes some (very modest) cost on voters and arguably burdens poor (and hence minority) voters disproportionately.

Indeed, under the Fifth Circuit's reasoning, the requirement of registration itself would be invalid if someone could show that poor voters disproportionately find it difficult to assemble the documents that registration typically requires. Yet the practice of voter registration was ubiquitous in 1982, when Section 2 was amended, and dates to the 1800s. Nat'l Conf. of State Legislators, *The Canvass,* Voter Registration Examined (March 2012). It is unthinkable that, when Congress amended Section 2 in 1982, it meant to prohibit a voting practice such as registration - especially when such a prohibition is never mentioned anywhere in the 1982 Amendments' extensive legislative history. See *Chisom v. Roemer,* 501 U.S. 380, 396 n.23 (1991) ("Congress'[s] silence in this regard can be likened to the dog that did not bark.").

4. Any reading of Section 2 that would threaten such a wide swath of hitherto uncontroversial voting laws at least deserves this Court's review. Congress enacted Section 2 to end discrimination, not to upend ordinary election laws.

As Justice Harlan once observed in another context, "[a]ll that [the State] has done here is fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." *Griffin v. Illinois,* 351 U.S. 12, 34 (1956). So ***25** too here: According to the Fifth Circuit, Texas has violated Section 2 simply by failing to remedy pre-existing economic disparities. But a Section 2 violation cannot be based solely on pre-existing statistical disparities and general socioeconomic inequalities.

Judge Jones correctly warned in her dissent below that this flawed analysis will take us "another step down the road of judicial supremacy by potentially subjecting virtually every voter regulation to litigation in federal court," even as it "disable[s] the working of the democratic process." Pet. App. 211a (Jones, J., dissenting). The Fifth Circuit's decision richly warrants this Court's review.

*26 CONCLUSION

By relying on the general correlation between race and poverty, the Fifth Circuit's decision provides a roadmap for invalidating many voting regulations that not only prevent voter fraud but also enhance confidence in the outcome of elections - a necessary condition of democratic government. In so doing, the decision below unconstitutionally turns Section 2 on its head, undermining the fundamental right of *all* citizens to organize and regulate their elections free from unauthorized micromanagement by unelected federal judges.

The petition should be granted.

Footnotes

1 No one other than *amici*, their members and counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk.

2 As with Texas, North Carolina offers all citizens free voter IDs to assist them in complying with the law there. *McCrory,* 831 F.3d at 235.

3 The Fourth Circuit decision in the North Carolina case is similarly flawed: The record in that case "contains no evidence as to how the amended voter ID requirement affected voting in North Carolina. *McCrory,* 831 F.3d at 242 (Motz, J., dissenting in part). Like the Fifth Circuit, the Fourth Circuit has ignored Section 2's requirement that a challenged law hinder actual participation.

2016 WL 492302 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STORMANS, INC., doing business as Ralph's Thriftway, Rhonda Mesler, and Margo Thelen, Petitioners,
v.
John WIESMAN, Secretary of the Washington State Department of Health, et al.

No. 15-862.
February 5, 2016.

On Petition for Writ of Certiorari to the United States Courts of Appeals for the Ninth Circuit

Brief of Amici Curiae United States Conference of Catholic Bishops and Washington State Catholic Conference Supporting Petitioners

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*ii QUESTION PRESENTED

As explained in the petition, Washington forbids pharmacies to decline to stock and dispense abortifacient drugs because of religious objections. Washington seeks to enforce this rule even though the regulation exposes only religious objectors - not secular objectors - to liability. The Ninth Circuit held that this religious gerrymander did not violate the Free Exercise Clause of the First Amendment.

The question presented is:

Does a law prohibiting religiously motivated conduct violate the Free Exercise Clause when it (a) exempts the same conduct undertaken for a host of secular reasons, (b) has been enforced only against religious conduct and (c) has a history showing an intent to target religion?

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*1 INTRODUCTION AND INTERESTS OF *AMICI*

For millions of Washington residents, Catholic hospitals and pharmacies play a critical role in providing needed medical care. Indeed, because Catholic entities provide approximately half of Washington's hospital beds, these hospitals serve as an important safety net in an otherwise inadequate health care system, especially in such areas as treatment for alcohol and drug addiction, and for HIV/AIDS. The same is true of Catholic hospitals and Catholic-owned pharmacies in many other locations throughout the Nation.

Amici are Catholic entities described in more detail in Appendix A. Like Petitioners, *amici* and their affiliated hospitals and pharmacies object on religious grounds to the Washington regulation at issue here, which requires Petitioners and other religiously observant providers to stock and dispense drugs that they believe may operate by causing abortions. Like Petitioners, *amici* believe abortion is morally wrong, whether administered through pills or surgery. *Amici,* moreover, have every reason to believe that Catholic-owned hospital systems and pharmacies will soon be targeted by Washington officials unless the decision below is reversed.

The considerations supporting that belief are the same considerations that led this Court to invalidate the animal-slaughter regulations at issue in ***2** *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 534 (1993) - a decision for which the Ninth Circuit offered no persuasive distinction. First, as in *Lukumi,* the Washington regulations have been applied *only* against religious providers. Second, as in *Lukumi,* Washington regulators have approved of or allowed similar actions - here, failing to stock and dispense the problematic drugs - for myriad secular reasons. Third, as in *Lukumi*, the manifest intent of those who crafted the regulations was to force those with the targeted beliefs to either violate those beliefs or leave - in this case, to exit the Washington healthcare system.

Indeed, relying on the decision below, any or all of the other eight states in the Ninth Circuit - which together account for some twenty percent of the national population - could easily adopt or vigorously enforce similar regulations in a manner that targets Catholic pharmacies and hospitals. Unless immediately reversed, moreover, the decision below will likely lead to similar problems in other states.

Like Petitioners, Catholic healthcare providers seek no special favors. They merely ask to be treated no worse than their secular counterparts. But Washington and the Ninth Circuit refuse to treat them as such, and in so doing ignore the requirements of the Free Exercise Clause, as interpreted in *Lukumi.* The Court should grant review and reverse - with or without briefing and argument.

***3 STATEMENT**

In the decision below, the Ninth Circuit approved a religious gerrymander of the very sort condemned in *Lukumi* - except that in this case the gerrymander has been directed not at a small, obscure religion, but at people and institutions holding mainstream Christian beliefs about the sanctity of human life.

1. Petitioners are a small Washington family business that operates a grocery store with a retail pharmacy (“Ralph's”), as well as individual Washington pharmacists. Pet. 5. For religious reasons, Petitioners refuse to stock or dispense pills that may prevent embryo implantation, most notably Plan B and *Ella.* Pet. 6; Pet. App. at 10a.

For over a decade, Petitioners' religious beliefs have run into a conflict with first proposed and now final Washington regulations. Encouraged by Planned Parenthood, the nation's leading abortion provider, in 2005 Washington's governor first proposed a regulation designed to prevent pharmacists from declining to stock or dispense Plan B for religious reasons. Pet. 8. During the administrative proceedings, the Washington Pharmacy Quality Assurance Commission (“Commission”) surveyed Washington pharmacies' practices as to Plan B. Pet. App. 148a. Of the 540 that responded,

two percent said they did not carry Plan B for religious reasons, while ten times as many - twenty-one percent - said they did not carry the drugs for various secular reasons. Pet. App. 148a. These included "low demand, an easy alternative source or the pharmacy's status as a … niche pharmacy." Pet. App. 148a.

In an effort to pressure the Commission to pass the regulations proposed at the insistence of Planned ***4** Parenthood, the state Human Rights Commission threatened Commission members with personal liability if they allowed religious exceptions. Pet. 9; Pet. App. 126-27a, 374-99a. Nevertheless, the Commission unanimously voted for a draft rule that would *protect* religious objectors. The draft rule did this by allowing them to opt instead for a "facilitated referral" - that is, referring patients who wanted Plan B to another pharmacy that stocks it.

Washington's governor then "threatened to replace the entire Board if the draft rule was not changed." Pet. App. 58a. A modified rule was proposed, eliminating facilitated referrals for religious objectors, but exempting other pharmacies for a variety of business-related reasons - effectively holding that "only religious objections are illegitimate." Pet. App. 58a. Before the final vote, the Governor replaced two members, including the chairman. Pet. 11. He later made clear that: "I for one am never going to vote to allow *religion* as a valid reason for a facilitated referral." Pet. App. 145a (emphasis added). The regulation passed.

The final regulation expressly exempted pharmacies from having to stock or dispense Plan B (and *Ella,* which had recently come to market) for many - if not all - conceivable business reasons, and any reason "substantially similar" to those. Pet. 11-13. But there was no exemption for religious objections.

2. Before litigation, the Commission received complaints that Ralph's and neighboring pharmacies were not stocking Plan B. Pet. 14. The Commission determined that the neighboring pharmacies were in compliance with the rule because their reasons were secular. Pet. 14. But when Ralph's provided its religious ***5** reason for refusing to stock those drugs, the Commission kept the investigation open.

Petitioners sued, raising (among others) a Free Exercise Clause claim. Pet. 15. On that basis, the district court granted a preliminary injunction, which the Ninth Circuit reversed. See Pet. App. 263a-332a.

3. During trial, the Commission Chairman testified that he "understood [that] the *only* instance under the Regulations where a facilitated referral was not permissible was for conscientious objections." Pet. App. 144a; accord Pet. App. 92a (statement by Commission's Executive Director); Pet. App. 360a.

Also during trial, the district court asked whether the regulation would apply to Catholic hospitals and pharmacies. App. 18b, 28b. In response, both defendants and defendant-intervenors (represented by Planned Parenthood, which had instigated the regulation) explained that, aside from purely inpatient pharmacies, Catholic hospitals and pharmacies would in fact be subject to the regulation's mandate. App. 18b-27b, 28b-31b.

4. After the district court ruled in favor of petitioners, the Ninth Circuit again reversed. The panel attempted to dismiss the regulation's disproportionate effect on religious providers - and to distinguish *Lukumi* - on the ground that this regulatory system is "complaint-driven." Pet. App. 40a. Moreover, discounting statements by individual Commission personnel showing a clear intent to target religious objectors, the panel asserted that the Commission *as a whole* had never communicated such an intent, and, therefore, that there was no violation of the Free Exercise Clause, as applied in *Lukumi.* Pet. App. 27a.

***6 SUMMARY OF ARGUMENT**

While they agree with all of the reasons Petitioners have offered in support of the petition, *amici* are especially concerned with two implications of the Ninth Circuit's decision that warrant immediate review.

First, as explained in Part I, the Ninth Circuit's decision approves a general pathway by which any government can elude the prohibition on "religious gerrymanders" established by this Court's decisions, especially *Lukumi.* According to the Ninth Circuit, all a government need do to sustain a policy that discriminates against people or institutions of faith is to adopt a "complaint-based" enforcement system - one designed to rely upon the discriminatory initiative of people or groups within the community, rather than overt discrimination by government actors. But such a system - an "outsourced religious gerrymander" - is as much a threat to the religious liberty of *all* people and institutions of faith as the more overt gerrymander condemned in *Lukumi.* And such a system is every bit as much a violation of the First and Fourteenth Amendments.

Second, as explained in Part II, *amici* are particularly concerned about both the short- and long-term. impact of the Ninth Circuit's decision on Catholic healthcare, especially in Washington and throughout the Ninth Circuit. As both Washington and Planned Parenthood explicitly argued below, the regulation upheld by the Ninth Circuit applies not just to Petitioners, but also to all Catholic-owned outpatient and retail pharmacies operated by Washington's Catholic hospital systems. Thus, the Ninth Circuit's ruling immediately puts these Catholic hospitals and pharmacies on notice that they must either dispense what ***7** Catholic doctrine says are immoral abortifacients or perpetually risk losing their licenses if Planned Parenthood - or any of its pro-abortion allies - lifts a finger of protest. And those groups have made no secret of their desire to force *all* religious healthcare providers either to provide unrestricted access to these drugs, or to abandon their healing ministries.

If the Ninth Circuit's ruling stands, those groups can also be expected to press for similar laws and regulations throughout the Ninth Circuit. Indeed, those groups are already advocating that Washington's rule be extended to other states and even nationwide. And as that happens, religious hospital systems and pharmacies in many other states throughout the Ninth Circuit - and beyond - will be at constant risk of being driven from their healing ministries, just as Catholic-owned pharmacies and hospital systems in Washington *today* face an unacceptable choice between carrying out those ministries and complying with Catholic doctrine.

*8 ARGUMENT

I. The Ninth Circuit's decision merits review - and summary reversal - because it has approved a classic "religious gerrymander," and on grounds that threaten all people and institutions of faith.

Washington's regulation is narrowly tailored, not to meet a compelling government interest, but to target only religious objectors. That is what this Court's decisions call a "religious gerrymander," and it is an affront to the First Amendment. It is also a threat to *all* people and institutions of faith, whether or not they are involved in health care, and whether or not they object to abortion or abortifacients.

1. Religious gerrymanders have been consistently condemned by this Court's free exercise decisions. Most recently, in *Lukumi*, the Court condemned such a gerrymander consisting of a ban on religious animal sacrifice but not secular animal slaughter. See 508 U.S. at 534. Quoting Justice Harlan's opinion in *Walz, v. Commissioner,* 397 U.S. 664 (1970), the Court in *Lukumi* explained that in such cases the Court "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." 508 U.S. at 534 (quoting *Walz,* 397 U.S. at 696 (Harlan, J., concurring)).

This Court likewise condemned such gerrymandering in *Employment Division v. Smith,* 494 U.S. 872, 878 (1990). There the Court explained that, if a state actor "sought to ban … acts or abstentions only when they are engaged in for religious reasons," that would violate the Free Exercise Clause. *Id.* at 878.

2. Washington's actions are a textbook example of a religious gerrymander, in at least three respects.

***9** First is the regulation's content. In *Lukumi*, the laws at issue made certain conduct - killing an animal - unlawful when done for religious reasons, while exempting identical conduct undertaken for secular reasons. See 508 U.S. at 527-28, 543-45. So too here: On its face, the Washington regulation ensures that religiously motivated conduct - in this case a facilitated referral rather than stocking and dispensing a drug - is made unlawful, while exempting identical conduct undertaken for secular reasons.

Indeed, the district court's findings demonstrate that the regulatory scheme provides either an enumerated or unenumerated exemption for virtually every other reason for not stocking and dispensing these drugs. See Pet. App. 201a-208a (cataloging exceptions). This leaves the regulation applicable only to individuals and institutions with religious objections.

Even more starkly, surveys during the regulatory proceedings revealed that, for every pharmacy that declined to stock and dispense Plan B or *Ella* for religious reasons, *ten* pharmacies declined to stock and dispense them for secular reasons. Pet. App. 148a-49a. This of course forecloses any claim that the regulation was based simply on a governmental interest in maximizing access to these drugs.

Second is the regulation's record of enforcement. In *Lukumi*, the Court found that the city's animal slaughter laws had been enforced only against people with certain religious beliefs - believers in Santeria - and not against anyone else. See 508 U.S. at 536. So too here: The district court's undisputed findings demonstrate that, since its adoption, the Washington regulation has been enforced *only* against pharmacists who ***10** have religious objections, thus gerrymandering out secular objectors. Pet. App. 168a-69a.

Third is the regulation's history. In *Lukumi*, the laws' history showed that the city's purpose in enacting the challenged laws was to thwart the exercise within the city of a particular religious belief - the Santeria belief in animal sacrifice. See 508 U.S. at 582 (Opinion of Kennedy, J., joined by Stevens, J.). So too here: The extensive evidence compiled and presented by the district court shows without doubt that the purpose of the regulation was to thwart the exercise of a particular religious belief - the traditional Christian belief in respect for nascent human life. See Pet. App. 123a-145a.

In short, as actually applied, the pharmacy regulation at issue here is a flat violation of the First Amendment, as construed and applied in *Lukumi.* That alone warrants summary reversal.

3. Ironically, the Ninth Circuit's principal response to Washington's gerrymander was to engage in a gerrymander of its own - selectively including every snippet of evidence that could be read to support the regulation, while systematically ignoring most of the evidence and findings supporting the district court's decision.

For example, the Ninth Circuit discounted the trial testimony of the Commission's chairman. Pet. App. 35a. He testified that "the *only* instance under the Regulations where a facilitated referral was *not* permissible was" for a religious reason. Pet. App. 144a (emphasis added); accord Pet. App. 92a (Commission's executive director saying the same); Pet. App. 360a (same). And the Ninth Circuit ignored this statement ***11** despite the perfect fit between the chairman's explanation of the rule's design - to stop religious objectors from declining to stock and dispense Plan B and *Ella* - and the list of those prosecuted under the regulation, all of whom are religious objectors.

Similarly absent from the Ninth Circuit's opinion is any reference to the Governor's threat to sue or remove Commission members if they allowed a religious exception, despite the district court's reliance on this critical fact. See Pet. at 9-10; Pet. App. 126a-27a (district court opinion); Pet App. 374a, 377a (Human Rights Commission's threat). Likewise ignored are numerous pieces of administrative history that underscore the Commission's pattern of enforcement. See Petition at 13-15. Indeed, the opinion does not even mention the principal actor in the regulatory process - the Governor, who was a well-known ally of Planned Parenthood. See Pet. App. 10a-48a.

The implications of this are clear: The Ninth Circuit has now sanctioned the very kind of "religious gerrymander" forbidden by the First Amendment and warned against by this Court - especially in *Lukumi.* For that reason, as Petitioners have also explained, the Ninth Circuit's decision conflicts not only with *Lukumi* and other decisions of this Court, but also with decisions in other circuits and state supreme courts. Pet. 22-38.

4. The Ninth Circuit's decision is also a serious threat to religious liberty, not just of the Petitioners and similar healthcare providers, but also of all people and institutions of faith. Not only has that court sanctioned a blatant religious gerrymander - thereby establishing a precedent for such targeting of religion in future cases - but its attempt to distinguish *Lukumi* ***12** promises serious erosion of that decision, at least within the Ninth Circuit and likely elsewhere.

The panel's principal basis for avoiding Petitioners' claim of a religious gerrymander - and thus for distinguishing *Lukumi* - was that the Commission's enforcement process was "complaint-driven" rather than based on prosecutorial initiative. Pet. App. 38a-40a. It was on this basis that the panel held it did not matter that the Commission was consistently enforcing its regulation "against religiously motivated violations but not secularly motivated motivations." *Id.* 37a. But the implication of that analysis is that a religious gerrymander is acceptable under the Free Exercise Clause as long as the resulting religious discrimination is outsourced - that is, delegated to private individuals likely to complain about those who engage in the prohibited action or inaction for religious reasons.

From the standpoint of religious liberty, that is an exceptionally dangerous doctrine. As *Lukumi* illustrates, those who take or refrain from particular actions on religious grounds are often the subject of ill will - or at least suspicion or fear - in the communities in which they live. To excuse a discriminatory enforcement regime on the ground that it is "complaint-based" is thus to legitimize, condone and protect the very religious bias that would lead community members to complain about actions taken (or avoided) for religious but not secular reasons - like the animal killing in *Lukumi.* Religious discrimination in enforcement violates the Free Exercise Clause whether it results from prosecutorial initiative or from a community's religious (or anti-religious) bias.

In sanctioning such a "complaint-based" religious gerrymander - and the resultant departure from ***13** *Lukumi* - the Ninth Circuit has put all believers at serious risk. Imagine, for example, a municipal regulation prohibiting the wearing of headscarves in public or the placement of items on utility poles. Such regulations could easily be used by community members to target Muslims (in the first example) or Orthodox Jews (in the second example). See, *e.g., EEOC v. Abercrombie & Fitch Stores, Inc.,* 135 S. Ct. 2028 (2015); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 309 F.3d 144 (3d Cir. 2002). Yet under the Ninth Circuit's decision, governments would be free to enforce those regulations solely against religious conduct if enforcement were triggered only by the complaints of those hostile to Muslims or Jews.

The First Amendment forbids such discrimination, just as it forbids the only somewhat more naked discrimination in *Lukumi.* As this Court has held, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti,* 466 U.S. 429, 433 (1984).

***14 II. The ruling below puts Washington's Catholic hospital systems and retail pharmacies to an impossible choice between violating their faith and ceasing or curtailing their healing ministry.**

Absent reversal by this Court, the Ninth Circuit's ruling will also put Washington's Catholic retail pharmacies and hospital systems - which account for approximately half of Washington's hospital beds [2] - in a serious moral dilemma. That dilemma could lead many of them to end or curtail their healing ministries in Washington, much as Catholic adoption agencies have been forced out of several jurisdictions as a result of those jurisdictions' refusal to accommodate Catholic views on marriage. [3] By approving a regulation generally requiring that pharmacies stock and dispense on

demand two drugs that *amici* regard as morally unacceptable in many or all circumstances, the Ninth Circuit has effectively imposed that requirement on many Catholic hospital systems and all Catholic-owned retail pharmacies.

***15 A. Like all hospitals in Washington, Catholic hospitals are effectively required by federal and state law to have in-house pharmacy services available at all times.**

Washington regulations require that hospitals provide pharmaceutical services twenty-four hours a day, seven days a week. Wash. Admin. Code § 246-873-050. And, by defendant-intervenors' own admission in the district court - represented, again, by Planned Parenthood - these requirements apply equally to Catholic hospitals systems. App. 23b-24b.

Hospitals have multiple ways to meet the requirement that they have pharmaceutical services available at all times. One is that the staff pharmacist arranges for pharmaceutical services during hours when she is absent. Wash. Admin. Code § 246-873-050. Another option is for the hospital pharmacy to exclusively serve patients who have a bed in the hospital. App. 29b-30b. Most common, however, is a third option: maintaining an outpatient pharmacy that serves patients, hospital employees, and frequently also the general public. See App. 30b. For economic reasons, the vast majority of Catholic hospitals choose this third option [4] - and thus operate an outpatient or retail pharmacy.

Federal law also effectively requires that hospitals serving older or poor populations maintain a pharmacy. To be financially viable, hospitals that seek to serve the elderly and the poor as well as more well-to-do patients - especially in rural areas - generally must accept those patients covered by the federal Medicare ***16** and Medicaid programs. [5] And, to receive reimbursement for services provided under those programs, a hospital must provide pharmacy services. [6]

For all of these reasons, Catholic hospital systems in Washington are effectively required to maintain a pharmacy if they wish to serve the general public, including the poor. And many of those pharmacies are either outpatient or full retail pharmacies. See App. 8b-9b, 11b, 14b-15b.

***17 B. By approving a regulation requiring that all retail pharmacies stock and dispense on demand Plan B and *Ella,* the Ninth Circuit has effectively imposed that requirement on all Catholic-owned retail pharmacies and most Catholic hospital systems.**

The Ninth Circuit's decision has effectively placed on most of Washington's Catholic hospital systems and all Catholic-owned outpatient or retail pharmacies the obligation to stock and dispense *Ella* and Plan B, even in circumstances where the provision of those drugs would violate Catholic teachings. The decision does this in at least two ways.

First, by upholding the regulation in its entirety, the Ninth Circuit's decision means that the regulation applies to any pharmacy that is not otherwise exempt. See Pet. App.41a (upholding regulation as constitutional). And the briefing by both Washington and Planned Parenthood (representing the defendant-intervenors) in the trial court (as reproduced in the appendix to this brief) aptly demonstrates that outpatient and retail pharmacies operated by Catholic hospital systems are *not* exempt. App. 24b, 28b.

Second, in discussing Catholic health care providers specifically, the Ninth Circuit suggested that the only reason the Washington regulation had not been enforced against them was that no complaints had been filed. Pet. App.37a-39a. Thus, if certiorari were denied - or the decision below affirmed - any abortion-rights activist could walk into a Catholic-owned hospital or pharmacy in Washington, demand *Ella* and, when refused, file a complaint, thereby triggering an enforcement action.

***18** This consequence is not hypothetical: Most Catholic hospital systems in Washington operate outpatient or retail pharmacies. Indeed, of a sample comprising eighteen hospitals discussed in the district court (owned by three Catholic hospital systems), fifteen have associated outpatient or retail pharmacies, thus squarely subjecting them to Washington's regulation. See App. 8b-9b, 11b, 14b-15b. And of course, all other Catholic-owned retail pharmacies would be potentially subject to such tactics.

Representing defendant-intervenors in this very lawsuit, moreover, Planned Parenthood has specifically argued not only that retail and other outpatient pharmacies associated with Catholic hospitals are not exempt from the regulation, but also that the Commission is required to investigate every complaint alleging a failure to comply. App. 23b; accord App. 30b (State trial brief confirming outpatient hospitals not exempt from this regulation). Even more ominously, the record shows that Planned Parenthood deliberately engaged in test marketing to "catch" Petitioners in noncompliance. Pet. App. 156a-157a.

It is hardly speculation, then, to suggest that once the Ninth Circuit's decision is safely beyond the reach of this Court, Planned Parenthood or one of its allies will start filing complaints against Catholic hospital systems or other Catholic-owned pharmacies that do not comply with the regulation, just as they have done with Petitioner's pharmacy. And given the Ninth Circuit's decision, any such entity will be hard pressed to prevail in the subsequent investigation or litigation.

***19 C. Catholic hospital systems and pharmacies cannot provide these drugs as the Washington regulation requires and remain true to Catholic moral teachings.**

The Washington rule thus puts Catholic hospital systems and other Catholic pharmacy owners in a moral dilemma: On one hand, they wish to continue their healing missions. Yet that mission subjects them to the Washington regulation, which forces them to stock and dispense *Ella* and Plan B in circumstances contrary to Catholic moral teachings.

Those teachings are enunciated by *amicus* United States Conference of Catholic Bishops in a document entitled, Ethical and Religious Directives for Catholic Health Care Services.[7] And the teachings are clear: "Catholic health care institutions are not to provide abortion services[.]"[8] In declarations filed in the district court, moreover, the key Washington Catholic hospital systems established that, given these directives, they could not and would not dispense *Ella* at all, and would dispense Plan B only to victims of sexual assault in the hospital setting, and only in cases in which it could be determined that ovulation had not ***20** recently occurred. App. 5b-6b.[9] Thus, if the Ninth Circuit's decision stands, it will potentially make it impossible for the Catholic hospital systems and other Catholic owners of outpatient and retail pharmacies to operate lawfully in Washington and remain true to Catholic moral teachings.

In essence, the choice the Ninth Circuit offers to these Catholic healthcare providers is this: violate your religious beliefs (by providing what Catholic teaching rejects as abortifacient drugs) or end or curtail your healing ministry. That dilemma is an additional, powerful reason for this Court's review.

***21 D. Further percolation of the issue presented would only harm religious health care providers - including Catholic hospital systems and pharmacies in Washington and elsewhere - and their patients.**

Some might argue that the issue presented in the petition should be allowed to "percolate" while other states consider and/or start enforcing similar laws. That temptation should be resisted.

First, as explained above, allowing the Ninth Circuit's decision to stand would immediately put most Catholic hospital systems in Washington to an impossible choice between their faith and their healing ministries. And it would hoist all Catholic-owned pharmacies on the horns of that same dilemma. It is precisely this sort of choice that the Free Exercise Clause is supposed to guard against. See, *e.g.*, *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707,

715 (1981) (religion is burdened when one is pressured to act in a way forbidden by religion). Accordingly, by allowing the issue to "percolate," the Court would be allowing widespread, ongoing violations of core First Amendment rights.

Second, if review were denied here, regulations similar to Washington's would almost certainly crop up in other states - thereby creating a similar dilemma for Catholic healthcare institutions there. Indeed, since 2005 - shortly before the Washington regulation here was adopted - Planned Parenthood has ***22** been pressing a nationwide campaign for laws and regulations requiring pharmacists to provide Plan B and *Ella* regardless of conscientious objections. [0]

For example, shortly after the Ninth Circuit's first decision in this case, see App. 263a, Planned Parenthood persuaded Illinois to adopt a regulation almost identical to Washington's. That regulation was struck down by the Illinois courts - in conflict with the Ninth Circuit's decision here. *Morr-Fitz, Inc. v. Blagojevich,* 2011 WL 1338081, No. 2005-CH-000495 (Ill. Cir. Ct. Apr. 5, 2011), *affirmed on other grounds, Morr-Fitz, Inc. v. Quinn,* 976 N.E.2d 1160 (Ill. App. Ct. 2010). But, consistent with its long-standing institutional policy, Planned Parenthood is likely to continue pressing for similar measures elsewhere.

Planned Parenthood's other allies - including the ACLU's Reproductive Rights Project and NARAL Pro-Choice America - have also entered the fray, promising to seek similar laws in other states. For example, the ACLU states that its goal is to "seek[] government policies that ensure access to affordable contraception … *be it in the form of sanctioning religious refusals or* ***23** treating contraception differently from other care." [2] If it cannot get the change it wants by other means, the ACLU will advocate for "a legislative or regulatory mandate." [3]

For its part, NARAL currently is working to advance the ABC Act, a federal bill that would "ensure women get unfettered access to birth control at the pharmacy counter." [4] While it would prefer a federal solution, NARAL says it will also attempt to get states to pass similar laws. [5]

With an unreviewed Ninth Circuit decision in their pockets, these groups would likely try to persuade more states to adopt similar laws. Each of these laws would force Catholic healthcare institutions into the same moral dilemma outlined above: either violate their faith or shut down their pharmacies, with all the consequences that would entail.

*24 CONCLUSION

The Ninth Circuit's decision represents an enormous, present threat to Catholic healthcare in Washington and, eventually, throughout the Nation. It represents an equally serious threat to people and institutions of faith faced with governmental mandates and prohibitions of all kinds. This Court's immediate intervention is essential to prevent religious institutions from being forced to choose between violating the law and violating their faith.

For all these reasons, this Court should grant the petition and summarily reverse the Ninth Circuit's judgment. Alternatively, plenary review should be granted and the case set for oral argument.

Footnotes

1 No one other than *amici*, their members and counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk. Counsel for respondents received timely notice of intent to file this brief, as required by Rule 37.2.

2 Nancy Gohring, *The Catholic Church is Managing Many Local Hospitals. How Will it Affect Your Health Care?,* Seattlemag.com, June 2014, http://www.seattlemag.com/article/catholic church managing many local hospitals how will it affect your health care.

3 See, *e.g.*, Discrimination Against Catholic Adoption Services, United States Conference of Catholic Bishops (2015), http://www.usccb.org/issues and action/religious liberty/up load/RL Adoption Services Fact Sheet 2015.pdf

4 See App. 8b 9b, lib, 14b 15b (15 of 18 Catholic hospitals chose some form of the "outpatient or "retail pharmacy option).

5 See Medicare.gov, *Get Help Paying Costs,* https://www.medicare.gov/your medicare costs/help paying costs/ get help paying costs.html; Jayne O'Donnell & Laura Ungar, *Rural hospitals in critical condition,* USA Today (Nov. 12, 2014), http://bit.ly/RuralHospitalsUSAToday (noting extensive reliance by rural hospitals on federal funding); Jeffrey Stensland, et al., *Future Financial Viability of Rural Hospitals*, Health Care Fin. Rev., Summer 2002, at 175, 175 (noting that, at the time of the article, "Medicare patients represent ed] approximately one half of rural hospital admissions and *one third of rural hospital revenue*) (emphasis added).

6 42 C.F.R. § 482.25.

7 U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services, Fifth Edition,* Nov. 17, 2009, http://www.usccb.org/issues and action/human life and dignity/health care/upload/Ethical Religious Directives Catholic Health Care Services fifth edition 2009.pdf. The Conference only formulates and disseminates these Directives; it does not apply or enforce them in particular cases.

8 *Id.* at 26; see also App. 4b, 9b, 12b, 16b. In Catholic moral teaching, abortion includes a deliberate act to prevent the implantation, and hence the survival, of an early human embryo. *Id.*

9 Ella (ulipristal acetate) and the well known abortion drug RU 486 "have roughly comparable activity in terminating pregnancy when administered during the early stages of gestation. A. Tarantal, *et al.*, "Effects of Two Antiprogestins on Early Pregnancy in the Long Tailed Macaque (*Macaca fascicularis*), 54 *Contraception* 107 115 (1996), at 114. See also G. Bernagiano & H. von Hertzen, *Towards wore effective emergency contraception?*, 375 The Lancet 527, 527 (2010) ("Ulipristal has similar biological effects to mifepristone, the antiprogestin used in medical abortion). It causes abortions after as well as before implantation.

Plan B is marketed as a way to prevent pregnancy after unprotected intercourse. The Food and Drug Administration has said it acts "by delaying or inhibiting ovulation, and/or altering tubal transport of sperm and/or ova (thereby inhibiting fertilization), *and/or* altering the endometrium (*thereby inhibiting implantation*). 62 Fed. Reg. 8610 12, 8611 (Feb. 25, 1997) (emphasis added). For a recent review of studies exploring this last mode of action, which would be abortifacient and therefore immoral in Catholic teaching, see R. Peck & J. Velez, "The Postovulatory Mechanism of Action of Plan B: A Review of the Scientific Literature, 13 *The National Catholic Bioethics Quarterly* 677 716 (Winter 2013).

10 See, *e.g.*, Planned Parenthood Federation of America, *Survey of Top Pharmacy Chains Policies on Pharmacist Refusals,* (May 25, 2005), https://www.plannedparenthood.org/about us/newsroom/press releases/pharmacist refusals (offering a "state by state legislative guide mapping pharmacist refusal laws and proposed bills along with a community action guide about how to fight them.).

11 See 68 Ill. Adm. Code § 1330.91(j) (explaining that " p]harmacies have a duty to deliver lawfully prescribed drugs to patients … except for the following or substantially similar circumstances and then listing secular reasons).

12 *Birth Control*, American Civil Liberties Union (last visited XX/XX/2016), https://www.aclu.org/issues/reproductive freedom/birth control?redirect blog/tag/birth control court cases.

13 See Sondra Goldschein, *Religious Refusal and Reproductive Rights: Accessing Birth Control at the Pharmacy*, ACLU Reproductive Freedom Project 21 (2007), https://www.aclu.org/sites/default/files/field document/asset up load file576 29402.pdf.

14 See NARAL Pro Choice America, *NARAL Pro Choice America Calls on Congress to Stop Harassment of Women by Pharmacists*, (Feb. 14, 2013), http://www.prochoiceamerica.org/media/press releases/2013/pr02142013 abc.html.

15 NARAL Pro Choice America, *Access at Pharmacies*, (last visited Jan. 26, 2016) http://www.prochoiceamerica.org/what is choice/birth control/access at pharmacies.html ("States can pass laws that guarantee that women can get their birth control prescription filled at any pharmacy.).

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2016 WL 1377728 (U.S.) (Appellate Brief)
Supreme Court of the United States.

UNITED STATES OF AMERICA, et al., petitioners,
v.
STATES OF TEXAS, Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Oklahoma, South Carolina, South Dakota, Tennessee, West Virginia, Wisconsin; Paul R. LePage, Governor, State of Maine; Patrick L. McCrory, Governor, State of North Carolina; C.L. "Butch" Otter, Governor, State of Idaho; Phil Bryant, Governor, State of Mississippi; Bill Schuette, Attorney General, State of Michigan.

No. 15-674.
April 4, 2016.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief of Amici Curiae National Sheriffs' Association, the Remembrance Project, and American Unity Legal Defense Fund Supporting Respondents

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***i** QUESTION PRESENTED

The Executive Branch unilaterally created a program that would deem four million unlawfully present aliens to be "lawfully present" and eligible for a host of benefits, including work authorization. Pet. App. 413a. This program, called DAPA, goes far beyond forbearing from removal or enforcement discretion.

The questions presented are:

1.a. Whether at least one plaintiff State has a personal stake in this controversy sufficient for standing, when record evidence confirms that DAPA will cause States to incur millions of dollars in injuries.

1.b. Whether DAPA - which affirmatively grants lawful presence and work-authorization eligibility - is reviewable agency action under the Administrative Procedures Act (APA).

2. Whether DAPA violates immigration and related benefits statutes, when Congress has created detailed criteria under which aliens may be lawfully present, work, and receive benefits in this country.

3. Whether DAPA - one of the largest changes in immigration policy in our Nation's history - is subject to the APA's notice-and-comment requirement.

4. Whether the Guidance violates the Take Care Clause of the Constitution, art. II, section 3.

This brief focuses on Question 2, with special attention to whether DAPA violates the Immigration and Nationality Act as amended by the Illegal Immigration Reform and Immigrant Responsibility Act.

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***1** INTRODUCTION AND INTERESTS OF *AMICI*

This case has enormous importance for all Americans who are concerned about the rule of law. But its resolution is especially important to groups like *amici* National Sheriffs' Association, The Remembrance Project and American Unity Legal Defense Fund, who are described at greater length in the Appendix, and who have a particular interest in the enforcement of the Nation's immigration laws. *Amici* are concerned that, if allowed to go into effect, the Executive order at issue here - Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) - will exacerbate the problem of violent crime by unauthorized immigrants. DAPA will thereby lead to more deaths like those of Joshua Wilkerson, Jonathan Alvarado, and Kathryn Steinle (whose tragic stories are recounted below) and thousands of others.

Concerns about public safety were at the root of opposition to a law proposed in 2013, the Border Security, Economic Opportunity, and Immigration Modernization Act, which was supported by the Administration and would have granted legal status to most of the Nation's estimated 11 million unauthorized immigrants. Despite repeatedly stating the President did not have authority to grant legal status administratively, after a grassroots effort blocked the 2013 legislation, the Administration issued DAPA, which would unilaterally grant legal status - including the right to ***2** work and other benefits - to some 4 million unauthorized immigrants.

While DAPA violates federal law and the U.S. Constitution in all of the ways identified by respondents, this brief focuses on the issue of public safety. It describes how DAPA not only evades Congress's decision not to pass the 2013 proposal, but also violates express Congressional limits on Executive discretion that were designed to protect American residents from harm by unauthorized immigrants. It also shows how DAPA would exacerbate the very safety problems Congress hoped to prevent. Combined with the policies of numerous "sanctuary cities" on the detention of criminal aliens, DAPA's implementation would greatly increase the risk of unauthorized immigrants committing serious crimes against American citizens and other lawful residents.

The effects of this Court's decision will also extend to similar actions by this or a future Administration. Indeed, the Administration now asserts that there is "no justiciable limit" to the number of aliens to which it can grant the kind of legal status that DAPA contemplates - thereby portending additional encroachments on Congress's authority over immigration.

If this Court reversed the Fifth Circuit, that decision would seriously erode Congress' constitutional authority to protect Americans from the crime and other consequences of uncontrolled immigration, even as it would cede to the Presidency the power to set up an alternative immigration system without any of those protections. Such a decision would thereby undermine both the rule of law and public safety.

***3 STATEMENT**

DAPA, adopted in November 2014, represented a substantial expansion of an earlier program known as Deferred Action for Childhood Arrivals or DACA. J.A. 96.

1. Adopted in the "DACA Directive" [2] of June 2012, DACA halted deportations of people who are under the age of 30, entered the United States before the age of 16, and have continuously resided in the U.S. for 5 years. J.A. 102-03. The Department of Homeland Security characterized DACA as an "exercise of prosecutorial discretion" not conferring any "substantive right, immigration status or pathway to citizenship." But in fact the DACA Memo instructed U.S. Citizenship and Immigration Services (USCIS) to quickly determine whether individuals qualified for one highly important "immigration status" - that is, whether they "qualify for work authorization." J.A. 103, 106.

The DACA Memo also instructed executive officials to determine each DACA application on a case-by-case basis after a background check. J.A. 104. But the record shows that executive officials *automatically* approve DACA applications that meet the other eligibility requirements without necessarily conducting the background check. Pet. App. 56a n.130; J.A. 656-657.

At the time DACA was issued, moreover, President Obama explicitly noted that he did not have legal authority to expand that order to larger classes of aliens: "if we start broadening that, then essentially I would be ignoring the law in a way that I think would be very ***4** difficult to defend legally." R.2142. Moreover, this limited view of presidential authority was at the heart of the Administration's support for the proposed Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, which would have granted legal status to most of the Nation's estimated 11 million unauthorized immigrants.

2. Nevertheless, in November 2014, the Department adopted a new program, DAPA, sweeping millions of additional individuals within DACA's reach and expanding the period for which DACA and the accompanying employment authorization is granted from two- to three-year increments. J.A. 96, 291-292, 340. The DAPA Memo "direct[ed] USCIS to establish a program, similar to DACA" for "individuals who have a son or daughter who is a U.S. citizen or lawful permanent resident" and who meet five additional eligibility requirements. Pet. App. 416a.

DAPA thus permits 4 million of the Nation's estimated 11.3 million undocumented immigrants "to be lawfully present in the United States." J.A. 289. It also allows them to seek legal status by "apply[ing] for work authorization for the renewable three-year period of deferred action," and to receive "social security, retirement benefits, social security disability benefits, or … Medicaid" as well as many state benefits. J.A. 289, 340.

Although it is impossible to know exact quantities, substantial numbers of undocumented immigrants have engaged in serious violent crimes, either in their home countries or since arriving in the United States. For example, more than half of all individuals removed by U.S. Immigration and Customs Enforcement (ICE) in fiscal year 2014 had criminal convictions. J.A. 151. ***5** And seventy-six percent of those removed from the interior of the country (as opposed to being detained at the border) had "aggravated felony" convictions, two or more other felony convictions, or three or more misdemeanor convictions, J.A. 148-149. The year 2014 saw the removal of almost another 3,000 gang members. J. A. 141.

This is likely just the tip of the iceberg. Accordingly, whenever executive officials grant a DAPA application, there is a substantial likelihood that they are conferring legal status on a person who poses a risk of criminal activity - including violent crimes directed at citizens and residents of the United States.

3. A majority of States challenged DAPA as a violation of the Administrative Procedure Act (APA), 5 U.S.C. Sections 553, 706, and the Take Care Clause of the Constitution, art. II, section 3. J.A. 34-37. The district court granted the States' motion for a preliminary injunction enjoining DAPA's implementation. Pet. App. 244a-406a. The United States appealed to the Fifth Circuit and moved for a stay pending appeal, which the district court denied. *Texas v. United States,* No. 1:14-cv-00254, 2015 WL 1540022, at *8 (S.D. Tex. Apr. 7, 2015).

The Fifth Circuit also denied the stay and affirmed the preliminary injunction. Pet. App. 1a-90a, 156a-210a. On the merits, the Fifth Circuit held that DAPA violated the APA's notice-and-comment procedure and its substantive provisions by interfering with the operation of existing federal immigration statutes. Pet. App. 53a-86a. The United States has not sought a stay of the preliminary injunction in this Court.

*6 SUMMARY OF ARGUMENT

The present system of immigration administration set up by Congress was designed in part to protect American citizens and other lawful residents from the risk of violent crimes committed by unauthorized immigrants. If allowed to take effect, DAPA would subvert this statutory scheme and thus create the very public safety problems that Congress tried to prevent. DAPA would therefore substantially increase the risk of more citizens and other lawful residents being murdered by unauthorized immigrants - victims like Joshua Wilkerson, Vanessa Pham, Rosool Harrell, Jusmar Gonzaga-Garcia, Mirjana Puhar, Jonathan Alvarado and Kathryn Steinle - whose untimely deaths are described below.

Section I discusses the inadequacy of DAPA's screening methods, which, on their face, do not sufficiently protect against the risk of violent crime. Moreover, based on the administration of DAPA's predecessor, DACA, even these meager protections will not be fully enforced. And, contrary to the Administration's contention that DAPA is necessary to comply with Congress' direction to focus enforcement resources against violent criminals, deferred action under DACA has coincided with a *decrease* in enforcement against dangerous criminal aliens.

Nor is there merit to the argument by *amici* supporting petitioners that DAPA will promote public safety by facilitating trust between unauthorized aliens and local law enforcement. There is little evidence that immigration enforcement discourages cooperation between unauthorized aliens and the police. But even if this were true in general, in this context *7 both federal and state laws protect unauthorized aliens who cooperate with the police. Moreover, the idea that immigration enforcement prevents community trust is the basis of various state and local "sanctuary" policies, which have led to disastrous public safety consequences - including multiple murders of innocent U.S. residents.

Section II addresses how and why DAPA contravenes Congress' statutory scheme to prevent alien crime. The Immigration and Nationality Act, for example, has long contained strong protections against criminal aliens. And the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 strengthened these measures, which made swift removal of criminal aliens central to federal immigration policy. DAPA's grant of deferred action to unauthorized aliens includes exemptions that directly violate these directives and contravene Congress' policy to reduce the risk of violent crime through vigorous enforcement.

For these additional reasons, and those articulated by respondents, the Fifth Circuit's decision should be affirmed.

*8 ARGUMENT

Petitioners argue that DAPA is necessary, in part, because it will allow the Secretary "to focus its limited resources on border enforcement and removing serious criminals." Br. 74. In fact, DAPA both undermines public safety and contravenes Congress' statutory directions to further that important goal.

I. DAPA THREATENS PUBLIC SAFETY.

Contrary to petitioners' arguments, DAPA's protections against violent criminals receiving deferred action are inadequate. And even if DAPA's *articulated* standards were adequate, recent practice suggests the USCIS is unlikely

to adhere to them anyway. Most troublingly, in combination with DACA, DAPA is likely to exacerbate violence by unauthorized immigrants, who have already committed thousands of murders and other violent crimes. [3]

A. Many violent criminals would likely be eligible to receive deferred action under DAPA's inadequate standards.

In theory, DAPA prohibits deferred action for those with criminal records that would make them a "priority" removal under the Administration's "Policies for ***9** the Apprehension, Detention and Removal of Undocumented Immigrants" (the Prioritization Memo), which the Department issued to complement DAPA. J.A. 420a.

1. The Prioritization Memo, however, assigns high priority only to those *convicted* of felonies and certain "significant" misdemeanors such as for domestic violence and firearm offenses. *Ibid.* It follows that criminals who are otherwise eligible and have not been convicted of disqualifying crimes *will* receive deferred action. Thus, an alien who committed a felony, even a serious, violent felony, but who pleaded down to a less serious misdemeanor would not be barred from receiving deferred action. And therein lies the problem.

The risk that a truly violent, dangerous criminal will plead down from a serious felony to a less serious misdemeanor is not merely hypothetical. In *Padilla v. Kentucky,* which held that an alien criminal defendant has a Sixth Amendment right to know the deportation consequences of a criminal conviction, this Court observed that a competent defense attorney would "plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation." 130 S. Ct. 1473, 1486 (2010). *Padilla* thus mandated what was already common practice amongst most attorneys and by statute in many states. [4] These creative plea bargains would allow many criminal aliens who have committed serious, violent crimes to receive deferred action under DAPA.

***10** To be sure, because of the injunction in this case, USCIS has not yet detailed how it would implement DAPA. However, USCIS's administration of DAPA's predecessor, DACA, is instructive. While DACA applies to a different class of aliens, like DAPA it bars those who have "been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety." J.A. 103. This overlaps with many of the classes listed as high priority and ineligible for DAPA relief under the Prioritization Memo. But despite these provisions, in 2013 alone, USCIS revoked 282 DACA recipients' deferred action status because of gang ties it learned about *after* they had received deferred action. [5] There is no reason to believe ICE and USCIS will become *more* proficient at identifying threats to public safety before deferred action is granted under DAPA, if that policy goes into effect.

Moreover, many other violent criminals have had less serious criminal records and would therefore *not* be barred from receiving deferred action, even under DAPA's prohibitions. For example, in 2013, unauthorized alien Hermilo Vildo Moralez was convicted for the murder of Joshua Wilkerson. Mr. Moralez had previously been arrested for harassment, a misdemeanor, but had no other known criminal history. [6] Thus, he ***11** would have been eligible for deferred action under DAPA.

Similarly, in 2013, Julio Miguel-Garcia Blanco was convicted of murdering Vanessa Pham. Before his arrest for murder, he had been charged with three misdemeanors, but had only one conviction. [7] Thus, he too would have been eligible for deferred action under DAPA.

Based on these events, there can be no doubt that implementation of DAPA would subject other citizens and lawful residents to the risk of murder or other violent acts at the hands of unauthorized aliens like Morales and Blanco.

2. In addition, USCIS will not even commit to categorically denying deferred action to those convicted of child pornography, child abuse, or abduction. [8] Surely ***12** anyone convicted of those crimes is likewise a threat to public safety, and should be removed.

It is simply unacceptable to subject American citizens and other lawful residents to the risk of such violent crimes. That is especially true when, as explained below in Section II, the policies that create those risks violate governing law.

B. Even where DAPA would preclude deferred action, USCIS does not have resources or procedures sufficient to ensure its own enforcement priorities are followed.

Even if the standards contained in DAPA were adequate - and they are not - USCIS does not have adequate resources or procedures to ensure that it does not approve applications from criminal aliens and other public safety threats that should be high enforcement priorities.

1. This is established by numerous instances in which USCIS has failed to prevent criminal aliens and known gang members, who should be barred under its own regulations, from receiving deferred action under DACA. For example, in 2015, after receiving deferred action under DACA, Emmanuel Jesus Rangel-Hernandez murdered four people - Rosool Jaleel Harrell, Jusmar Gonzaga-Garcia, Mirjana Puhar, and Jonathan Alvarado. Moreover, USCIS acknowledged he was approved for deferred action "notwithstanding a … record indicating he was a known gang member." [9]

In response to an inquiry from Senator Charles Grassley, USCIS also said it had found 49 *more* DACA ***13** recipients who were in the federal gang member database [0] - but who received deferred action nonetheless. The fact that USCIS would grant deferred status to known gang members is yet more evidence that USCIS lacks the resources, ability or will to protect public safety.

Because USCIS admits it does not have the resources even to conduct a full accounting of the number of criminal aliens who received deferred action but did not meet the Administration's own standards, it is impossible to know how many DACA recipients have committed crimes. However, as starkly illustrated by Rangel-Hernandez's victims, just one mistake can produce tragic and irreversible consequences.

2. *Amici* supporting petitioners nevertheless argue that DAPA will "advance homeland security and public safety" in part because "the government performs background checks" on the recipients. Former Fed. Immigr. & Homeland Security Officials Br. at 16. This echoes USCIS's repeated assurances that it has policies in place to screen DACA applicants under various federal criminal databases for gang membership ***14** and other indicators of danger to the public. [2] But the promise of such "background checks" is illusory.

First, USCIS acknowledges it does not carry out the kind of full background check on people seeking "status granting" benefits like deferred action as it does for naturalization. [3] USCIS requires *legal* immigrants to go through a vigorous vetting procedure when seeking naturalization. Almost all applicants must submit to a full criminal background investigation using the FBI's Name Check system, give biometric information, and undergo a probing interview with a USCIS officer. [4]

In contrast, USCIS does not typically submit DACA applicants through the FBI Name Check screening or require an interview, and has indicated it will not do so with DAPA applicants. [5] Besides the fundamental unfairness of holding legal immigrants to a higher vetting standard than unauthorized aliens, this contravenes Congress's statutory scheme, discussed in Section II, to ensure full vetting of aliens for public safety threats.

This incomplete vetting has allowed known criminals and gang members to receive relief under DACA. For example, in March 2015, Project Wildfire, a multiagency ***15** operation targeting international gangs, arrested 199 alien gang members, of which five percent had already received or were applying for deferred action under DACA. [6]

Second, apparently, the government sometimes intentionally violates its own stated priorities. For example, a whistleblowing ICE attorney has alleged that her superiors told her to classify felony identity theft as a misdemeanor, [7] thereby reducing the likelihood that the affected felons would be subject to full scrutiny.

Again, if USCIS cannot or will not properly screen public safety threats from a much smaller class of aliens, it is unlikely to screen out such threats if DAPA is implemented.

C. Experience under DACA shows that DAPA would not lead the Department to focus on enforcement against criminal aliens.

In spite of this contrary evidence, petitioners nevertheless contend that "by deferring action for individuals who are not priorities for removal, the Guidance enables [the Department] to better focus on its removal priorities." Br. at 16. That assertion, however, is belied by the Administration's performance under DACA.

1. If deferred action enabled the Department to focus on high priority risks to public safety, it would have increased enforcement against criminal aliens since DACA's adoption. But that has not happened. ***16** Rather, since 2012, enforcement against criminal aliens has plummeted, as shown in the following table:

Fiscal Year	Removal of Convicted Criminal Aliens (in thousands) [18]
2012	225
2013	217
2014	179
2015	139

As the table shows, under DACA, removal of criminal aliens declined from some 225,000 in 2012 to about sixty percent of that - 139,000 - in 2015.

Indeed, in 2014 alone, rather than remove them, ICE *released* over 30,000 criminal aliens. That number included 175 with homicide convictions and 373 with sexual assault convictions. [9]

The result has been tragic. ICE acknowledged that between FY 2010 and FY 2014, "there were 121 unique criminal aliens who had an active case at the time of release and were subsequently charged with homicide-related offenses." [20]

***17** 2. Nor has deferred action led to efficient tracking and removal of recipients who commit crimes. As of May 2015, ICE had only removed 89 of the 282 criminal alien DACA recipients who had had their deferred action status revoked; the agency even *released* 77 of these criminals from its own custody. Johnson written responses, *supra.*

Because of this weak enforcement, the criminal alien population continues to grow. As of October 4, 2015, there were 179,037 criminal aliens with outstanding removal orders, over 96% of whom ICE had previously released, and an additional 184,948 criminal aliens whom ICE released with pending deportation hearings. Vaughn statement, *supra.*

Meanwhile, the number of violent immigrant gang members also continues to grow. Although the Justice Department has called members of criminal street gangs the highest priority for removal, Pet. App. 420a-29a, in 2014 ICE arrested barely half the number of gang members it did in 2013, and the lowest number since 2015.[2] Obviously, deferred action has not helped the Administration protect the Nation from this clear and present danger.[22]

***18** Whether or not DACA is itself illegal, if the Court removes the injunction in this case and allows DAPA to proceed, the Administration will implement it within the context of the current enforcement regime. The Administration's failure to screen out dangerous criminal aliens in the much more limited DACA context suggests that DAPA will lead to the unnecessary victimization of many more American citizens and legal immigrants at the hands of unauthorized aliens.

D. Experience under DACA and an array of "sanctuary" policies shows that DAPA would not promote public safety through increased cooperation between immigrants and law enforcement.

Nor is there any merit to the argument by a group of law enforcement executives led by the Major Cities Chief Association (Major Cities Brief) - many of them from so-called "sanctuary cities" - that DAPA will enhance public safety "by removing the fear of detention and removal" and thus encouraging unauthorized aliens to cooperate with law enforcement. Major Cities Chief Ass'n Br. at 7. The evidence simply does not support these claims. And the belief that reducing immigration enforcement will increase cooperation has already undermined public safety through local sanctuary policies that have led directly to murder and other serious crimes.

1. The Major Cities Brief contends that unauthorized immigrants "fear that interactions with local and state law enforcement could result in scrutiny of one's immigration status," citing a study purporting to show a significant number of Hispanics who claim they are less likely to report crimes to law enforcement because ***19** of this concern.[23] However, the actual behavior of Hispanic crime victims does not reflect this hypothetical concern. Data from the Department of Justice's Bureau of Justice Statistics show that Hispanics are slightly *more* likely than the general population to report violent crimes.[24]

Moreover, according to surveys of immigrants who do not report crimes, language barriers (47%), cultural differences (22%), and failure to understand the U.S. justice system (15%) motivate their decisions to a far greater extent than any concerns about deportation.[25] In short, there simply is no solid factual foundation for the claim that immigration enforcement deters unauthorized aliens from cooperating with law enforcement.

To the extent any unauthorized aliens fear reporting crimes, moreover, DAPA is not necessary to address this concern. As the district court's injunction only applies to deferred action status, not to removal ***20** priorities, any alien (other than a violent criminal) who might receive deferred action under DAPA faces very little threat of deportation in any event.

2. Furthermore, existing law provides ample protections for unauthorized aliens who report crimes. For example, federal law provides a special U-Visa for unauthorized alien crime victims who assist law enforcement in prosecuting crime.[26] Granting deferred action to large classes of unauthorized aliens would likely *weaken* this incentive for cooperating.

The Major Cities Brief, moreover, does not cite a single local jurisdiction that refers unauthorized alien victims and witnesses to federal immigration officials. Even the toughest local laws have policies against this. For example, Alabama's HB 56 was "hailed by advocates and critics alike as the most stringent [state level] anti-immigration legislation."[27]

Yet it still explicitly exempts from reporting to federal officials any unauthorized alien who "is a critical witness in any prosecution, or is the child of a critical witness in any prosecution." [28]

In short, ample protections already exist for avoiding any disincentives that unauthorized aliens might otherwise have to report crimes. Implementation of ***21** DAPA would provide no meaningful incremental encouragement to cooperate with law enforcement.

3. The sordid history of "sanctuary policies" in many states and localities, including the majority of those whose executives signed the Major Cities Brief, further undermines the idea that DAPA would reduce crime by leading to more cooperation with police. Such policies - to varying degrees - prohibit local law enforcement from cooperating with federal immigration officials. [29] And, similar to DAPA's public safety justification, "[t]he predominant reason local officials give for sanctuary policies has been the desire to encourage unauthorized aliens to report crimes to which they are victims or witnesses." [30]

Like DAPA, sanctuary policies attempt to enhance community-police relations by permitting illegal activity *en masse,* but with devastating effects. For example, in 2015, unauthorized alien Juan Francisco Lopez-Sanchez, who had been deported five times and had seven prior felony convictions, shot and killed Kathryn Steinle. [3] Less than three months before Steinle's murder, the City and County of San Francisco, whose Police Chief co-signed the Major Cities Brief here, refused ***22** to comply with an ICE detainer request and released Lopez-Sanchez following an imprisonment for a felony drug distribution conviction. [32] That action by a signatory of the Major Cities Brief cost Ms. Steinle her life.

Steinle's murder was not an isolated incident. In just the first nine months of 2014, sanctuary jurisdictions released 9,295 criminal aliens that ICE sought to detain, 2,320 of whom were arrested for committing other crimes *after* the sanctuaries released them. [33]

For reasons previously explained, DAPA will merely enhance the risk of unauthorized aliens committing violent crimes. DAPA's underlying idea that society should excuse the violation of its laws to encourage violators to be more cooperative with police has already produced disastrous results in the context of sanctuary city policies. Indeed, the argument's very premise undermines the foundations of the criminal justice system - as violators of any and every law could theoretically be hesitant to cooperate with law enforcement for fear of being apprehended for their own crimes. To believe that a new federal policy based on that same discredited idea will not result in even more crimes is madness.

***23 II. DAPA CONTRAVENES CONGRESS' EFFORTS TO PREVENT CRIME BY UNAUTHORIZED IMMIGRANTS.**

As respondents demonstrate, DAPA violates not only the U.S. Constitution, but also federal laws specifically designed to protect the American public from crime by unauthorized immigrants. Resp. Br. 37. The risk of such crime has been a major concern since at least 1910, when the Senate Immigration Commission found that "present immigration law is not adequate to prevent the immigration of criminals, nor is it sufficiently effective as regards to the deportation of alien criminals." [34] As a result, the 1917 Immigration Act, the first major federal restriction on immigration, barred "persons who have been convicted … of a felony or other crime or misdemeanor involving moral turpitude." [35] Even as Congress enacted the Immigration and Naturalization Act (INA) in 1952 and liberalized immigration policies in 1965, it maintained strong protections against criminal aliens. [36]

***24** That trend continued in 1996 with enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). [37] IIRIRA was enacted in response to public outcry that laws against removable and criminal aliens

were not vigorously enforced - with resulting risks to (among other things) public safety. That law made "comprehensive amendments" to the INA to strengthen enforcement against unauthorized criminal aliens, *Immigr. & Naturalization Serv. v. St. Cyr,* 533 U.S. 289, 292 (2001), in part by limiting the Executive's discretion to grant relief to unauthorized aliens. Contrary to petitioners' assertion, IIRIRA did not grant discretion to issue blanket deferred action. Instead, it mandated more vigorous enforcement of existing laws against removable aliens, especially criminals.

A. IIRIRA strengthened the INA's enforcement mechanism in part to protect the Nation from criminal aliens.

IIRIRA was passed in part in response to concerns about alien crime caused by under-enforcement of existing immigration laws. In 1990, Congress had created the U.S. Commission on Immigration Reform, ***25** headed by former Congresswoman Barbara Jordan. [38] The Jordan Commission's preliminary recommendations in 1994 included reductions in legal immigration, strengthened employer sanctions, and a system to "ensure the prompt and effective removal of criminal aliens. [39] While IIRIRA did not enact the majority of the Jordan Commission's recommendations as to legal immigration or employer sanctions, it strengthened restrictions on criminal aliens "by reforming exclusion and deportation law and procedures." [40]

1. The "congressional architects" of IIRIRA "made amply clear their intention of targeting criminal aliens for expedited deportation from the United States." [4] One of the principal sponsors of the legislation, Rep. Lamar Smith, explained that one of the foundations of the law was "protecting American citizens from immigrants who commit crimes." Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reason,* 28 St. Mary's L.J. 883, 929 (1997) (Smith & Grant).

Smith noted that the effect of IIRIRA "should be to maximize the number of criminal aliens who remain ***26** in detention and to minimize the number who avoid removal through the granting of discretionary relief or through legal technicality." *Id.* at 933. Even the scholars cited by petitioners acknowledge that in IIRIRA, "Congress has made the system of deportation more categorical, eliminating many avenues of relief from removal that in earlier periods were available to noncitizens who engaged in deportable conduct." [42]

2. Petitioners nevertheless argue that, because Congress limited the number of removable criminal aliens while also limiting judicial review, the Executive must exercise discretion because others now cannot. Br. at 41-42. Yet this ignores the reality that IIRIRA itself also explicitly limited *Executive* discretion.

For example, IIRIRA amended INA 212(d)(5)(A) (8 U.S.C. 1182(d)(5)), which had previously granted the Attorney General authority to parole "for emergent reasons or for reasons deemed strictly in the public interest." IIRIRA expressly limited the Attorney General's authority under this provision to granting relief "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5). The reference to "public benefit" is incompatible with the Administration's view, reflected in DAPA, that it is acceptable to subject the American public to an increased risk of crime by unauthorized immigrants.

Even more to the point, IIRIRA restricted the attorney general's authority to grant voluntary departure when the alien commits an aggravated felony or ***27** for a period of more than 120 days. [43] That too again demonstrates Congress's desire to reduce the risk to the American public from crimes committed by unauthorized aliens.

Finally, IIRIRA amended INA 240A(b)(1) to limit the definition of "exceptional and extremely unusual hardship" to emphasize that an alien seeking to prevent deportation "must provide evidence of harm to his spouse, parent, or child substantially *beyond* that which ordinarily would be expected to result from the alien's deportation." H. Rep. No.

104-828, at 213 (1996) (Conf. Rep.) (emphasis added). If enforced, that amendment would also help protect the American public from crimes by unauthorized aliens by making it more difficult them to avoid deportation.

***28 B. DAPA's granting of deferred action to such a large class of immigrants not only violates the law, but also contravenes Congress's policy of reducing the risk of violent crime by unauthorized immigrants.**

When opining on DAPA, the Office of Legal Counsel correctly acknowledged that "an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering." Pet. App. 417a-419a. But DAPA *is* directly "contrary to" one of the major "congressional polic[ies] underlying" the IIRIRA.

As explained above, IIRIRA reflected a clear congressional policy to ensure that immigration law is enforced uniformly and vigorously by reducing the discretion of both the Executive and Judicial branches to arbitrarily grant relief to, among others, criminal aliens. And again, that policy was designed to reduce the risk to all Americans of violent crime by such undocumented immigrants.

The Executive's decision to give less priority to reducing that risk is thus highly relevant to DAPA's lawfulness. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637 (1952) (Jackson, J., concurring). In at least three respects, DAPA is incompatible with Congress's "express [and] implied will.

First, in flat contravention of IIRIRA's amendment to Section 240A(b)(1), DAPA offers legal status to those who "are the parents of U.S. citizens or lawful ***29** permanent residents" - but *without* any requirement of a hardship, much less an "exceptional and extremely unusual hardship." J. A. 411a. That aspect of DAP A effectively overrides the amendment to Section 240A(b)(1), even as it increases the risk of violent crime by those who escape deportation as a result.

Second, DAPA violates Congress's directive in IIRIRA that ICE officers ensure that certain unauthorized aliens - including many who pose a risk of violent crime - "shall be detained." Petitioners acknowledge that aliens with deferred action "are removable." Br. at 28. So DAPA effectively tells those same officers that these removable aliens - i.e., even those with serious criminal charges or convictions - "shall *not* be detained." That is an obvious affront to Congressional authority.

Third, under DAPA, alien felons guilty only of a "state or local offense for which an essential element was the alien's immigration status" are expressly eligible for deferred action, thereby excusing many felony identity theft and document fraud charges. [44] Yet by its terms, IIRIRA itself classifies those guilty of felony forgery as aggravated felons who must be removed. 8 U.S.C. § 1101 (a)(43)(R).

Indeed, one of IIRIRA's architects, Rep. Smith, emphasized that the legislation treated "immigration-related crimes" like document fraud "with the degree of severity they deserve" because increasingly "these immigration-related crimes are carried out by sophisticated ***30** criminal enterprises, which also are often involved in drug smuggling, prostitution, illegal labor practices, and other major crimes." Smith & Grant, *supra* at 935-936. As explained above in Section I.A., moreover, many violent criminals end up pleading down to less serious crimes.

Requiring federal immigration officials to ignore Congress's directives regarding removable aliens and to allow those guilty of what Congress described as an aggravated felony to receive deferred action is "so extreme" in its departure from Congress's instructions that it amounts "to an abdication of [the Executive's] statutory responsibilities." *Heckler v. Chaney,* 470 U.S. 821, 853 (1985). Such an abdication should not be tolerated by this Court, much less condoned in a decision upholding DAPA.

CONCLUSION

By enjoining the implementation of DAPA, the district court and the Fifth Circuit vindicated the Congressional policy of reducing the risk of violent crimes committed by unauthorized immigrants. In so doing, those courts reduced the risk that thousands more American citizens and lawful residents - like Joshua Wilkerson, Jonathan Alvarado and Kathryn Steinle - will be murdered or otherwise harmed by unauthorized immigrants. A decision reversing the district court's preliminary injunction would increase that risk even while endorsing a lawless departure from the Nation's duly enacted immigration laws.

For all of these reasons and those elaborated by respondents, the Fifth Circuit's decision should be affirmed.

*1a APPENDIX A: Description of the *Amici*

The National Sheriffs' Association (NSA) Chartered in 1940, the NSA is a professional association representing thousands of sheriffs, deputies and other law enforcement, public safety professionals, and concerned citizens nationwide. The NSA has provided programs for sheriffs, their deputies, chiefs of police, and others in the field of criminal justice in order to enable them perform their jobs in the best possible manner and to better serve the people of their cities, counties, or jurisdictions. The NSA has worked to forge cooperative relationships with local, state and federal criminal justice professionals across the nation to network and share information about homeland security programs and projects. It has long held that Congress and the Administration should put its focus on funding programs to enhance border security, strengthen employment verification, and create a pathway for legal employment and status. The NSA's interest in this case is that DAPA makes it more difficult for Congress and the Administration to reach these goals and undermines the efforts of state and local law enforcement to keep their communities safe.

The Remembrance Project is a Texas-based nonprofit organization that works to support the families of illegal alien homicide victims, and to educate Americans about the importance upholding current laws and following the Constitution. From this mission has emerged a national quilt of remembrance, The Stolen Lives Quilt. The Quilt, now in over 25 states, is a growing, visual reminder of the true cost of an uncontrolled border, measured in lives stolen and forever lost to families, communities and to America's future. ***2a** The Remembrance Project's interest in this case is to ensure enforcement of our nation's laws, and to emphasize the human costs of a lawless immigration policy. While other amici have pointed to the individual stories of illegal aliens who benefited from deferred action, see United We Dream Amicus Br. at 18-32, The Remembrance Project reminds the Court of the victims of criminal aliens - men and women like men and women like Jesse Benavides, Spencer Golvach, Sgt. Brandon Mendoza, Dominic Durden, Dustin Inman, Dr. Mario J. Gonzalez, Felicia Ruiz, Joshua Wilkerson, Ranger Kris Eggle, Robert Krentz, Ruben Morfin, Eric Haydu Zepeda, Dustin Inman, Matthew Denise, Richard Grossi, Louise Sollowin, Sarah Root, Tessa Tranchant - whose survivors work with the Project to prevent tragedies like the murders of their loved ones and thousands of other Americans.

American Unity Legal Defense Fund (AULDF) is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century. AULDF has filed amicus briefs in other recent cases, including *Arizona v. Intertribal Tribal Council of Arizona,* 133 S. Ct. 2247 (2013); *Arizona v. United States,* 132 S. Ct. 2492 (2012); and *Home v. Flores,* 557 U.S. 433, 461 n. 10 (2009) (citing AULDF's amici brief).

Footnotes

1 None of the parties or their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. Besides funding from *amici* themselves, the brief was funded in part by a grant to The Remembrance Project from US Inc. All parties have consented to the filing of this brief in communications on file with the Clerk.

2 Formally, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children. J.A. 102 06.

3 A 2011 GAO study estimated a total of 25,064 homicides committed by incarcerated criminal aliens, though it did not separate unauthorized from legal immigrants. US Gov't Accountability Office, *Criminal Alien Statistics, Information on Incarcerations, Arrests, and Costs,* GAO 11 187 at 12 (Mar. 2011), http://www.gao.gov/assets/320/316959.pdf. However, the same study estimated that in the states of New York, California, Texas, Arizona, and Florida alone, *unauthorized* immigrants were responsible for between 5,300 5,400 homicides. *Id.* at 28 34.

4 Stephanos Bibas, *Regulating the Plea Bargaining Market: From Caveat Emptor to Consumer Protection,* 99 Cal. L. Rev. 1117, 1146 (2011).

5 Oversight of the Dep't of Homeland Security, hearing before S. Coram, on Judiciary. 104th Cong. (April. 29, 2015) (written responses to questions for the record, Jeh Johnson, Secretary, Dep't of Homeland Security) ("Johnson written responses).

6 Oversight of the Administration's Misdirected Immigration Enforcement Policies: Examining the Impact in Public Safety and honoring the victims, hearing before S. Comm. On Judiciary (July 21, 2015) (testimony of Laura Wilkerson).

7 The three crimes were petty larceny, public intoxication, and price alteration, but he was only convicted of the price alteration charge. The petty larceny and price alteration arrests came in between his murder of Ms. Tram in 2010 and his arrest in 2013. Whitney Rhodes, Suspect in Pham Case to Face Second Degree Murder Charges, Fairfax City Patch (Dec 15, 2012), http://patch.com/virginia/fairfaxcity/suspect in pham case faces second degree murder charges.

8 Oversight of U.S. Citizenship and Immigration Services: Ensuring Agency Priorities Comply with the Law Before the Subcomm. on Immigr. & the Nat'l Interest of S. Comm. on the Judiciary, 114th Cong. (2015) (responses to questions for the record, Tracy Renaud, Associate Director, USCIS), https://www.judiciary.senate.gov/download/moore neufeld renaud responses to questions for the record ("Renaud written responses).

9 *Ibid.*

10 According to USCIS, it could not separate those flagged in the federal database for reasons other than gang membership such as criminal history. *Ibid.*

11 See, David North, *Are DACA Aliens Gang Members? USCIS Does Not Want to Know,* Cntr. for Immigr. Stud. (Oct. 16 2015) http://cis.org/north/are daca aliens gang members uscis does not want know (noting a Freedom of Information Act response from USCIS noting it did not keep track of the number of self identifying gang members applying for DACA); Letter from Leon Rodríguez, Director, U.S. Citizenship & Immigr. Serv., to Charles C. Grassley, U.S. Senator (Apr. 17, 2015) (Rodríguez letter).

12 Rodríguez letter, *supra.*

13 Renaud written responses, *supra.*

14 8 C.F.R. §§. 335.1 2; USCIS Policy Manual, Background & Security Checks, vol 12, ch 2, https://www.uscis.gov/policymanual/HTML/PolicyManual Volume12 PartB Chapter2.html.

15 Renaud written responses, *supra.*

16 Johnson written responses, *supra.*

17 Complaint at 41, *Vroom v. Johnson,* No. 2:14 cv 02463 DKD (D. Ariz., Nov. 6, 2014).

18 ICE Enforcement and Removal Operations Report: Fiscal Year 2015 (Dec. 22, 2015) at 2. https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf. (ICE removals)

19 Oversight of the Administration's Criminal Alien Removal Policies, hearing before S. Comm. on Judiciary. 104th Cong. (Dec. 2, 2015) (Statement of Jessica M. Vaughan, Director of Policy Studies, Cntr. for Immigr. Stud.).

20 Letter from Sarah R. Saldana, Director, U.S. Immigration and Customs Enforcement, to Jeff Flake, U.S. Senator, & Charles Grassley, U.S. Senator (May 28, 2015) http://www.grassley.senate.gov/sites/default/files/judiciary/uploady2015 05 28%20ICE %C20to%C20CEG%C20and%C20Flake%C20 Altimirano˙.pdf.

21 *Ibid.*

22 Additionally, the lack of expanded deferred action as adopted in DAPA has not led to the Administration's spending its resources deporting those it does not deem priorities. In fact, 93% of those deported are considered priority deportations. ICE removals, *supra* at 5. There is thus no need to assign some kind of "status so that ICE officers can distinguish aliens who are deportable from those that are not.

23 Major Cities Chiefs Ass'n Br. at 8 (citing Nik Theodore, Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement, at 5 6, Univ. of Illinois Chicago (May 2013), available at http://www.academia.edu/4738588/Insecure Communities Latino Perceptions of Police Involvement in Immigration Enforcement.).

24 Lynn Langton, *Victimizations Not Reported to the Police,* 2006 2010, Bureau of Justice Statistics, at 1, 16 (2012) http://www.bjs.gov/content/pub/pdf/vnrp0610.pdf 51% of Hispanic violent crime victims did not report their crime compared to 52% of the general population.

25 Robert C. Davis, et. al., *Access to Justice for Immigrants Who are Victimized: The Perspectives of Police and Prosecutors,* 12 Crim. Justice Policy Rev. 183, 190 (2001).

26 8 U.S.C. § 1101(a)(15)(U). See also 8 U.S.C. § 1229(b)(2)(A) (granting Attorney General authority to cancel removal of unauthorized immigrants who are battered spouses and children).

27 Joseph Darrow, *Developments in the Legislative Branch: Alabama Follows Arizona s Lead in Enacting Local Immigration Control Measures,* 26 Geo. Immigr. L.J. 195, 195 (2011).

28 Ala. Code. §31 13 20.

29 Bryan Griffith, et. al., *Map: Sanctuary Cities, Counties, and States, Map,* Cntr. for Immigr. Stud. (Jan. 2016).

30 Orde F. Kittrie, *Federalism, Deportation, Deportation, and Crime Victims Afraid to Call the Police,* 91 Iowa L. Rev. 1449, 1475 (2006).

31 Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities after Secure Communities,* 91 Chi. Kent L. Rev. 13, 48 49 (2016).

32 *Ibid.*

33 Jessica M. Vaughan, *Number of Sanctuaries and Criminal Releases Still Growing,* Cntr. for Immigr. Stud. (Oct. 2015), http://cis.org/sites/cis.org/files/vaughan santuaries 3.pdf.

34 Abstracts of Reports of the Immigration Commission, S. Doc. No. 61 747 at 27 (3d Sess. 1910).

35 H.R. 10384; Pub. L. 301; 39 Stat. 874 § 3.

36 Immigration and Nationality Act of 1952, Pub.L. 82 414, 66 Stat. 163, (1952) § 212(a)(9) (listing crimes of moral turpitude making alien "excluded from admission); *id. at* §241(a) (expanding definition of criminal "moral turpitude as "classes of deportable aliens). The 1965 Immigration Act, "a high water mark for opponents of immigration restriction Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965,* 75 N.C. L. Rev. 273, 276 (1996), did not weaken any restrictions on exclusion or removal of criminal aliens. H.R. 2580; Pub. L. 89 236, 79 Stat. 911 (1965).

37 In addition, Congress passed The Anti Terrorism and Effective Death Penalty Act of 1996 (AEDPA) prior to IIRIRA. AEDPA expanded the types of crimes leading to removal and limited habeas review of removal decisions. See generally John J. Dvorske, *Commencement of Deportation Proceedings Under the Antiterrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),* 185 A.L.R. Fed. 221 (2003).

38 U.S. Comm. on Immigr. Reform, Executive Summary (1994) *available at* http://www.utexas.edu/lbj/uscir/exesum94.pdf.

39 *Id.* at 28.

40 H. Rep. No. 104 828, at 199 (1996) (Conf. Rep.).

41 Terry Coonan, *Dolphins Caught in Congressional Fishnets Immigration Law s New Aggravated Felons,* 12 Geo. Immigr. L.J. 589, 590 (1998) (citing Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reason,* 28 St. Mary's L.J. 883, 929 930 (1997) (citing H.R. Rep. No. 104 469, pt. 1, at 118 (1996))).

42 Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law,* 119 Yale L.J. 458, 517 (2009).

43 8 U.S.C. §1229c(a)(2)(A). Increased use of deferred action arose because "government has needed to find other ways to offer nonstatus to large groups of individuals in light of these limitations. Geoffrey Heeren, *The Status of Nonstatus,* 64 Am. U. L. Rev, 1115, 1132 (2015). While IIRIRA's restrictions on voluntary departure or parole do not apply verbatim to deferred action, applying "common sense as to the manner in which Congress is Ukely to delegate a policy decision of such economic and political magnitude to an administrative agency suggests Congress was not attempting to create a whack a mole system, whereby the Administration can simply evade explicit restrictions on one form of discretionary relief by radically expanding another. See *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (1999) (internal citations and quotations omitted).

44 Frequently Asked Questions Relation to Executive Action on Immigration, Immigr. & Customs Enforcement, https://www.ice.gov/immigrationAction/faqs.

2016 WL 1042962 (U.S.) (Appellate Brief)
Supreme Court of the United States.

UNITED STATES OF AMERICA, Petitioner,
v.
Michael BRYANT, Jr.

No. 15-420.
March 14, 2016.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH CIRCUIT

Brief of Amici Curiaecriminal Justice Organizations and Scholars in Support of Respondent

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*i QUESTION PRESENTED

Section 117(a) of Title 18 of the U.S. Code provides that it is a federal crime for any person to "commit[] a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country" if the person "has a final conviction on at least 2 separate prior occasions in Federal, State, *or Indian tribal court* proceedings for" enumerated domestic violence offenses, including misdemeanor offenses. 18 U.S.C. § 117(a) (emphasis added).

This brief addresses the following question, which is fairly subsumed within the question on which this Court granted review:

Despite the constitutional doubts doctrine, the rule of lenity and the Indian law canon, must 18 U.S.C. 117(a) be construed to include even *uncounseled* convictions in tribal courts?

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INTRODUCTION AND INTERESTS OF *AMICI*

The ultimate question in this case is whether an American Indian's prior conviction in tribal court can be used as a predicate for a recidivism prosecution in federal court under Section 117(a) of the Violence Against Women Act when the defendant lacked any right or opportunity to request counsel in the tribal court. Under the Government's interpretation, that provision poses a substantial risk that impoverished and often illiterate Native Americans will be sent to prison for extended periods based on uncounseled convictions, even for crimes they did not actually commit: Under that interpretation, an uncounseled conviction in tribal court - even for a misdemeanor - can be used as a predicate for the substantial sentencing enhancement that Section 117(a) allows. But that interpretation contravenes one of the main purposes of the Sixth Amendment right to counsel which, as this Court repeatedly has recognized, exists in large part to reduce the risk that criminal defendants will be "railroaded" by busy prosecutors and courts into pleading guilty to crimes of which they are innocent. *Strickland v. Washington,* 466 U.S. 668, 689 (1984); *Powell v. Alabama,* 287 U.S. 45, 52 (1932).

Amici - each described in more detail in the Appendix - are organizations and scholars focused on criminal justice. While they fully support the Act's objective of reducing violence against all women, they oppose any interpretation that would discriminate against American Indians by placing them at a substantial ***2** risk of long prison sentences predicated on uncounseled tribal-court convictions, including for crimes they did not commit. Fortunately, neither the text of Section 117(a) nor the goal of reducing violence against Native American women requires that this provision be interpreted to subject impoverished American Indians to that risk.

There is, in short, a better path, one that not only guards against this risk but also avoids the need to resolve the serious constitutional issues implicated by this case. And that path is simply to construe Section 117(a)' s reference to "convictions" in tribal court as being limited to *counseled* convictions, at least where the conviction resulted in incarceration.

That approach better comports with the text and historical context of the provision-including the fact that the other "convictions" that can serve as statutory predicates for enhancement are likewise necessarily limited to counseled convictions. That approach also better comports with the rule of lenity that this Court applies to all federal criminal statutes. And that approach better comports with this Court's long-standing canon that statutes addressing American Indians should be interpreted, where fairly possible, to avoid a detrimental impact on them.

If, therefore, this Court is not fully persuaded by the Ninth Circuit's constitutional analysis - or even if it is - *amici* respectfully urge the Court to adopt this approach to construing Section 117(a). The Court should reject the Government's interpretation, which subjects disadvantaged American Indians to the unique and substantial risk of serving long prison sentences based on uncounseled convictions, including convictions for crimes they never committed.

*3 STATEMENT

After his conditional guilty plea in the United States District Court for the District of Montana, respondent Michael Bryant, Jr. was convicted of domestic assault by a "habitual" offender, in violation of 18 U.S.C. § 117(a). Pet. App. 3a. Conviction under that provision requires "a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court" 18 U.S.C. § 117(a). Bryant, a member of the Northern Cheyenne Tribe, had pleaded guilty to two or more tribal court misdemeanors for domestic assault. Pet. App. 3a.

Throughout these tribal court proceedings, Bryant did not have the benefit of counsel. Pet. App. 5a. That is because, when an Indian tribe prosecutes its own members in its tribal court, it is not governed by provisions of the Federal Constitution, such as the Sixth Amendment. As this Court has observed, "[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978); *accord Duro v. Reina,* 495 U.S. 676, 693 (1990) ("the Bill of Rights does not apply to Indian tribal governments"). And, while the Indian Civil Rights Act of 1968 provides some procedural protections to Indian defendants, that statute does not provide a right to appointed counsel in tribal courts. See 25 U.S.C. §§ 1302(a)(2)-(10), 1303.

Before entering Bryant's conditional plea, the district court denied his motion to dismiss, which alleged that his indictment under Section 117(a) violated the Fifth and Sixth Amendments because it relied on his ***4** uncounseled tribal court convictions. Pet. App. 3a; Motion to Dismiss, *United State v. Bryant,* Dkt. No. 11-70, Doc. 19, at 1-2 (D. Mont. Nov. 7, 2011). But the United States Court of Appeals for the Ninth Circuit reversed that ruling. Pet. App. 1a-16a.

In its opinion, the Ninth Circuit recognized that respondent's uncounseled convictions were not themselves constitutionally infirm, because "the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings." Pet. App. 7a-8a. Yet, based on its reading of *Nichols v. United States,* 511 U.S. 738 (1994), and the Ninth Circuit's own decision in *United States v. Ant,* 882 F.2d 1389 (1989), the appellate court determined that, because the tribal court convictions resulted in imprisonment and had not been imposed in a proceeding that "guarantee[d] a right to counsel that is, at minimum, coextensive with the Sixth Amendment right," the uncounseled convictions could not be relied upon to fulfill Section 117(a)'s predicate-offence requirement. *Id.* at 12a.

*5 SUMMARY OF ARGUMENT

Although the Ninth Circuit decided this case on constitutional grounds, it did not need to do so, and this Court need not do so, either. Settled principles of interpretation provide ample basis for construing Section 117(a) to extend to tribal court convictions resulting in incarceration only when those convictions were counseled. Such a construction makes it unnecessary to decide whether the district court's admitted use of *uncounseled* tribal court convictions as a predicate for Bryant's conviction violated the Fifth or Sixth Amendments.

Indeed, no fewer than three settled principles of interpretation require that Section 117(a) be construed in this manner if the text allows it. First, under the constitutional doubts doctrine, if a statute can reasonably be read in a way that does not raise constitutional problems, that reading is preferred to an alternative that raises such problems. See, *e.g., United States v. Stevens,* 559 U.S. 460, 481 (2010). Surely the Ninth Circuit's constitutional analysis - and its holding that invocation of Section 117(a) here violates the Sixth Amendment - provide ample basis for invoking this doctrine. The rule of lenity points in the same direction, requiring that any ambiguities in criminal statutes be read in a defendant's favor. See, *e.g., Cleveland v. United States,* 531 U.S. 12, 25 (2000)). Finally, wherever possible, statutes that address Indians must be interpreted to avoid affecting them negatively, with doubtful provisions construed in their favor. See, *e.g., Montana v. Blackfeet Tribe,* 471 U.S. 759, 766 (1985). Here, it would be manifestly contrary to the interests of American Indians,

many of whom are poor and lack *6 adequate education, to subject them to the risk of substantial federal prison time based on uncounseled tribal-court prosecutions, including for crimes of which they are innocent.

Nor is there any doubt that, insofar as tribal court convictions involving incarceration are concerned, Section 117(a) can reasonably be construed as limited to *counseled* convictions. First, the linguistic context of the word "convictions" suggests that Congress had in mind only counseled convictions - as indicated by its inclusion of "tribal court" convictions in a series with "Federal" and "State" convictions, both of which require a right to appointed counsel. See, *e.g., Freeman v. Quicken Loans, Inc.,* 132 S. Ct. 2034, 2042 (2012). Second, it is presumed that when Congress acts, it is aware of relevant, pre-existing legal precedent. See, *e.g., Merck & Co. v. Reynolds,* 559 U.S. 633, 648 (2010). And at the time Section 117(a) was adopted in 2006, the most directly pertinent authority was the Ninth Circuit's 1989 decision in *United States v. Ant,* which held that the Sixth Amendment *bars* the government from using an uncounseled conviction that resulted in incarceration in a subsequent federal criminal prosecution. See 882 F.2d 1389, 1394-95 (1989).

For these reasons, whether or not the Court is persuaded by the Ninth Circuit's constitutional analysis, it can and should hold that, insofar as Section 117(a) covers tribal convictions resulting in incarceration, the statute is limited to counseled convictions. The Court can thus avoid subjecting disadvantaged Indians to the unique and substantial risk of serving long prison sentences based on uncounseled convictions, including convictions for crimes they never committed.

*7 ARGUMENT

THE COURT CAN AND SHOULD CONSTRUE SECTION 117(A) AS NOT APPLYING TO UNCOUNSELED TRIBAL-COURT CONVICTIONS, THEREBY AVOIDING THE NEED TO RESOLVE THE CONSTITUTIONAL ISSUES PRESENTED HERE.

Before this Court addresses the constitutional questions presented here, it would be wise to first grapple with the statutory text. See *United States v. Quality Stores, Inc.,* 134 S. Ct. 1395, 1399 (2014). As shown below, settled principles of statutory interpretation require that Section 117(a) be read, if fairly possible, *not* to include uncounseled tribal-court convictions. And two accepted canons - *noscitur a sociis* and the rule that Congress is presumed to be aware of contemporaneous case law - make clear that Section 117(a) can reasonably be read not to include such convictions.

A. Settled principles require that Section 117(a) be read, if fairly possible, not to include uncounseled tribal-court convictions, at least where they resulted in incarceration.

Three traditional tools of statutory interpretation - the constitutional doubts doctrine, the rule of lenity and the Indian law canon - each strongly suggest that this Court should find Section 117(a) inapplicable to uncounseled tribal-court convictions.

1. Constitutional Doubts

First, this Court has repeatedly held that where reasonably possible statutory language should " 'be *8 construed to avoid serious constitutional doubts.' " *United States v. Stevens,* 559 U.S. 460, 481 (2010) (quoting *FCC v. Fox Television Stations, Inc.,* 129 S. Ct. 1800, 1811 (2009)); *accord* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 247-51 (2012). This canon "rest[s] on the reasonable presumption that Congress did not intend … [to] raise" such doubts. *Clark v. Martinez,* 543 U.S. 371, 381 (2005).

For reasons well explained by the Ninth Circuit and respondent, construing Section 117(a) to include uncounseled convictions that resulted in imprisonment raises Sixth Amendment and due process questions that are, at a minimum, difficult. This Court's decision in *Nichols v. United States* provided a limited exception to the Sixth Amendment's right

to counsel: the federal government could use an uncounseled prior conviction to "enhance the sentence of a subsequent offense" - but only if the original conviction still "complied with the Sixth Amendment." 511 U.S. 738, 740 (1994). However, the federal government now demands that this exception be expanded to include uncounseled convictions obtained entirely outside the bounds of the Sixth Amendment - in sovereign tribal courts - and then use those convictions in federal courts that are constrained by this constitutional provision. See *United States v. Bryant,* 769 F.3d 671, 677-78 (9th Cir. 2014). This approach thus implicates serious Sixth Amendment and due process issues that are not easily resolved.

Instead of deciding whether Congress intended to violate or even approach violating these constitutional ***9** principles, this Court should instead construe the statute in a way that avoids these constitutional questions.

2. Rule of Lenity

Additionally, given that Section 117(a) is a criminal statute "if [this Court's] recourse to traditional tools of statutory construction leaves any doubt about the meaning of [the statute]," it must apply the rule of lenity. *Yates v. United States,* 135 S. Ct. 1074, 1088 (2015) (plurality opinion); *accord* Scalia & Garner, Reading Law at 296-302. This rule requires that any " 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' " *Id.* (quoting *Cleveland v. United States,* 531 U.S. 12, 25 (2000)).

If the Court is uncertain as to how Section 117(a) law comports with the Sixth Amendment right to counsel and associated due process principles - or even as to how the statute should be interpreted apart from constitutional concerns - the Court should resolve this uncertainty in favor of the criminal defendant. As discussed below, it is far from clear that Congress intended this law to apply to defendants who were never provided the right to counsel, especially those imprisoned as a result of an earlier prosecution. And when Congress does not clearly detail what it intends to punish, the resulting uncertainty should be resolved in favor of the defendant.

3. Laws Affecting Indians

This Court has also long held that where reasonably possible "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." ***10** *Blackfeet Tribe,* 471 U.S. at 766 (1985). To be sure, the canon "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe,* 476 U.S. 498, 506 (1986). But if there *is* ambiguity, the meaning of a statutory provision addressing Indians should be resolved in accordance with this Court's Indian law canons. See Cohen's Handbook of Federal Indian Law §2.02 at 113 (Nell Jessup Newton et al. eds., 2012) (citing Supreme Court cases for the proposition that "[t]he basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be construed liberally in favor of the Indians and that all ambiguities are to be resolved in their favor.").

Here, as Petitioner notes, Congress had a clear intention to protect Native American women and to punish repeat domestic abusers. See Pet. Br. at 6. But as discussed below, there is no clear intention from the text or context that Congress intended to enhance the punishments for defendants based on uncounseled convictions, especially when those convictions resulted in incarceration. And especially in light of recent amendments to the Violence Against Women Act, it is most unlikely that Section 117(a)'s worthy objective would be materially advanced by allowing federal prosecutors to rely upon uncounseled convictions. [2]

***11** Moreover, it would be manifestly contrary to the interests of American Indians, many of them poor and lacking in literacy and education, [3] to subject them to the risk of substantial federal prison sentences based on uncounseled tribal-court prosecutions, including for crimes of which they are innocent. This and other courts have long recognized

the critical importance of the right to counsel in protecting defendants from the risk of conviction based on flimsy evidence or, worse, when they are actually innocent. In *Whorton v. Bockting,* for example, the Court noted that "the risk of an unreliable verdict is intolerably high" when a criminal defendant is denied representation. 127 S. Ct. 1173, 1182 (2007) (*citing Gideon v. Wainwright,* 372 U.S. 335, 344 (1963)). Representation by counsel in critical stages of criminal proceedings is thus crucial to ensure fair and accurate outcomes, regardless of the quality of the courts conducting those proceedings. See, *e.g., Missouri v. Frye,* 132 S. Ct.1399, 1405 (2012) (quoting *Montejo v. Louisiana,* 556 U.S. 778, 786 (2009)). [4] Indeed, for these and other reasons, this Court has said the right to counsel is so important that its complete ***12** denial is one of the "very limited class of cases" in which the error is structural and thus subject to automatic reversal. See *Neder v. United States,* 527 U.S. 1, 8 (1999).

Given the enormous risks to American Indians if Section 117(a) were interpreted as the Government proposes, the Indian law canon requires that the statute be interpreted in a way that favors Indian defendants-in this case, by not including uncounseled tribal-court convictions. [5]

B. Under two settled canons of construction, Section 117(a) can reasonably be read (at a minimum) as limited to counseled convictions.

Settled canons of construction also make clear that Section 117(a) can reasonably read in that manner. The language of Section 117(a) reaches defendants who have "a final [domestic abuse] conviction … in Federal, State, or Indian tribal court proceedings." 18 U.S.C. § 117(a) (Supp. II 2014). The phrase "conviction … in … Indian tribal court" does not automatically establish that uncounseled tribal-court convictions are included.

To determine the proper meaning of that phrase, or at least its permissible meanings, it is important to examine ***13** the context of the phrase as well as of the statute. See *Yates,* 135 S. Ct. at 1081-82. And in this case, the Court should first apply the *noscitur a sociis* or "associated words" canon to examine the phrase's textual context. Then the Court should examine the statute's broader context, bearing in mind the presumption that Congress is aware of pre-existing case law.

1. *Noscitur a Sociis*

As the Court is well aware, *noscitur a sociis* simply means that " 'a word is given more precise content by the neighboring words with which it is associated.' " *Freeman v. Quicken Loans, Inc.,* 132 S. Ct. 2034, 2042 (2012) (quoting *United States v. Williams,* 553 U.S. 285, 294 (2008); *accord* Scalia & Garner, Reading Law at 195-98. The Court relies on this principle to " 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.' " *Yates,* 135 S. Ct. at 1085 (quoting *Gustafson v. Alloyd Co.,* 513 U.S. 561, 575 (1995)); 1089 (Alito, J., concurring) (agreeing with the four justices in plurality that this canon should apply).

For example, in *Freeman,* this Court determined that the meanings of the words "portion" and "percentage" did not "mean the entirety." See 132 S. Ct. at 2042. The third word, "split," provided the needed clarification. Because "split" could not refer to "the entirety," neither could "portion" or "percentage." See *id.* Thus the neighboring words can inform as to what Congress meant when it used the word or phrase at issue. And the Court could therefore properly focus on what the *neighboring* words or phrases had in common and apply that to the word or phrase at issue. See ***14** *id.* at 2042; see also *Yates,* 135 S. Ct. at 1085; *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307 (1961).

Here, the phrase "Indian tribal court proceedings" is preceded by "Federal" and "State" court proceedings. See 18 U.S.C. § 117(a) (Supp. II 2014). And the United States Constitution requires that, where incarceration is at issue, criminal defendants must be provided counsel in both federal and state courts. See U.S. Const. amend. VI; *Gideon v. Wainwright,* 372 U.S. 335, 342-45 (1963); *Murray v. Giarratano,* 492 U.S. 1, 6 (1989); *Maryland v. Kulbicki,* 136 S.Ct 2, 3 (2015) (per

curiam). Thus, a requirement that is necessarily applicable to the neighboring phrases - that is, a requirement that the conviction be "counseled" - would naturally apply to the phrase "conviction in tribal court" as well.

Another example is *State v. Taylor,* 594 N.W.2d 533 (Minn. Ct. App. 1999), discussed and endorsed in the treatise by Justice Scalia and Bryan Garner. See Scalia & Garner, *supra,* at 196-97. In that case, a statute made it a crime to carry or possess a pistol in a motor vehicle unless it was unloaded and "contained in a closed and fastened case, gunbox, or securely tied package." 594 N.W.2d at 535. When police stopped the defendant, Ms. Taylor, it was discovered that she had a pistol in her (presumably closed) purse, on the basis of which she claimed that she was carrying the pistol lawfully. On appeal, however, the State argued that *noscitur a sociis* requires that the word "case" be read restrictively, that is, as a container that prevents the gun from being readily retrievable. *Id.* at 536.

The appellate court recognized that the defendant's proposed reading - i.e., any closed and fastened receptacle, ***15** including her purse - comported with the ordinary meaning of "case." But the court ultimately agreed with the State that, given the surrounding words in the statute, " 'case' should be construed in a similarly narrow sense.' " *Id.* Accordingly, the court ruled that " 'case' should be construed as having a limited, technical meaning similar to 'gunbox,' the word that follows it." *Id.*

So too here. As in *Taylor,* the word "conviction" in ordinary parlance might well include Mr. Bryant's prior uncounseled misdemeanor convictions. See Respondent's Brief at 23-28. But in the context of *this* statute, it is at least permissible - if not mandatory - to read the word "conviction" in the more limited, technical sense of a "conviction" that complies with the constitutional requirements applicable in the other classes of proceedings listed in the statute, that is, "Federal [or] State … court" proceedings. And that of course means that, at least where incarceration results, for the statute to apply the defendant must have been afforded a right to counsel.

In short, *noscitur a sociis* makes it at least reasonable to read "conviction" in Section 117(a) as requiring compliance with the usual Sixth Amendment requirements - even though that Amendment may not of its own force technically apply to proceedings in tribal court.

2. Presumption that Congress Is Aware of Relevant Law

The well-settled presumption that Congress is aware of relevant background law makes such a reading even more reasonable. Specifically, the existence of *Nichols* and *Ant* when Section 117(a) was passed ***16** strongly suggests a legislative intention or understanding that, where incarceration results, predicate offenses must be counseled. This Court "assume[s] that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co.,* 559 U.S. at 648.

Congress passed Section 117(a) in 2006. See 18 U.S.C. § 117(a) (Supp. II 2014). At that time, it presumably was aware of *Nichols.* So it presumably knew that only when an uncounseled prior conviction *complies* with the Sixth Amendment, it can be "relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." *Id.* at 740, 746-47. And that strongly suggests that, when the prior conviction does not "comply" with the Sixth Amendment-either because that Amendment was affirmatively violated *or* because, as here, that Amendment simply didn't apply in the prior proceedings - Congress would not assume that the prior conviction could serve as a predicate offence under Section 117(a).

That conclusion is buttressed by the presence of *United States v. Ant,* 882 F.2d 1389 (9th Cir. 1989), which squarely answers that question. Indeed, *Ant* would have been the *only* appellate decision at the time dealing with the specific issue of using uncounseled prior convictions from tribal court; neither of the two circuit decisions that later disagreed with *Ant* were decided until after the statute passed. See *United States v. Shavanaux,* 647 F.3d 993 (10th Cir. 2011); *United States v. Cavanaugh,* 643 F.3d 592 (8th Cir. 2011).

Ant, moreover, held that when an uncounseled prior conviction is obtained in a manner that *would have violated* the Sixth Amendment in federal or state ***17** court, it cannot be used as a sentence enhancing tool. See *Ant,* 882 F.2d at 1394-95. Thus it deals with a different situation than *Nichols,* and indeed is still considered valid law.

Moreover, while some academics may have argued in 2006 that there was some tension between *Nichols* and *Ant*, Congress certainly did not have a conclusive answer on whether *Ant* was still valid. So Congress must be presumed to have known that, if it wished to include *uncounseled* tribal-court convictions in Section 117(a), it needed to do so expressly and clearly.

Because it did not address the *Ant* decision, either directly or indirectly, Congress appears to have either intended to exclude uncounseled convictions or, at a minimum, did not purposefully intend to include them. Either way, Congress's silence on that issue in the face of *Ant* buttresses the conclusion that, to the extent it reaches proceedings that resulted in incarceration, Section 117(a)'s reference to "convictions … in tribal court proceedings" should be read to encompass only counseled convictions.

***18 CONCLUSION**

For all these reasons, the Court can and should interpret Section 117(a) as not applying to uncounseled tribal-court convictions. Such a construction will substantially reduce the risk that indigent American Indians - unlike other impoverished groups - will routinely be sentenced to substantial prison time based on uncounseled prior convictions, including convictions for crimes they did not commit. Accordingly, the decision below should be affirmed.

1a APPENDIX A: Interests of Particular *Amici

The National Association for Public Defense ("NAPD") is an association of over 11,000 professionals critical to delivering the right to counsel. NAPD members include attorneys responsible for managing public defender programs and ensuring the constitutional right to effective assistance of counsel. We are the advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of services. Our collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital, and appellate offices, and through a diversity of traditional and holistic practice models.

Arizona Attorneys for Criminal Justice ("AACJ"), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Missouri Association of Criminal Defense Lawyers (MACDL) is dedicated to protecting the rights of criminally accused through a strong and cohesive criminal defense bar. It strives to improve the quality of justice in Missouri by seeking to ensure fairness and equality before the law.

***2a** The Montana Association of Criminal Defense Lawyers ("MTACDL") is an affiliate of the National Association of Criminal Defense Lawyers. MTACDL was formed in 1997 to ensure justice and due process for persons accused of crimes; to foster the integrity, independence and expertise of those who represent persons accused of crimes; and to promote the proper and fair administration of justice.

Oregon Criminal Defense Lawyers Association ("OCDLA") is a 1,200-member non-profit organization of private criminal defense attorneys, public defenders, investigators and others engaged in criminal and juvenile defense. OCDLA works to improve the quality of the defense function in the juvenile and adult justice systems, protect the constitutional and statutory rights of those accused and convicted of crimes, and educate the public, the courts, and the legislature about the defense function.

Washington Association of Criminal Defense Lawyers (WACDL) was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL membership includes private criminal defense lawyers, public defenders, and related professionals, all committed to preserving fairness and promoting a rational and humane criminal justice system. WACDL joins this brief as a part of its mission to promote justice and protect individual constitutional rights.

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Footnotes

1 No one other than *amici,* their members and counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk.

2 The Violence Against Women Act of 2013 gave tribes the authority necessary to exercise "special domestic violence jurisdiction over domestic violence offenders, regardless of their race. 25 U.S.C. § 1304(b). Congress also set aside funds so that the Attorney General can strengthen tribal courts, § 1304(f)(1), including supporting tribal prosecution efforts. § 1304(f)(1)(B). Armed with these tools, tribal courts and prosecutors are now much better equipped to handle domestic violence prosecution than they were when Section 117(a) was enacted.

3 See National Center for Education Statistics, Adult Literacy in America at 31 (1993) https://nces.ed.gov/pubs93/93275.pdf (noting that half of adult American Indians are illiterate); Jens Manuel Krogstad, *One in four Native Americans and Alaska Natives are living in poverty,* Pew Research (June 13, 2014), http://www.pewresearch.org/fact tank/2014/06/ 13/1 in 4 native americans and alaska natives are living in poverty/.

4 That, of course, is why the position urged here does not in any way denigrate tribal courts.

5 This approach, of course, would also allow Congress to amend the law if it really intends that Section 117(a) apply to all uncounseled tribal court convictions. Obviously, such an amendment would be subject to challenge under the Fifth and Sixth Amendments. And it would be invalid for reasons explained by the Ninth Circuit and respondent here. But at least this Court would know that the Government's construction of Section 117(a) is really what Congress intends.

1 Institutional affiliations of law professors are for identification purposes only.

2012 WL 6693652 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

ELMBROOK SCHOOL DISTRICT, Elmbrook Joint Common School District No. 21, Petitioner,
v.
John DOE, 3, a minor by Doe 3's next best friend Doe 2, et al., Respondents.

No. 12-755.
December 20, 2012.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petition for a Writ of Certiorari

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*i QUESTIONS PRESENTED

1. Whether the Establishment Clause prohibits the government from conducting public functions such as high school graduation exercises in a church building, where the function has no religious content and the government selected the venue for reasons of secular convenience.

2. Whether the government "coerces" religious activity in violation of *Lee v. Weisman,* 505 U.S. 577 (1992), and *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), where there is no pressure to engage in a religious practice or activity, but merely exposure to religious symbols.

3. Whether the government "endorses" religion when it engages in a religion-neutral action that incidentally exposes citizens to a private religious message.

*II RULE 14.1(B) STATEMENT

Petitioner is the Elmbrook School District (the "District"), a municipal public school district in Brookfield, Wisconsin. The District was defendant-appellee before the *en banc* court of appeals below.

Respondents (the "Does") are past and present District students and their parents. Respondents were plaintiffs-appellants below. Respondents were permitted to bring this litigation pseudonymously in the courts below. Petitioners' Appendix 111a ("App.").

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***1 PETITION FOR A WRIT OF CERTIORARI**

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the *en banc* court of appeals appears at 687 F.3d 840. App. la. The panel opinion appears at 658 F.3d 710. App. 83a. The opinion of the district court is unpublished but electronically reported at 2010 WL 2854287. App. 146a.

JURISDICTION

The court of appeals panel rendered its decision on September 9, 2011. The court of appeals granted Respondents' petition for rehearing *en banc* and reversed the panel in an opinion dated July 23, 2012. On October 4, 2012, Justice Kagan extended the time for filing a petition for certiorari to and including December 20, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion ***." U.S. Const, amend. I.

STATEMENT

The *en banc* Seventh Circuit held that a school district violated the Establishment Clause by holding graduation events in a church auditorium, notwithstanding the undisputed facts that the graduation events were entirely secular and that the district selected the church auditorium because it regarded this ***2** venue as the best and most cost-effective available. According to the *en banc* court, "[r]egardless of the purpose of school administrators in choosing the location, the sheer religiosity of the space created a likelihood that high school students and their younger siblings would perceive *** a message of endorsement." App. 25a-26a. The court then determined that using church space was "religiously coercive" because "[o]nce the school district creates a captive audience, the coercive potential of endorsement can operate." App. 30a.

This ruling conflicts with the decisions of other circuits and state supreme courts upholding the use of churches for graduations and other public functions. If allowed to stand, it would unsettle longstanding practices in public schools across the country and expose governments to liability for a host of common practices. It also departs from this Court's precedents under the Establishment Clause. As Chief Judge Easterbrook and Judges Posner and Ripple explained (in separate dissents), the *en banc* court " 'has decided an important federal question in a way that conflicts with relevant decisions' of the Supreme Court of the United States." App. 45a (Ripple, J., dissenting) (quoting S. Ct. R. 10(c)). The petition for a writ of certiorari should be granted.

1. The Elmbrook School District is a public school district centered around Brookfield, a suburb west of Milwaukee in Waukesha County, Wisconsin. App. 5a. The District operates two major high schools, Brookfield Central and Brookfield East. *Ibid.*

Before 2000, both high schools conducted graduations in the schools' gymnasia. In late 1999, the senior class officers at Brookfield Central wrote a letter ***3** to the District superintendent, asking that graduation be moved to the auditorium of a local church, which was conveniently located and had ample parking, comfortable seating, and air conditioning.

The students made this request because they found the gymnasium to be hot, cramped, and uncomfortable. App. 6a. It lacked air conditioning and contained only folding chairs and wooden bleachers for seating, "caus[ing] the atmosphere to be very busy and perhaps even chaotic," with "the temperature in the Gymnasium [becoming] extremely hot in the month of June." App. 7a n.2.

The class officers observed that the auditorium of Elmbrook Church was much larger and had ample free parking. App. 6a. It also offered cushioned seating, air conditioning, and excellent handicapped facilities. *Ibid.* After presenting their proposal to the District superintendent, the class officers also presented the idea to the senior class, which voted overwhelmingly in favor. App. 6a-7a.

The ultimate decision to move graduation was made by the school principal and approved by the District superintendent. After considering several alternative venues, school officials chose the Church, because "no[] [other venue] is as attractive as the Church, particularly for the price." App. 15a. The Church charged a standard rental rate between $2,000 and $2,200 for each graduation and between $500 and $700 for each honors night. Students raised money to contribute to the cost of the rental, and the balance was paid from general District funds.

Two years later, in 2002, a similar process began at Brookfield East. App. 6a. After a majority of seniors voted to use the Church auditorium, the school ***4** principal agreed. App. 7a. In every year that graduating seniors participated in an advisory vote, the students favored the Church auditorium overwhelmingly, with majorities as high as 90 percent. App. 8a n.4.

There is no dispute that the decision to rent the Church auditorium was motivated by a secular purpose. As the court below noted, Respondents "do not argue that the District had a non-secular purpose in choosing the Elmbrook Church for its graduation ceremonies." App. 21a n.16. Although the District superintendent and one member of the school board attended the Church, Respondents have not alleged that either attempted to benefit the Church. App. 8a.

2. Elmbrook Church is a non-denominational, evangelical Christian church. App. 6a. Evangelicals make up about 18% of the population of Waukesha County, greatly outnumbered by Roman Catholics (29%) and the unaffiliated (40%). See Ass'n of Religion Data Archives, County Membership Report, Waukesha County, Wisconsin: Religious Traditions, 2010, *available at* http:// www.thearda.com/rcms2010/ r/c/55/rcms2010 55133 county name 2010.asp. The Church holds its weekly worship services in a space variously referred to as the "sanctuary," the "Sanctuary/Auditorium," or the "auditorium." App. 6a n.1.

Like many churches, the building incorporates a cross as a structural element of its roof; a second cross appears at the front of the auditorium. Hymnals and Bibles are available in the pews, and the lobby contains artwork and pamphlets bearing religious messages. Signs outside of the Church also contain crosses, as do some window etchings. App. 9a-12a.

For the graduations, the Church removed all non-permanent religious symbols from the dais at the ***5** District's request. But the Church has a policy of not covering permanent religious symbols. App. 11a. During the first year that Brookfield Central rented the auditorium, the cross was covered, apparently inadvertently. In following years, the cross remained visible in keeping with Church policy. *Ibid.*

Students and school officials conducted the graduation exercises without participation by the Church. It is undisputed that the graduations themselves contained no religious content. No invocations or prayers were ever offered, and no religious references were ever made. App. 13a; App. 48a (Ripple, J., dissenting). During one graduation in 2002, some Church members offered religious literature in the lobby, but there is no evidence that this ever recurred. App. 11a. During other graduations, Church members staffed information booths containing religious literature in the lobby. One respondent alleged that church volunteers handed out "graduation materials" at one event, but these materials had no religious content. *Ibid.*

3. Respondents are nine current or former District students or their parents, some of whom have attended past graduations at the Church and assert that they "felt uncomfortable, upset, offended, unwelcome, and/or angry" because of the religious setting. App. 14a-15a. On April 22, 2009, Respondents filed suit in the United States District Court for the Eastern District of Wisconsin, App. 15a, arguing that holding graduation events in the Church auditorium violated the First and Fourteenth Amendments to the United States Constitution. In addition to compensatory and nominal damages, they sought a preliminary injunction against the District's holding its 2009 graduation at Elmbrook Church. App. 2a. The district court denied Respondents' motion for a preliminary ***6** injunction.

Respondents then sought a permanent injunction barring the District from conducting future graduations, or any other school event, at Elmbrook Church or any other religious venue. App. 15a. In the alternative, they sought a permanent injunction barring the District from conducting school events at Elmbrook Church unless all visible religious symbols were covered or removed. They also sought a declaratory judgment, nominal and compensatory damages, and attorneys' fees.

Neither party contended that there were any disputed questions of material fact. On cross motions for summary judgment, the district court ruled in favor of the District. As the court explained, the "motivating factors for moving graduation to [the Church]" were "the shortcomings of the District's then-current facilities, along with the Church's modern amenities, close location, and reasonable cost." App. 171a. Although Respondents claimed that several alternative locations could have hosted the graduations, the district court concluded that "nothing in the record suggests that any of the alternative locations suggested by the plaintiffs are equal or superior to the Church in terms of amenities, convenience, and costs." App. 172a. Thus, the court held that "the reasonable observer would fairly understand that the District's use of the Church for these events is based on real and practical concerns, and not an impermissible endorsement of religion." App. 173a.

While the case was pending in the district court, the District stopped using the Church auditorium. App. 13a. As the District superintendent explained in a letter, "[t]he long term plan" had always been "to ***7** construct gymnasiums that have the capacity and amenities to return our graduation exercises to their local campuses." App. 156a. That plan came to fruition in 2009, with the construction of a new, 3,500-seat, air-conditioned field house at Brookfield East, which became the site of both schools' graduations, and renovations to the gymnasia at both high schools. Brookfield Central, which had previously held its Senior Honors Night in the Church's chapel, moved that event to the school's new gymnasium.

4. A panel of the Seventh Circuit affirmed, concluding that renting the Church auditorium neither coerced religious practice nor endorsed religion. The Seventh Circuit held that the case is not moot. App. 99a-103a. Respondents "have live claims for damages" for past unconstitutional conduct, and the District "[ha]s not *** rule[d] out using the Church in the future should the need arise." App. 99a, 102a. On the issue of coercion, the panel distinguished between cases involving coerced religious practice, see *Lee v. Weisman,* 505 U.S. 577 (1992), and those in which a person is merely exposed to religious symbols. App. 113a-122a. As the court explained, the religious symbols in this case were "purely passive and incidental to attendance at an entirely secular ceremony," and "the Establishment Clause does not shield citizens from encountering the beliefs or symbols of any faith to which they do not subscribe." App. 118a.

The panel also held that renting the Church auditorium did not endorse religion. Although a graduation attendee "undoubtedly would be aware of the religious nature of the setting," the panel reasoned, "an objective observer would understand the religious symbols and messages in the building and on Church grounds to be part of the underlying setting as the ***8** District found it rather than as an expression of adherence or approval by the school." App. 126a. Judge Flaum dissented. App. 134a (Flaum, J., dissenting).

After Respondents petitioned for rehearing, the *en banc* court of appeals reversed. Although its opinion began by stressing the "limited scope" of its judgment and the importance of factual context, App. 3a, it adopted a legal analysis that

broadly prohibits conducting government functions in church buildings. The court acknowledged that the District had a secular purpose in choosing the church auditorium as the graduation venue, App. 21a n.15, that the venue was chosen for reasons of secular convenience, and that the graduation itself conveyed no religious messages. Nonetheless, the court held that bringing "seminal schoolhouse events to a church *** *necessarily* conveys a message of endorsement." App. 20a-21a (emphasis added). Thus, "[r]egardless of the purpose of school administrators in choosing the location, the sheer religiosity of the space created a likelihood that high school students and their younger siblings would perceive a link between church and state." App. 25a (footnote omitted).

The court also held that "the District's decision to use Elmbrook Church for graduations was religiously coercive under *Lee* and *Sante Fe.*" App. 28a. Although the court acknowledged that "*Lee* and *Santa Fe* focus on the problem of coerced religious *activity,*" and "the school district did not coerce overt religious activity," App. 29a, the court nevertheless held that this distinction was not meaningful, because coercion and endorsement "are two sides of the same coin." *Ibid.* Because the graduating students were "a captive audience," the "message of endorsement carried an impermissible aspect of coercion." App. 30a, 32a. The ***9** court also viewed the graduation exercise as religiously coercive because the District, by holding graduation at the Church, had " 'force[d] *** a person to go to or to remain away from church against his will.' " App. 30a (quoting *Everson v. Bd. of Educ. of Ewing Twp.,* 330 U.S. 1, 15 (1947)).

Judge Ripple, Chief Judge Easterbrook, and Judge Posner each dissented. Judge Ripple argued that the *en banc* opinion "rests on [an] extension of the Supreme Court's decisions in *Lee* and *Santa Fe* beyond the boundaries of their rationales," and thus resolved " 'an important federal question in a way that conflicts with relevant decisions' of the Supreme Court of the United States." App. 45a (Ripple, J., dissenting).

Chief Judge Easterbrook noted that the "only message a reasonable observer would perceive is that comfortable space is preferable to cramped, overheated space. *** No reasonable observer believes that renting an auditorium for a day endorses the way the landlord uses that space the other 364 days." App. 61a-62a (Easterbrook, C.J., dissenting). He also criticized the majority for conflating endorsement and coercion. App. 63a.

Judge Posner explained that "[t]he idea that mere exposure to religious imagery, with no accompanying proselytizing, is a form of religious establishment has no factual support, as well as being implausible." App. 75a (Posner, J., dissenting). Rather, the District was "simply treating religious property owners like their closest secular counterparts." App. 72a.

All three dissenters agreed that the majority's decision conflicted with the decisions of other circuits upholding the use of churches as polling places: "If graduation in a church is forbidden because renting a ***10** religious venue endorses religion, *** then renting a religious venue for voting must be equally unconstitutional." App. 65a (Easterbrook, C.J., dissenting); App. 78a (Posner, J., dissenting); App. 57a (Ripple, J., dissenting). They also agreed that "[t]he likely effects of [the majority's] decision" are to "depriv[e] [students and families] of the best site for their high school graduation" and "to initiate what federal law does not need: a jurisprudence of permissible versus impermissible rentals of church space to public schools and other public entities." App. 77a (Posner, J., dissenting).

REASONS FOR GRANTING THE PETITION

This Court has consistently maintained a distinction between the "coercion" test and the "endorsement" test under the Establishment Clause, reserving the coercion test for cases in which individuals are subjected to official pressure to engage in a religious practice or activity, and the endorsement test for cases in which the government itself favors or promotes a particular religious message to the detriment of others. The Seventh Circuit collapsed the distinction between the two lines of analysis by holding that mere exposure to passive religious symbols constitutes "coercion," and that entirely neutral government conduct constitutes unconstitutional "endorsement." The result is a rule against conducting public functions in a church building, even for reasons of secular convenience.

That holding conflicts with long-standing, practical, and entirely legitimate governmental practices and conflicts with federal appellate and state supreme court decisions governing both graduations in particular and governmental functions more generally. ***11** Doctrinally, the decision contradicts this Court's "coercion" and "endorsement" jurisprudence and creates or widens splits in the circuits over how these doctrines operate.

I. The Decision Below Conflicts with Other Circuits and State Supreme Courts on the Constitutionality of Using Church Space for Government Functions.

The *en banc* majority held that the government "necessarily conveys a message of endorsement" by using a church for "seminal" public functions. App. 20a-21a. It also held that conducting a government function in a church building "force [s] [or] influence[s] a person to go to or to remain away from church against his will." App. 30a. Taken together, these holdings establish a broad rule against conducting government functions in a church building, regardless of the government's reasons for doing so.

These holdings conflict with the decisions of other circuits and state supreme courts, which have repeatedly upheld the use of church buildings for government purposes - including graduation venues, classrooms, polling places, and post offices. Contrary to the decision below, the coercion doctrine applies only to pressure to engage in religious practices, not to mere exposure to religious messages. And the prohibition on requiring a person to "go to church" is about compulsory attendance at religious worship services; it has no application to walking into a church building for secular reasons, such as voting or attending graduation.

1. In *Bauchman for Bauchman v. West High School,* 132 F.3d 542, 553 n.8 (10th Cir. 1997), the Tenth Circuit considered whether a public high ***12** school violated the Establishment Clause by holding performances of the school choir "at sites dominated by crosses and other religious images." 132 F.3d at 555. Like Respondents here, the plaintiffs argued that conducting school events in a church constituted both "coercion" and "endorsement" in violation of the Establishment Clause. The Tenth Circuit, however, rejected both arguments. It rejected the coercion argument because the performances did not involve "a religious activity analogous to [the prayers] addressed in *Lee.*" *Id.* at 552 n.8. And it rejected the endorsement argument because a reasonable observer would view the school's actions "in context and in their entirety," and would know that churches "often are acoustically superior to high school auditoriums or gymnasiums, yet still provide adequate seating." *Id.* at 554-555.

Two state supreme courts have also upheld the use of churches for graduations. In *State ex rel. Conway v. District Board of Joint School District No. 6,* 156 N.W. 477, 480 (Wis. 1916), the plaintiffs argued that the use of churches for graduation constituted a "preference" for religion and forced them to attend a church against their will and in violation of the Wisconsin Constitution, which gives the state less "flexibility" than the federal Establishment Clause. See *State ex rel. Reynolds v. Nusbaum,* 115 N.W.2d 761, 769-770 (Wis. 1962). The Wisconsin Supreme Court, however, rejected both arguments. It noted that "[o]ften in smaller places church auditoriums are more commodious and better calculated to take care of the overflow crowds that congregate at [graduation]," and that it would be "farfetched *** to say that *** [students] are [thus] compelled to attend a place of worship." *Conway,* 156 N.W. at 480. The New ***13** Mexico Supreme Court reached the same result under the federal Constitution in *Miller v. Cooper,* 244 P.2d 520 (N.M. 1952).

In *School District of Hartington v. Nebraska State Board of Education,* 195 N.W.2d 161 (Neb.), *cert. denied,* 409 U.S. 921 (1972), the Nebraska Supreme Court upheld a school district's rental and use of classrooms in a Catholic school. Although the lease required religious objects to be removed from the classrooms, *id.* at 162, students doubtless encountered religious imagery as they attended class "amidst the daily affairs of [the] religious school," *id.* at 168 (White, C.J., dissenting). Nevertheless, the court reasoned that "[i]f the property used or leased is under the control of the public school authorities and the instruction offered is secular and nonsectarian, there is no constitutional violation." *Id.* at 163; see also 409 U.S. at 925-926 (Brennan, J., concurring in denial of certiorari) (approving "an arrangement motivated solely by the lack of space in the public schools"). The *en banc* decision cannot be reconciled with these cases.

2. The *en banc* decision also conflicts with the decisions of other circuits upholding the use of churches as polling places. In *Otero v. State Election Board of Oklahoma,* 975 F.2d 738 (10th Cir. 1992), the Tenth Circuit considered whether a state violated the Establishment Clause by locating polling places inside churches. The plaintiff claimed that his beliefs did not permit him to enter a church to vote. *Id.* at 740-741. The Tenth Circuit, however, rejected the claim. It held that the use of churches furthered the secular purpose of providing "a conveniently located [polling] place." *Id.* at 740. Moreover, it held that the plaintiff failed to show "that an excessive rent is being paid for ***14** these polling places or that the defendants are attempting to promote a particular religion or religion in general." *Id.* at 741.

The Second Circuit reached the same result in *Berman v. Board of Elections,* 420 F.2d 684 (2d Cir. 1969) (*per curiam*), rejecting a challenge by an Orthodox Jew to a law that required him to vote in a church or vote by absentee ballot. See also *Cooper v. U.S. Postal Serv.,* 577 F.3d 479, 496 (2d Cir. 2009) (noting that customers across the country patronize contract postal units in "churches or synagogues or monasteries or mosques" and in so doing encounter "ecclesiastical architecture, schedules of religious services, and religious iconography or statuary"), *cert. denied*, 130 S. Ct. 1688 (2010).

The *en banc* decision's logic would invalidate the common practice of locating polling places in a church. App. 65a (Easterbrook, C.J., dissenting); App. 78a (Posner, J., dissenting); App. 57a (Ripple, J., dissenting). In many residential areas, churches are the only facilities amenable to serving as polling places. Yet these churches are often just as " 'pervasively religious' as Elmbrook Church," App. 65a (Easterbrook, C.J., dissenting) (quoting App. 31a), and "[a]ll of the objections the majority makes to graduation in a church apply to voting in a church." App. 65a. Indeed, as the dissenters explained, graduation presents an easier case than voting in a church, because "there is no more basic function of a civil community than the act of casting a ballot." App. 57a (Ripple, J., dissenting).

***15 II. The Decision Below Conflicts with Decisions of This Court and Other Circuits on the Scope and Meaning of Religious "Coercion."**

The *en banc* decision also dramatically expands the doctrine of religious "coercion" beyond governmental pressure to engage in religious practices, to encompass mere exposure to religious symbols. Establishment Clause jurisprudence distinguishes between "coercion," which is the use of government power to pressure or induce persons to engage in religious practices, and "endorsement," which involves governmental promotion of or favoritism toward some religious messages over other religious or secular perspectives. The former, it is widely agreed, implicates the core of the Establishment Clause. There has been significant disagreement both among Justices of this Court and in the academy over when, if ever, mere governmental endorsement is unconstitutional. No Justice of this Court has ever taken the position that mere exposure to religious symbols, on an episodic basis, amounts to coercion within the meaning of the Establishment Clause. The Seventh Circuit's decision collapses coercion into endorsement.

Although the *en banc* court acknowledged that "the school district did not coerce overt religious activity," it nevertheless held that incidental exposure to religious symbols constituted coercion, because coercion and endorsement "are two sides of the same coin." App. 29a. That analysis cannot be squared with *Lee* or *Santa Fe* or the decisions of other circuits.

1. Both *Lee* and *Santa Fe* involved government-sponsored religious activities. *Lee* involved school-sponsored prayer by clergy at a high school graduation. 505 U.S. 577. *Santa Fe* involved school ***16** -sanctioned prayer by a student at a high school football game. 530 U.S. 290. In both cases, the Court explained that "the State affirmatively sponsor[ed] *the particular religious practice of prayer." Id.* at 313 (emphasis added); *Lee,* 505 U.S. at 586 ("These dominant facts mark and control the confines of our decision: State officials direct the performance of a *formal religious exercise* at [graduation].") (emphasis added).

Here, the graduations were devoid of prayer or any other religious activities. As the majority conceded: "*Lee* and *Santa Fe* focus on the problem of coerced religious *activity,*" but "the school district did not coerce overt religious activity."

Pet App. 29a. Nevertheless, the court held that some students might "observe[] classmates at a graduation event *** meditating on [the Church's] symbols" and feel "subtle pressure to honor the day in a similar manner." App. 30a-31a. That remarkably overbroad holding threatens the constitutionally protected right of students and other private persons to engage in religious observances in a public context. If it is unconstitutionally coercive for students to observe their classmates meditating on religious symbols, it must be unconstitutionally coercive for students to see classmates saying grace before meals, praying before a test, reading the Bible during quiet reading period, or meeting after school for Bible study or prayer. But see *Good News Club v. Milford Cent. Sch.,* 533 U.S. 98 (2001) (exclusion of religious club from meeting after school hours violated Free Speech Clause); *Board of Educ. of Westside Cmty. Sch. v. Mergens,* 496 U.S. 226 (1990) (upholding equal access for Christian club). This would be a revolution in First Amendment jurisprudence. It is fundamental that the Establishment Clause protects against governmental ***17** power, not private speech in a public context. See *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 841 (1995) (noting "the critical difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect"); *Lee*, 505 U.S. at 598 ("The First Amendment does not prohibit practices *** which do not *** directly or substantially involve the state in religious exercises.") (quotation omitted).

2. The majority's analysis also creates a circuit split over the meaning of "coercion" under the Establishment Clause. Following *Lee* and *Santa Fe*, the Fifth, Ninth, Fourth, and Tenth Circuits have explained that impermissible coercion occurs only when "(1) the government directs (2) a *formal religious exercise* (3) in such a way as to oblige the participation of objectors." *Croft v. Perry,* 624 F.3d 157, 169 (5th Cir. 2010) (quotation omitted; emphasis added); accord *Newdow v. Rio Linda Union Sch. Dist.,* 597 F.3d 1007, 1038 (9th Cir. 2010) (reciting the Pledge of Allegiance does not coerce students to participate in a "religious exercise"); *Myers v. Loudoun Cnty. Pub. Sch.,* 418 F.3d 395, 408 (4th Cir. 2005) ("The indirect coercion analysis discussed in *Lee, [Sch. Dist of Abington Twp. v.] Schempp,* [374 U.S. 203 (1963)] and *Engel [v. Vitale,* 370 U.S. 421 (1962)] simply is not relevant in cases, like this one, challenging nonreligious activities."); *Bauchman,* 132 F.3d at 553 n.8 ("[A] coercion analysis [under *Lee*] is inapplicable" absent "*a religious activity* analogous to that addressed in *Lee* or other school prayer cases.") (emphasis added).

Had the *en banc* court accepted the recognized definition ***18** of coercion, it could not have held that conducting a graduation in a church auditorium coerces students. The opinion below acknowledges that "the school district did not coerce overt religious activity." App. 29a. Yet the same opinion determined that "[o]nce the school district creates a captive audience, the coercive potential of endorsement can operate," App. 30a, thereby watering down the concept of "coercion" in direct conflict with other circuits.

III. The Decision Below Conflicts with Decisions of This Court and Other Circuits on the Scope and Meaning of Religious "Endorsement."

The *en banc* decision also exacerbates widespread confusion and division over the endorsement test. Although the majority acknowledged that the District chose the Church on a religion-neutral basis, it nevertheless held that "the sheer religiosity of the space created a likelihood that high school students and their younger siblings would perceive *** a message of endorsement." App. 25a. This holding conflicts with decisions of this Court and other circuits. The "religiosity" of the church building is a matter of private choice, protected by the Free Exercise Clause. The Establishment Clause protects against *governmental* conveyance of religious messages and *governmental* favoritism or promotion of religion. If the government has conveyed no religious messages (as is undisputed here) and the government chose the graduation venue on entirely secular and neutral grounds (as is also undisputed here), the fact that a church is imbued with "religiosity" is unexceptional and beside the point.

***19** A. The Decision Below Conflicts With This Court's Decisions on the "Endorsement" Test.

1. The *en banc* court's analysis started off on the wrong foot because the "endorsement" test applies only when there is (a) government religious expression or (b) government favoritism toward religion. In *Capitol Square Review & Advisory Board v. Pinette,* 515 U.S. 753 (1995), a plurality of this Court determined that " '[e]ndorsement' connotes an expression or demonstration of approval or support"; accordingly, the Court's cases have "equated 'endorsement' with 'promotion' or 'favoritism.' " *Id.* at 763 (citing The New Shorter Oxford English Dictionary 818 (1993); Webster's New Dictionary 845 (2d ed. 1950)). The plurality explained that it was "peculiar to say that government 'promotes' or 'favors' a religious display by giving it the *same access* to a public forum that all other displays enjoy." *Id.* at 763-764 (emphasis added). "[A]s a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion." *Id.* at 764. By contrast, "[w]here we have tested for endorsement of religion, the subject of the test was either expression *by the government itself, Lynch [v. Donnelly,* 465 U.S. 668 (1984)], or else government action alleged to *discriminate in favor* of private religious expression or activity." *Ibid.* Thus, the plurality rejected use of the endorsement test, because it "would attribute to a neutrally behaving government *private* religious expression." *Ibid.* Such a test "has no antecedent in our jurisprudence, and would better be called a 'transferred endorsement' test." *Ibid.*

The *en banc* court applied just such a "transferred ***20** endorsement" test here. Although it acknowledged that the District chose the venue for purely secular reasons and "did not itself adorn the Church," it nevertheless held that students would attribute the religious symbols to the District due to a combination of the "religiosity" of the Church and "the importance of the graduation ceremony." App. 27a. Thus, it "attribute[d] to a neutrally behaving government *private* religious expression." *Pinette,* 515 U.S. at 764. Because religious institutions are typically imbued with "religiosity" and governmental functions are typically important, the Seventh Circuit's holding is essentially that governmental functions may never be conducted in a religious building - even for reasons of secular convenience, where no reasonable observer would attribute the building's displays to the government.

Contrary to the decision below, this Court has repeatedly held that neutral policies do not "endorse" religion. Government may treat religious persons or institutions on a neutral basis, alongside secular persons or institutions. Thus, this Court has upheld programs that provide aid to both religious and nonreligious institutions on a neutral basis. *Zelman v. Simmons-Harris,* 536 U.S. 639, 649 (2002); *Mitchell v. Helms,* 530 U.S. 793 (2000) (plurality); *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1, 8 (1993). It has also upheld religious speech in a government forum that is open to religious and nonreligious speech on a neutral basis. See, *e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384 (1993). In these cases, if the Court even mentioned "endorsement" at all, it was only to note in passing that treating religious and nonreligious entities in a neutral fashion does not constitute endorsement. ***21** *Zobrest,* 509 U.S. 1 (no mention of endorsement); *Mitchell,* 530 U.S. 793 (plurality) (same); *Pinette,* 515 U.S. at 764 (plurality) (rejecting endorsement); *Zelman,* 536 U.S. at 652 ("[W]here a government aid program is neutral with respect to religion, *** the perceived endorsement of a religious message *** is reasonably attributable to the individual recipient, not to the government."); *Lamb's Chapel,* 508 U.S. at 395 ("no realistic danger [of endorsement]" where "[t]he District property had repeatedly been used by a wide variety of private organizations").

Although the *en banc* court paid lip service to this neutrality principle, App. 19a (quoting *McCreary Cnty.,* 545 U.S. at 860), its analysis has precisely the opposite effect. As the three separate dissents pointed out, after the *en banc* court's decision, a school district can no longer compare religious and nonreligious venues on a neutral basis and choose the venue that best meets its needs; rather, it must "assess the iconography of the churches that compete to rent space," App. 78a (Posner, J., dissenting), and "avoid[] any association with a 'pervasively religious' organization," App. 58a (Ripple, J., dissenting). Thus, contrary to this Court's cases, the lower court's ruling requires the government to discriminate *against* religion.

When the government has behaved neutrally, as is undisputed here, it is a great leap to claim that it has "endorsed" religion. The foundation of the "endorsement" concept is Justice O'Connor's observation that governmental endorsement of a particular religious position "sends a message to non-adherents that they are outsiders, not full

members of the political community." *Lynch v. Donnelly,* 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). That is true only when the government conveys a message that a ***22** particular religious persuasion is preferred or "favored" and that others are "disfavored." *Id.* at 688 n.1. The Seventh Circuit's notion that an entirely *neutral* position could "endorse religion" is baffling. No venue has a constitutional right to be selected for graduations. But to choose one on account of being religious, or to exclude another on account of being religious, would equally convey a message of favored or disfavored status. The Seventh Circuit's categorical exclusion of religious venues "partake[s] not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Schempp*, 374 U.S. at 306 (1963) (Goldberg, J., concurring). Such results, as Justice Goldberg presciently insisted in the first school prayer decision, "are not only not compelled by the Constitution, but, it seems to me, are prohibited by it." *Ibid. A* posture of "benevolent neutrality" - the message that religion is a worthy and commendable part of our pluralistic culture - does not offend the First Amendment. The government does not have to treat religious venues as if they were diseased and uniquely unsuitable for public functions.

2. The *en banc* court's expansive interpretation of the endorsement test is all the more troubling because that test has been repeatedly criticized as "flawed in its fundamentals and unworkable in practice." *Allegheny*, 492 U.S. at 669 (Kennedy, J., dissenting). Five Justices have called for its rejection - Justices Kennedy, Scalia, Thomas, and White, and Chief Justice Rehnquist. See *Allegheny,* 492 U.S. at 669 (Kennedy, J., concurring in judgment and dissenting in part, joined by Rehnquist, C.J., White and ***23** Scalia, JJ.) ("The uncritical adoption of [the endorsement test] is every bit as troubling as the bizarre result it produces in the cases before us."); *Pinette*, 515 U.S. at 768 n.3 (plurality opinion, Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.) ("[The endorsement test] supplies no standard whatsoever ******** It is irresponsible to make the Nation's legislators walk this minefield.").

Three more Justices have questioned the endorsement test's validity - Chief Justice Roberts and Justices Breyer and Alito. See *Salazar v. Buono,* 130 S. Ct. 1803, 1819 (2010) (Kennedy, J., joined by Roberts, C.J., and Alito, J.) ("Even if [the endorsement test] were the appropriate one, but see [criticism of the endorsement test in *Allegheny* and *Pinette*] *******"); *id.* at 1824 (Alito, J., concurring) ("Assuming that it is appropriate to apply the so-called 'endorsement test,' this test would not be violated [here]."); *Van Orden v. Perry,* 545 U.S. 677, 700 (2005) (Breyer, J., concurring) (declining to apply the endorsement test and stating that "I see no test-related substitute for the exercise of legal judgment").

Indeed, a majority of this Court has relied on the endorsement test to invalidate government action in only two cases, both of which have been subsequently reversed or undermined. *Sch. Dist. of City of Grand Rapids v. Ball,* 473 U.S. 373, 391 (1985) (applying endorsement test), *overruled by Agostini v. Felton,* 521 U.S. 203 (1997); compare *Allegheny,* 492 U.S. at 592-597 (applying endorsement test), with *Van Orden,* 545 U.S. 677 (ignoring endorsement test); see *Buono,* 130 S. Ct. at 1819 (plurality) (citing criticism of the endorsement test); cf. *Santa Fe,* 530 U.S. at 308, 312 (stating that "endorsement" is "one of the relevant questions" but relying primarily on "improper ***24** effect of coercing those present to participate in an act of religious worship"). In recent years, this Court has ignored or rejected the endorsement test far more often than it has applied it. See, *e.g., Pinette,* 515 U.S. at 764 (plurality) (rejecting endorsement test); *Van Orden,* 545 U.S. 677 (ignoring endorsement test); *Lee,* 505 U.S. at 577 (same); *Zobrest,* 509 U.S. 1 (same); *Mitchell,* 530 U.S. 793 (plurality) (same); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687 (1994) (same); *Marsh v. Chambers,* 463 U.S. 783 (1983) (same).

Rather than following these cases, the Seventh Circuit employed an analysis almost identical to the analysis in *Ball*, 473 U.S. 373, which has been overruled. There, the school district authorized public school teachers to teach secular classes in "leased" classrooms in religious schools. *Id.* at 375. Although the classes were purely secular, and aid was made available on religion-neutral terms, the Court held that the performance of "important educational services" in the "pervasive [religious] atmosphere" would be perceived by schoolchildren as endorsement of religion. *Id.* at 388, 391. Here, similarly, the *en banc* majority held that the "importance of the graduation ceremony" combined with the "sheer religiosity of the space" created a message of endorsement. App. 25a. But this mode of analysis was rejected in *Agostini,* which held

that secular instruction provided "on a neutral basis *** on the premises of sectarian schools *** cannot reasonably be viewed as an endorsement." 521 U.S. 234-235. The decision below is a throwback to the repudiated reasoning of *Ball.*

***25 B. The Decision Below Exacerbates Acknowledged Circuit Splits Over the "Endorsement" Test.**

The *en banc* decision also widens two acknowledged circuit splits over the endorsement test.

1. First, circuits have divided over when the "reasonable observer" would misattribute the actions of third parties to the government. This conflict surfaced in *Pinette*, which involved a private group's placement of a cross in a public forum on the statehouse lawn. A plurality of the Court would have held that private speech in a neutral public forum cannot be attributed to the government and cannot be perceived as endorsement of religion. 515 U.S. at 770. But the concurring and dissenting opinions maintained that a reasonable observer could "mistake" private religious speech for "government speech endorsing religion." *Id.* at 785 (Souter, J., concurring); *id.* at 807 (Stevens, J., dissenting) ("[I]t is enough that *some* reasonable observers would attribute a religious message to the State.").

Like this Court in *Pinette*, lower courts have divided over when the reasonable observer can attribute private conduct to the government. The Fourth, Sixth, Ninth, and Eleventh Circuits have sided with the *Pinette* plurality, concluding that the reasonable observer *cannot* attribute private conduct to the government, as long as the government is treating all forms of private conduct neutrally. See, *e.g., Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.,* 567 F.3d 278, 294 (6th Cir. 2009) (rejecting " 'any mistaken impression' that the City endorsed any one message" in a neutral funding program); ***26** *Peck v. Upshur Cnty. Bd. of Educ.,* 155 F.3d 274, 287 (4th Cir. 1998) (reasonable observer would not "believe that the schools were endorsing or favoring religion" merely because the government permitted private religious expression during school hours); *Chabad-Lubavitch of Ga. v. Miller,* 5 F.3d 1383, 1394 (11th Cir. 1993) (refusing to adopt the perspective of an "uninformed or unreasonable" observer, who would make "an erroneous attribution of private religious speech to the State"); *Kreisner v. City of San Diego,* 1 F.3d 775, 782 (9th Cir. 1993) ("private speech in a traditional public forum" is not "government endorsement of religion").

The Second and Tenth Circuits, by contrast, have sided with the *Pinette* concurrence and dissent, concluding that a reasonable observer *can* mistake private conduct for government endorsement. See, *e.g., Green v. Haskell Cnty. Bd. of Comm'rs,* 574 F.3d 1235, 1246 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing *en banc*) (the majority's reasonable observer "erroneously attributes [private] remarks to the county government") (emphasis omitted); *Kaplan v. Burlington,* 891 F.2d 1024, 1030 (2d Cir. 1989) (striking down display of private menorah in a public forum because "the City was perceived as fulfilling the role of sponsor").

Here, the *en banc* court sided with the *Pinette* dissent, concluding that students would mistake the Church's private religious message for that of the District. Although the court agreed that "the District did not itself adorn the Church with proselytizing materials," it held that children would attribute the religious symbols to the District because of "the importance of the graduation ceremony" and "the existence of other suitable graduation sites." App. 27a. By contrast, the dissenters sided with the circuits that ***27** have followed the *Pinette* plurality, emphasizing that "the graduates knew well that the iconography belonged to the landlord church, not to their school"; thus, "it would be totally unreasonable for any student to attribute to the District any endorsement of the message of the iconography." App. 50a-51a (Ripple, J., dissenting).

2. The courts of appeals have also divided over how much knowledge to attribute to the reasonable observer. As the *Pinette* plurality observed, it is unclear whether the reasonable observer should be defined as "any beholder (no matter how unknowledgeable), or the average beholder, or *** the 'ultrareasonable' beholder." *Pinette,* 515 U.S. at 768 n.3 (emphasis omitted). Because of this ambiguity, "[an] unresolved dispute *** exists within various circuits and within the Supreme Court as to the proper level of understanding to impute onto our mythical reasonable observer." *Freedom from Religion Found., Inc. v. City of Marshfield,* 203 F.3d 487, 496 n.2 (7th Cir. 2000).

Particularly in the public school context, there is a division over whether the reasonable observer would be a school child or a mature adult. Cf. *Good News Club,* 533 U.S. at 117 (declining to consider "possible misperceptions of schoolchildren"); *id.* at 142-143 (Souter, J., dissenting) (emphasizing "particular impressionability of schoolchildren"). In *Newdow,* 597 F.3d 1007, the Ninth Circuit considered an Establishment Clause challenge to the recitation of the Pledge of Allegiance. The dissent would have struck down the Pledge using a reasonable observer akin to a young student unfamiliar with the history of the Pledge. *Id.* at 1094 (Reinhardt, J., dissenting). The majority, by contrast, held that "a child's understanding ***28** cannot be the basis for our constitutional analysis"; the reasonable observer would be "aware of the history and origins of the words in the Pledge [and] would view the Pledge as a product of this nation's history and political philosophy." *Id.* at 1037-38.

Here, the majority emphasized that the reasonable observer would be "high school students and their younger siblings." App. 23a; see also App. 25a; App. 21a ("special concern with the receptivity of school-children to endorsed religious messages"); App. 24a ("children in attendance"); App. 27a ("presence of children"). According to this analysis, "children in particular" would perceive endorsement based on the "iconic place [of graduation] in American life" and the "sheer religiosity of the space." App. 26a, 31a. The dissents, however, criticized the majority for deeming the reasonable observer to be an uninformed child: "The graduating students, now by virtue of their graduation, must be considered capable of exercising the judgment expected of all reasonable citizens of a democratic polity." App. 51a (Ripple, J., dissenting). Thus, the graduates would understand that the iconography "symbolizes the landlord's view, not the District's view." *Ibid.*

Many cases have involved similar disputes, with circuits sharply dividing over how much knowledge to impute to the reasonable observer. See, *e.g., Modrovich v. Allegheny Cnty.,* 385 F.3d 397, 416 (3d Cir. 2004) (Gibson, J., dissenting) (reasonable observer "reads local newspapers as well as local history books," "attend[s] the Allegheny County Council meeting[s]," and would be aware of deposition testimony); *Am. Civil Liberties Union of Ohio Found., Inc. v. Ashbrook,* 375 F.3d 484, 504 (6th Cir. 2004) (Batchelder, J., dissenting) (reasonable observer would ***29** know more about "the overall context"); *Ind. Civil Liberties Union v. O'Bannon,* 259 F.3d 766, 776 (7th Cir. 2001) (Coffey, J., dissenting) (majority erred by assuming "that a reasonable observer will glance only at a single side [of the monument] or glance only at the side bearing the larger letters"); *Doe v. Beaumont Indep. Sch. Dist.,* 173 F.3d 274, 308-309 (5th Cir. 1999) (Garza, J., dissenting) (reasonable observer should have known about "the pertinent legislative text, the legislative history, and the interpretation of the legislation by a responsible administrative agency, as well as about the history and context of the community in which the case has arisen"), *on reh'g en banc,* 240 F.3d 462 (5th Cir. 2001); *Elewski v. City of Syracuse,* 123 F.3d 51, 59 n.6 (2d Cir. 1997) (Cabranes, J., dissenting) (majority wrongly assumed "an omniscient observer, whose experience sweeps in not just what is visible to the naked eye *** but the unseen closed-door meetings of local retailers and politicians"); *Ams. United for Separation of Church & State v. City of Grand Rapids,* 980 F.2d 1538, 1558 (6th Cir. 1992) (*en banc*) (Lively, J., dissenting) (reasonable observer "might be a passer-through," who "does not have to be familiar with [the city's] religious demographics, the city's regulations regarding use of the plaza, or past uses to which it has been put").

These disputes further demonstrate the "formless, unanchored, [and] subjective" nature of the endorsement test. App. 66a (Posner, J., dissenting). Courts have flexibility to impute any amount of knowledge to a reasonable observer and to make the reasonable observer draw any inferences about private conduct. Thus, the endorsement test "fails to provide a judicial standard capable of principled application." Jesse H. Choper, ***30** *The Endorsement Test: Its Status and Desirability,* 18 J.L. & Pol. 499, 535 (2002).

IV. This Case Presents a Recurring Question of National Importance.

The *en banc* decision threatens to upend a variety of longstanding governmental practices. Most obvious is the practice of hosting public school graduations in rented church facilities - a practice that has been common for decades. But the

en banc decision also threatens a variety of *other* longstanding government uses of church property - including the use of churches for charter schools, food distribution programs, town meetings, or polling places. As Judge Posner observed, the decision promises a new "jurisprudence of permissible versus impermissible rentals of church space." App. 77a.

1. Pub he schools often hold graduations in rented space. Because it is common for each graduate to have many guests, "a high school with a relatively small graduating class of 200 students might need to accommodate an audience of more than 2,000." Christine Rienstra Kiracofe, *Going To The Chapel, And We're Gonna … Graduate?: Do Public Schools Run Afoul Of The Constitution By Holding Graduation Ceremonies In Church Buildings?,* 266 Ed. L. Rep. 583, 583 (2011). Thus, many graduations occur "in larger, off-campus venues." *Ibid.;* see also *Lee,* 505 U.S. at 583 ("In the Providence school system, most high school graduation ceremonies are conducted away from the school.").

Not uncommonly, the most convenient off-campus venue is a church. As in this case, churches often provide more space, better facilities, and more flexible scheduling for a better price. Kiracofe, *supra,* at 584. In many cases, renting a church costs less than holding ***31** the event on school grounds. Thus, school districts around the country frequently hold graduations in churches. See, *e.g.*, 2012 High School Graduation Schedule, *available at* http:// www.scskl2.org/SCS/pages/hsgrad dates12.html (Tennessee county held all eight high school graduations in churches); *Graduations,* Arkansas Democrat-Gazette, May 6, 2012, *available at* http:// www.arkansasonline.com/news/2012/may/06/graduations-20120506-00/?f=rivervalley (listing Arkansas high schools holding graduations at off-site venues including churches); *Images: Wacunda High School Graduation,* Daily Herald, May 20, 2012, *available at* http:// www.dailyherald.com/article/20120520/news/705209736/photos/AR/ (Illinois high school held graduation in a church); Soulsville Charter School to Hold First-Ever Graduation With A Bang, *available at* http:// www.staxmuseum.com/events/news/view/soulsville-charter-school-to-hold-first-ever-gradu (Tennessee charter school held graduation in a church). Indeed, in their petition for rehearing, Respondents argued that "[t]his case is exceptionally important" precisely because "[n]umerous public schools *** around the country" hold their graduations in churches. App. 228a.

Nor is this a new practice. As noted above, state supreme courts have consistently upheld it since at least 1916. See *Conway,* 156 N.W. at 480; *Miller,* 244 P.2d 520.

Because of the cost of litigation and threat of attorneys' fees under Section 1988, local governments rarely defend against lawsuits challenging these graduations, however meritless they might ultimately be. Instead, they typically settle. See Americans United for Separation of Church and State, Graduation ***32** Ceremonies in Religious Buildings, *available at* http:// www.au.org/tags/graduation-ceremony-religious-buildings (noting threatened litigation against schools in New York, Georgia, Wisconsin, California, Maryland, and Pennsylvania, and that these schools were unwilling to litigate); Kristen Stoller, *Board to Pay Legal Fees in Settlement,* Hartford Courant, July 24, 2012 (noting $469,610.50 settlement); David Drury, *Graduation Planned at Comcast Theater,* Hartford Courant, Feb. 25, 2010, at B5 (noting selection of new venue after litigation threat); Joan Hellyer, *Tech School Moves Graduation Ceremony,* Bucks County Courier Times, at 5 (same); Laurin Sellers, *Brevard Alters Graduation Sites After Church-State Suit*, Orlando Sentinel, May 14, 2006, at B1 ("After being sued last year, the School Board agreed not to have commencement exercises in churches ***."); Kasi K. Addison, *Newark Schools Settle Religious Bias Lawsuit,* NJ.COM, June 9, 2008, *available at* http:// www.nj.com/newark/index.ssf/2008/06/newark schools settle religiou.html (noting settlement). Thus, while the question is recurring and important, with dramatic financial consequences for school districts across the country, it rarely gets litigated to completion.

This case presents an excellent vehicle for addressing this vital and recurring question. The material facts are undisputed, and the constitutional question was fully litigated and squarely presented below. Although the District moved graduations to its new field house in 2010, the Seventh Circuit panel rightly held that the case was not moot because Respondents "have live claims for damages," Pet App. 99a, and the District has "refused to state that it would never again hold a graduation in Elmbrook ***33** Church," App. 14a. Thus, as Respondents argued in their petition for rehearing, "this case is not moot." App. 214a n.1.

2. The *en banc* decision calls into question other common government uses of church property - such as for charter schools, town meetings, or polling places on Election Day. See Shelley Ross Saxer, *Government and Religion as Landlord and Tenant,* 58 Rutgers L. Rev. 409 (2006); *Porta v. Klagholz,* 19 F. Supp. 2d 290 (D.N.J. 1998) (upholding use of church premises for a charter school). While the *en banc* court sought to stress the "limited scope of this opinion," App. 3a, it also broadly claimed that students were "religiously coerced" because " '[n] either a state nor the Federal Government *** can force nor influence a person *to go to or to remain away from church* against his will," App. 30a (citation omitted; emphasis added). According to the court, this principle was violated here because the District "direct[ed] students to attend a pervasively Christian, proselytizing environment." *Ibid.* That principle would apply, *a fortiori,* to voting, as well as other public functions, in churches.

As Chief Judge Easterbrook explained in dissent, the *en banc* court "cannot disavow the logical implications of [its] decisions." App. 65a (Easterbrook, C.J., dissenting). "If graduation in a church is forbidden because renting a religious venue endorses religion, and if endorsement is coercive, then renting a religious venue for voting must be equally unconstitutional," since "[a]ll of the objections the majority makes to graduation in a church apply to voting in a church." *Ibid.;* see also App. 64a (Posner, J., dissenting). The mere fact that cases involving the Establishment Clause are necessarily "fact-intensive," ***34** *Van Orden,* 545 U.S. at 700 (Breyer, J., concurring), does not mean that principles established in one case would not invalidate similar practices in another.

3. The *en banc* decision is particularly mistaken given the long American tradition of government use of church property. Since the early days of the Republic, local governments have rented property from churches for secular public activities. Indeed, only a "minority of New England towns [had] erected town houses before the American Revolution." Kevin M. Sweeney, *Meetinghouses, Town Houses, and Churches: Changing Perceptions of Sacred and Secular Space in Southern New England, 1720 - 1850*, 28 Winterthur Portfolio 59, 78 (1993). As a result, in most towns, the religious "meetinghouse continued to be the center of activity, serving both for worship and for secular assembly." Edmund W. Sinnott, *Meetinghouse & Church in Early New England* 23 (1963).

Over the course of the Nineteenth Century, towns gradually built separate structures for official business, such that, "[b]y 1850, in a majority [of Massachusetts towns] the town meeting had found a permanent home in a town house." Sweeney, *supra*, at 88. Nevertheless, even in 1850 - more than a decade after disestablishment in Massachusetts - over twenty towns "entered into agreements providing for the joint occupancy of a meetinghouse with a religious society, usually by renovating the basement for town meetings." *Ibid.* The *en banc* decision conflicts with this long and established tradition.

*****

The *en banc* decision cannot be reconciled with the decisions of this Court or of other circuits. It also promises to upend longstanding governmental practices ***35** and to initiate a new "jurisprudence of permissible versus impermissible rentals of church space." App. 77a (Posner, J., dissenting). Such a result is both unnecessary and has profound practical and doctrinal consequences warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Footnotes

* Counsel of Record

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2013 WL 859986 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

ELMBROOK SCHOOL DISTRICT, Elmbrook Joint Common School District No. 21, Petitioner,

v.

John DOE, 3, a minor by Doe 3's next best friend Doe 2, et al., Respondents.

No. 12-755.
March 6, 2013.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Reply Brief for Petitioner

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***1 REPLY BRIEF**

Respondents nowhere dispute that the School District chose the Church auditorium for secular reasons, or that graduations lacked religious references. They admit that the Questions Presented are "important." BIO 30. And they admit that the decision below will expose school districts to liability for widespread, century-old practices.

They argue primarily that certiorari would be "premature," because this is "the first and only" decision striking down this common practice. BIO 1. While it is true the decision below stands alone in its startlingly broad Establishment Clause analysis, that is no reason to deny certiorari. The lower courts are split on whether churches may be used as venues for important public events, and even more deeply split on the proper "coercion" and "endorsement" analyses. The decision below deepens these splits.

Respondents also claim that the decision below is "narrow[]" and "fact-sensitive" - because the *en banc* court said so. BIO 27. But labeling an opinion " fact-sensitive" does not make it so. Respondents cannot evade the court's *holding:* Conducting "seminal" public events in a church "necessarily conveys a message of endorsement." App. 20a-21a. As Respondents admit, this rule prohibits holding *any* graduation at a church unless the church "lacks religious iconography" or the school faces "exigent circumstances." BIO 27.

Respondents repeatedly suggest that the District did not act neutrally, because graduation could have been held at "non-religious venues." BIO 17; see also BIO i, 2, 5-6, 31. But Respondents never allege that other venues were equal to the Church - only that ***2** they were "availabl[e]." BIO i, 2, 5-6, 17, 31. As the district court explained, other venues were not equal: "[T]he Church is located within a few miles of the schools, is handicap accessible, includes ample, free parking, has large video screens for close-up viewing, permits the District to record and replay the ceremonies on public access television, and requires payment of user fees consistent with [the] costs [of] *** us[ing] [the District's] own facilities." App. 172a. Compared with these amenities, no "alternative locations suggested by the plaintiffs are equal or superior to the Church." *Id.* The *en banc* majority did not disagree. Cf. App. 15a ("[A]lthough other venues are available for graduation, none is as attractive as the Church, particularly for the price.").

Indeed, another nearby school has already been forced to abandon the Church because of the decision below. See American Association of School Administrators *Amici* Br. at 5-6. That school must now rent Miller Park - a 42,200-seat baseball stadium - at more than triple the price of the Church.

The Constitution does not require schools to conduct graduation in inferior, more costly venues. The petition for a writ of certiorari should be granted.

I. The Court Should Resolve the Conflict over the Constitutionality of Using Church Space for Government Functions.

Respondents argue that there is no conflict over the constitutionality of using church space for government functions, because the *en banc* decision is "the first and only *federal* appellate ruling" to strike down the longstanding practice of holding *graduation* in a church. BIO 9 (emphasis added). But they fail to distinguish cases upholding numerous government ***3** uses of religious space.

1. In *Bauchman for Bauchman v. West High School,* 132 F.3d 542 (1997), the Tenth Circuit upheld high school choir performances at churches "dominated by crosses and other religious images." *Id.* at 555. Respondents concede that the court approved the "use of religious venues," BIO 9, but argue that choir performances differ from graduation, because students can "opt out," BIO 10. This Court, however, has rejected the idea of an opt-out from extracurricular events. *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 310-312 (2000). Nor did *Bauchman* rely on an opt-out; it relied on the absence of "religious activity" such as prayer. 132 F.3d at 552 n.8. Respondents also contend that "the choir performed at both secular and religious venues," and the religious venues were chosen only because they were "conducive" to choral music. BIO 10. But the same is true here: Graduation has been held in both secular and religious venues, and the Church was used only because it was "conducive" for secular reasons. Indeed, *Bauchman* was the *harder* case, because students both entered a religious venue and performed "Christian devotional music." 132 F.3d at 553. Here, graduations were entirely secular.

Respondents fare no better with the state Supreme Court cases. They concede that *State ex rel. Conway v. District Board of Joint School District No. 6,* 156 N.W. 477 (Wis. 1916), upheld graduation in a church on indistinguishable facts, applying a more stringent state constitutional standard, but claim that the case is dated and that another part of the ruling "did not survive this Court's decision in [*Lee v. Weisman,* 505 U.S. 577 (1992)]." BIO 11. That does not square *Conway* with the decision below. Respondents ***4** claim that the graduation in *Miller v. Cooper,* 244 P.2d 520 (N.M. 1952), was different because there were no "alternative facilities" available. BIO 11. But *Miller* said there *was* an alternative facility "large enough to accommodate those who desired to attend"; the only problem was "sufficient seating." 56 N.M. at 356. The problem of "sufficient seating" in *Miller* is no different from the problems of sufficient parking, suitable handicap facilities, and adequate air conditioning here.

Respondents say that the rental of classrooms in *School District of Hartington v. Nebraska State Board of Education,* 195 N.W.2d 161 (Neb.), *cert. denied,* 409 U.S. 921 (1972), is different because the lease required that religious objects be removed. BIO 11. But the court did not rely on that; instead, it broadly affirmed "[t]he right of a public school district to use or lease *all or a part of a church* or other sectarian building for public school purposes." 195 N.W.2d at 163 (emphasis added). If anything, *Hartington* was a harder case, because the students attended class in the religious building all year, rather than once for graduation.

2. Respondents cannot distinguish cases upholding voting in a church. See *Otero v. State Election Bd. of Okla.,* 975 F.2d 738 (10th Cir. 1992); *Berman v. Bd. of Elections,* 420 F.2d 684 (2d Cir. 1969) (*per curiam*). They claim that voting "typically" takes place in non-consecrated areas, and voters "ordinarily" can cast an absentee ballot. BIO 12. But that is not always true. Sometimes voting takes place with "a towering cross in the voting area," and sometimes citizens are "forced to cast their ballot in a house of worship" with no alternative. Rev. Barry W. Lynn, *Stop Using Churches as Polling Places,* CNN Belief ***5** Blog (Nov. 6, 2012), *available at* http:// religion.blogs.cnn.com/2012/11/06/my-take-stop-using-churches-as-polling-places. As Chief Judge Easterbrook said, "[a]ll of the objections the majority makes to graduation in a church apply to voting in a church." App. 65a.

II. The Court Should Resolve the Conflict over the Scope and Meaning of Religious "Coercion."

The *en banc* decision also dramatically expands the doctrine of "coercion" in conflict with decisions of this Court and other circuits. No court has ever held that exposure to passive religious symbols amounts to unconstitutional coercion. Pet. 15.

1. According to Respondents, this Court has said that private, passive religious displays can be coercive. But they cite no such case. *Stone v. Graham,* 449 U.S. 39 (1980) (*per curiam*), did not "consider[] whether religious displays appeared in a coercive context," BIO 14, but held that posting the Ten Commandments on schoolroom walls had a "plainly religious" purpose. 449 U.S. at 41. Nor did the "partial concurrence and partial dissent of four Justices" in *County of Allegheny v. ACLU,* 492 U.S. 573, 664 (1989) (Kennedy, J., concurring and dissenting), "recogniz[e] the coercive potential of religious symbols." BIO 14. It said the opposite: the religious displays were *not* coercive, because government speech "may coerce" only in "an extreme case," such as where the government makes "an obvious effort to proselytize" - drawing a sharp distinction between mere religious displays and government proselytization. 492 U.S. at 661 (Kennedy, J., concurring and dissenting); cf. *id.* at 606-609 (majority) (criticizing " 'proselytization' ***6** test"). Compare BIO 15 (claiming that vacated panel opinion said religious displays can be coercive) with App. 117a-118a (reasoning, like the *Allegheny* concurrence, that religious displays can violate coercion standard only if government also tries "to proselytize" or pressure students "to participate in any religious exercise").

2. Respondents fail to distinguish the opinions of four other circuits that have rejected coercion absent government-directed "religious exercise." Pet. 17. Respondents dismiss three of these cases because they involved references to God in the Pledge of Allegiance, which is "not religious." BIO 16-17. But that is the point: Each case found no relevant coercion absent *overt religious activity.* Respondents likewise fail to distinguish *Bauchman*'s coercion analysis. They say the court found no coercion "because the choir members could freely opt out." BIO 17. But that was what the court said in its *free exercise* holding. 132 F.3d at 557. In its *establishment clause* holding, it said that "coercion analysis is inapplicable," because there was no "religious activity analogous to that addressed in *Lee.*" *Id.* at 552 n.8.

Under that rule, the District would have prevailed, because "the school district did not coerce overt religious activity." App. 29a. The Seventh Circuit applied a contrary rule to reach a contrary result.

III. The Court Should Resolve the Conflict over the Scope and Meaning of Religious "Endorsement."

The *en banc* decision conflicts with this Court's "endorsement" cases and widens two acknowledged circuit splits over the endorsement test.

1. Respondents first claim that *private* religious ***7** speech *can* be attributed to the government, even when the government acts neutrally. BIO 18-19. But no case so holds; every case Respondents cite involved *government* speech conveying a government message. *Santa Fe,* 530 U.S. at 302, 306 (pre-game prayer policy "invites and encourages religious messages," which are "public speech," not "private student speech"); *Lee,* 505 U.S. at 588, 597 (graduation prayers were "state-imposed" religious exercise); *Allegheny,* 492 U.S. at 594 (holiday display was "the government's display"); *id.* at 664 (Kennedy, J., concurring and dissenting) (display was a "form of government speech"); *Pleasant Grove City v. Summum,* 555 U.S. 460, 472473 (2009) (monuments "are meant to convey and have the effect of conveying a government message").

Here, it is undisputed that the Church's religious symbols are private speech, and that the District chose the Church on religion-neutral grounds. The majority's finding of endorsement thus attributes "*private* religious expression" "to a neutrally behaving government" - contrary to *Capitol Square Review & Advisory Board v. Pinette,* 515 U.S. 753, 764 (1995) (plurality).

Next, Respondents argue that this Court's funding and forum cases are irrelevant, because the District "is [not] distributing public funds," and "there is no public forum here." BIO 19-21. But this argument misses the point. The broader question in those cases is whether government "endorses" religion when it treats religious and nonreligious institutions neutrally. The *en banc* majority said "yes." This Court's funding and forum cases uniformly say "no." Pet. 20-21.

Nor is this case meaningfully distinguishable from those cases. The District does not, as Respondents ***8** suggest, "select[] one venue annually" for all outside events. BIO 20. Rather, it holds nearly 100 outside events each year at a variety of rented venues selected on a religion-neutral basis. See, *e.g.,* C.A. App. 136, 607. The fact that one venue out of a hundred is religious does not "endorse" religion any more than the fact that one funding recipient out of a hundred is religious. Cf. *Zelman v. Simmons-Harris,* 536 U.S. 639, 652, 658 (2002) (no "endorsement" where 96% of voucher recipients attended religious schools).

Ultimately, the *en banc* decision would require the District to discriminate *against* religion. Pet. 21. The District would be required to place a thumb on the scale *against* any venue with religious imagery, even if it were objectively superior. Such discrimination is not, as Respondents claim, "the fundamental premise of the Establishment Clause." BIO 22 (quoting *Allegheny*). Rather, it "foster[s] a pervasive bias or hostility to religion," which "undermine[s] the very neutrality the Establishment Clause requires." *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 845-846 (1995).

2. Lower courts are divided over when private religious speech can be attributed to the government. Contrary to the decision below, four circuits have held that a reasonable observer *cannot* attribute private religious expression to the government when the government treats religion neutrally. Pet. 25-26. Respondents do not dispute this characterization of the circuits; instead, they claim that the decisions are irrelevant because they involved "a public forum" or government "funding." BIO 20-21. But as explained above, this case is not meaningfully distinguishable from the forum or funding cases.

***9** 3. The decision also widens an "unresolved dispute *** within various circuits *** [over] the proper level of understanding to impute onto our mythical reasonable observer." *Freedom from Religion Found., Inc. v. City of Marshfield,* 203 F.3d 487, 495 n.2 (7th Cir. 2000). Respondents claim that this split is based on "outdated decisions," and that this Court recently "clarified" the issue by holding that the reasonable observer "'must be deemed aware of the history and context' of a challenged practice." BIO 23 (quoting *McCreary Cnty. v. ACLU of Ky.,* 545 U.S. 844 (2005)).

But this supposed "clarification" is nothing new. The endorsement test has *always* assumed that the reasonable observer is aware of the "history" and "context" of "a challenged governmental practice." *Allegheny,* 492 U.S. at 630 (O'Connor, J., concurring). The problem is that this test is "flawed in its fundamentals and unworkable in practice." *Id.* at 669 (Kennedy, J., concurring and dissenting).

If the circuits "now consistently apply this standard," BIO 23, that fact has been lost on them. They continue to lament the "[c]onfounded" state of " 'Establishment Clause purgatory,' " *Card v. City of Everett,* 520 F.3d 1009, 1016 (9th Cir. 2008), and the "judicial morass resulting from the Supreme Court's opinions," *Green v. Haskell Cnty. Bd. of Comm'rs,* 574 F.3d 1235, 1235 n.1 (10th Cir. 2009) (Kelly, J., dissenting from denial of rehearing *en banc*). Even two of the four decisions held up by Respondents as models of clarity (BIO 23) lament that courts "remain in Establishment Clause purgatory," *ACLU of Ky. v. Mercer Cnty.,* 432 F.3d 624, 636 (6th Cir. 2005), and that "splintered" decisions and "divided precedent" force courts "to rely on 'little more than intuition and a tape measure.' " ***10** *Skoros v. City of N. Y.,* 437 F.3d 1, 13, 15 (2d Cir. 2006).

4. The lower court's expansion of the "endorsement" test is particularly troubling given that several Justices have called for rejecting that test, and the Court has relied on it to invalidate government action only twice, both times in cases

later undermined or overruled. Pet. 22-24. Respondents argue that "this case does not present a good vehicle" for considering the endorsement test, because they assert a hodgepodge of other Establishment Clause theories. BIO 25-26. But Respondents' coercion theory is incorrect, and any alternative theory, if still live (doubtful) or meritorious (even more doubtful), can be addressed on remand. The validity of the endorsement test is squarely presented.

IV. This Case Presents a Recurring Question of National Importance.

Respondents concede that the issue presented is "important," BIO 30, and that school districts across the Nation will now face liability for holding "important ceremonial events," BIO i, in churches. Yet Respondents nonetheless insist that the *en banc* decision was "limited" and "fact-sensitive," BIO 27, because the majority described its holding as "narrowly focused" on "the set of facts before [it]," App. 3a-5a.

But merely labeling a decision "narrow" does not make it so, because a court "cannot disavow the logical implications of [its] decisions." App. 65a (Easterbrook, C.J., dissenting). The *en banc* court broadly held that conducting "seminal" public events in a church "necessarily conveys a message of endorsement." App. 20a-21a.

Even Respondents admit that this holding sweeps well beyond the facts of this case. In their view, the ***11** decision forbids *any* "important ceremonial event" in a church unless (1) "the facility lacks religious iconography or covers or removes religious items," or (2) there are "exigent circumstances" such as "a natural disaster." BIO i, 27. Because almost all churches have "religious iconography" and schools routinely use them absent "exigent circumstances," that rule would prohibit a vast array of common practices. See Pet. 30-31.

Moreover, as Respondents admit, the logic of the opinion extends beyond graduations to encompass "important ceremonial events," BIO i - a formulation that would certainly implicate voting in churches. Indeed, the *en banc* majority refused to rule out challenges to voting, saying only that voting in "certain church-owned facilities" would be permissible "in the proper context." App. 4a. But if voting occurs in the "[]consecrated parts of the church," or "there are [no] ready alternatives," it is now constitutionally suspect. App. 40a. This rule has "profound consequences for all levels of state and local government." Texas *et al. Amici* Br. at 2.

To the extent that the decision below *could* be considered fact-sensitive, that makes matters worse. What if the cross appeared only in the lobby? Or only atop the steeple? What if there were fewer banners or brochures? Such a "jurisprudence of minutiae" forces courts to decide important constitutional questions based on "little more than intuition and a tape measure." *Allegheny,* 492 U.S. at 674-679 (Kennedy, J., dissenting).

Ultimately, Respondents' arguments come down to this: It is too early to say "what the decision's impact might be" and unclear "whether other circuits ***12** [will] even agree with it at all." BIO 30. But the impact of the decision is *already* "profound." Texas *et al. Amici* Br. at 2. Other circuits are *already* in disarray over the legal standards. Percolation will not clarify this pure question of law. Besides, after the decision below, only a rare school district would risk $400,000 in attorneys' fees to save $15,000 in graduation costs. Cf. Kristen Stoller, *Board to Pay Legal Fees in Settlement,* Hartford Courant (July 24, 2012) (settlement required $469,610.50 in attorneys' fees).

CONCLUSION

The petition for a writ of certiorari should be granted.

Footnotes

* Counsel of Record

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2013 WL 1309087 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

BIG SKY COLONY, INC., and Daniel E. Wipf, Petitioners,
v.
MONTANA DEPARTMENT OF LABOR AND INDUSTRY.

No. 12-1191.
April 1, 2013.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

Petition for a Writ of Certiorari

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*i QUESTIONS PRESENTED

1. Whether the Free Exercise Clause requires a plaintiff to demonstrate that the challenged law singles out religious conduct or has a discriminatory motive, as the First, Second, Fourth, and Eighth Circuits and Montana Supreme Court have held, or whether it is instead sufficient to demonstrate that the challenged law treats a substantial category of nonreligious conduct more favorably than religious conduct, as the Third, Sixth, Tenth, and Eleventh Circuits and Iowa Supreme Court have held.

2. Whether the government regulates "an internal church decision" in violation of the Free Exercise Clause, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,* 132 S. Ct. 694 (2012), when it forces a religious community to provide workers' compensation insurance to its members in violation of the internal rules governing the community and its members.

*II PARTIES TO THE PROCEEDINGS

Petitioner Big Sky Colony, Inc., is an apostolic association and member colony of the Hutterian Brethren Church. Petitioner Daniel E. Wipf is the Colony's lead minister. Petitioners were plaintiffs-appellees below. Petitioner Big Sky Colony, Inc., has no parent corporation and issues no stock.

Respondent Montana Department of Labor and Industry is an agency of the State of Montana. Respondent was defendant-appellant below.

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*1 PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the Montana Supreme Court.

OPINIONS BELOW

The opinion of the Montana Supreme Court appears at 291 P.3d 1231. App. la. The opinion of the Montana district court is unpublished. App. 53a.

JURISDICTION

The Montana Supreme Court rendered its decision on December 31, 2012. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ***."

The relevant portions of the Montana Workers' Compensation Act, Mont. Code Ann. § 39-71, are reprinted in the Appendix. App. 93a-141a.

STATEMENT

This case involves an attempt by the State of Montana to force a small religious community of Hutterites to participate in the State's workers' compensation scheme, in direct violation of 500 years of Hutterite religious practice. In a sharply

divided 4-3 decision, the Montana Supreme Court upheld the State's action under the Free Exercise Clause on the ***2** ground that it was not motivated by "discrimination against religious organizations." App. 19a.

This ruling widens a square, well-developed circuit split over the proper legal standard governing claims under the Free Exercise Clause. It also conflicts with a long line of cases from this Court and federal and state appellate courts protecting the right of internal church governance. This case presents an ideal vehicle for resolving these significant conflicts on matters of national importance.

1. Petitioner Big Sky Colony ("Colony") is a member colony of the Hutterian Brethren Church. Petitioner Daniel E. Wipf is the Colony's lead minister.

The Hutterian Brethren Church was founded in the 1530s by Jakob Hutter, who in 1536 was burned at the stake by Ferdinand I in Innsbruck, Austria, for refusing to recant his Anabaptist beliefs. After suffering severe persecution in Europe, the Hutterites emigrated to North America in the 1870s in search of religious freedom. During World War I, many Hutterites in the United States were jailed because of their pacifism, and two died from brutal mistreatment in prison. John W. Bennett, *Hutterian Brethren: The Agricultural Economy and Social Organization of a Communal People* 32 (Stanford Univ. Press 1967).

In North America, Hutterites are organized into three branches: the *Schmiedeleut, Dariusleut,* and *Lehrerleut.* Petitioners are part of the *Lehrerleut,* the most traditional and religiously orthodox branch.

The *Lehrerleut* Hutterites live in remote religious communes called colonies. Each colony consists of several Hutterite families, typically totaling 100-150 individuals. To support themselves, colony members live simply and operate a communal farm. App. 148a- ***3** 149a. The harvest is used to feed the members, and the excess is sold to other colonies or non-members. *Ibid.* There are approximately thirty-five *Lehrerleut* colonies in Montana, all of which share the same religious beliefs as Petitioner Big Sky Colony.

Daily life in the colonies is regulated much like a monastery or convent. Families live in identical dwelling units surrounding a communal nursery, school, and dining hall. They eat their meals together in the communal dining hall. They attend daily worship services in the communal church. They educate their children in the communal school. They work together on the communal farm. They wear the same homemade clothing. They speak a unique German dialect, refrain from voting, and have limited contact with the outside world. App. 148a-149a.

The defining feature of the Hutterites, and the one that has separated them from all other Christian groups for almost 500 years, is their radical commitment to *Güitergemeinschaft,* or "community of goods." Hutterites believe that true Christian love requires all members to renounce private property and hold all their possessions in common. This belief is based on a literal interpretation of the biblical Book of Acts, which describes how early Christians sold their possessions, lived communally, and distributed to anyone who had need. Peter Riedemann, *Peter Riedemann's Hutterite Confessions of Faith* 120-21 (John Friesen ed., Herald Press 1999) (1565) (discussing *Acts* 2:44-47 and 4:32-35).

Accordingly, all Hutterites renounce any claim to real or personal property and transfer all their property to the colony. App. 180a-181a, 221a-223a. Members receive food, clothing, and other necessities under ***4** the supervision of a steward (*Diener der Notdurft,* literally "servant of need"), who manages the Colony's possessions. Robert Friedmann, *Hutterite Studies* 115-18 (Hutterian Brethren Book Center 2d ed. 2010) (1961). Each member also vows to devote all of his or her time, labor, and energy to the colony "without compensation or reward of any kind whatsoever." App. 182a; see also App. 221a-223a, 149a. This voluntary sharing of labor, like the sharing of property, is an act of religious worship. App. 149a.

Hutterite members also renounce the use of the legal system to assert claims against each other or the community. App. 224a-225a. In a community with no private ownership, there can be no ownership of a legal claim against the community. Friedmann, *supra,* at 138. Thus, legal claims between believers are forbidden. Riedemann, *supra,* at 138 (citing *1 Corinthians* 6:7-8).

All of these commitments are embodied in the colony's *Bund,* or covenant, which each member can voluntarily sign upon reaching the age of eighteen. App. 221a-225a. Members who violate the *Bund* are subject to excommunication. App. 223a.

The absolute community of goods also extends to communal provision of medical care. Hutterite colonies have pooled their resources to form the Hutterite Medical Trust, a cooperative medical trust that provides comprehensive, modern medical care to all members. App. 149a-150a. All members receive the same care regardless of their ability to work or the reason for their illness or injury. *Ibid.*

2. Like other states, Montana has a Workers' Compensation Act ("Act"), which provides "wage-loss and medical benefits to a worker suffering from a ***5** work-related injury or disease." Mont. Code Ann. § 39-71-105(1). The Act is part of a "quid pro quo" between employers and employees. *State Farm Fire and Cos. Co. v. Bush Hog, LLC,* 219 P.3d 1249, 1253 (Mont. 2009). Employers receive immunity from tort suits for workplace negligence; in return, employees receive guaranteed compensation for workplace injuries regardless of fault. *Ibid.*

Under the Act, certain employers must provide workers' compensation coverage to their employees, either through self-insurance, private insurance, or a state fund. Mont. Code Ann. §§ 39-71-2101, 2201, 2311. An employee who suffers a work-related injury is entitled to assert a claim and receive compensation. *Id.* at § 39-71-407. Employees are not permitted to waive their rights under the Act, *id.* at § 39-71-409(1), and employers are prohibited from terminating workers for filing a claim, *id.* at § 39-71-317.

Montana was one of the first states to adopt a comprehensive workers' compensation law in 1915. *State Farm,* 219 P.3d at 1253 n.1. For the first 94 years, Hutterite colonies were exempt. As the Montana Department of Labor and Industry explained, because "the Colony did not pay 'wages' to its members," "the Colony did not fall within the definition of 'employer,' " and "the Colony's members did not fall within the definition of 'employee.' " App. 4a. Throughout that time, there is no record of any Hutterite member ever being injured on the job and failing to receive comprehensive medical care, or any member ever seeking to assert a workers' compensation claim.

3. In 2009, the Montana Legislature amended the Act to include the Hutterites. The amendments were ***6** introduced at the request of several construction companies, which complained that Hutterite colonies received an unfair advantage by performing construction jobs without paying workers' compensation costs. App. 227a. As the sponsor of the amendments explained: "[T]his section [of the bill applies to] Hutterite colonies who frequently bid on and perform jobs, often in the construction industry ***. [The Hutterites] avoid the payment of wages and avoid the payment, therefore, of workers' compensation costs[,] thereby gaining a competitive advantage." App. 58a. Because the Hutterites shun politics and were not consulted during the drafting process, they were never able to inform the Legislature that they already provide more comprehensive medical insurance than the Act requires.

To include the Hutterites under the Act, Section 6 of House Bill 119 amended the definition of "employer" to include:

> (d) a religious corporation, religious organization, or religious trust receiving remuneration from nonmembers for agricultural production, manufacturing, or a construction project conducted by its members on or off the property of the religious corporation, religious organization, or religious trust.

Mont. Code Ann. § 39-71-117(1). Similarly, Section 7 of the Bill amended the definition of "employee" to include:

> (i) a member of a religious corporation, religious organization, or religious trust while performing services for the religious corporation, religious organization, or religious trust, as described in 39-71-117(1)(d).

***7** Mont. Code Ann. § 39-71-118(1).

The State concedes that these amendments were designed to extend coverage of the Act to the Hutterites. App. 326a. There is also no evidence that these amendments affect any other secular or religious organization in the State. App. 42a.

Despite these amendments, the Act continues to include twenty-six exemptions for various types of employment. Mont. Code Ann. § 39-71-401(2)(a)-(z). These include, for example: "household or domestic" employees; "independent contractor[s]," "sole proprietor[s]," and members of a partnership, LLP, or LLC; "real estate, securities, or insurance salesperson[s]"; railroad workers; "timer[s], referee[s], umpire[s], or judge[s], at an amateur athletic event"; "newspaper carrier[s]"; "freelance correspondent[s]"; "cosmetologist[s]" and "barber[s]"; horseracing jockeys and trainers; "petroleum land professional [s]"; officers or managers of "ditch compan[ies]"; certain common carriers or motor carriers; athletes engaged in a contact sport; and musicians performing under a written contract. *Ibid.*

The Act also includes two exemptions that would seem to protect the Hutterites. First, the Act exempts any service performed "by a member of a religious order in the exercise of the duties required by the order." *Id.* at § 39-71-401(2)(t). Second, it exempts "employment of a person performing services in return for aid or sustenance only." *Id.* at § 39-71-401(2)(h). However, the State interprets neither exemption to protect the Hutterites.

4. On January 8, 2010, the Colony and its minister, Daniel E. Wipf, filed a "Petition for Declaratory Relief" in Montana state court, seeking a declaration ***8** that the amendments to the Workers' Compensation Act violate the First Amendment. The parties filed cross-motions for summary judgment and agreed that no material facts were in dispute.

The Colony made two main arguments. First, it asserted that the Act was neither "neutral" nor "generally applicable" under *Employment Division v. Smith,* 494 U.S. 872 (1990), because it was gerry-mandered to apply to the Hutterites while exempting a wide variety of similar secular and religious conduct. App. 243a-249a, 261a. Second, it argued that the Act unconstitutionally regulated its "internal church decision[s]" in violation of *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 132 S. Ct. 694, 707 (2012). App. 247a-248a.

The Colony did not claim a general right to be free from regulation of its economic activities. In fact, its agricultural production has long been heavily regulated by the State, without complaint. App. 26a-27a. Nor did the Colony claim that the Act imposed a financial burden on its operations. The Colony's health insurance plan already provides members with significantly more comprehensive coverage than the Act requires, at great expense to the Colony; thus, the Act imposes "very little additional costs [on the Hutterites] *** if it costs more at all." App. 270a.

Instead, the Colony objected to the fact that the Act regulates the internal relationship between the Colony and its members. For almost 500 years, Hutterite doctrine has required all members to renounce private property, to work freely without compensation, and to abstain from asserting legal claims against fellow members. Contrary to these teachings, the Act gives individual members a private, ***9** unwaivable right to compensation; it compels the Colony to compensate its members for their work; and it creates a legal claim between the Colony and its members. The Act also forbids employers from terminating employees for asserting a claim, thus making it illegal for the Colony to discipline members who violate church teaching.

In response, the State acknowledged that the Act "admittedly is directed towards 'religious organizations,' *** primarily the Hutterites." App. 326a. But it claimed that the Act was neutral and generally applicable "because it does not

intentionally 'infringe upon or restrict practices *because of* their religious motivation.' " App. 311a (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993)). The State also acknowledged that "a law requiring Hutterites to buy consumer goods or pay its members a wage *** would likely interfere 'with the internal governance of the [Colony]' " in violation of *Hosanna-Tabor,* 132 S. Ct. at 706. App. 282a. Nevertheless, it claimed that the workers' compensation requirement was different, because it "only affects the relationship between the [Colony] and the workers' compensation system." App. 275a (quoting *St. John's Lutheran Church v. State Comp. Ins. Fund,* 830 P.2d 1271, 1278 (Mont. 1992)). Finally, the State argued that the Act furthered a compelling interest in "creat[ing] a level playing field *** between religious and secular organizations competing in [commercial activities]." App. 319a; see also App. 316a-317a.

The district court granted summary judgment to the Colony. It held that the Act was not "neutral and generally applicable," because it "was designed specifically to address Hutterites" and "drafted with such care to apply to only Hutterites." App. 75a-76a. It also ***10** found that the Act impermissibly interfered in the internal governance of the Colony, by creating an "employer-employee relationship between members of the Colony and the Colony" and infusing "property rights concepts [that are] forbidden by the fundamental communal living and community of goods doctrine upon which the [Colony] is founded." App. 74a. Finally, the court held that the Act furthered no legitimate purpose, because Hutterites are forbidden by their religion from asserting a workers' compensation claim, and if any member did so, they would be required to relinquish any benefits to the Colony. App. 77a.

5. In a sharply divided, 4-3 decision, the *en banc* Montana Supreme Court reversed. According to the majority, the Act was neutral and generally applicable because it did not "single out religious beliefs," and did not "regulate or prohibit any conduct 'because it is undertaken for religious reasons' "; it merely included the Colony in a regulatory system that "generally applies" to other employers. App. 18a-19a Thus, the Colony "fail[ed] to establish evidence of discrimination." App. 19a.

The dissenters rejected the notion that the Colony was required to prove singling out or discriminatory motive. App. 42a-43a. Instead, it was enough to prove that the Act "applies to the religious structure of the Hutterites" but not to "other religious organization[s]." *Ibid.* It was also enough to prove that the Act, by exempting a wide variety of nonreligious employment, "fails to prohibit nonreligious conduct that endangers the State's purported government interests" just as much as the Hutterites' conduct would. App. 47a. "The failure to draft [the amendments] in a ***11** generally applicable manner necessarily requires strict scrutiny review." App. 44a.

The dissent also concluded that the Act "interferes with the internal relationship between the Colony and its members." App. 49a. Specifically, "the Act requires injured employees to initiate and thus 'own' a claim against the employer," in direct violation of "the central tenets of the Hutterite faith." *Ibid.* This, according to the dissent, interferes in "the relationship between a religious entity and its members" in violation of *Hosanna-Tabor,* 132 S. Ct. 694. App. 49a-50a.

Finally, the dissent concluded that the Act could not survive strict scrutiny. Although the State claimed that the Act furthered its interest in creating a level playing field among Montana businesses, that interest had nothing to do with the actual purpose of the Workers' Compensation Act - "providing care and rehabilitation to injured workers." App. 46a-47a. The State also failed to show that the Act would address the level-playing-field concern, because the Colony already provided expensive, comprehensive, no-fault health insurance to its members. *Ibid.* Finally, the dissent concluded that the Act ultimately served no purpose at all, because the State admitted that Colony members would either refrain from filing claims or would be required to turn over all compensation to the Colony - "the very definition of illusory coverage that 'defies logic' and violates public policy." App. 50a.

REASONS FOR GRANTING THE PETITION

In *Smith,* 494 U.S. 872, and *Lukumi,* 508 U.S. 520, this Court held that a law is subject to strict scrutiny under the Free Exercise Clause if it is not "neutral" and "generally applicable." But in the wake of *Smith* and *Lukumi,* "[t]he federal

circuits have ***12** split on whether *Lukumi* requires an *object to infringe upon religious practice* before a law must be supported by a compelling government interest." Sarah Waszmer, *Taking It out of Neutral: The Application of* Locke*'s Substantial Interest Test to the School Voucher Debate,* 62 Wash. & Lee L. Rev. 1271, 1285 (2005) (emphasis added); see also Douglas Laycock, *The Supreme Court and Religious Liberty,* 40 Cath. Law. 25, 26 (2000) (noting "considerable disagreement over what exactly [*Lukumi*] means").

Five circuits or state supreme courts hold that a law is subject to strict scrutiny only if it singles out religious conduct for adverse treatment or has a discriminatory motive. *Strout v. Albanese,* 178 F.3d 57, 65 (1st Cir. 1999); *Skoros v. City of N. Y.,* 437 F.3d 1, 39 (2d Cir. 2006); *Bethel World Outreach Ministries v. Montgomery Cnty. Council,* 706 F.3d 548, 561 (4th Cir. 2013); *Olsen v. Mukasey,* 541 F.3d 827, 832 (8th Cir. 2008); App. 18a-19a. In these circuits, the plaintiff must prove that the law targets conduct for uniquely adverse treatment "because of [its] religious motivation," *Bethel,* 706 F.3d at 561; *Olsen,* 541 F.3d at 832; App. 19a, or that the law was motivated by "substantial animus against [religion]," *Strout,* 178 F.3d at 65. This approach focuses on the "neutrality" portion of *Lukumi,* without giving independent significance to the requirement of "general applicability."

By contrast, five other circuits or state supreme courts reject the requirement of singling out or discriminatory motive, instead holding that a law is subject to strict scrutiny if it treats a substantial category of nonreligious conduct more favorably than similar religious conduct. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,* 170 F.3d 359 (3rd Cir. 1999) (Alito, J.); ***13** *Ward v. Polite,* 667 F.3d 727, 738-40 (6th Cir. 2012) (Sutton, J.); *Shrum v. City of Coweta, Okla.,* 449 F.3d 1132 (10th Cir. 2006) (McConnell, J.); *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1234-35 (11th Cir. 2004); *Mitchell Cnty. v. Zimmerman,* 810 N.W.2d 1 (Iowa 2012). These circuits maintain that the requirements of "neutrality" and "general applicability" are distinct.

In this case, the Montana Supreme Court sided with the circuits that require singling out or discriminatory motive, thus widening a square and well-developed split. This case presents an ideal vehicle for resolving that conflict.

The decision below also warrants this Court's review because it conflicts with a long line of cases protecting the right of churches to govern their internal affairs. As this Court held most recently in *Hosanna-Tabor,* 132 S. Ct. 694, even when a law is neutral and generally applicable, it cannot regulate "an internal church decision that affects the faith and mission of the church itself." *Id.* at 707. Here, however, the decision below authorizes the government to create individual property rights and an adversarial right of compensation between Hutterite colonies and their members - in direct violation of 500 years of internal Hutterite governance. That decision cannot be squared with *Hosanna-Tabor* or the long line of decisions protecting internal church governance.

I. The decision below deepens a conflict over the legal standard governing whether a law is "neutral" and "generally applicable" under the Free Exercise Clause.

Federal circuits and state supreme courts are evenly divided over the legal standard governing ***14** claims under the Free Exercise Clause. Five jurisdictions hold that a showing of singling out or discriminatory motive is a *necessary* prerequisite for strict scrutiny. Five others hold that a showing of singling out or discriminatory motive is not necessary; instead, it is enough to show that a law treats a substantial category of nonreligious conduct more favorably than similar religious conduct. The conflict is deep, well-developed, and entrenched, and it has produced conflicting results in indistinguishable cases.

A. The federal circuits and state supreme courts are evenly divided over whether a free exercise plaintiff must demonstrate singling out or discriminatory motive to prove that a law is not "neutral" and "generally applicable."

The Montana Supreme Court has now joined the First, Second, Fourth, and Eighth Circuits in holding that a law is subject to strict scrutiny under the Free Exercise Clause only if singles out religious conduct or has a discriminatory motive. *Strout,* 178 F.3d at 65; *Skoros,* 437 F.3d at 39; *Bethel,* 706 F.3d at 561; *Olsen,* 541 F.3d at 832; App. 18a-19a. Under this approach, the plaintiff must demonstrate that "the *object* of [the law] was to burden practices *because of their religious motivation,*" *Bethel,* 706 F.3d at 561 (emphasis added) - either by showing that the law targets religious conduct for a unique prohibition, or that it was driven by a discriminatory motive. See *Olsen,* 541 F.3d at 832 (plaintiff failed to demonstrate that the "object [of the law] is to infringe upon or restrict practices because of their religious motivation") (internal quotation omitted); *Strout,* 178 F.3d at 65 (plaintiff failed to prove "substantial animus against [religion] that motivated the law in question"); ***15** *Skoros,* 437 F.3d at 39 (plaintiffs "fail[ed] to demonstrate that the purpose of the defendants' challenged actions was to impugn [plaintiffs'] religious beliefs or to restrict their religious practices."); see also *St. Bartholomew's Church v. City of N. Y.,* 914 F.2d 348, 354 (2d Cir. 1990) (plaintiff failed to provide "evidence of an intent to discriminate against, or impinge on, religious belief"); *Cornerstone Bible Church v. City of Hastings,* 948 F.2d 464, 472 (8th Cir. 1991) (plaintiff failed to provide "evidence that the [government] has an anti-religious purpose").

By contrast, the Third, Sixth, Tenth, and Eleventh Circuits, along with the Iowa Supreme Court, have rejected the requirement that a plaintiff demonstrate singling out or discriminatory motive. *Fraternal Order of Police,* 170 F.3d at 359; *Ward,* 667 F.3d at 738-40; *Shrum,* 449 F.3d at 1132; *Midrash,* 366 F.3d at 1234-35; *Mitchell Cnty.,* 810 N.W.2d at 1. As the Tenth Circuit has explained: "Proof of hostility or discriminatory motivation may be *sufficient* to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus." *Shrum,* 449 F.3d at 1145 (McConnell, J.) (emphasis added; citations omitted). In these circuits, it is enough to prove that the government exempts "a substantial category of [nonreligious] conduct" that "undermines the purposes of the law to at least the same degree as the [prohibited religious] conduct [would]." *Blackhawk v. Pennsylvania,* 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.).

The leading case adopting the latter approach is *Fraternal Order of Police.* There, a police department adopted a grooming policy prohibiting officers from growing beards; the purpose of the policy was to "foster[] a uniform appearance" among the police force. ***16** 170 F.3d at 366. Although the policy included an exception for beards grown for medical reasons, the department refused to grant an exception for beards grown for religious reasons. In an opinion by then-Judge Alito, the Third Circuit held that the no-beard policy violated the Free Exercise Clause. *Id.* at 364-66. Although there was no evidence of singling out or anti-religious motive, the court held that strict scrutiny was required because the exemption for medical reasons "undermines the Department's interest in fostering a uniform appearance" just as much as an exemption for religious reasons would. *Id.* at 366.

The reasons for this rule are twofold. First, granting an exemption for secular conduct, but not analogous religious conduct, represents a "value judgment in favor of secular motivations, but not religious motivations." *Ibid.* Such a value judgment requires strict scrutiny. *Ibid.*; cf. *Lukumi,* 508 U.S. at 537-38 (ordinance was subject to strict scrutiny because it "devalues religious reasons *** by judging them to be of lesser import than nonreligious reasons"). Second, part of the rationale for *Smith* is that if burdensome laws apply to secular and religious conduct alike, religious minorities are more likely to be protected through "the political process." *Smith,* 494 U.S. at 890. But if the government can make exemptions for favored political groups, the "vicarious political protection [for religious groups] breaks down." Laycock, 40 Cath. Law. at 36. The law becomes "a prohibition that society is prepared to impose upon [religious adherents] but not upon itself," which is the "precise evil [that] the requirement of general applicability is designed to prevent." *Lukumi,* 508 U.S. at 545-46.

Following *Fraternal Order of Police,* three other circuits and one state supreme court have held that a ***17** law is not generally applicable when it exempts nonreligious conduct that undermines the government's interest just as much as the prohibited religious conduct would. See *Ward,* 667 F.3d at 738-40 (Sutton, J.); *Blackhawk,* 381 F.3d at 211 (Alito, J.); *Midrash,* 366 F.3d at 1234-35; *Shrum,* 449 F.3d at 1144-45 (McConnell, J.); *Mitchell Cnty.,* 810 N.W.2d at 3. None of these courts requires the plaintiff to demonstrate singling out or discriminatory motive. Contra *Hines v. S.C. Dep't*

of Corr., 148 F.3d 353, 356-57 (4th Cir. 1998) (upholding a grooming policy banning beards, despite an exemption for "medical condition[s]," on the ground that the Free Exercise Clause prohibits only "laws designed to suppress religious beliefs or practices").

This conflict is square and entrenched, and it has been recognized not only by courts but also by commentators. As one scholar has noted, "we have the *Smith*/*Lukumi* test, but we have considerable disagreement over what exactly that test means." Laycock, 40 Cath. Law. at 26. Similarly, other commentators have noted that "[t]he federal circuits have split on whether *Lukumi* requires an object to infringe upon religious practice before a law must be supported by a compelling government interest," and "the Supreme Court has not addressed this split." Waszmer, 62 Wash. & Lee L. Rev. at 1285.

B. The decision below conflicts with other state supreme courts and federal circuit courts.

In this case, the Montana Supreme Court sided with the circuits that require a showing of singling out or discriminatory motive. According to the majority, a law is subject to strict scrutiny "*only* when [it] ***18** impermissibly singles out 'some or all religious beliefs or regulates or prohibits conduct *because it is undertaken for religious reasons.*' " App. 18a (quoting *Lukumi,* 508 U.S. at 532) (emphasis added). The majority held that "the workers' compensation requirement does not place the Colony members in a discriminatory position compared to other religious groups," and "[t]he legislature did not conceive of the workers' compensation system as a means to shackle the religious practices of Colony members," App. 8a-9a (emphasis added). Thus, the Colony "fail[ed] to establish evidence of discrimination against religious organizations." App. 19a.

This decision cannot be squared with the decisions of the Third, Sixth, Tenth, or Eleventh Circuits, or the Iowa Supreme Court, all of which reject the requirement of singling out or discriminatory motive. Under these decisions, the key question is whether the law exempts "a substantial category of [nonreligious] conduct" that "undermines the purposes of the law to at least the same degree as the [prohibited religious] conduct [would]." *Blackhawk,* 381 F.3d at 209 (Alito, J.).

Here, the Workers' Compensation Act exempts twenty-six different types of employment relationships, many of which undermine the State's alleged interests far more than an exemption for the Hutterites would. For example, the Act exempts domestic workers; independent contractors; sole proprietors; members of partnerships, LLPs, or LLCs; real estate, securities, or insurance salespersons; railroad workers; timers, referees, umpires, or judges at amateur athletic events; newspaper carriers; freelance correspondents; cosmetologists and barbers; horseracing jockeys and trainers; petroleum land professionals; ***19** officers or managers of ditch companies; certain common carriers or motor carriers; athletes; and musicians. Mont. Code Ann. § 39-71-401(2)(a)-(z). Beyond that, the Act exempts any person "performing services in return for aid or sustenance only," and any "member of a religious order in the exercise of duties required by the order." *Id.* at § 39-71-401(2)(h), (t).

These exemptions undermine the State's supposed interest in a "level playing field" even more than an exemption for the Colony would. For example, businesses organized as a partnership, LLP, or LLC can perform any commercial activity - including the activities performed by the Hutterites - without providing workers' compensation to their members. *Id.* at § 39-71-401(2)(d), (3). Secular communes can engage in farming just like the Hutterites without providing workers' compensation. *Id.* at § 39-71-401(2)(h). And a Catholic monastery or other religious order can engage in the same work as the Hutterites without providing workers' compensation. *Id.* at § 39-71-401(2)(t). All of these relationships are exempt from the Act, even if the employer - unlike the Hutterites - does *not* provide comprehensive medical care to its employees. As the dissenters pointed out: "These exemptions are contrary to the governmental interests asserted by the State," and prevent the State from establishing a "level playing field" across all areas of commerce. App. 46a-48a.

Under the legal standard employed by the Third, Sixth, Tenth, and Eleventh Circuits, and the Iowa Supreme Court, this would be an easy case. In *Fraternal Order of Police,* for example, the police department's prohibition on beards included only one exemption for a narrow slice of secular conduct that ***20** undermined the government's interest - beards grown

for medical reasons. 170 F.3d at 366. Growing a beard for other secular or religious reasons was prohibited. But here, the Act includes twenty-six exemptions for a vast swath of secular and religious conduct, including conduct identical to, and far more detrimental to the State's interests than, that of the Hutterites. Thus, even more than in *Fraternal Order of Police,* the State has made a "value judgment" in favor of secular conduct and against the Hutterites - a value judgment that requires strict scrutiny. *Ibid.*

Other circuits have likewise subjected laws to strict scrutiny, even when the secular exemptions were far narrower and more modest than those at issue here. See *Ward,* 667 F.3d at 738-40 (prohibition on referring counseling patients was not generally applicable where it exempted "multiple types of referrals" for secular reasons, but not religious reasons); *Blackhawk,* 381 F.3d at 211 (wildlife permitting fee was not generally applicable where it exempted zoos and circuses, but not Native Americans); *Midrash,* 366 F.3d at 1234-35 (zoning code was not generally applicable where it exempted private clubs, but not synagogues); *Mitchell Cnty.,* 810 N.W.2d at 3 (prohibition on steel wheels was not generally applicable where it exempted school buses, but not Mennonite tractors). The decision below cannot be squared with these cases.

C. The decision below conflicts with this Court's cases.

The decision below also conflicts with this Court's free exercise cases. Those cases establish that while a showing of singling out or discriminatory motive may be *sufficient* to merit strict scrutiny, it is not *neces* ***21** *sary.* Strict scrutiny is also required where the government treats a substantial category of nonreligious conduct more favorably than similar religious conduct.

1. The leading case is *Lukumi.* There, the Court considered four municipal ordinances that restricted the killing of animals. 508 U.S. at 526-28. The question was whether the ordinances violated the rights of a Santeria priest, who sacrificed animals as part of his religious practice. In a 9-0 decision, this Court held that the ordinances were neither neutral nor generally applicable.

The Court's analysis proceeded in two parts. First, the Court held that the ordinances were not "neutral" because they "had as their object the suppression of religion." 508 U.S. at 542. This object was apparent, the Court said, because the ordinances "singled out [religious conduct] for discriminatory treatment." *Id.* at 537-38. In a separate section of the opinion, Justice Kennedy also considered "direct" evidence of "discriminatory object" - namely, comments by government officials expressing "significant hostility" toward Santeria adherents. *Id.* at 540-42. But this section of the opinion was joined by only one other Justice.

Next, the Court held that the ordinances were not "generally applicable." *Id.* at 542-45. The Court said that it "need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall *well below the minimum standard* necessary to protect First Amendment rights." *Id.* at 543 (emphasis added). In particular, the ordinances were not generally applicable because they included exemptions for "[m]any ***22** types of animal deaths or kills for nonreligious reasons." *Id.* at 543. Thus, they "fail[ed] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree than Santeria sacrifice does." *Ibid.*

2. The decision below, like the First, Second, Fourth, and Eighth Circuits, held that *Lukumi* requires strict scrutiny "*only* when the regulation impermissibly singles out 'some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.' " App. 18a (quoting *Lukumi,* 508 U.S. at 532) (emphasis added). According to this view, *Lukumi* requires affirmative "evidence of discrimination." App. 19a.

But this view ignores the second half of *Lukumi* (on general applicability) in favor of the first. In the first half, of course, the Court held that singling out religious conduct is *sufficient* to prove a lack of neutrality. 508 U.S. at 532; see also *ibid.* (Free Exercise Clause prohibits discrimination "*[a]t a minimum*") (emphasis added). But the Court did not stop there. It also held that the ordinances fell "well below the minimum standard" of general applicability, because they exempted

"[m]any types of animal deaths or kills for nonreligious reasons." 508 U.S. 543. This holding depended *not* on singling out, but on "unequal treatment" of similar religious and nonreligious conduct. *Id.* at 542-45.

Nor did the Court require evidence of discriminatory motive. Only two Justices suggested that discriminatory motive was relevant. *Id.* at 540-42 (Kennedy, J., joined by Stevens, J.). Two Justices said that it was irrelevant, *id.* at 558-59 (Scalia, J., and Rehnquist, C.J., concurring), and five expressed no ***23** opinion. Thus, the Third, Sixth, Tenth, and Eleventh Circuits, and the Iowa Supreme Court, have rightly held that *Lukumi* does not require a showing of discriminatory motive.

3. This Court's decision in *Sherbert* further confirms that the Free Exercise Clause does not require a showing of singling out or discriminatory motive. There, a state law denied unemployment benefits to any person who refused a job "without good cause." *Sherbert v. Verner,* 374 U.S. 398, 401 (1963). Applying this provision, the state denied benefits to a Seventh-day Adventist who refused to work on the Sabbath. *Id.* at 408-09. Although there was no evidence of singling out or discriminatory motive, this Court struck down the law on the ground that it created a mechanism of "individualized exemptions." *Smith,* 494 U.S. at 884. Justice Harlan dissented, arguing that there was no evidence "that the State discriminated against the appellant on the basis of her religious beliefs." *Sherbert,* 374 U.S. at 420.

This Court specifically preserved the holding of *Sherbert* in *Smith,* where it noted that the law permitted exemptions for "at least some 'personal reasons,' " but not religious reasons. 494 U.S. at 884. It also relied on that holding in *Lukumi,* where it said that the challenged ordinance involved an impermissible mechanism for "individualized exemptions." 508 U.S. at 537-38. As then-Judge Alito later held, if " individualized exemptions" require strict scrutiny in the absence of discrimination, then the same is even more true when, as here, "the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption." *Fraternal Order of Police,* 170 F.3d at 365.

***24** Accordingly, the lower court's decision cannot be reconciled with either *Lukumi* or *Sherbert.* See also *Wisconsin v. Yoder,* 406 U.S. 205 (1972) (striking down compulsory school-attendance law despite the absence of singling out or discriminatory motive).

II. The decision below conflicts with decisions of this Court, federal circuit courts, and state supreme courts protecting the right of churches to govern their internal affairs.

The decision below also conflicts with a long line of cases protecting the right of churches to govern their internal affairs. This right includes the right to choose religious leaders, *Hosanna-Tabor,* 132 S. Ct. 694, to decide "who ought to be members," *Bouldin v. Alexander,* 82 U.S. 131, 139-40 (1872), and to establish rules for "the ecclesiastical government of all the individual members." *Watson v. Jones,* 80 U.S. 679, 728-29 (1871). Even neutral and generally applicable laws cannot interfere with such "internal church decision [s]." *Hosanna-Tabor,* 132 S. Ct. at 707.

"Internal church decisions" are also at issue here. For 500 years, Hutterite communities have followed detailed rules governing their communal life - including requirements that members renounce private property, work without compensation, and relinquish any legal claim against the community. But the workers' compensation requirement changes all of this. Contrary to Hutterite teaching, it creates an unwaivable, individual right of compensation that members hold against their community; it compels the community to compensate members for their work; and it forbids the community from excluding members who assert that right.

***25** The lower court's decision ignored this. Without mentioning *Hosanna-Tabor* or the right of internal church governance, it held that the Act does not impermissibly burden the community, because it simply regulates the Colony "in the same manner that [it] regulates the commercial activities of other employers in Montana." App. 8a. That decision cannot be squared with the decisions of this Court, federal circuit courts, or state supreme courts.

1. Last term, in *Hosanna-Tabor,* this Court reaffirmed what many courts have long recognized: that churches have a right to be free from interference in "the internal governance of the church." 132 S. Ct. at 706. There, a Lutheran church dismissed one of its school teachers, who sued for retaliation under the Americans with Disabilities Act. This Court held that the suit was barred by the First Amendment "ministerial exception," because the hiring of the teacher was a "strictly ecclesiastical" matter, not subject to government interference. *Id.* at 709.

The Court distinguished cases involving "internal church decision[s]," such as the hiring of a teacher, from cases involving "outward physical acts," such as the ingestion of peyote in *Smith. Id.* at 707. The government cannot interfere in "an internal church decision that affects the faith and mission of the church itself" - even by neutral and generally applicable laws. *Ibid.*

Federal circuit courts have long applied this rule in circumstances analogous to this case. For example, in *Schleicher v. Salvation Army,* 518 F.3d 472 (7th Cir. 2008) (Posner, J.), two former ministers sued the Salvation Army under the Fair Labor Standards Act (FLSA), claiming that they were unlawfully denied ***26** minimum wage and overtime pay for their work managing thrift shops, which they asserted was an "ordinary commercial activity" under the FLSA. *Id.* at 476.

The Seventh Circuit rejected their claims. Although "[t]he sale of the goods in the thrift shop is a commercial activity," it also has a "spiritual dimension," because the ministers and the thrift shops were part of a "self-contained religious communit[y]." *Id.* at 476-77. Judge Posner likened the case to one where monks take a vow of poverty and support their monastery by producing and selling wine. *Id.* at 476. "No one could think the curious precapitalist economy of a monastery an ordinary commercial activity" subject to minimum wage requirements. *Ibid.* Thus, forcing the community to pay minimum wage "would plunge a court deep into religious controversy and church management." *Id.* at 477.

But that is precisely what the lower court did here. The Hutterites are a monastery of families. Like other monasteries, they are organized as an "apostolic association" under 26 U.S.C. § 501(d); their members take a vow of poverty; their daily life is organized around communal meals and worship; and their work is performed freely as an act of worship. Yet the lower court held that when they sell agricultural produce to non-members, they are engaged in purely "commercial activities," and their internal relationships can be regulated "like all other employers in Montana." App. 8a. This decision directly conflicts with *Hosanna-Tabor* and *Schleicher.* See also *Alcazar v. Corp. of the Catholic Archbishop of Seattle,* 627 F.3d 1288, 1293 (9th Cir. 2010) (First Amendment bars minimum-wage claim by Catholic seminarian); ***27** *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.,* 363 F.3d 299 (4th Cir. 2004) (First Amendment bars overtime-wage claim by kosher supervisor at nursing home).

2. It is no response to say that *Hosanna-Tabor* involved "ministers," while this case involves mere "members." That distinction makes no sense in the context of a monastery or Hutterite colony, where every member is integral to the religious life of the community. See *Hosanna-Tabor,* 132 S. Ct. at 711 (Alito, J., concurring) ("[I]t would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one."). It also contradicts federal and state cases protecting the right of churches to establish rules for "the ecclesiastical government of all the *individual members.*" *Watson,* 80 U.S. at 728-29 (emphasis added). Just as the state cannot interfere with the selection of church leaders, it cannot interfere with internal rules governing members.

This Court first recognized the right of churches to govern their members in *Bouldin,* 82 U.S. at 131 (1872). There, a minority faction of a church sought to excommunicate the church trustees and take control of the church property. This Court, however, concluded that it lacked authority to decide who was a member of the church: "[W]e have no power to revise or question ordinary acts of church discipline, or of excision from membership. *** [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off." *Id.* at 139-140.

Since *Bouldin,* lower courts have repeatedly affirmed the right of churches to establish rules governing ***28** members. In *Paul v. Watchtower Bible & Tract Society of New York,* 819 F.2d 875 (9th Cir. 1987), for example, a former member of the Jehovah's Witnesses sued the church for infliction of emotional distress based on the church's practice of "shunning" - a form of social ostracism directed at former members. The Ninth Circuit, however, held that the suit was barred by the First Amendment: "Courts generally do not scrutinize closely the relationship among members (or former members) of a church." *Id.* at 883. Rather, "[r]eligious activities which concern only members of the faith are and ought to be free - as nearly absolutely free as anything can be." *Ibid,* (quoting *Prince v. Massachusetts,* 321 U.S. 158, 177 (1944) (Jackson, J., concurring)).

Consistent with *Watson, Bouldin,* and *Hosanna-Tabor,* state supreme courts have long affirmed the right of churches to establish rules for their members. See, *e.g., C.L. Westbrook, Jr. v. Penley,* 231 S.W.3d 389, 400 (Tex. 2007) (rejecting "professional negligence" claim by former church member, because it would "impinge upon [the church's] ability to manage its internal affairs" and "to discipline members"); *Harris v. Matthews,* 643 S.E.2d 566, 572 (N.C. 2007) (rejecting claim by church members that would involve the court in "ecclesiastical decisions concerning church management and use of funds"); *Lott v. E. Shore Christian Ctr.,* 908 So.2d 922 (Ala. 2005) (refusing to interfere in dispute over discipline of church member); *First Born Church of the Living God, Inc. v. Hill,* 481 S.E.2d 221, 222 (Ga. 1997) (court-ordered meeting of church membership "would be totally inconsistent with the Church's fundamental religious freedom *** to determine its own governmental rules and regulations").

***29** State supreme courts have also rejected the application of workers' compensation laws to monasteries and similar religious communities. See, *e.g., Blust v. Sisters of Mercy,* 239 N.W. 401, 404 (Mich. 1931) (rejecting workers' compensation for novitiate in a Catholic order, because "[t]he[ir] relation[ship] was far removed from pecuniary considerations"); *Dixon v. Salvation Army,* 201 S.W.3d 386, 388-89 (Ark. 2005) (rejecting workers' compensation for member of Salvation Army, because the Salvation Army "is a religious movement," and the member worked "out of a desire to improve himself"); see also *Joyce v. Pecos Benedictine Monastery,* 895 P.2d 286, 289-90 (N.M. Ct. App. 1995) (rejecting workers' compensation for member of monastery). The reason is obvious: Forcing a monastery to provide workers' compensation to its members fundamentally interferes with its internal governance.

The lower court's decision cannot be reconciled with these cases. The workers' compensation requirement directly interferes with the internal rules governing Hutterite members - specifically, the rules requiring all members to renounce private property, to work without compensation, and to relinquish all claims against the community. It also makes it illegal for the Hutterites to excommunicate a member who asserts a claim in violation of the community's rules. Mont. Code Ann. § 39-71-317. Even the State admits that this would "likely" violate *Hosanna-Tabor.* App. 272a. Thus, the Act regulates internal church governance in direct conflict with *Hosanna-Tabor.*

3. This Court's decision in *Tony and Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290 (1985), is not to the contrary. See App. 13a-15a. There, the Court upheld the application of the federal ***30** minimum-wage law to a religious foundation, despite the foundation's religious objections. *Alamo,* 471 U.S. at 293. But that case differs in several key respects.

First, the foundation in *Alamo* was engaged in "ordinary commercial businesses" with "a common business purpose" - including service stations, clothing outlets, grocery stores, candy companies, and a motel. *Id.* at 295-99. The businesses just "happened to be owned by [a] religious [organization]." *Id.* at 298. Here, it is undisputed that the Hutterites are not operating "ordinary commercial businesses" animated by a "common business purpose," but are instead following a self-sustaining, 500-year-old religious tradition.

Second, the Court found that the members in *Alamo* worked "in expectation of compensation." *Id.* at 302. They were " 'fined' heavily for poor job performance, worked on a 'commission' basis, and were prohibited from obtaining food from

the cafeteria if they were absent from work." *Id.* at 301 n.22. Here, no member works "in expectation of compensation"; they vow never to receive it. And all members receive the same care regardless of their ability to work.

Finally, in *Alamo,* there were doubts about the foundation's religious sincerity. Those doubts proved well-founded when the foundation's leader was convicted of tax evasion and trafficking minors for sex, and sentenced to 175 years in prison. *Jury Convicts An Evangelist Of Tax Evasion,* N.Y. Times, June 12, 1994; Associated Press, *Evangelist Who Took Child 'Brides' Is Sentenced to 175 Years,* N.Y. Times, Nov. 13, 2009. Here, no one questions the sincerity of the 500-year-old Hutterite traditions.

***31** In short, *Alamo* rested on the existence of an "ordinary" commercial relationship, which the government can regulate, and which the State concedes is not present here. 471 U.S. at 302. In fact, the State admits that "a law requiring Hutterites to *** pay its members a wage *** would likely interfere 'with the internal governance of the [Colony]" in violation of *Hosanna-Tabor* - thus conceding that *Alamo* is distinguishable. App. 282a.

4. If this Court does not grant plenary review on the question of internal church governance, it should nevertheless grant certiorari, vacate the judgment below, and remand the case (GVR) for reconsideration in light of *Hosanna-Tabor,* 132 S. Ct. 694. A GVR order is appropriate where (1) "recent developments" that "the court below did not fully consider *** reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," and (2) "it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater,* 516 U.S. 163, 167 (1996). Based on this standard, this Court has issued a GVR order when a plaintiff "clearly presented a federal constitutional *** claim to the State Supreme Court," and "the dissenting justices discerned the significance of the issue raised," but the majority rendered its decision "without examining the specific constitutional claims [asserted]." *Youngblood v. West Virginia,* 547 U.S. 867, 869-70 (2006).

That is just what occurred here. While this case was pending in the Montana Supreme Court, this Court issued its decision in *Hosanna-Tabor,* 132 S. Ct. 694. Both parties briefed the issue, App. 248a, 257a, 272a-75a, 278a, 282a, and the State conceded ***32** that some applications of the Act would "likely" violate *Hosanna-Tabor,* App. 272a, 282a. The dissenters also concluded that the Act regulated "the relationship between [the Colony] and its members" in violation of *Hosanna-Tabor.* App. 47a-49a. Yet the majority did not cite or discuss it. Thus, there is "reason to believe the court below did not fully consider [*Hosanna-Tabor*]," and a GVR order is appropriate. *Lawrence,* 516 U.S. at 167-68; see also *Stutson v. United States,* 516 U.S. 193, 195 (1996) (GVR where the "opinion below did not consider the import of a recent Supreme Court precedent that both parties now agree applies"); *Robinson v. Story,* 469 U.S. 1081 (1984) (GVR in light of a recent decision that predated the vacated decision).

III. The case presents recurring questions of vital importance for thousands of religious organizations across the country.

Review is also warranted because of the sweeping practical significance of the questions presented.

The first question presented, on the meaning of "neutral and generally applicable" under *Smith* and *Lukumi,* arises in almost every free exercise claim. Government defendants "routinely" argue that "religious claimants must prove that government officials acted out of an anti-religious motive." Laycock, 40 Cath. Law. at 27. Religious plaintiffs almost never concede that they must prove bad motive. Thus, the result frequently turns on which side of the split a court joins.

In recent years, free exercise cases have also arisen with greater frequency. In the ten years immediately following *Lukumi* (1993-2002), a Westlaw search for "Free Exercise Clause" yields 1179 cases. ***33** In the next ten years (2003-2012), the same search yields 2616 cases - an increase of over 220%. This is due, in part, to the nation's increasing religious diversity. As religious diversity increases, so does the likelihood that any given law will conflict with minority religious practices. Not surprisingly, minority faiths tend to produce a disproportionate share of free exercise conflicts. Compare Barry A. Kosmin & Ariela Keysar, *American Religious Identification Survey: Summary Report* 5 (2009) (religious minorities

compose 12% of population), with Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts,* 98 Iowa L. Rev. 231, 246 (2012) (religious minorities bring 57% of federal free exercise claims). For these increasingly common conflicts, the scope of the Free Exercise Clause is of vital practical importance.

The 5-5 split on this question is also deep, square, and well-developed. This Court established the "neutral" and "generally applicable" standard over twenty years ago in *Smith* and *Lukumi,* and it has been debated by courts and commentators at length. The split is not based on the text of the Constitution, but on the meaning of *Lukumi* - specifically, whether the showing of discriminatory purpose in *Lukumi* is necessary in every free exercise case, or instead made *Lukumi* an easy case. Further percolation will do nothing to resolve that question.

Finally, the questions presented are particularly important for minority religious communities like the Hutterites. Unlike larger, politically active religious groups, minority communities are far less likely to obtain accommodations through the legislative process. Douglas Laycock, *The Religious Exemption Debate,* 11 Rutgers J. L. & Religion 139, 163 (2009). Indeed, ***34** in this case, the Hutterites were not consulted during the legislative process at all - which is not surprising, given that their religious convictions prevent them from voting. But the rule adopted by the court below allows legislatures to grant selective exemptions to favored secular groups, while ignoring severe burdens on minority religious conduct. The result is that religious minorities are painted into ever smaller corners of American society.

*****

The decision below widens a square and well-developed split over the proper legal standard governing free exercise claims. It also conflicts with a long line of cases protecting internal church governance, overturning almost 500 years of Hutterite religious practice. The result is not only of immense practical importance to churches across the country, but also poses "a very real threat" to "the continued survival of [500-year-old Hutterite] communities." *Yoder,* 406 U.S. at 218-19, 235.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for plenary review. In the alternative, the petition should be granted, the judgment below vacated, and the case remanded for further consideration in light of *Hosanna-Tabor,* 132 S. Ct. 694.

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2013 WL 4761412 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

BIG SKY COLONY, INC., and Daniel E. Wipf, Petitioners,
v.
MONTANA DEPARTMENT OF LABOR AND INDUSTRY.

No. 12-1191.
September 4, 2013.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

Reply Brief for the Petitioners

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***1 REPLY BRIEF**

Rather than address the split of authority, Montana compares the Hutterites to "Tyson Foods," "Cargill," and "Dunkin Donuts." BIO 1. It claims that the Hutterites are "*the* market leader *** in Montana's agricultural, construction, and manufacturing industries." *Ibid.*

Only in fantasyland. Fewer than 5,000 Hutterites live in Montana. Their per capita "income" is $7,050 - compared with the statewide average of $24,640. Thus, Hutterites represent less than 0.5% of Montana's population and 0.1% of its income. [2] Cargill's revenues, by contrast, are quadruple Montana's GDP. [3]

Although they produce much of Montana's hogs, eggs, and poultry, BIO 6, that is because Montana produces hardly any - 0.08% of the nation's total. [4] ***2** The vaunted "meat processing plant" (BIO 6), if it ever materializes, would be owned solely by Chinese investors, who wanted "niche" pigs from "smaller-production farms." [5] And the supposedly "aggressive []" construction and manufacturing activities (BIO 5) account for only 3% of Hutterites' meager "income." Appendix A ("Sundry Income").

Montana's attempt to paint the Hutterites as wealthy magnates would be amusing if it were not so threatening. Like other religious minorities, Hutterites have suffered from exaggerated notions of their economic prowess before. Only decades ago, they were heavily persecuted for their supposedly too-prosperous "land expansion." John Hofer, *The History of the Hutterites* 65 (1988).

Aside from an economic fable, Montana offers little in opposition to certiorari. First, it tries to manufacture a vehicle problem, claiming that the Hutterites "never presented their now-preferred Free Exercise argument" below. BIO 3. But this contention conflates an argument with a claim; the Hutterites plainly presented their free exercise claim below.

Second, Montana tries to minimize the split, arguing that all courts ask "the same fundamental Free Exercise question." BIO 17-18. But the courts answer the question by two different methods - either requiring evidence of discriminatory motive or not. Thus, as ***3** the State later admits, lower courts do "approach [] the question differently." BIO 18.

Finally, the State claims that there is no conflict with *Hosanna-Tabor*, because this case involves a "classic labor regulation." BIO 23. But the State concedes that forcing the Hutterites to pay minimum wage would violate *Hosanna-Tabor*, App. 282a, and it offers no principled basis for distinguishing workers' compensation from wages.

I. The State's manufactured vehicle problems are illusory.

1. Montana claims that the first question presented is "waived," because the Hutterites "never presented their now-preferred Free Exercise argument" below - at least "not as [a] stand-alone argument." BIO 3, 11. This argument fails for several reasons.

First, it conflates an argument with a claim. "Once a federal *claim* is properly presented, a party can make any *argument* in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido,* 503 U.S. 519, 534 (1992) (emphasis added). Here, the *claim* is that the workers' compensation law violates the Free Exercise Clause. Various theories about why the law is not generally applicable under *Lukumi* "are not separate *claims*," but "separate *arguments* in support of a single claim." *Ibid.*

Second, even the *arguments* are not new. In their first district court brief, the Hutterites argued neutrality and general applicability separately, maintaining that the law was "not generally applicable" because "the secular ends of the law 'were pursued only with respect to conduct motivated by religious ***4** beliefs.' " Resp. App. 8a (quoting *Lukumi*), 9a ("[The Act] does not affect secular conduct.").

They elaborated in their reply brief, noting that "[o]ther group[s] [were] specifically exempted from workers' compensation compliance" - most notably, "those performing services in return for aid or sustenance only." Resp. App. 38a. This, they said, was like the law in *Lukumi*, which "was unconstitutional because [secular] methods of killing animals were not prohibited." Resp. App. 35a.

The district court addressed this argument, explaining: "[W]here the law provides *a series of exceptions, Sherbert*, it must accommodate religious practice unless there is a compelling state interest; [but] where the law is neutral and generally applicable, *i.e., provides no exceptions, Smith*, then government may restrict religious practice." App. 70a (emphasis added). And when a "law create[s] *[secular] exemptions*," it must "afford the *same protection for religious practices.*" App. 65a (emphasis added). Although the court noted that the workers' compensation law had "certain exemptions contained in section 39-71-401," App. 57a, it did not analyze them because it held that the law targeted the Hutterites. App. 76a.

The argument was also raised in the Montana Supreme Court. There, the Hutterites argued that they were denied "the general exemptions of the Act," App. 245a, and that they were treated differently from "[c]ommunal secular groups," which are "exempt from the Act because they do not pay a wage." App. 261a. As the brief asked: "Why should communal secular groups be exempt from the Act if communal religious organizations are not[?]" *Ibid.*

***5** Even the "first page" of their brief highlighted this issue. Cf. BIO i, 2-3, 12, 15. It said that the "one issue" was whether the "intent *and effect* of [the law] is to make life difficult for a particular religious group." App. 235a (emphasis added). "Intent" refers to invidious targeting, or neutrality; "effect" refers to unequal treatment, or general applicability.

Not surprisingly, the dissenters addressed exemptions, too. They argued that the law "currently exempts other areas of employment in agriculture, manufacturing, and construction" (listing six examples); that "[t]hese exemptions are contrary to the governmental interests asserted by the State"; and that these exemptions "lend further credence" to the arguments under *Lukumi.* App. 47a-48a. The majority responded by adopting a broad holding that necessarily rejects the exemptions argument - namely, that a law is subject to strict scrutiny "*only* when [it] impermissibly singles out some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." App. 18a (emphasis added; quotation omitted). In other words, because singling out or discriminatory motive is required, unequal exemptions are irrelevant.

All of this is more than enough to demonstrate not only that "petitioner's federal *claim*" was "either addressed by, or properly presented to, the state court," but that its arguments were, too. *Adams v. Robertson,* 520 U.S. 83, 86 (1997)

(emphasis added). The trial judge and dissenters plainly considered the argument. That the majority rejected it without serious analysis does not mean it was not presented.

Indeed, this Court has frequently found federal claims preserved by far less precise arguments than ***6** those here. See, *e.g., Palazzolo v. Rhode Island,* 533 U.S. 606, 623 (2001) (claim preserved even though the "argument was not pressed at trial"); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.,* 530 U.S. 238, 245 n.2 (2000) (claim preserved even though "petitioners did not pellucidly articulate this theory"); *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 159 n.5 (1980) (claim preserved even without "specific reference to the Federal Constitution"); *Taylor v. Kentucky,* 436 U.S. 478, 483 n.10 (1978) (claim preserved even though the state court "did not discuss federal decisions"); *Braniff Airways v. Neb. State Bd. of Equalization & Assessment,* 347 U.S. 590, 598-99 (1954) (claim preserved even though petitioner "name[d] the wrong constitutional clause").

Nor is the free exercise claim "waived under longstanding Montana precedent." BIO 16. As noted above, it was raised and addressed at every stage of litigation. If the majority thought the argument relied on by the dissenters was waived, it easily could have said so. Instead, it adopted a broad rule rejecting it. If that court did not deem the argument waived under Montana law, neither can this Court. See Eugene Gressman et al., *Supreme Court Practice* 197-98 (9th ed. 2007).

2. Alternatively, Montana claims that "Petitioners are effectively asking this Court to render an advisory opinion," BIO 4, because the State "could" change its interpretation of "employer" and "wages" on remand, and the Hutterites "have not challenged" this new interpretation. BIO 20-21.

But the Hutterites cannot challenge pure speculation. Montana has always interpreted "employer" and "wages" to exclude the Hutterites - and still does. ***7** App. 4a. If this Court invahdates the challenged amendment, the Hutterites will receive full relief on every ripe claim. Of course, Montana "could" overturn 96 years of stable law to target the Hutterites on remand. BIO 20. But only then would a challenge to that new interpretation become ripe.

II. The decision below deepens a conflict over the meaning of "neutral" and "generally applicable."

1. Montana's attempt to minimize the split fares no better. First, Montana says there must be no split because "[n]one of [the cases] express disagreement with any of the other cases." BIO 17. But this is simply wrong: As the Third Circuit explained, "in contrast to our decision in *Fraternal Order of Police*, two other circuit courts have stated that the Free Exercise Clause offers no protection when a statute or policy contains broad, objectively defined exceptions ***." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 309 F.3d 144, 167 (3d Cir. 2002). Since this recognition of the split, the Second, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, and Iowa Supreme Court, have deepened the conflict. Pet. 12-13.

Next, Montana says "all of the cases on both sides of Petitioners' 'split' asked the same fundamental Free Exercise question": whether religious practices have been "singled out for discriminatory treatment." BIO 18-19 (quoting *Lukumi,* 508 U.S. at 538). That is only half true. *Of course*, every court asks whether there was evidence of singling out or discriminatory motive, because every court agrees that such evidence is "*sufficient* to prove that a challenged governmental action is not neutral." *Shrum v. City of Coweta, Okla.,* 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.) ***8** (emphasis added). But lower courts are divided over whether such evidence is *necessary.* Some say it is - that plaintiffs must prove "substantial animus against [religion] that motivated the law in question." *Strout v. Albanese,* 178 F.3d 57, 65 (1st Cir. 1999); Pet. 14-15. Others say it isn't - that "the Free Exercise Clause is not confined to actions based on animus." *Shrum,* 449 F.3d at 1145; Pet. 15. Because animus is difficult to prove even when it exists, this difference is usually dispositive.

Finally, Montana argues that the split is "largely academic," because the opinions requiring singling out or discriminatory motive are "uniformly cursory and shallow." BIO 19. But that is precisely the problem. Given the extreme

facts of *Lukumi*, courts have often adopted a "cursory and shallow" interpretation that requires equally extreme facts in every case. *Lukumi* then becomes an excuse to dismiss free exercise claims without serious analysis.

2. Montana says even less about how this case can be reconciled with the decisions of the Third, Sixth, Tenth, or Eleventh Circuits, or Iowa Supreme Court - all of which have struck down laws with far narrower exemptions. Pet. 18-20. It says nothing about its exemptions for sole proprietors or members of partnerships, LLPs, or LLCs. Pet. 19. It says nothing about its exemption for members of religious orders. *Ibid.* And it says nothing about its exemption for independent contractors. App. 48a.

The State says only that an exemption for the Hutterites would be more harmful, because Hutterites are supposedly "some of the State's most successful and prolific businesses." BIO 31-32. But the Hutterites are not more "prolific" than every sole ***9** proprietor, independent contractor, and working member of a partnership, LLP, or LLC in Montana. Montana has already granted exemptions to almost 18,000 independent contractors - more than ten times the number of adult male Hutterites. [6] That does far more to undermine the State's supposed interests.

Finally, Montana claims that it was "legitimately concerned that a catastrophic injury to a colony member might expose Montana's Uninsured Employers' Fund to substantial liability." BIO 32. This is spurious. Under Montana law, the Uninsured Employers' Fund is available only to "'employers' *who are subject to the Act* but have not provided coverage for their employees." App. 45a (emphasis added). Thus, before the State enacted the challenged amendment, it was legally impossible for any Hutterite to make such a claim. *Ibid.*

III. The decision below conflicts with *Hosanna-Tabor* and other decisions on the right of churches to govern their internal affairs.

The State also fails to explain how this case can be reconciled with decisions protecting the internal affairs of churches.

1. First, Montana admits that *Hosanna-Tabor* prohibits the government from interfering with "an internal church decision." BIO 22. It also admits that *Hosanna-Tabor* would bar it from imposing a minimum wage, App. 282a, or from interfering in the ex-communication of a member claiming workers' compensation. ***10** BIO 25. Nevertheless, it claims that mandating workers' compensation coverage is different, because it is "a classic labor regulation" that applies when Hutterites are "paid by 'nonmembers' " and is "generally applicable to all competitors." BIO 23.

But the law in *Hosanna-Tabor* - the ADA - is also "a classic labor regulation"; it also applied to a school receiving payment from "nonmembers"; and it also applied "to all competitors." If the state can regulate the relationship between a church and its members merely because the church is "paid by 'nonmembers,' " then nothing is an internal church decision.

Next, Montana claims that applying *Hosanna-Tabor* would make the Hutterites "a law unto [themselves]," able to ignore "general health and safety laws." BIO 22-23. But the Hutterites have been heavily regulated by these laws for decades, without objection. Pet. 8; App. 26a-27a. They object to this particular law only because it interferes with their "internal relationship [s]" - including 500-year-old rules governing how the Colony and its members share property - which is not true of general health and safety laws. App. 49a.

Alternatively, the State claims that the burden on internal governance is "exaggerated," BIO 23, because the Hutterites can simply decline to file claims (BIO 24); because workers' compensation is no different from their existing health insurance (BIO 25); and because they can excommunicate any member who files a claim (BIO 26-26). Were this true, the law would serve no purpose; it would be "the very definition of illusory coverage that 'defies logic.' " App. 50a.

But it is not true. Under the workers' compensation law, colonies must set aside funds for compensating ***11** injured workers. Mont. Code Ann. §§ 39-71-2101 to -2115. Unlike the Hutterite Medical Trust, these funds are not shared equally

by all members; they are available only to "covered" members performing certain types of work. *Id.* § 39-71-407. Nor are the funds limited to medical expenses; they must also cover lost "wages." *Id.* § 39-71-123. Access to the funds is a vested, individual right that a member or his successor-in-interest holds against the colony. *Id.* § 39-71-721(1)(a). And it is a right that routinely produces legal disputes that "must be brought before [the State]." *Id.* § 39-71-2401. All of this flatly contradicts Hutterite vows to abandon all claims of individual right, to hold all property in common, and to relinquish all claims against the colony.

Finally, Montana claims that it has an "important interest" in protecting "*former* Hutterite members." BIO 26. But the Hutterites have been exempt for 96 years, and no member, or former member, has ever been injured without receiving comprehensive care. Beyond that, colonies frequently provide food, housing, and medical care to former members, even to old age. And Montana does not pursue this supposed interest with respect to thousands of non-Hutterite workers who are exempt - even when they are injured and lack access to workers' compensation *or* a generous medical trust.

2. Montana also argues that this case is "controlled by *Alamo*, not *Hosanna-Tabor*" because the Hutterites engage in " 'ordinary' commercial businesses" and "work[] 'in expectation of compensation.' " BIO 28-29. But *Alamo* rested on a finding that the members were "employees" under federal law, who worked in expectation of "wages." 471 U.S. 290, 301 (1985). Members were " 'fined' heavily for poor job performance, ***12** worked on a 'commission' basis, and were prohibited from obtaining food from the cafeteria if they were absent from work." *Id.* at 301 n.22.

Here, by contrast, Montana formally determined that Hutterite members are *not* "employees" and do *not* work in expectation of "wages." App. 4a. And that determination is obviously true: No member is ever fined for poor performance; the same food, shelter, and medical care are provided to every member regardless of work. The federal Department of Labor also interacts with the Hutterites and has never suggested that they must pay minimum wage. And Montana has admitted that forcing the Hutterites to pay wages would violate *Hosanna-Tabor* (App. 282a) - a tacit admission that *Alamo* is inapplicable.

3. Finally, Montana simply ignores the many decisions that have rejected compensation claims between religious orders and their members (Pet. 26-27), rejected interference with rules governing members (Pet. 28), and rejected the application of workers' compensation to religious orders (Pet. 29). Nor does it dispute that states across the country already exempt religious orders like the Hutterites from their workers' compensation laws, Michigan *Amicus* Br. 7-15, and that Hutterites are functionally indistinguishable from monasteries, Belmont Abbey *Amicus* Br. 4. In short, the State offers no principled basis for distinguishing this case from one in which a monastery is compelled to pay wages to its members - a case it admits is controlled by *Hosanna-Tabor.* App. 282a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Footnotes

1 See Appendix A, *infra.* Financial data are from the Leherleut Hutterites Montana's largest and most successful branch. "Per capita 'income is the sum of "Total Personal Expenses and "Net Income multiplied by 36 colonies and divided by population (3,726). See also United States Census Bureau, http:// quickfacts.census.gov/qfd/states/30000.html (Montana per capita income).

2 *Ibid.* (($7,050*5,000)/($24,640*989,417) .001).

3 See Cargill, http://www.cargill.com/company/glance/ ($134 billion revenue); Bureau of Economic Analysis, http:// www.bea.gov/newsreleases/regional/gdp state/2012/pdf/gsp0612.pdf at 7 ($32 billion GDP).

4 See National Agricultural Statistics Services, http:// quickstats.nass.usda.gov/results/C6B1A963 29EB 3D40 BEF9 E32DD84EF774 ($7,975,000 Montana poultry and egg sales); http:// quickstats.nass.usda.gov/results/

EC4B0533 8D7D 39DA 97D5 960D126BC000 ($36,331,000 Montana hog sales); http:// quickstats.nass.usda.gov/ results/9DCFC4C0 5B9A 320D A99C 26F9BE82E1DC ($37,065,947,000 national poultry and egg sales); http:// quickstats.nass.usda.gov/results/FE10165A B9E3 3285 AFDF B6D827940B8A ($18,056,981,000 national hog sales).

5 See Billings Business, http://billingsgazette.com/business/montana pig farmers eye asian trade deal/article c9681c90 721 b 5cf6 904e b2f6c2989d78.html.

6 See Dep't of Labor & Indus., http://erd.dli.mt.gov/workers comp regulations/montana contractor/independent contractor central unit/independent contractor list.html (submit blank search form; search for Certificate # "% ; go to last page).

2010 WL 3501185 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Arnold SCHWARZENEGGER, Governor of California, et al., Appellants,
v.
Marciano PLATA and Ralph COLEMAN, et al., Appellees.

No. 09-1233.
September 3, 2010.

On appeal from the United States District Courts for the Eastern District and Northern District of California

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*i QUESTIONS PRESENTED

The appellants have presented three questions concerning the lower court's application of the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. Amici curiae's argument relates to the second two:

2. Whether the court below properly interpreted and applied Section 3626(a)(3)(E), which requires a three-judge court to find, by clear and convincing evidence, that "crowding is the primary cause of the violation of a Federal right; and … no other relief will remedy the violation of the Federal right" in order to issue a "prisoner release order."

3. Whether the three-judge court's "prisoner release order," which was entered to address the allegedly unconstitutional delivery of medical and mental health care to two classes of California inmates, but mandates a system-wide population cap within two years that will require a population reduction of approximately 46,000 inmates, satisfies the PLRA's nexus and narrow tailoring requirements while giving sufficient weight to potential adverse effects on public safety and the State's operation of its criminal justice system.

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*1 INTEREST OF AMICI CURIAE

This appeal concerns the propriety of a three-judge court's application of the PLRA when imposing a population cap on California's correctional system that would require the release of approximately 46,000 state prisoners. Amici curiae, like any other states, may someday be forced to defend against lawsuits filed under the PLRA with the aim of forcing large-scale prisoner releases. Consequently, amici have a substantial interest in the disposition of this case, and present this brief in support of appellants, Arnold Schwarzenegger, Governor of California, *et al.*, pursuant to Supreme Court Rule 37.4.

SUMMARY OF ARGUMENT

The three-judge court has violated the plain language of the PLRA, and needlessly threatened public safety, by ordering the release of tens of thousands of prisoners without determining whether there were any ongoing federal constitutional violations in the state's prison system.

Under the PLRA, a court may not issue a prisoner-release order unless the prisoners prove by clear and convincing evidence that such relief is necessary to remedy an ongoing violation of their federal rights, and that no narrower remedy is ***2** possible. Thus, the starting point when considering a request for a prisoner-release order must always be the issue of whether there are in fact ongoing violations, and if so what is the nature and scope of the current violations. Until that question is answered, a court cannot determine whether any new relief is warranted, much less what the narrowest possible relief would be.

Nevertheless, the three-judge court not only refused to consider whether there were ongoing federal violations in the state's prison system, it prohibited the state from presenting evidence on the issue. Instead, the three-judge court relied on the fact that individual district courts had found violations years before, when issuing much less onerous prospective relief, and that the state had not sought to terminate that lesser relief. But those prior findings did not speak to the presence of ongoing violations at the time of the three-judge court's decision, and, in any event, were made under a lower standard of proof than is required for a prisoner-release order. Moreover, the state had no statutory burden to terminate the earlier relief; rather, the burden of proof remained with the prisoners to prove current and ongoing violations that could only be remedied with a prisoner-release order. Thus, the individual district courts' prior orders did not resolve the issue before the three-judge court.

While that error would itself be sufficient to warrant reversal, it is noteworthy that the three-judge court's own opinion offers good reason to question whether, and, if so, to what extent there are ongoing constitutional violations in the state's correctional system. The underlying claims in ***3** these cases are that the state's treatment of the prisoners' serious medical and mental health problems is so deficient as to constitute cruel and unusual punishment, in violation of the Eighth Amendment. But the three-judge court's analysis was incompatible with the demanding standards governing such claims. Time and again, the court substituted expert opinion for constitutional minima, prior deficiencies for current conditions, and idealized practices for those demanded by contemporary standards of decency.

In addition, it follows that the three-judge court violated the PLRA's requirements that a prisoner-release order be the only possible remedy, and that it be narrowly drawn. In the first place, systemwide relief would have required ongoing, systemic violations, which, again, were not found. But even putting that aside, there would have been no justification for the scope of the three-judge court's order, which impermissibly would require the release of a great number of prisoners who have no serious medical or mental health needs, and are not even class members in the underlying lawsuits.

Finally, real-world experience with large-scale prisoner-release orders undermines the three-judge court's remarkable prediction that releasing tens of thousands of prisoners will not affect, or will even *enhance*, public safety. Prior experience shows that, even when targeted at the prisoners who are supposed to represent the best of the worst, such orders inevitably place innocent citizens at much greater risk of victimization.

***4 ARGUMENT**

I. The three-judge court violated the PLRA by issuing a prisoner-release order without finding an ongoing violation of a federal right.

At their essence, the issues before the Court are neither complex nor fact-bound. Under the plain language of the PLRA, the alleged violation of a federal right is what guides every step. It is the violation that makes state prison conditions a proper subject for federal review, renders prospective relief necessary, and limits the permissible extent of that relief. In particular, the PLRA expressly and repeatedly requires that any prospective relief, especially the last-resort remedy of a prisoner-release order, be narrowly tailored to correct a violation of a federal right of a specific prisoner or class of prisoners. *See* 18 U.S.C. § 3626(a)(1)(A), (a)(1)(B), (a)(3)(E).

It is thus necessary that, before ordering prospective relief, a court find an ongoing federal violation, and define the nature and scope of that current violation with reasonable specificity. Absent a specific, ongoing violation, it would be meaningless to claim that a particular form of relief is necessary and narrowly-tailored.

Nevertheless, the three-judge court refused to follow the statutorily-required procedure, erroneously declaring that it "need not … again evaluate the state's continuing constitutional violations" when issuing prospective relief in the form of a large-scale prisoner-releaser order. *Coleman,* 2009 WL 2430820, *31, 2009 U.S. Dist. LEXIS 67943, *136. Indeed, the three-judge court ***5** went so far as to prohibit "the introduction of evidence relevant only to determining whether the constitutional violations … were 'current and ongoing.' " *Id.*, 2009 WL 2430820, *31 n.42, 2009 U.S. Dist. LEXIS 67943, *137 n.42. That approach was irreconcilable with the terms and structure of the PLRA, and has resulted in an unjustified prisoner-release order that threatens public safety.

A. The failure to determine whether the alleged violations were ongoing cannot be reconciled with the language and structure of the statute.

The first and most basic requirement of the PLRA is that any prospective relief, *i.e.*, any relief other than compensatory monetary damages, 18 U.S.C. § 3626(g)(7), "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1)(A). Whenever a court orders prospective relief pursuant to the PLRA, it must find "that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Id.*

Thus, the starting point when considering prospective relief must always be a violation of particular prisoners' federal rights. Moreover, that violation must be current and ongoing at the time the relief is granted.[2] Otherwise, the requirement ***6** that the prospective relief "extend[ ] no further than necessary to correct the violation" would be nonsensical, and the consistent use of the present tense when referring to the violation would be stripped of its ordinary significance. *See Carr v. United States,* U.S , 130 S.Ct. 2229, 2230-31 (2010) ("[T]he present tense generally does not include the past …."), *citing* 1 U.S.C. § 1.

In addition, the PLRA imposes special requirements for prospective relief, such as the relief at issue here, that "requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law." 18 U.S.C. § 3626(a)(1)(B).[3] In this context, a court may not order prospective relief unless "(i) Federal law requires such relief to be ordered in violation of State or local law; (ii) the relief is necessary to correct the violation of a ***7** Federal right; and (iii) no other relief will correct the violation of the Federal right." *Id.*

While these requirements for relief that contravenes state law are similar to the general standards for all prospective relief, they are more than "absentminded duplication." *Arcadia v. Ohio Power Co.,* 498 U.S. 73, 79 (1990); *see also Mackey v. Lanier Collection Agency & Service, Inc.,* 486 U.S. 825, 837 & n. 11 (1988). Rather, they mean precisely what they say: prospective relief that contravenes state law must be required by the pertinent federal right itself, and it must be the *only* possible means of correcting the violation of that right.

Finally, the PLRA imposes yet another set of requirements when, as is also the case here, the prospective relief is a prisoner-release order. Such orders may only be issued by a three-judge court upon a "find[ing] by clear and convincing evidence that … crowding is the primary cause of the violation of a Federal right; and … no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E).

These requirements impose a new and higher standard of proof ("clear and convincing evidence"), and therefore cannot be satisfied by the individual district court's prior findings, which would have been made under a lower standard. Moreover, like the earlier provisions, they are phrased in the present tense, and applying them could only make sense

if there were a current and ongoing violation to correct. Thus, they, too, require a court considering a prisoner-release order to first find, based on a complete record, that there ***8** is an ongoing federal violation that cannot be remedied through any lesser measures.

Given these statutory requirements, the three-judge court's decision violated the plain language and structure of the PLRA, and undermined its manifest purpose of making prisoner-release orders a remedy of absolute last resort. Since the three-judge court did not determine whether the alleged constitutional violations were still ongoing, there was no basis for it to issue *any* new remedy. And since the three-judge court did not determine whether the alleged constitutional violations were extraordinary in their current form, there particularly was no basis for it to issue a remedy so unprecedented in scope that it would require the release of approximately 46,000 prisoners.

B. The proffered explanations for the three-judge court's approach have no merit.

The three-judge court and the prisoners have offered several arguments in support of their position that it was unnecessary for the court to determine whether and, if so, to what extent the alleged constitutional violations were ongoing. As set forth below, those arguments have no statutory or logical basis.

1. The three-judge court erred by relying on the individual district courts' prior findings of constitutional violations.

The three-judge court's primary explanation for its refusal to determine whether the alleged constitutional violations were ongoing was that -- ***9** years before the prisoner-release order -- the individual district courts had found that there were then ongoing constitutional violations. *Coleman,* 2009 WL 2430820, *30-31, 2009 U.S. Dist. LEXIS 67943, *136-37. [4] Reliance on those prior decisions was error.

At the outset, while the procedural histories of these cases are lengthy, it is important to remember that *Plata* had its genesis in a stipulated remedial order that did not address whether state officials had acted with deliberate indifference, as would have been required to establish a violation of the Eighth Amendment. *See* Stipulation for Injunctive Relief, filed Jun. 13, 2002. This was not unusual, as such orders sometimes "go well beyond what is required by federal law." *Horne v. Flores,* U.S. , 129 S.Ct. 2579, 2594 (2009). [5] Yet as a ***10** predictable consequence, while the individual district court stated as a general matter that unconstitutional conditions in the state's correctional system had not been corrected as of 2005, it did not distinguish between conditions that were a result of the deliberate indifference required for a constitutional violation, and conditions that were merely contrary to the stipulated order. *See Plata v. Schwarzenegger, supra,* 2005 WL 2932253, 2005 U.S. Dist. LEXIS 43796.

But even putting that aside, the individual district courts in *Plata* and *Coleman* did not purport to make their findings of constitutional violations under a "clear and convincing" standard of proof, nor was there any reason for them to do so. The PLRA imposes that standard only for prisoner-release orders, 18 U.S.C. § 3626(a)(3)(E), and thus requires the three-judge court to make an independent finding before issuing such relief.

Finally, even if there had been clear and convincing evidence of "ongoing" constitutional violations when the cases were before the individual district courts years earlier, it would not follow that there also must have been ongoing violations when the three-judge court issued its decision in August 2009, much less when it issued its final order in January 2010. A correctional system can change a great deal over a period of years. The three-judge court itself recognized as much when issuing its prisoner-release order, which would be implemented over the course of two ***11** years. And, more importantly, the terms and structure of the PLRA recognize such realities with their consistent requirement of ongoing violations. Thus, contrary to the three-judge court's view, the issue of whether the alleged constitutional violations were "current and ongoing" could not be divorced from the question of whether the drastic remedy of a large-scale prisoner-release order was necessary.

Even under traditional limitations on prospective injunctive relief, the three-judge court's failure to tailor its prisoner-release order to a current and ongoing constitutional violation would have been error. *See Imprisoned Citizens Union v. Ridge,* 169 F.3d 178, 188 (3d Cir. 1999) (Alito, J.) ("[C]onsistent with well-established limitations on the courts' authority to issue prospective injunctive relief to remedy constitutional violations…, the remedy imposed must be tailored -- temporally as well as substantively -- to redress the constitutional wrong at issue"), and cases cited therein. *See also O'Shea v. Littleton,* 414 U.S. 488, 493 (1974) (absent ongoing constitutional harm, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief…."). *A fortiori*, that failure was error under the PLRA's requirements for prospective relief, which are at least as demanding.

2. The denial of the state's summary judgment motion did not resolve the question of whether there were ongoing constitutional violations.

The three-judge court offered a *non sequitur* when it claimed in the alternative that, "even if [it] ***12** were required to find independently that the requirements of § 3626(a)(3)(A) -- including its requirement that prior orders have 'failed to remedy the deprivation of the Federal right' -- have been met, [it] did so in denying defendants' motion for summary judgment." *Coleman,* 2009 WL 2430820, *31, 2009 U.S. Dist. LEXIS 67943, *137. In the first place, it was simply incorrect to claim that the order denying the state's motion for summary judgment included a finding of ongoing constitutional violations. *See Coleman v. Schwarzenegger,* 2008 WL 4813371, *4 (E.D. Cal. Nov. 3, 2008) (not available on Lexis) (relying on three- and thirteen-year-old findings by individual district courts). But even if the three-judge court had made such a finding for purposes of the motion for summary judgment, it would have done so before any witnesses testified at trial, and under a standard that required the court to view the facts in the light most favorable to the prisoners. *Scott v. Harris,* 550 U.S. 372, 378 (2007). Thus, as would seem elementary, a finding of an ongoing violation at the summary-judgment stage would not have resolved the issue at the subsequent trial.

3. It was the prisoners' burden to prove ongoing violations warranting new and greater relief, not the state's burden to terminate earlier relief.

The three-judge court's failure to determine whether there were ongoing constitutional violations also was not excused by its observation that the state had not moved to terminate other, less onerous prospective relief, which had been entered years before by the individual district courts. ***13** *Coleman,* 2009 WL 2430820, *31, 2009 U.S. Dist. LEXIS 67943, *137. At the outset, this observation again ignored the fact that two years had passed since the cases were before the individual district courts, and thus that the earlier proceedings did not necessarily reflect current conditions.

Moreover, under circuit precedent, if the state had moved to terminate the earlier prospective relief, it would have had the burden to prove the absence of an ongoing violation. The Ninth Circuit stands alone in placing the burden on the state to prove the absence of an ongoing violation when it files a motion to terminate prospective relief. *Compare Gilmore v. Enomoto,* 220 F.3d 987, 1007 (9th Cir. 2000) ("[T]he burden of proof … [lies with] the party seeking to terminate the prospective relief"), *with Guajardo v. Tex. Dep't of Crim. Justice,* 363 F.3d 392, 395-96 (5th Cir. 2004) (per curiam) (stating, with respect to motions to terminate prospective relief, "We agree with the great majority of courts to address this issue: a plain reading of the PLRA, including its structure, imposes the burden on the prisoners"); *and Laaman v. Warden, N.H. State Prison,* 238 F.3d 14, 20 (1st Cir. 2001) (stating, with respect to petition to terminate prospective relief, "[T]he burden remains on the plaintiffs to show that such violations [of their federal rights] persist"). Nevertheless, circuit precedent would have bound the district courts had the state sought to terminate the earlier prospective relief.

In contrast, for new prospective relief, particularly a prisoner-release order, the PLRA places the burden of proof on the prisoners, who must establish by clear and convincing evidence, ***14** *inter alia*, that there is an ongoing violation, and that previous remedial attempts have failed to correct it. 18 U.S.C. § 3626(a)(3)(E). Thus, by relying on the fact that the

state had not sought to terminate the earlier prospective relief, the three-judge court misallocated the burden of proof, again contravening the plain language of the statute.

4. The three-judge court prohibited the state from presenting evidence on whether there were ongoing constitutional violations, but even if it had, the court's failure to determine whether there were such violations would have been error.

The *Coleman* appellees suggested at the jurisdictional stage that, because the district court heard testimony from certain experts who had recently toured the prisons, the three-judge court did not erroneously prohibit the state from presenting evidence on whether the alleged constitutional violations were current and ongoing. *Coleman* Mot. to Dismiss, 30-31. That claim was simply incorrect, but, regardless, it could not remedy the three-judge court's principal error, which was much deeper than a simple evidentiary misstep. Again, the three-judge court's basic error was in failing to determine (even on the evidence before it) whether and, if so, to what extent the alleged constitutional violations were ongoing.

The prisoners' suggestion that the three-judge court did not prohibit evidence on the question of whether the alleged constitutional violations were "current and ongoing" would surely come as a surprise to the three-judge court. Prior to trial, the state argued that the issue of whether ***15** the alleged constitutional violations were ongoing was central, and requested permission to present evidence on the point, but the three-judge court denied that request. Pretrial Tr. 28:16-29:2. Thereafter, the state sought reconsideration, arguing that the three-judge court's preclusion of evidence on that issue was irreconcilable with the terms of the PLRA, but the court denied that request as well, again ruling that evidence of whether there were ongoing constitutional violations would not be admitted. Trial Tr. 6:24-7:9. *See also id.* at 57:11-58:13.[6] In addition, as explained above, the three-judge court expressly acknowledged in its opinion that it did not permit evidence relevant only to the question of whether the alleged constitutional violations were still ongoing. *Coleman,* 2009 WL 2430820, *31 n.42, 2009 U.S. Dist. LEXIS 67943, *137 n.42.

But in any event, even if the three-judge court had permitted the state to present evidence on the question of whether the alleged constitutional violations were ongoing, that would not have excused the court's failure to make a determination on the issue, and to hold the prisoners to their statutory burden of proof when doing so. Again, the PLRA does not require the ***16** state to prove a negative, *i.e.*, the absence of any constitutional violations in its entire correctional system. Rather, it requires the prisoners to prove by clear and convincing evidence -- and the three-judge court to find -- that crowding is the primary cause of such violations, and that no remedy short of a prisoner-release order could possibly correct the violations. 18 U.S.C. § 3626(a)(3)(E). Obviously, one cannot determine the "cause" of a violation without knowing whether the violation exists in the first place, and cannot create the narrowest possible "remedy" for the violation without knowing the scope of the violation. Thus, there can be no meaningful application of those statutory requirements unless the three-judge court determines for itself whether and, if so, to what extent there are ongoing violations.

C. The three-judge court's own opinion creates serious doubts about whether and, if so, to what extent there were ongoing constitutional violations.

Because the three-judge court contravened the PLRA by issuing relief that was not tethered to any finding of an ongoing violation of the prisoners' federal rights, the three-judge court's judgment would be untenable even if the prisoners' underlying constitutional claims had any current merit. That issue is for the three-judge court in the first instance, and it has yet to address the question. Nevertheless, it is noteworthy that the three-judge court's own opinion creates serious doubts about whether the alleged violations actually were ongoing, and, if so, whether they were so extraordinary in their current form that ***17** the only possible remedy was to release tens of thousands of prisoners.

The underlying constitutional claim in this case is that the state's treatment of the prisoners' serious medical and mental health needs is so contrary to minimum standards of decency as to constitute cruel and unusual punishment, in violation of the Eighth Amendment. And, of course, the standard for such claims is demanding.

An inmate alleging that prison officials have engaged in cruel and unusual punishment by failing to provide essential health care cannot obtain relief "simply on the ground that the prison medical facilities [are] inadequate...." *Lewis v. Casey,* 518 U.S. 343, 350 (1996). Rather, he must prove that he has suffered actual harm as a result of the officials' "deliberate indifference to [his] serious illness or injury," *Estelle v. Gamble,* 429 U.S. 97, 105 (1976); or that, because of the officials' deliberate indifference, he is being involuntarily exposed to a health risk that is " '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.' " *Baze v. Rees,* 553 U.S. 35, 50 (2008) (plurality), *quoting Helling v. McKinney,* 509 U.S. 25, 34-35 (1993) (emphasis added by this Court). Similar to criminal recklessness, "deliberate indifference" requires that the prison officials be aware of, and disregard, an "excessive risk to inmate health or safety[.]" *Farmer v. Brennan,* 511 U.S. 825, 837 (1994).

When the three-judge court's decision is considered in light of this standard, the most striking aspect of the court's approach is that it ***18** relied neither on objective measures of community expectations for prison health care, nor on evidence of deliberate indifference by the state defendants. Instead, at nearly every turn, both when discussing alleged inadequacies in particular facets of the prison health care system, and when blaming overcrowding for those perceived deficiencies, the three-judge court explained its decision by reference to expert opinion testimony from prison administrators. *See, e.g., Coleman,* 2009 WL 2430820, *36, 2009 U.S. Dist. LEXIS 67943, *151-52 (accepting expert testimony that prisoners should not be examined in areas where their privacy is protected only by a fabric screen); 2009 WL 2430820, *36, 2009 U.S. Dist. LEXIS 67943, *153 (accepting expert testimony that prisoners should undergo "a physical exam, as opposed to a medical interview," when they are admitted).

The problem with this approach is that the issue on which the expert witnesses actually opined -- whether the state's correctional system comported with their understanding of professional standards -- is not of constitutional significance. *See Rhodes v. Chapman,* 452 U.S. 337, 348 n.13 (1981) ("[O]pinions of experts as to desirable prison conditions.... 'simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question' "), *quoting Bell v. Wolfish,* 441 U.S. 520, 543-44 n.27 (1979); *Inmates of Occuquan,* 844 F.2d 828, 837 (D.C. Cir. 1988) ("It is cruel conditions, defined by reference to community norms, to which the Constitution speaks; neither 'deficient' conditions nor conditions that violate 'professional standards' rise to the lofty heights of constitutional ***19** significance"). *See also Bobby v. Van Hook,* U.S. , 130 S.Ct. 13, 16-17 (2009) (*per curiam*) (reversing judgment that treated professional standards as constitutional minima); *id.* at 20 (Alito, J., concurring) (explaining that it is the responsibility of the courts, not professional organizations, to determine the requirements of the Constitution). Consequently, such heavy reliance on expert opinion not only is unwarranted, it has a corrupting tendency to lead courts away from the discrete Eighth-Amendment questions before them, and toward the larger world of prison administration (and criminal-justice policy), where they do not belong. *See Lewis v. Casey,* 518 U.S. at 350 (distinction between courts and prison officials "would be obliterated" if, despite absence of constitutional harm, courts intervened merely because prisoners were "being subject to a governmental institution that was not organized or managed properly"); *Inmates of Occuquan,* 844 F.2d at 837 ("[T]he obvious danger of employing professional standards as benchmarks is that they ineluctably take the judicial eye off of core constitutional concerns and tend to lead the judiciary into the forbidden domain of prison reform").

Moreover, many of the three-judge court's particular observations and findings were deeply suspect for additional reasons if they were supposed to be components of Eighth Amendment violations (as they would have had to be to support the remedy). For example, the court claimed that, according to expert testimony, "[*a*]*s of mid-2005*, a California inmate was dying needlessly every six or seven days." ***20** *Coleman,* 2009 WL 2430820, *1, 2009 U.S. Dist. LEXIS 67943, *39 (emphasis altered). But while that would indeed have been highly troubling if it were true, the constitutional

question concerned current conditions, not conditions "as of mid-2005," and current conditions were dramatically better by the three-judge court's chosen measure.

According to the court-appointed receiver, who now includes definitely-preventable deaths in the broader category of "likely" preventable deaths, there were just three likely-preventable deaths in 2007 (one every 121 or 122 days), the last year for which the three-judge court would have had statistics. *See* Jurisdictional Statement, 15. [7] Moreover, the three-judge court did not claim that any of the likely-preventable deaths from 2007 or later were attributable to Eighth Amendment violations. Thus, there is good reason to question whether, and, if so, to what extent, even the three-judge court's most disturbing claim was of ongoing constitutional significance.

The three-judge court also focused on the fact that, because of limited space and personnel, the state often conducted medical interviews, rather than full medical and dental examinations, when admitting new prisoners. According to the three- ***21** judge court, "This violates the 'basic principle that incoming prisoners must undergo a comprehensive exam upon arrival so that an adequate treatment plan may be developed and implemented. A physical exam, as opposed to a medical interview, is necessary because some conditions can be identified and confirmed only through physical examination of the patient.' " *Coleman,* 2009 WL 2430820, *36, 2009 U.S. Dist. LEXIS 67943, *153 (citations to record omitted). But whatever the source of this "basic principle," it was not the Eighth Amendment's proscription of cruel and unusual punishments. Treating the failure to comply with such "principles" as components of an Eighth Amendment violation would ignore this Court's holdings that prison officials do not violate their constitutional duties unless they disregard a known risk that is *sure or very likely* to cause *imminent* harm, *Baze v. Rees,* 553 U.S. at 50, and would establish as a constitutional minimum a level of care far beyond even community standards for non-incarcerated individuals. *See, e.g.*, Ateev Mehrotra, M.D., *et al., Preventive Health Examinations and Preventive Gynecological Examinations in the United States*, Archives of Internal Med., Sep. 24, 2007, Vol. 167, at 1876-83 (reporting that only 21% of Americans undergo preventive health exams, and that prominent clinical organizations, including the American College of Physicians, do not recommend such exams for asymptomatic patients).

Another area that the three-judge court singled out for attention was the supposed lack of medical privacy enjoyed by prisoners. *See* ***22** *Coleman,* 2009 WL 2430820, *39, 2009 U.S. Dist. LEXIS 67943, *161 (crediting expert testimony that state violated "fundamental medical confidentiality rights" by using only fabric screens to protect privacy); 2009 WL 2430820, *67, 2009 U.S. Dist. LEXIS 67943, *243 (faulting state for allegedly ignoring, *inter alia*, "the need for clinical privacy"). But to state the obvious, privacy rights in prison must often give way to the need for institutional security in prison, *see generally Hudson v. Palmer,* 468 U.S. 517 (1984); any embarrassment that might accompany being overheard speaking with a prison doctor is a far cry from the "wanton infliction of pain" prohibited by the Eighth Amendment, *see, e.g., Farmer v. Brennan,* 511 U.S. at 834; and the mental state involved in using only fabric screens to shield inmate privacy cannot reasonably be characterized as knowing disregard of a risk that is "*sure or very likely*" to lead to "*imminent*" harm. *Baze v. Rees,* 553 U.S. at 50.

Much of the remainder of the three-judge court's opinion focused on a litany of respects in which, according to expert opinion, the state correctional system had insufficient personnel, equipment, and recordkeeping. *See, e.g., Coleman,* 2009 WL 2430820, *43-49, 2009 U.S. Dist. LEXIS 67943, *175-91. But as was typical of the lower court's decision as a whole, those alleged deficiencies were not tied to any current, specifically-identified constitutional violations. And in any event, even if the claimed shortage of manpower and other resources were causing ongoing constitutional violations, the obvious remedy would be to increase their supply by hiring more doctors, custodians, and record-keepers, not to decrease demand by releasing prisoners.

***23** Such examples demonstrate the extraordinary disconnect between the standards of the Eighth Amendment and the PLRA on the one hand, and the approach taken by the three-judge court on the other. While this Court has explained that *some* prison conditions may have a mutually re-enforcing effect for purposes of the Eighth Amendment, *Wilson v. Seiter,* 501 U.S. 294, 304-05 (1991), that was not license for the three-judge court to aggregate *inappropriate* factors

by, for example, treating expert opinions as constitutional minima, selectively relying on stale data rather than current conditions, and demanding a standard of care that would be uncommonly high even outside the prison context.

But regardless, as explained at the outset, the three-judge court's fundamental error was in not even *considering* the question of whether and, if so, to what extent there were ongoing constitutional violations. Consequently, there is no need for this Court to decide how that question should have been answered. Amici raise the underlying Eighth Amendment issue only to illustrate one of the chief dangers of the three-judge court's procedural error -- that it may well be cloaking an even bigger substantive error.

II. The remedy of releasing thousands of prisoners whose constitutional rights have not been violated was not necessary and narrowly drawn.

As is implicit in the foregoing discussion, the three-judge court's order requiring the release of approximately 46,000 prisoners -- many of whom likely have no serious medical or mental health ***24** needs, and thus are not class members in the underlying lawsuits -- also violates the PLRA's requirements that prisoner-release orders may not be issued unless "no other relief will remedy the violation of the Federal right," 18 U.S.C. § 3626(a)(3)(E)(ii); and that, when issued, they must be "narrowly drawn, [and] extend[ ] no further than necessary to correct the violation of the Federal right...." 18 U.S.C. § 3626(a)(1)(A).

At the outset, this Court has made clear that any systemwide remedy, even one far short of a mass prisoner-release, is "patently" inappropriate when only a few isolated constitutional violations are established. *Lewis v. Casey,* 518 U.S. at 359-60. *See also Rizzo v. Goode,* 423 U.S. 362, 373 (1976) (twenty violations insufficient to justify sweeping equitable relief affecting 7,500 local officers). All the more so, such a remedy was grossly inappropriate here, as there were no findings of *any* ongoing constitutional violations. [8]

Moreover, even if there were current violations, the challenged relief would be overbroad in that it would force the release of prisoners who have no serious medical or mental health needs, and consequently are not class members in the underlying lawsuits. The three-judge court acknowledged that its population cap was "likely" to require the release of an unspecified number of ***25** inmates who are not even arguably victims of the alleged constitutional harm. *Coleman,* 2009 WL 2430820, *77, 2009 U.S. Dist. LEXIS 67943, *272. But the vagueness of that statement obscured just how remarkable -- and indefensible -- the court's approach was.

The three-judge court not only offered no estimate of how many class members were among the prisoners who would be released, it offered no estimate of how many class members there were to begin with. Thus, under the three-judge court's approach, it is possible that *none* of the class members would be among the 46,000 or so prisoners who would be released because of the court's order. And, perhaps even more troublingly, it is possible that *all* of the class members would be among the 46,000. For example, it is possible that there were only 35,000 class members to begin with, and that those 35,000 would be released along with 11,000 healthy prisoners. [9]

***26** Of course, whether because of the state's legitimate choices or simple chance, the actual balance of class members and non-class members released pursuant to the three-judge court's order almost certainly would fall somewhere between those two extremes. But they nevertheless illustrate just how inconsistent the three-judge court's approach was with the terms of the PLRA, which again make clear that prisoner-release orders are prohibited unless they are the only possible relief, 18 U.S.C. § 3626(a)(3)(E)(ii); and that, when issued, they must be "narrowly drawn" and "extend[ ] no further than necessary to correct the violation of the Federal right...." 18 U.S.C. § 3626(a)(1)(A). [0]

***27** This is not to say, of course, that the three-judge court should have ordered the mass-release of prisoners with serious mental or physical illnesses. But if there was to be a remedy at all, it should have been narrowly drawn to directly

address only the needs of such inmates. The three-judge court's order, which instead would most directly benefit prisoners who, unless by coincidence, are not even class members, is unsupportable under the PLRA.

III. Real-world experience with large-scale prisoner releases suggests that the three-judge court's order poses a significant threat to public safety.

The three-judge court's failure to decide these cases in a manner consistent with the requirements of the PLRA is troubling for many reasons, but the most palpable is the resulting threat to public safety. While the three-judge court has confidently declared that the state can release approximately 46,000 prisoners in a manner "that will not have an adverse impact on public safety, and that in fact may improve public safety," *Coleman,* 2009 WL 2430820, *84, 2009 U.S. Dist. LEXIS 67943, *293, real-world experience with large-scale prisoner releases shows otherwise. The documented effects of such an order in Philadelphia, which were well known to Congress when it enacted the PLRA, are illustrative.

***28** Pursuant to a consent decree in effect from 1986 until after the adoption of the PLRA in 1995, a federal district court judge enforced a population cap on the Philadelphia prison system that required the release or non-admittance of several hundred inmates per week. [2] Like her colleagues from California, the district court judge in Pennsylvania did not require local officials to indiscriminately "throw open the doors of [their] prisons." *Coleman,* 2009 WL 2430820, *78, 2009 U.S. Dist. LEXIS 67943, *274. Rather, she did essentially what the three-judge court proposes to do here, and what courts invariably have done when enforcing population caps: leave officials with no choice but to release (or not admit) the ***29** criminals seen as the best of the worst, such as those who had committed non-violent drug or property crimes, and those incarcerated because of probation or parole violations. *See* Violent Criminal Incarceration Act of 1995, Hearings on H.R. 667 Before the Committee on the Judiciary, United States House of Representatives, 104th Cong. 1st Sess. (Jan. 19, 1995) (testimony of Lynne Abraham, District Attorney of Philadelphia) (hereafter "Abraham House Testimony").

Yet the effect of the population cap on public safety was not the neutral or favorable one the three-judge court has predicted here. Rather, it was an extraordinary crime wave. During an eighteen-month period from January 1993 through June 1994 in which local officials took it upon themselves to document the consequences of the population cap, Philadelphia police rearrested 9,732 prisoners who had been released because of the cap. The new crimes those defendants were charged with committing during their premature releases included 79 murders, 1,113 assaults, 959 robberies, 701 burglaries, 90 rapes, 14 kidnappings, 264 firearms violations, 2,748 thefts, 2,215 drug-dealing offenses, and 127 counts of driving under the influence. Abraham House Testimony, *supra*; Statement of Sen. Dole, 141 Cong. Rec. at 26448.

Many of the victims of those crimes were residents of crime-plagued inner-city neighborhoods, whose suffering all too often escapes the notice of decisionmakers. *Cf. United States v. Pineda-Moreno,* 2010 WL 3169573 *3, 2010 U.S. App. LEXIS 16708, *9 (9th Cir. Aug. 12, 2010) (Kozinski, C.J., joined by Reinhardt, J., *et al.*, dissenting from denial of rehearing *en banc*) ***30** (observing that judges are among the members of society least likely to encounter the effects of court rulings that affect the public at large). But outrage over the population cap grew, and the need for prison litigation reform became glaringly apparent, when Daniel Boyle, a 21-year-old rookie police officer, was gunned down by Edward Bracey, a recently-released prisoner.

After his premature departure from jail, Bracey, a career car thief, promptly returned to his trade. When Officer Boyle attempted to stop him after one of his heists, Bracey led the young officer on a chase that ended with the thief crashing into a building. Unwilling to surrender even at that point, Bracey jumped out of his stolen car with a gun and fired eight times at Officer Boyle, including a fatal shot to the right temple. *See Commonwealth v. Bracey,* 662 A.2d 1062 (Pa. 1995); Violent Criminal Incarceration Act of 1995, Hearings on H.R. 667 Before the Committee on the Judiciary, United States House of Representatives, 104th Cong. 1st Sess. (Jan. 19, 1995) (testimony of Detective Patrick Boyle, father of Officer Boyle).

Several other police officers narrowly avoided similar fates. Officer Donald McMullen survived, albeit with a significant loss of vision, when released prisoner James Leath shot him in the face. *See* Wanda Motley and Julia Cass, *Council Hearings Examine Limit on Prison Population: Victims and Rendell vs. Guards and Inmates*, Philadelphia Inquirer, Sep. 29, 1994, at p. B1; Joseph A. Slobodzian, *Man Who Wounded Officer in #91 Gets Added Sentence: Life*, Philadelphia Inquirer, May 27, 1994, at p. B3. Similarly, Officer Bernard Murphy and his brother, ***31** Officer Shawn Murphy, survived the gunshot wounds they sustained when re-arresting Eddie Byrd, a released drug offender. *See* Dave Rascher, *Man Gets 20 Years for Shooting 2 Cops*, Philadelphia Daily News, Dec. 3, 1994, at p. 10. And Officer Raymond Shaw's bullet-proof vest saved his life when Robert Kirby, a drug-dealer freed thanks to the population cap, shot him during a marijuana bust. *See* Frank Dougherty, *Cop-Shooting Suspect Was Out of Jail on Cap*, Philadelphia Daily News, Nov. 8, 1995, at p. 7; Dave Racher, *Bulletproof Vest Saved Cop's Life -- And Spared Teen From a Murder Rap*, Philadelphia Daily News, May 15, 1996, at p. 15.

Of course, it was neither the intention nor the expectation of the district court in Philadelphia that imposing a population cap on the local prison system would lead to such violence against police and other innocent victims. Judicial intervention into prison affairs invariably begins with the best of intentions, often motivated by concerns over seemingly harsh sentencing practices or failures to comply with preferred standards for prison administration. But what the Philadelphia experience shows is that such concerns are best left to the people to address through the elected representatives responsible for shaping prison and criminal-justice policies.

At least some of the former prisoners who fired on Philadelphia police likely would have qualified for release under the three-judge court's order as well, as they all had been incarcerated in connection with non-violent offenses when they were freed because of the Philadelphia population cap. Indeed, the idea of such prisoners having been ***32** incarcerated at all for their drug and property crimes might well have been in tension with the three-judge court's view of enlightened criminal-justice policy. And yet those released prisoners and thousands of others in Philadelphia proved the prescience of then-Judge Alito's warning that, when, as here, the prosecuting authority does not believe that a large-scale prisoner release can be accomplished safely, "a court cognizant of its responsibilities to the community would hesitate to require the [state or local government] to follow a course of action that is antithetical to [its] most basic obligations and contrary to the public safety." *Harris v. City of Philadelphia,* 47 F.3d 1342, 1359 (3d Cir. 1995) (Alito, J., dissenting).

Unfortunately, the three-judge court's decision, for all its lengthy discussion of expert opinion, comes across as almost cavalier in its prediction that the public will be, if anything, *safer* with 46,000 more criminals on the streets. The lower court relied heavily on expert opinion to the effect that modestly-shorter prison terms would reduce deterrence only slightly. *See, e.g., Coleman,* 2009 WL 2430820, *89, 2009 U.S. Dist. LEXIS 67943, *309. But compliance with the three-judge court's population cap would not be a discrete, onetime event. Rather, the state would have to comply with the cap indefinitely. [3] Thus, short-term ***33** deterrence, or even incapacitation, on an individual level is not the issue.

If the three-judge court's order were allowed to stand, the state would *constantly* have thousands more criminals on its streets than it would but for the order. That is not hyperbole; rather, it is the simplest explanation of what the order under review would mean in practice. To assert that such a state of affairs "will not have an adverse impact on public safety, and [ ] in fact may improve public safety," *Coleman,* 2009 WL 2430820, *84, 2009 U.S. Dist. LEXIS 67943, *293, is to depart from the PLRA, *see* 18 U.S.C. § 3626(a)(1)(A) ("The court shall give substantial weight to any adverse impact on public safety.…."), and to forget the hard-earned lessons of history.

The simple and unambiguous terms of the PLRA make prisoner-releaser orders a remedy of last resort by restricting them to cases in which they are necessary and narrowly tailored to remedy an ongoing federal violation, and do not unreasonably threaten public safety. Because the three-judge court's decision does not comport with those basic statutory requirements, reversal is imperative.

***34 CONCLUSION**

The decision of the three-judge court should be reversed.

Footnotes

FN

* Counsel of Record

1 *See Coleman v. Schwarzenegger,* 2009 WL 2430820, *106, 2009 U.S. Dist. LEXIS 67943, *136 (E.D. Cal. Aug. 4, 2009) ("Under the order establishing a population cap, the size of the prison population will be reduced by approximately 46,000).

2 Although the phrase "current and ongoing is used elsewhere in the PLRA, in reference to petitions to terminate prospective relief, 18 U.S.C. § 3626(b)(3), amici use it in this context only because it was the three judge court's formulation; any word or phrase that conveys the need for present violations would serve equally well.

3 According to the population reduction plan submitted by the state and approved by the three judge court, many of the measures necessary to comply with the court's prisoner release order, such as reducing the grading of certain offenses and moving inmates to private or out of state facilities, violate state law. J.S. App. 59a 69a. And of course, those are hardly the only respects in which the prisoner release order intrudes in areas typically reserved to the states. Every time a state inmate is released earlier than he would have been but for a federal court's population cap, or is not admitted in the first place because of such a cap, the state's basic prerogative to establish and enforce its own criminal laws is restricted.

4 Interestingly, the individual district court in *Plata* also found that the primary cause of the alleged failure to provide constitutionally adequate care was not overcrowding, but poor management, leading to ill considered staffing and record keeping practices. *See Plata v. Schwarzenegger,* 2005 WL 2932253, *29, 2005 U.S. Dist. LEXIS 43796, *83 (N.D. Cal. Oct. 3, 2005) (" T]he single root cause of this crisis] is] an historical lack of leadership, planning, and vision by the State's highest officials during a period of exponential growth of the prison population, manifesting itself in a failure to take measures "such as taking incompetent doctors out of patient care, hiring qualified new doctors and nurses, and providing a medical records system ….).

5 For an explanation of why public officials may enter such agreements, even when they are not constitutionally required, see Gerald N. Rosenberg, "The Politics of Consent: Party Incentives in Institutional Reform in Consent Decrees, in *Consent and Its Discontents: Policy Issues in Consent Decrees*, 13 38 (2006), *available at* http:// www.princeton.edu/prior/publicatons/ docs/consent.pdf.

6 Even in the limited portion of the transcript cited by the prisoners in ostensible support of their claim that the state was not precluded from presenting relevant evidence, the three judge court reiterated that evidence would not be received to the extent that it addressed only "the question of whether or not there's a continuing constitutional violation because that supposedly was not among the "questions that are properly before the court.… Trial Tr. 837:16 837:24.

7 In December 2009, after the three judge court issued its decision, the court appointed receiver published statistics for 2008, when there were five likely preventable deaths for the year. *See* Kent Imai, M.D., *Analysis of Year 2008 Death Reviews*, Dec. 14, 2009, at 8, *available at* http:// www.cprinc.org/docs/resources/OTRES DeathReviewAnalysisYear2008 20091214.pdf. Those are the most recent figures available to amici.

8 It should go without saying that the factual allegations in these cases were more extensive than those in *Lewis* or even *Rizzo*, but again the most disturbing finding here concerned *past* conditions, and none of the findings here has been determined to involve an ongoing constitutional violation.

9 35,000 is a purely hypothetical number, and likely dwarfs the number of prisoners with truly intensive needs, who present the most demand for the correctional system's healthcare resources. To amici's knowledge, no one not the three judge court, nor even the parties themselves has a reliable, record based estimate of the size of the total plaintiff class. While the prisoners presumably would attempt to put the number as high as possible, it is difficult to imagine how even they could reach 46,000 (to pick a less random number), except by double counting prisoners who are members of both classes or by failing to distinguish between those prisoners who require very little care and those who require a great deal of care.

10 Because the three judge court failed to comply with the requirements of the PLRA, there is no need to rely on general caselaw on structural injunctions, which precedent has often developed in very dissimilar factual contexts. But even under such authority, the three judge court's order again would be unsupportable. This is not a situation in which injunctive relief merely would have some "collateral or "incidental spillover effect benefiting individuals who are not victims of the alleged wrong. *Compare Missouri v. Jenkins,* 515 U.S. 70, 110 11 (1995) (O'Connor, J., concurring). Rather, the three judge court's order

would *directly* benefit non victims, and would do so on a massive scale. There is no legitimate basis for such an approach. *See* 42 U.S.C. § 1983 (state officials can only be liable "to the party injured.… "); *Dayton Bd. of Educ. v. Brinkman,* 433 U.S. 406, 419 20 (1977) (scope of remedy is limited to scope of constitutional violation). And it would have the practical effect of doing indirectly what is forbidden directly expanding the classes to include prisoners who have suffered no injury, and consequently have no standing. *Cf. Schlesinger v. Reservists to Stop the War,* 418 U.S. 208, 222 (1974); *Blum v. Yaretsky,* 457 U.S. 991, 1001 02 (1982).

11 *See, e.g.*, Statement of Sen. Abraham, 141 Cong. Rec. 26352, 26448 (1995) ("American citizens are put at risk every day by court decrees. I have in mind particularly decrees that cure prison crowding by declaring that we must free dangerous criminals before they have served their time, or not incarcerate certain criminals at all because prisons are too crowded. The most egregious example is the city of Philadelphia. For the past 8 years, a Federal judge has been overseeing the wholesale release of up to 600 criminal defendants per week.… "); Statement of Sen. Dole, 141 Cong. Rec. 26476, 26549 (Sep. 27, 1995) ("Perhaps the most pernicious form of micromanagement is the so called prison population cap. … For example,] there's the case of Philadelphia, where a court ordered prison cap has put thousands of violent criminals back on the city's streets, often with disastrous consequences ").

12 The consent decree was entered over the objection of local prosecutors (who had no guaranteed right of intervention prior to the PLRA), and despite the absence of any finding of ongoing constitutional violations in Philadelphia's prisons. *See Harris v. Pernsely,* 820 F.2d 592 (3d Cir. 1987); Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. 3, S. 38, S. 400, S. 866, S. 900 Before the Committee on the Judiciary, United States Senate, 104th Cong. 1st Sess. (Jul. 27, 1995) (testimony of Lynne Abraham, District Attorney of Philadelphia).

13 The three judge court made clear, albeit not in the context of discussing the public safety consequences of its order, that it expected the population cap to force a long term reduction in the number of prisoners the state may hold. *See Coleman,* 2009 WL 2430820, *68, 2009 U.S. Dist. LEXIS 67943, *245. Under the court's decision, while the number of released prisoners will fluctuate over time, and may even come down somewhat because of new prison construction or transfers of inmates to other states' facilities, it will remain very substantial for the foreseeable future.

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Supreme Court of the United States.

Jose PADILLA, Petitioner,
v.
COMMONWEALTH OF KENTUCKY, Respondent.

No. 08-651.
August 17, 2009.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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*i QUESTIONS PRESENTED

1. Whether a State has an affirmative duty, as a condition of preserving a duly entered guilty plea, to provide counsel to investigate and advise a criminal defendant in state court of collateral consequences, such as deportation, that may result from the plea.

2. Assuming there is no such affirmative duty, whether "gross misadvice" regarding a collateral consequence of a plea, such as deportation, can constitute ineffective assistance of counsel under the Sixth Amendment, and thereby entitle the defendant to vacatur of the plea.

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***1** INTRODUCTION AND INTEREST OF *AMICI CURIAE*

As this court has recognized, plea agreements are the backbone of "the orderly administration of justice" in this country. *United States v. Timmreck,* 441 U.S. 780, 784 (1979). Indeed, in the state courts - which typically account for over ninety percent of all felony convictions in the United States - plea agreements make up the overwhelming majority of those convictions.[2] But if this Court were to adopt Padilla's position, and thereby abolish or weaken the settled rule that those who plead guilty need only understand the *direct* consequences of their pleas - a principle known as the "collateral consequences" rule - that ruling, at least in the States, would likely break the back of the plea agreement system.

***2** Padilla urges the Court to hold that a criminal defendant who knowingly, intelligently, and voluntarily accepted the direct consequences of a plea agreement can unilaterally revoke the bargain he struck with the state upon a showing that he was uninformed or misinformed by counsel about a noncriminal, collateral consequence of his conviction. To be sure, his case arises in the difficult context of deportation, where Congress has made a policy choice against permitting immigrants who engage in criminal conduct to remain in the United States. But the rule Padilla urges cannot in principle be limited to that context. And if this Court follows his suggestion and abolishes or weakens the collateral consequence rule, defendants who have pleaded guilty could soon be empowered to re-open their plea agreements based on a host of collateral consequences, including such things as parole eligibility, firearms privileges, and child custody issues. Moreover, given the enormous numbers of aliens who are charged with crimes in this Nation, even an "exception" limited to deportation and/or affirmative "misadvice" would wreak havoc with the plea agreement system.

Accordingly, the *amici* States have an obvious, powerful interest in this Court's resolution of the questions presented. And the same is true of *amicus* National District Attorneys Association (NDAA), the oldest and largest professional organization representing U.S. criminal prosecutors. NDAA's members are state and local prosecutors who will bear the burden of re-prosecuting thousands of defendants like Padilla if this Court abandons or weakens the collateral consequences rule. *Amici* recognize, of course, that prosecutors considering plea agreements must take into account any undue hardship the plea may ***3** create, and NDAA's officials have spoken out about the sometimes harsh impact of collateral consequences on criminal defendants.[3] These ethical obligations and policy concerns do not, however, add up to a new constitutional right to sound advice from state-paid counsel on the collateral consequences of a criminal conviction - enforceable through vacatur of an otherwise fully informed guilty plea.

STATEMENT

This case is about a confessed drug smuggler who relied on the advice of competent counsel to voluntarily plead guilty in *State* court, in the face of overwhelming evidence against him, and who now seeks to vacate his plea in hopes of escaping the *federal* immigration consequences of his crime.

In September 2001, a Kentucky law enforcement officer stopped Padilla's truck to perform a routine paperwork check. J.A. 47-49. In the subsequent consent-based search, the officer found 23 wrapped Styrofoam boxes that were mysteriously absent from the truck's shipping manifest. R. 33. When he asked Padilla what was in the boxes, Padilla responded, "maybe drugs." *Id.* As it turned out, Padilla was hauling nearly half a ton of marijuana. *Id.*

Represented by a state-paid lawyer who was fully competent in criminal-law matters, Padilla lost his bid to suppress the drugs and the confession. Recognizing that he was left without defenses, and facing ***4** the prospect of a jury that would not take kindly to drug smuggling, he elected to plead guilty to three offenses: misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia, and felony trafficking in marijuana. R. 34, J.A. 61-68. Padilla's felony drug trafficking conviction carried a maximum sentence of ten years. Ky. Rev. Stat. Ann. § 218A.1421(4)(a); 532.060(2)(c). Padilla, who expressed no dissatisfaction with his counsel's representation at the time, received a sentence of five

years in prison and five years probated, with credit for time already served. His prison time was thus only half of what it could have been if he had gone to trial and lost - which was a virtual certainty.

Two years later, in 2004, Padilla filed a pro se motion for postconviction relief under state law. J.A. 71-74. He alleged that he had received constitutionally ineffective assistance of counsel because his attorney told him that his conviction would not affect his immigration status, when in fact, as a felony drug offense, it made him eligible for deportation. J.A. 71-74. Padilla thus argued that his plea was invalid because the assistance he received fell short of that required by 1;he Sixth Amendment. The local Kentucky Circuit Court denied his motion because it found that his plea was "knowing, intelligent, and voluntary." R. 72-76.

The Kentucky Court of Appeals, in a 2 to 1 decision, reversed and remanded the case for an evidentiary hearing to determine whether Padilla had been misadvised, and whether this misadvice had rendered his plea agreement involuntary. Pet. App. 29-40, 36. The Kentucky Supreme Court reversed, holding that collateral consequences of a criminal conviction were "outside the scope of the … Sixth Amendment ***5** right to counsel" and could not render Padilla's plea involuntary. Pet. App. 23.

SUMMARY OF ARGUMENT

As Kentucky's brief carefully and cogently explains (at 12-23), the "collateral consequences" rule is almost universally accepted, not only in the state courts, but in virtually all the federal circuits. That is because the rule - which limits the Sixth Amendment effectiveness inquiry to the direct consequences of a prosecution - rests on a common-sense principle that helps courts adhere to the text of the Sixth Amendment while honoring the government's interest in finality and efficiency. This court should embrace it.

By its terms, the Sixth Amendment guarantees each criminal defendant "the assistance of counsel for his *defense*" in "all *criminal* prosecutions." U.S. Const. amend. VI (emphasis added). Thus, an attorney's effectiveness for Sixth Amendment purposes must be evaluated with reference to "the range of competence demanded of attorneys in *criminal cases.*" *Hill v. Lockhart,* 474 U.S. 52, 57 (1985) (quoting *McMann v. Richardson,* 397 U.S. 759, 771 (1970)) (emphasis added). By excluding matters "over which the trial judge has no control and for which he has no responsibility," the collateral consequences rule allows courts to focus on the defense attorney's competence in handling the "criminal prosecution" to which the Sixth Amendment attaches. *United States v. Gonzalez,* 202 F.3d 20, 27 (1st Cir. 2000).

The collateral consequences rule also serves the state's strong interest in the finality of plea agreements. As this Court has recognized, "[e]very inroad on the concept of finality undermines confidence in ***6** the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *United States v. Timmreck,* 441 U.S. 780, 784 (1979) (quoting *United States v. Smith,* 440 F.2d 521, 529 (7th Cir. 1971) (Stevens, J., dissenting)). This interest is at its height in the plea agreement context, both because "the vast majority of criminal convictions result from such pleas" and because "the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *Id.*

Given the overwhelming number of plea agreements entered in state courts each year (an estimated 1.2 million, in 2004), [4] as well as the enormous cost of indigent defense in state courts - more than $2.8 billion in 2002 [5] - States and prosecutors have a critical interest in the finality of those pleas. The collateral consequences rule protects this finality interest by preventing convicted criminals from re-opening their pleas based on matters that are outside the scope of the state's criminal prosecution. The rule thus protects the state's interest in an efficient justice system by preventing it from having to pay for counsel to advise defendants on a variety of specialized collateral matters outside the sentencing court's control, and by ***7** limiting the number of plea bargains that are re-opened and sent to trial.

The collateral consequences rule is also necessary to prevent the right to counsel from becoming completely detached from the text and history of the Sixth Amendment. As this Court has previously recognized, and scholars of all stripes agree, the Framers understood the Sixth Amendment to guarantee only the right to *employ* counsel in criminal cases, not the right to receive state-paid counsel. While this Court departed from that understanding in *Gideon v. Wainwright,* 372 U.S. 335 (1963) - and we do not quarrel with that decision - this historical background counsels restraint when faced with an invitation to dramatically expand the right to state-paid counsel beyond its present bounds.

But that is exactly what Padilla's arguments would do. Besides attacking the collateral consequences rule altogether, he argues for two exceptions that would effectively swallow the rule: a "deportation" exception, and a "misadvice" exception. Neither one makes sense.

As to the first: Deportation is a *federal* civil proceeding that must be initiated by the Department of Homeland Security in a special federal Immigration Court. It is subject to its own multi-layer review process, and is completely outside of the control of a state court presiding over a criminal prosecution. The collateral consequences rule clearly and correctly excludes such proceedings from the scope of the Sixth Amendment right to criminal trial counsel. And, given the large number of aliens who are charged with crimes, an "exception" for deportation issues ***8** would substantially burden the plea agreement system, and dramatically increase its cost.

Adopting an exception based on "misadvice" would be equally if not more unwise. As Kentucky has explained, the distinction between misadvice and "non-advice" is often elusive in theory. And, as a practical matter, recognition of a "misadvice" exception would effectively open *every* guilty plea to an expensive, time-consuming collateral attack. Indeed, such an exception would give criminal defendants a powerful incentive to fabricate allegations about legal advice they were given by their court-appointed lawyers - allegations that would often be difficult to disprove months or years after the fact. It would also create incentives for unscrupulous appointed counsel to *deliberately* misadvise their clients on some collateral issue, thereby creating a latent "misadvice" claim that the client could invoke if she later had misgivings about her plea.

Perhaps most important, constitutionalizing advice on collateral consequences would effectively pre-empt the states' ongoing efforts to address the effect of deportation on criminal defendants. As another *amicus* has pointed out, twenty-eight states and the District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas. Br. of the Nat'l Assn. of Crim. Defense Lawyers et al., *Amici Curiae,* App. 11a; *see also INS v. St. Cyr,* 533 U.S. 289, 323 n.48 (2001) (citing laws in eighteen states and the District of Columbia). There simply is no need for this Court to displace the States' efforts, or future efforts by Congress, to address this policy problem in the manner they think best.

*9 I. The Collateral Consequence Rule Serves Important Governmental Interests And Is Fully Consistent With the Text and History of the Sixth Amendment, as Well As this Court's Precedents

A. The Rule Protects the Strong State Interest in the Finality of Plea Agreements, Which are the Backbone of the U.S. Criminal Justice System

Thirty years ago in *Timmreck*, this Court recognized that "new grounds for setting aside guilty pleas" have a disproportionate impact on the "orderly administration of justice" because "the vast majority of criminal convictions result from such pleas." 441 U.S. at 784. If anything, that observation is even more true now than it was then: In 2004, 95% of all state felony convictions - and 96% of state felony drug convictions - were entered via plea agreements. [6] The proportions are similar in federal courts. [7] These numbers make clear that the state's interest in the finality of plea agreements is at least as strong today as it was thirty years ago.

Because plea agreements are so essential in the U.S. justice system, ensuring their finality is likewise essential. As Kentucky has shown (at 19-20), the collateral ***10** consequences rule protects the state's strong interest in finality by preventing felons who pleaded guilty to their crimes from overturning their conviction on grounds unrelated to their guilt or the integrity of the criminal proceedings against them. *See Timmreck,* 441 U.S. at 784.

The collateral consequences rule likewise prevents the States from being held responsible for proceedings - and related legal advice - that are effectively beyond their control. Indeed, the First Circuit has defined "collateral" in just such functional terms: A consequence is deemed "collateral" if it is "controlled by an agency which operates beyond the direct authority of the trial judge" or otherwise "remains beyond the control and responsibility of the district court in which [the] conviction was entered." *United States v. Gonzalez,* 202 F.3d 20, 27 (1st Cir. 2000). The collateral consequences rule thus protects the state's interest in finality by protecting guilty pleas from being attacked by defendants who have discovered too late the broad array of social and legal consequences that follow from a felony conviction. [8]

That protection is essential. Given the overwhelming number of State criminal convictions entered as a result of guilty pleas each year - over 1.2 million in 2004 alone [9] - even an incremental weakening in the finality of these pleas may have a dramatic ***11** effect on the integrity and effectiveness of the U.S. system of justice. *See Timmreck,* 441 U.S. at 784. That alone is a powerful reason to embrace the collateral consequences rule, and to reject Padilla's efforts to abolish or weaken it.

B. The Rule Protects States From The Potentially Enormous Costs Of Expanding The Right To State-Paid Counsel To Include Competent Advice On Collateral Matters Outside The States' Responsibility And Control.

Another powerful reason for the collateral consequences rule is protecting both the States' fiscs, and their judicial and prosecutorial resources.

The direct costs of providing counsel to indigent defendants are already enormous, and have risen substantially in the last 20 years. In 1986, the cost of indigent defense in the 50 states and the District of Columbia was just under $1 billion; by 2002, the cost had risen to over $2.8 billion. [0] Obviously, the more subjects on which the State must provide indigent defendants with competent legal advice, the greater those costs will be. Merely giving non-citizen defendants access to an immigration-law expert would substantially increase the States' costs of providing counsel to those they prosecute. And those costs could become truly exorbitant if the States were also required to provide sound legal advice on other potential ***12** collateral consequences of a plea agreement - such as its effects on divorce or child-custody proceedings; on landlord-tenant matters; on certain types of employment; or on the availability of public housing or other public services. Each of these areas is a distinct legal specialty. And without the collateral consequences rule, one can well envision a regime in which a State would be required to provide a "dream team" of five or more lawyers for each indigent defendant. The aggregate costs would be astronomical.

The addition of such costs, moreover, would go well beyond the rationale for requiring State-paid counsel. The logic of requiring states to pay for criminal defense counsel rests on the assumption that the states have a responsibility to ensure the basic fairness of the criminal prosecutions brought under their authority. States, as this Court has noted, "quite properly spend vast sums of money to establish machinery to try defendants accused of crime," and "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963). The collateral consequences rule keeps ***13** this limited constitutional right to state-paid counsel - designed to protect the right to a fair trial in a criminal prosecution - from evolving into a broad-ranging right to state-paid counsel to advise an indigent defendant on any number of non-criminal matters.

As noted, the fiscal consequences of allowing criminal defendants to re-open their plea agreements based on defective advice on collateral matters are potentially huge. Plea agreements are "an essential component of the administration of justice" partly because "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Santobello v. New York,* 404 U.S. 257, 260 (1971). For example, one investigation in the mid-1990s found that in Washington State, normal felonies resolved by a plea bargain cost about $600 to defend," while "defense in a full-blown criminal trial could cost as much as $50,000 per case." [2]

If the States were required to provide sound legal advice on the full range of potential collateral consequences, the costs associated with plea bargains would certainly double or triple in size. And that, of course, would reduce the State's incentive to resolve cases through plea bargains, and would thereby put ***14** even greater strain on judicial resources at both the state and federal levels.

C. The Sixth Amendment's Text And History Militate Against Any Further Extension Of The Right To State-Paid Counsel.

The Sixth Amendment's text and history also counsel strongly against any extension of the right to State-appointed counsel to include advice regarding collateral consequences. As this Court recognized in *Scott v. Illinois,* "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." 440 U.S. 367, 370 (1979). Indeed, there appears to be *no* serious dispute among legal scholars and historians that the Amendment, as originally enacted, provided nothing more than a right of an accused to the assistance of his or her own, personally funded counsel, and in no way mandated that counsel be provided by the government, be it federal or State. [3]

Amici recognize that, as to the States, the Court departed from this understanding more than 50 years ago when it held, in ***15** *Gideon v. Wainwright,* 372 U.S. 335 (1963), that the Sixth and Fourteenth Amendments provide indigent defendants a right to State-provided counsel in State felony proceedings. *Id.* at 344-45. [4] *Amici* have no quarrel with that settled precedent. Nevertheless, in deciding whether to overturn or weaken the collateral consequences rule, and thereby *expand* the right to State-paid counsel, the Court may wish to be mindful of the pertinent textual and historical evidence on the original understand of the Sixth Amendment's right to counsel. That evidence includes (a) the English common law as it existed just before the adoption of the Sixth Amendment; (b) the Framers' decision not to follow State laws that expressly provided a right to appointed counsel in certain circumstances; and (c) the interpretation of the Amendment's right-to-counsel provision by the first Congress. These materials establish that at its adoption the Sixth Amendment was not viewed as granting *any* right to government-provided representation. And that fact strongly suggests ***16** that the right to State-paid counsel, recognized in *Gideon* and its progeny, should not be expanded beyond its present bounds.

1. The Sixth Amendment's right-to-counsel provision was a response to the traditional English common-law rule, which severely limited the assistance of counsel in serious criminal cases. Under that rule, "a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest." *Powell,* 287 U.S. at 60; see William M. Beaney, *The Right to Counsel in American Courts* 8-10 (Greenwood 1972) (1955). By contrast, "parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel." *Powell,* 287 U.S. at 60. Thus, as this Court has recognized, the English rule "perversely gave less in the way of right to counsel to accused felons than to those accused of misdemeanors." *Scott,* 440 U.S. at 372; *Powell,* 287 U.S. at 60 (noting that the English rule was "outrageous" in that it gave "the right to the aid of counsel in petty offenses" but not "in the case of crimes of the gravest character, where such aid is most needed"). [5]

Because of the absurdity of the English rule, many Colonies abandoned it before the Sixth Amendment was even drafted. See ***17** *Betts,* 316 U.S. at 465 (noting that that Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, and Pennsylvania had abandoned the English Rule before the Sixth Amendment was adopted). As this Court has explained, in "light of th [e] common law practice, it is evident that the[se] constitutional provisions … were intended to do away with" that rule. *Id.* at 466. Or, as one commentator put it, the intent of the Framers "was clearly to abrogate this perverse English common law rule by constitutional amendment and to provide the defendant with the right to be represented by counsel, presumably of his own choice and at his own expense." B. Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged With Misdemeanors Entitled To Court Appointed Counsel?,* 5 Roger Williams U. L. Rev. 417, 425-26 (2000).

2. While making a decisive break with the English rule, the Sixth Amendment did not adopt the more expansive right to appointed counsel already recognized by some States. In fact, a comparison of the Sixth Amendment's language with that of contemporaneous State statutes mandating appointed counsel reveals that the Sixth Amendment's drafters deliberately avoided creating any right to appointed counsel.

When the Sixth Amendment was drafted, apparently only Connecticut and New Jersey appointed counsel for defendants facing felony indictments generally. See *Betts,* 316 U.S. at 467 n.20. Another five States provided counsel for defendants only in capital cases. See *Betts,* 316 U.S. at 467 n.20 (Delaware, Pennsylvania, Massachusetts, and New Hampshire); Beaney, *supra,* at 17 (South Carolina). Like New Jersey, these States did so through explicit statutory ***18** language providing for "assigned" counsel. [6] Moreover, these appointed counsel provisions supplemented more general statutory language providing the right to retain one's own counsel. See Beaney, *supra,* at 16-21.

The language of the Sixth Amendment, by contrast, made no mention of "assigned" or appointed counsel. This silence is particularly telling given that most of the founders were generally aware of the developments in State law at the time and that the federal Constitution was in many ways modeled after ***19** contemporaneous State constitutions. [7] Accordingly, the Sixth Amendment's silence on the right to appointed counsel reveals that - unlike the State laws that explicitly required appointed counsel - the Amendment was not designed to impose such a requirement.

3. Actions of the first Congress support the conclusion that the Sixth Amendment did not require appointed counsel. For example, the Judiciary Act of 1789, signed the day before the Sixth Amendment was proposed in Congress, contained the following provision: "[I]n all the courts of the United States, the parties may plead and manage their own causes personally *or* by the assistance of such counsel or attorneys at law as by the rules of the said courts … shall be permitted to manage and conduct causes therein." Ch. 20, § 35, 1 Stat. 73, 92 (1789) (emphasis added). Unlike the State statutes providing for appointed counsel in some circumstances, the Judiciary Act made no mention of that subject. And as Prof. Beaney has noted, "If Congress had thought that the proposed Sixth Amendment counsel provision embodied a startling change from this statutory rule, some discussion concerning the proposal would undoubtedly have occurred on the floor." Beaney, *supra,* at 28.

Even more telling is a 1790 statute requiring that anyone indicted for treason or other capital crimes be offered "assigned counsel":

> ***20** I. [Such a defendant] shall also be allowed and admitted to make his full defense by counsel learned in the law; and the court before whom such person shall be tried … shall, and they *are hereby authorized and required immediately upon his request to assign to such person such counsel*, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours ….

Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112, 118 (emphasis added).

The enactment of this statute contemporaneously with the Sixth Amendment clearly indicates that Congress did not believe the Sixth Amendment itself required "assigned" counsel in such cases. For if the Sixth Amendment itself provided such a right, the right provided in the statute would have been both redundant and woefully under-inclusive. As this Court has repeatedly held, "[a]n Act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, … is contemporaneous and weighty evidence of its true meaning.' " *Marsh v. Chambers,* 463 U.S. 783, 790 (1983) (omission in original) (quoting *Wisconsin v. Pelican Ins. Co.,* 127 U.S. 265, 297 (1888)); see *Franklin v. Massachusetts,* 505 U.S. 788, 803-04 (1992) ("[I]nterpretations of the Constitution by the First Congress are persuasive."); *Bowsher v. Synar,* 478 U.S. 714, 723-24 & n.3 (1986) (listing 20 members of the first Congress who had been delegates to the Philadelphia Convention). [8]

***21** Like the other historical evidence, the actions of the first Congress cast substantial doubt on the propriety of further expanding the federal right to appointed counsel to include advice on the collateral consequences of conviction.

II. Padilla's Proposed "Deportation" Exception Makes No Sense As A Matter Of Law Or Policy.

Apparently mindful of the importance of the collateral consequences rule, Padilla attempts to craft a narrow "deportation" exception to that rule. However, as Kentucky shows in its brief, deportation is unquestionably a collateral consequence of a criminal proceeding. Resp. Br. at 36-41. And as the Ninth Circuit has noted, "[a]ll other circuits to address the question have concluded that deportation is a collateral consequence of the criminal process and hence the failure to advise does not amount to ineffective assistance of counsel." *United States v. Fry,* 322 F.3d 1198, 1200 (9th Cir. 2003). That conclusion is correct: Deportation is a civil proceeding initiated in ***22** federal administrative courts and subject to its own extensive review process. The states, moreover, are already addressing the policy concerns surrounding the deportation of convicted criminals, and this Court should not prematurely pre-empt this process by constitutionalizing immigration advice to criminal defendants.

A. The Collateral Consequences Rule Clearly And Correctly Excludes State-Paid Counsel's Advice Regarding Civil Deportation Proceedings Carried Out in Special Administrative Courts Under the Authority of a Different Sovereign.

As Kentucky correctly points out (at 37), deportation is a collateral matter both because it does not stem directly from the conviction and because the sentencing court has no power over deportation decisions. Indeed, as the First Circuit has held, "what renders the plea's immigration effects collateral … [is] the fact that deportation is not the sentence of the court which accepts the plea but of another agency over which the trial judge has no control …." [9] *Gonzalez,* 202 F.3d at 27 (quotations omitted).

In fact, deportation is the result of a civil proceeding carried out in federal administrative courts and subject to its own extensive review process, up to and ***23** including review in this Court. *See, e.g., Nijhawan v. Holder,* 129 S. Ct. 2294, 2298 (2009). To deport a criminal immigrant, the Department of Homeland Security first files a Notice to Appear in Immigration Court, an administrative court under authority of the Executive Office for Immigration Review. [20] In these proceedings, criminal immigrants can and do raise claims under the Convention Against Torture in Immigration Court, and are allowed to present evidence that they have a credible fear of torture if they return to their home country and should not be removed from the U.S. *See, e.g., Kolkevich v. AG of the United States,* 501 F.3d 323, 325-26 (3d Cir. 2007).

Once the Immigration Judge rules on the immigrant's removal, both the DHS and the immigrant may appeal the Immigration Judge's decision to the Board of Immigration Appeals. Immigration Court Practice Manual at 101.

After the BIA issues its ruling, there follows another layer of review, this time in a federal Court of Appeals. *Kolkevich,* 501 F.3d at 326.

Finally, when a removal proceeding presents important unresolved legal questions, this Court may grant a writ of certiorari and review. *See, e.g., Nijhawan v. Holder,* 129 S. Ct. 2294, 2298 (2009).

This whole process, which is subject to its own layers of review and appeal, unquestionably qualifies as a "collateral consequence" of the immigrant defendant's ***24** criminal conviction. Of that there can be no doubt.

The practical consequences of Padilla's proposed "deportation exception," moreover, are staggering. Available statistics indicate that there are currently 22 million non-citizens residing in the United States; of those nearly 1000,000 are in custody - suggesting that substantial numbers are charged with crimes every year. [2] Given those numbers, an exception to the collateral consequences rule for immigration issues alone would dramatically expand the costs of the criminal justice system in many States. And such an exception would undermine the finality of a substantial percentage of State plea agreements. Padilla's "deportation exception," therefore, would come close to swallowing the collateral exception rule - and would certainly and substantially weaken the protections it provides to the States' treasuries, and to their prosecutorial and judicial resources.

B. In A Variety Of Ways, Most States Are Already Addressing The Collateral Effects Of Plea Agreements On Immigration Issues, And It Would Be Unwise To Interfere With The States' Experimentation In This Area.

A "deportation exception" would also inappropriately "take the development of rules and procedures in this area out of the hands of legislatures and state ***25** courts shaping policy in a focused manner and turn it over to federal courts …." *DA's Office v. Osborne,* 129 S. Ct. 2308, 2312 (2009). It is far more desirable - as a matter of well as Sixth Amendment jurisprudence - to let the states develop their own rules and policies in this area.

The States, moreover, are *already* grappling with this difficult and sensitive issue. As *amici* National Association of Criminal Defense Lawyers et al. have shown, 28 states and the District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas. Br. of the Nat'l Assn. of Crim. Defense Lawyers et al., *Amici Curiae,* App. 11a [hereinafter NACDL Brief]; *see also St. Cyr,* 533 U.S. at 323 n.48 (citing laws in eighteen states and the District of Columbia). Some states, like Texas, require the court to inform the defendant that his plea may result in deportation. Tex. Code Crim. Proc. art. 26.13. Washington requires a specific warning and allows an unwarned defendant who is at risk of deportation to withdraw his plea. Rev. Code Wash. (ARCW) § 10.40.200. California requires the court to give the defendant both a warning, and, upon request, additional time to consider the possible immigration consequences of his plea. Cal Pen Code § 1016.5. Other states take different approaches. And Kentucky itself has recently revised its plea forms to include a warning to non-citizens that they "may be subject to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service." Ky. Form AOC-491, Rev. 2-03; Ky. Form AOC-491.2, Rev. 1-03.

This kind of experimentation among the States currently occurs at the judicial level as well. One recent ***26** survey of state judges found that sixty percent of them discuss collateral consequences with defendants at sentencing. Alec C. Ewald et al., *Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench,* 29 Justice System Journal 145 (2008).

Given the variety of ways that states and judges are already addressing these issues, "[t]here is no reason to constitutionalize" advice of counsel on the immigration consequences of a guilty plea *Osborne,* 129 S. Ct. at 2312.

III. Padilla's Proposed "Misadvice" Exception Is Equally Misguided.

Nor is there any basis for Padilla's attempt to create a special exception for "misadvice." As Kentucky has shown (at 31-35), the decisions making exceptions to the collateral consequences rule for "misadvice" have failed to grapple with the text and history of the limited Sixth Amendment guarantee of counsel. Moreover, constitutionalizing misadvice on collateral consequences would not achieve the policy results Padilla seeks. To the contrary, a rule penalizing misadvice but not nonadvice would reward defense attorneys for *refusing* to answer their clients' questions about collateral matters - a perverse result in light of the ethical standards that encourage open discussion of collateral consequences. [22]

Even worse, as a practical matter, recognition of a "misadvice" exception would effectively open every ***27** guilty plea up to a time-consuming and expensive collateral attack. Such an exception would give criminal defendants a powerful incentive to fabricate allegations about legal advice they were given by their court-appointed lawyers - allegations that would be difficult after the fact. And such an exception would make it possible for unscrupulous appointed counsel to give their clients a later opportunity to reopen their plea agreements: All such counsel would need to do is to deliberately misadvise a client on some collateral issue, knowing that she could later invoke that misadvice if she had misgivings about her plea.

In short, a "misadvice" exception to the collateral consequences rule makes no sense as a matter of theory or practice.

IV. Abandoning Or Weakening The Collateral Consequences Rule Will Distort This Court's Sixth Amendment Jurisprudence Without Truly Benefiting Immigrants

Ultimately, the lengthy and uncertain process of petitioning to set aside a plea agreement is a poor substitute for the only remedy that would give Padilla and similarly situated immigrants meaningful relief: legislative change. As past NDAA president Robert M.A. Johnson said in 2001, "[a]t times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences." [23] Moreover, ***28** "[t]he efforts of prosecutors and judges do not fully deal with the problem" because they "lack [] the ability … to control the whole range of [collateral] restrictions and punishment imposed on an offender." Johnson thus concluded that ultimately, "[t]here must be some reasonable relief mechanism" in the laws that *impose* the collateral consequences.

Padilla's own case makes this point eloquently. He claims that but for the misadvice he allegedly received from his counsel, he would have gone to trial. Pet. Br. at 11. But his likelihood of success at trial was minuscule: Court records show that, in the year Padilla was arrested, only one defendant charged with a drug-related offense was acquitted by a jury. [24] What is more, the evidence against Padilla - which included over 1,000 pounds of marijuana in his truck and his admission that he knew that he was smuggling drugs - was overwhelming. R. 33-34. Thus, although Padilla asserts that going to trial and requesting jury sentencing *may* have resulted in earlier parole eligibility, Pet. Br. at 10, the reality is that anything less than a full acquittal would still have left him in exactly the same position he finds himself in today: an immigrant whose criminal conviction makes him deportable. Even the best pre-plea immigration advice would not have saved him from that fate. And that, of course, is why he cannot establish genuine prejudice from the misadvice he allegedly received.

***29** By contrast, the results Padilla urges here - excluding deportation from the collateral consequences rule or abandoning it altogether - would permanently distort the Sixth Amendment's limited guarantee of effective assistance of counsel "in all criminal prosecutions." It would also fail to truly address the harsh consequences of U.S. immigration laws for immigrant criminals. As the Seventh Circuit has put it, although "it is highly desirable that both state and federal counsel develop the practice of advising defendants of the collateral consequences of pleading guilty," in the end, "what is desirable is not the issue before us." *Santos v. Kolb,* 880 F.2d 941, 945 (7th Cir. 1989), *superseded by statute*, Pub. L. No. 101-649, Title V, 505(b), 104 Stat. 5050, *as recognized in Rodriguez v. United States,* No. 92-3163, 1995 U.S. App. LEXIS 7920, at *3 (7th Cir. Apr. 6, 1995). Ultimately, "[t]he failure of petitioner's counsel to inform him of the

immigration consequences of his guilty plea, however unfortunate it might be, simply does not deprive petitioner of the effective assistance of counsel guaranteed by the Constitution." *Id.*

CONCLUSION

In sum, providing accurate counsel to a criminal defendant about the immigration-law consequences of a guilty plea is certainly good practice for a State-paid attorney, and may well be required by the attorney's ethical obligations. But that does not mean that the *State* is required by the Sixth Amendment to ensure that such counsel is provided - on pain of losing the finality of a duly entered guilty plea. A contrary ruling would effectively destroy the collateral consequences rule and, in so doing, wreak havoc on the plea bargaining regime that is the backbone of the U.S. criminal justice system.

***30** For all these reasons, the Court should affirm the decision of the Supreme Court of Kentucky.

Footnotes

1 Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than the *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. NDAA is filing its brief with the consent of all parties. Letters of consent have been lodged with the Court.

2 Bureau of Justice Statistics, U.S. Dept. of Justice, Criminal Sentencing Statistics, http://www.ojp.usdoj.gov/bjs/sent.htm (last visited Aug. 11, 2009) (number of felony convictions entered in state and federal courts); Administrative Office of the United States Courts, Statistical Tables for the Federal Judiciary, June 30, 2008, Tbl. D4, *http:// www.uscourts.gov/stats/*june08/D04Jun08.pdf (noting that from June 30, 2007 to June 30, 2008, there were 2,585 federal felony convictions entered following trial and 77,962 entered following a plea agreement); Bureau of Justice Statistics, United States Department of Justice, State Court Sentencing of Convicted Felons 2004 Statistical Tables, Felony Case Processing in State Courts, Tbl. 4.1, http:// www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04401tab.htm (noting that an estimated 95% of state court felony convictions in 2004 were the result of a plea agreement).

3 NDAA, National Prosecution Standards § 68.1, http:// www.ndaa.org/pdf/ndaa natl prosecution standards 2.pdf; Robert M.A. Johnson, *Message from the President: Collateral Consequences,* The Prosecutor, May 2001, *available at* http:// www.ndaa.org/ndaa/about/president message may june 2001.html.

4 Bureau of Justice Statistics, U.S. Dept. of Justice, Criminal Sentencing Statistics, http://www.ojp.usdoj.gov/bjs/sent.htm (last visited Aug. 11, 2009).

5 The Spangenberg Group, American Bar Association Bar Information Program, State and County Expenditures for Indigent Defense Services in Fiscal Year 2002, at 35 (2003), *available at* http:// www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf.

6 Bureau of Justice Statistics, U.S. Dept. of Justice, Criminal Sentencing Statistics, http://www.ojp.usdoj.gov/bjs/sent.htm (last visited Aug. 11, 2009).

7 Federal courts appear to rely on plea agreements at least as much as state courts. Of the 89,069 criminal defendants in the U.S. District Courts between June 2007 and June 2008, just 3124 were tried by a jury or a judge. Nearly 78,000 or 96% pleaded guilty.

8 *See, e.g.*, U.S. Dep't of Justice, Federal Statutes Imposing Collateral Consequences Upon Conviction, http:// www.usdoj.gov/pardon/collateral consequences.pdf (last accessed August 5, 2009).

9 Bureau of Justice Statistics, U.S. Dept. of Justice, Criminal Sentencing Statistics, http://www.ojp.usdoj.gov/bjs/sent.htm (last visited Aug. 11, 2009).

10 The Spangenberg Group, American Bar Association Bar Information Program, State and County Expenditures for Indigent Defense Services in Fiscal Year 2002, at 35 (2003), *available at* http:// www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf.

11 This limited role is consistent with the rationale advanced by the Progressive thinkers who founded the first Public Defender's Office in Los Angeles in 1913. Against the more combative model endorsed by some, they envisioned the public defender as "an officer of the court protecting the innocent and pleading the guilty … even when he went to trial, … present ing] the evidence in a balanced and fair way his interest not solely that of the client, but of truth and justice, which entitled him to

the same respect accorded to the prosecutor. Babcock, Barbara Allen, *Inventing the Public Defender,* 43 Am. Crim. L. Rev. 1267, 1275 (2006).

12 Nkechi Taifa, *Symposium, Violent Crime Control and Law Enforcement Act of 1994: "Three Strikes and You re Out Mandatory Life Imprisonment for Third Time Felons,* 20 Dayton L. Rev. 717, 722 (1994); *see also* Tina M. Olson, *Strike One, Ready for More? The Consequences of Plea Bargaining "First Strike Offenders under California s "Three Strikes Law,* 36 Cal. W. L. Rev. 545, 562 n.159 (2000).

13 See, *e.g.*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 114 (1998) (" T]he Sixth Amendment gave the accused some freedom, some autonomy, in controlling the shape of 'his defence including] … whom (if anyone) to hire as a lawyer.); Anthony Lewis, *Gideon s Trumpet* 110 (Vintage Books 1989) (1964) ("Historically speaking, the amendment was almost certainly not envisaged by its framers as reaching the problem of the man too poor to hire a lawyer for his defense.).

14 The shift had already begun in *Powell v. Alabama,* 287 U.S. 45 (1932), which held that in some federal cases, which the Court said would be determined on a case by case basis, "the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel. *Id.* at 72. Six years later, the Court interpreted the Sixth Amendment to require the appointment of counsel in *all* federal cases where a defendant's "life or liberty is at stake. *Johnson v. Zerbst,* 304 U.S. 458, 468 (1938). However, for the next 25 years, the Court refused to incorporate this interpretation of the Sixth Amendment against the States. Instead, it adhered to its earlier holding in *Betts v. Brady,* 316 U.S. 455, 461 62 (1942), that " t]he Sixth Amendment of the national Constitution applies only to trials in federal courts, and that due process required appointed counsel in State cases only where necessary to avoid "a denial of fundamental fairness, shocking to the universal sense of justice. But *Betts* was overruled by *Gideon.*

15 Contemporaneous commentators also challenged the English rule. Blackstone inquired: "Upon what face of reason can that assistance be denied to save the life of a man, which is yet allowed him in prosecutions for every petty trespass? 4 William Blackstone, *Commentaries on the Laws of England* 355 (12th ed. 1795), *quoted in* Beaney, *supra,* at 11. And Zephaniah Swift referred to the English rule as a "cruel and illiberal principle. 2 *A System of Laws of the State of Connecticut* 398 99 (1795 96).

16 *See, e.g.*, 3 Statutes at Large of Pa. 199 (Busch 1896), *quoted in* Beaney, *supra,* at 16 (" U]pon all trials of said capital crimes, lawful challenges shall be allowed, and learned counsel assigned to the prisoners.); Act of Aug. 20, 1731, 43 Laws of the Province of S.C. 518 19 (Trott 1736), *quoted in* Beaney, *supra,* at 17 (stating that if a capital defendant "shall desire coun sel], the court … is hereby authorized and required, immediately, upon his or their request, to assign … such and so many council not exceeding two, as the person or persons shall desire) (omissions in Beaney); 1791 N.H. Laws 247 (Melcher 1792), *quoted in* Beaney, *supra,* at 21 (stating that a capital defendant "shall at his request have counsel learned in the law assigned him by the court); 2 Laws of the Commonwealth of Massachusetts from November 28, 1780 to February 28, 1807, ch. 71 app. at 1049 (providing for assigned counsel for defendants accused and indicted for treason: "And in ca<<SYM>>e any per<<SYM>>on or per<<SYM>>ons, <<SYM>>o accu<<SYM>>ed and indicted, <<SYM>>hall de<<SYM>>ire council, the Court before whom <<SYM>>uch per<<SYM>>on or per<<SYM>>ons, <<SYM>>hall be tried, or <<SYM>>ome Judge of that Court, <<SYM>>hall, and is hereby authorized and required, immediately upon his or their reque<<SYM>>t, to a<<SYM>><<SYM>>ign to <<SYM>>uch per<<SYM>>on or per<< SYM>>ons, <<SYM>>uch and <<SYM>>o many council, not exceeding two, as the per<<SYM>>ons <<SYM>>hall de<<SYM>>ire, to whom <<SYM>>uch counsil <<SYM>>hall have free acce<< SYM>>s at all <<SYM>>ea<<SYM>>onable hours.); Act of 1719, ch. 22, § 4, 1 Del. Laws 64, 66 (S. Adams & J. Adams, 1797) (requiring counsel in capital cases: "And that upon all trials of the << SYM>>aid capital crimes, lawful challenges <<SYM>>hall be allowed, and learned council a<<SYM>><<SYM>>igned to the pri<<SYM>>oners.).

17 See Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania s Radical 1776 Constitution and its Influences on American Constitutionalism,* 62 Temp. L. Rev. 541 43 (1989) (noting that the delegates "had wide experience with the contemporary state constitutional debates).

18 This Court adopted a similar interpretation some 100 years later when it had what appears to have been its first opportunity to address expressly the scope of the Sixth Amendment's right to counsel. In *United States v. Van Duzee,* 140 U.S. 169, 173 (1891), the Court addressed a claim by several federal court clerks for reimbursement for the cost of providing copies of indictments to criminal defendants. This required the Court to determine whether such copies were required by the Sixth Amendment. The Court held they were not. Under the Sixth Amendment, the Court held, " t]here is … no general obligation on the part of the government either to furnish copies of indictments, summon witnesses or retain counsel for defendants or prisoners. *Id.* The Court reasoned that " t]he object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to criminal defendants]; but it was not contemplated that this should be done at the expense of the government. *Id.*

19 Because the distinction between collateral and direct consequences of a criminal conviction turns largely on whether the consequence is under the sentencing court's "control, *Gonzalez,* 202 F.3d at 27, it is particularly odd for Padilla to argue, as he does at p. 51 of his merits brief, that restrictions on the *U.S. Attorney General s* ability to cancel post conviction deportation somehow transfers responsibility for deportation proceedings from the executive branch to the state or federal court presiding over the prior criminal prosecution.

20 Office of the Chief Immigration Judge, Immigration Court Practice Manual 55 (2008), *available at* http:// www.usdoj.gov/eoir/vll/OCIJPracManual/Chap%204.pdf hereinafter "Immigration Court Practice Manual].

21 Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs, Bulletin, Prison Inmates at Midyear 2007, June 2008, NCJ 221944, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf; American Community Survey, Selected Social Characteristics in the United States: 2007, *available at http:// www.census.gov/acs/www/Products/index.html.*

22 *See, e.g.*, National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation § 6.2(a)(3), 6.3(a), 8.2(b)(8), & 8.2(c)(3) (1997), *available at* http:// www.nlada.org/Defender/Defender Standards/Performance Guidelines.

23 Robert M.A. Johnson, *Message from the President: Collateral Consequences,* The Prosecutor, May 2001, *available at* http://www.ndaa.org/ndaa/about/president message may june 2001.html.

24 Administrative Office of the Courts, Kentucky Court of Justice, Hardin County Drug Offenses Disposed by Trial Type, Offense, Final Plea & Disposition (Aug. 10, 2009) (on file with author).

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2009 WL 1007121 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Jesse Jay MONTEJO, Petitioner,
v.
STATE OF LOUISIANA, Respondent.

No. 07-1529.
April 14, 2009.

On Writ of Certiorari to the Louisiana Supreme Court

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***i** SUPPLEMENTAL QUESTION PRESENTED

Should *Michigan v. Jackson,* 475 U.S. 625 (1986), be overruled?

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***1** Summary of Argument

The Fifth and Sixth Amendments protect an accused in distinct ways. The Fifth helps him face police questioning, and so the Court has enacted powerful rules to "counteract the 'inherently compelling pressures' of custodial interrogation, including the right to have counsel present." *McNeil v. Wisconsin,* 501 U.S. 171, 176 (1991) (quoting *Miranda v. Arizona,* 384 U.S. 436, 475 (1966)); *see also Edwards v. Arizona,* 451 U.S. 477 (1981). The Sixth, in contrast, helps the accused face an expert government prosecutor by providing counsel to navigate "the intricacies of substantive and procedural criminal law." *Rothgery v. Gillespie County,* 128 S. Ct. 2578, 2583 (2008) (quotations omitted). These constitutional

safeguards advance distinct policies, but in *Michigan v. Jackson,* 475 U.S. 625 (1986), the Court confiated them, resulting in doctrinal confusion and unjustifiable social costs. The Court should now overrule *Jackson* and "bring[] its Fifth and Sixth Amendment jurisprudence into a logical alignment." *McNeil*, 501 U.S., at 183 (Kennedy, J., concurring).

Jackson held that, after attachment and invocation of the Sixth Amendment right to counsel, "*any* subsequent waiver during a police-initiated custodial interview is ineffective." *McNeil,* 501 U.S., at 175 (emphasis added). *Jackson* simply transplanted into the Sixth Amendment the rule of *Edwards v. Arizona* - a rule designed to safeguard the *Fifth* Amendment right against compelled self-incrimination. *Jackson,* 475 U.S., at 626, 630-36 (adopting *Edwards*). In doing so, *Jackson* created a ***2** perverse new rule that unjustifiably "supersedes the suspect's voluntary choice to speak with investigators," *Texas v. Cobb,* 532 U.S. 162, 175 (2001) (Kennedy, J., concurring), and thus violates the Fifth Amendment policies it was supposed to reinforce.

Jackson was anomalous from the day it was decided because the *Edwards* rule "makes no sense at all" outside the Fifth Amendment. *See Jackson,* 475 U.S., at 640 (Rehnquist, J., dissenting). Indeed, the Court would soon discard *Jackson*'s premises in subsequent decisions. *See, e.g., Cobb,* 532 U.S., at 175-76 (Kennedy, J., concurring) (discussing *Jackson*'s doctrinal erosion). More fundamentally, *Jackson* misperceived the nature of the "Assistance of Counsel" guaranteed by the Sixth Amendment. U.S. Const. amend. VI. The Court should therefore overrule *Jackson* and remove an illogical and unnecessary accretion on this Court's Sixth Amendment jurisprudence that has been thoroughly undermined by subsequent decisions.

In *Jackson's* absence, an accused's free choice not to speak to police - or to speak only with counsel beside him - will still be protected by three layers: the Fifth Amendment, *Miranda* and *Edwards.* An ***3** accused will still enjoy counsel's Sixth Amendment assistance throughout pretrial critical phases, including custodial interrogation. And the Sixth Amendment will still bar police from circumventing an accused's right to counsel through subterfuge or other conduct that would not allow a *Miranda* waiver. *See, e.g., Patterson v. Illinois,* 487 U.S. 285, 296 n.9 (1988); *Massiah v. United States,* 377 U.S. 201, 205-07 (1964). Overruling *Jackson*, therefore, will not detract in the least from the essential protections of the Fifth and Sixth Amendment, but will instead bring needed coherence to the law and avoid the social cost inherent in suppressing a voluntary confession given in full compliance with *Edwards* and *Miranda.*

Discarding *Jackson* will also free investigators from an unfair presumption that, once the Sixth Amendment has attached, an accused's decision to speak without counsel must be the product of police overreaching. That presumption has no place in a Constitution that forbids *compelled* self-incrimination as a positive evil, U.S. Const. amend. V, but welcomes "uncoerced confessions [as] … an unmitigated good." *Cobb,* 532 U.S., at 172 (quoting *McNeil,* 501 U.S., at 181).

Argument

I. *Jackson* Rested on weak Foundations That Have Been Completely Eroded by Subsequent Decisions of the Court.

Jackson purports to strengthen the Sixth Amendment's guarantee of the "Assistance of Counsel" in criminal prosecutions. U.S. Const. amend. VI. In reality, however, *Jackson*'s anti- ***4** waiver rule is only tenuously connected to that constitutional guarantee. Instead, *Jackson* extends a prophylaxis that rationally furthers only the *Fifth* Amendment right against compelled self-incrimination. [2] This Part explains *Jackson*'s origins in the Fifth Amendment, why its original premises made little sense in the Sixth Amendment context, and why those premises have been undermined by subsequent decisions. [3]

Whether before or after attachment of the Sixth Amendment right to counsel, suspects have the Fifth Amendment right to demand counsel's presence, in order to counteract the "inherently compelling pressures" of interrogation. *Miranda*

v. Arizona, 384 U.S. 436, 467-74 (1966). The Court later enacted the *Edwards* prophylactic rule "to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Minnick v. Mississippi,* 498 U.S. 146, 150 (1990) (discussing *Edwards v. Arizona,* 451 U.S. 477, 484-85 (1981)). Once a suspect clearly invokes [4] his right to counsel during interrogation, not only will he be free from further police-initiated questioning outside counsel's presence, but his subsequent ***5** waiver - even if voluntary, knowing, and intelligent - will be presumed invalid. 451 U.S., at 484.

Five years later, *Michigan v. Jackson* engineered "a wholesale importation of the *Edwards* rule into the Sixth Amendment." *Cobb,* 532 U.S., at 175 (Kennedy, J., concurring); *Jackson,* 475 U.S., at 635-36. Under *Jackson*, a defendant's "assertion" of his right to counsel "at an arraignment or similar proceeding" triggers the *Edwards* effect: the police may not subsequently initiate questioning outside counsel's presence, and any waiver of counsel under such circumstances is ineffective, *Id. Jackson* thus applied the *Edwards* anti-coercion rule outside the immediate context of custodial interrogation. It also allowed *Edwards* to be triggered by a Sixth Amendment "invocation" that, as the Court later explained, "as a matter of *fact*, [does] *not* … invoke the *Miranda-Edwards* interest." *McNeil,* 501 U.S., at 178.

Jackson's harsh anti-waiver rule was based on a misunderstanding of counsel's Sixth Amendment function during questioning. *See infra* Part II. But as Part I.B *infra* explains, *Jackson*'s own internal reasoning for adopting that rule cannot withstand scrutiny. The *Jackson* dissenters - since echoed by individual Justices - recognized that *Jackson*'s premises were flawed from conception. Moreover, subsequent decisions have unraveled *Jackson*'s analytical framework. *Jackson* is "a mere survivor ***6** of obsolete constitutional thinking" and should therefore be overruled. [5]

A. From the beginning, the *Edwards* anti-coercion rule fit poorly in the Sixth Amendment context.

Jackson was based on three distinct premises that were either faulty when the case was decided, are untenable today in light of subsequent precedent, or both.

• *One. Jackson* thought the anti-coercion rationale of *Edwards* was "even *stronger* after [an accused] has been formally charged with an offense than before." 475 U.S., at 631-32 (emphasis added).

• *Two. Jackson* gave "a broad, rather than a narrow, interpretation to a defendant's request for counsel," and so rejected the argument that an accused requesting counsel at arraignment "may not have actually intended [his] request to encompass representation during any further questioning by the police." *Id.*, at 632-33.

• *Three. Jackson* simply imported *Edward*'s Fifth Amendment rule, finding "no warrant for a different view under [the] Sixth Amendment," and therefore concluded:

> ***7** Just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in the Sixth Amendment analysis. *Id.*, at 635.

Exposing the weakness of *Jackson*'s original premises begins with then-Justice Rehnquist's dissent (joined by Justices Powell and O'Connor), because subsequent decisions of the Court (and opinions by other Justices) have adopted and reinforced the dissent's fundamental objections. The dissenters focused on three weaknesses in the majority's analysis.

The dissenters first emphasized the fundamental point that *Edwards*'s prophylactic rule was intended to reinforce only the Fifth Amendment's prohibition on compelled self-incrimination. 475 U.S., at 638-40 (Rehnquist, J., dissenting). Applying that anti-coercion rule in the Sixth Amendment context, the dissent explained, "cut[s] the *Edwards* rule loose from its analytical moorings." *Id.*, at 640. "To put it simply," the dissent concluded, "the prophylactic rule set forth in *Edwards* makes no sense at all except when linked to the Fifth Amendment's prohibition against compelled self-

incrimination." *Id.* Three different Justices have since echoed the *Jackson* dissenters' basic criticism that transplanting *Edwards* into the Sixth Amendment context was a mistake. *See Cobb,* 532 U.S., at 175 (Kennedy, J., concurring) (criticizing *Jackson*'s ***8** "wholesale importation of the *Edwards* rule into the Sixth Amendment").

Second, the dissenters charged that application of the new *Jackson* rule "graphically reveal[ed] [its] illogic." 475 U.S., at 640 (Rehnquist, J., dissenting). While the *Jackson* bar was triggered by the "assertion" of an accused's right to counsel, attachment of the Sixth Amendment right is not tied to any assertion by a defendant. *Id.*, at 640-41. The *Fifth* Amendment right does arise only when invoked: linking *Edwards*s prophylactic rule to an "assertion" thus makes sense. *Id.* But applying *Edwards* to the Sixth Amendment, which does not depend on any assertion, left *Jackson* in an "analytical straitjacket." *Id.*, at 641. The *Jackson* rule would be limited "to those defendants foresighted enough, or just plain lucky enough, to have made an explicit request for counsel which, we have always understood to be completely unnecessary for Sixth Amendment purposes." *Id.*, at 642. Again, in agreement with the *Jackson* dissenters, three different Justices have since observed that, because "[t]he Sixth Amendment right to counsel attaches quite without reference to the suspect's choice to speak with investigators after a *Miranda* warning … it thus makes little sense for a protective rule to attach absent such an election by the suspect." *Cobb,* 532 U.S., at 176 (Kennedy, J., concurring).

Third, the dissenters viewed *Jackson* as an anomalous extension of the Court's waiver jurisprudence. They observed that the Court had previously erected *per se* barriers against certain police conduct. *See id.*, at 641 n.4 (Rehnquist, J., ***9** dissenting) (citing *Maine v. Moulton,* 474 U.S. 159 (1985); *United States v. Henry,* 447 U.S. 264 (1980); *Massiah v. United States,* 377 U.S. 201 (1964)). But those were "surreptitious informant" eases, in which an accused did not realize he was being questioned by a government agent and therefore had no opportunity to waive his right to counsel. *Id.* It made little sense to extend these precedents to the circumstances of *Jackson*, in which "the conduct of the police was totally open and aboveboard." *Id.*

There was another critical inconsistency in *Jackson* that was not discussed by the dissent. *Jackson*'s second premise was based on a flawed conflation of a defendant's "assertion" and his "waiver" of the right to counsel. 475 U.S., at 632-33 (citing *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)). But a defendant's effective or ineffective "assertion" of his right to counsel is in no sense a "waiver" of that right: the two concepts are analytically distinct, and therefore *Zerbst* provides no basis for "broadly" construing a defendant's assertion. More concretely, however, this aspect of *Jackson* flatly contradicted the Court's statement two years earlier in *Smith v. Illinois* that "[i]nvocation and waiver [of the right to counsel] are entirely distinct inquiries, and the two must not be blurred by merging them together." 469 U.S. 91, 98 (1984). *Jackson* made precisely that error, and therefore contravened the Court's own precedent.

B. Subsequent decisions have abandoned *Jackson*'s premises.

The Court discarded *Jackson*'s first premise a mere two terms later in ***10** *Patterson v. Illinois,* 487 U.S. 285 (1988). *Jackson* had said that "the reasons for prohibiting the interrogation of an uncounseled accused are *even stronger* after he has been formally charged with an offense than before." 475 U.S., at 631 (emphasis added). But in deciding that *Miranda* warnings supported waiver of both the Sixth and Fifth Amendment rights to counsel, *Patterson* reasoned:

> The State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities. With respect to this inquiry, we do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning. 487 U.S., at 298-99. [6]

But that core proposition from *Patterson* plainly repudiated *Jackson's* first premise. In *Cobb*, furthermore, three Justices recognized precisely that: *Patterson* undermined *Jackson. See* 532 U.S., at 175 (Kennedy, J., concurring) (discussing *Patterson*).

Jackson's second premise - conceptually flawed and contrary to *Smith v. Illinois* from the ***11** beginning - was further damaged by *Davis v. United States,* 512 U.S. 452 (1994). *Davis* held that a defendant's assertion of his right to counsel must be sufficiently clear and unambiguous "that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.*, at 459. Otherwise it would fail to trigger *Edwards. Id.*

Davis strictly construed a defendant's request for counsel, resolving any ambiguity in favor of the police. [7] *Jackson* had liberally construed the same request, resolving any ambiguity in favor of the accused. 475 U.S., at 633. There is no reason to assume that an *Edwards* assertion need be any less clear in the Sixth Amendment context. Indeed, to support the *Edwards* effect, the Sixth Amendment should require a *clearer* "assertion" since it would come, if at all, outside the context of interrogation. *Davis* therefore directly undermined *Jackson*'s second premise. In *Cobb*, three Justices recognized just that: *Davis* is "further reason to doubt the wisdom of the *Jackson* holding." *Cobb,* 532 U.S., at 175-76 (Kennedy, J., concurring).

Finally, *McNeil v. Wisconsin,* 501 U.S. 171 (1991), dealt the last blow to *Jackson*'s reasoning. *McNeil* held that an accused's invocation of his Sixth Amendment right to counsel is not, as a matter of fact or policy, an invocation of his Fifth Amendment right to counsel. 501 U.S., at 177-81. *McNeil* reasoned that defendants invoke their Fifth ***12** and Sixth Amendment rights to counsel for distinctly different purposes: (1) the Sixth, to insure postindictment protection "at critical confrontations with his expert adversary, the government," *id.*, at 177-78; (2) the Fifth, "to protect a quite different interest: a suspect's 'desire to deal with the police only through counsel,' " *id.*, at 178 (quoting *Edwards,* 451 U.S., at 484). Assertion of the Sixth Amendment right (a *Jackson* assertion) was not, as a matter of fact, the assertion of the Fifth Amendment right (an *Edwards* assertion). *Id.* Nor would such a rule be sound policy, because it would effectively render any accused "unapproachable by police officers suspecting them of involvement in other crimes, even though they have never expressed any unwillingness to be questioned." *Id.*, at 180-81. The Court rejected that result as destructive of a paramount pubic interest: "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser." *Id.*, at 181.

McNeil obliterated *Jackson*'s third premise by completely severing the *Jackson* anti-waiver rule from any tie to *Edwards.* Simply put, a *Jackson* invocation is factually and legally different from an *Edwards* invocation. 501 U.S., at 179. This means that, today, the *Jackson* rule exists only as a disembodied presumption. *See, e.g., id.* (characterizing a *Jackson* assertion as merely a "legally presumed … request for the assistance of counsel in custodial interrogation"). In *Cobb*, three Justices recognized that this fundamental problem rendered the *Jackson* rule pointless:

> ***13** [T]he acceptance of counsel at an arraignment or similar proceedings only begs the question: acceptance of counsel for what? It is quite unremarkable that a suspect might want the assistance of an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise, but nonetheless might choose to give on his own a forthright account of the events that occurred. A court-made rule that prevents a suspect from even making this choice serves little purpose, especially given the regime of *Miranda* and *Edwards.* 532 U.S., at 177 (Kennedy, J., concurring).

In sum, overruling *Jackson* will simply recognize what *Patterson, Davis* and *McNeil* have already made it: a hopeless anomaly.

II. *Jackson* Misperceived the Nature of the "Assistance of Counsel" Afforded During Custodial Interrogation.

In addition to its internal flaws, *Jackson* should be discarded in light of the very Sixth Amendment right to counsel it is said to protect. *Jackson* interprets counsel's role during custodial interrogation in a manner irreconcilable with the meaning and purpose of the Sixth Amendment, as well as the Court's broader jurisprudence. *Jackson* consequently erected an exaggerated anti-waiver rule, transforming counsel from an advisor into a shield against voluntary confessions.

***14 A. Counsel's "simple and limited" Sixth Amendment role in questioning requires only a "simple and limited" waiver standard.**

Since "an unaided layman ha[s] little skill in arguing the law or in coping with an intricate procedural system," the Sixth Amendment right to counsel guarantees him "a guide though complex legal technicalities." *United States v. Ash,* 413 U.S. 300, 307 (1973). Its "core purpose" is expert aid at the trial event, when "the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Gouveia,* 467 U.S. 180, 188-89 (1984) (quoting *Ash,* 413 U.S. at 309). The rise of the "public prosecutor" in colonial America explains this central function of the Sixth Amendment:

> The accused in the colonies faced a government official whose specific function it, was to prosecute, and who was incomparably more familiar than the accused with the problems of procedure, the idiosyncrasies of juries, and, last but not least, the personnel of the court.

Ash, 413 U.S. at 308 (quoting F. Heller, The Sixth Amendment 20-21 (1951)). [8]

***15** While focused on trial, the Sixth Amendment right to counsel becomes operative, before trial, upon the initiation of "adversary judicial proceedings," when the defendant is first "immersed in the intricacies of substantive and procedural criminal law." *Rothgery v. Gillespie County,* 128 S. Ct. 2578, 2583 (2008) (quoting *Kirby v. Illinois,* 406 U.S. 682, 689 (1972) (plurality opinion)). Thus the Court applies the right, after attachment, to all proceedings deemed "critical" [9] - stages where "the accused [is] confronted, *just as at trial*, by the procedural system, or by his expert adversary, or both." *Gouveia,* 467 U.S., at 189 (quotations omitted) (emphasis added). [0]

The Court discerns critical stages by asking whether, during a particular event, "the accused require[s] aid in coping with legal problems or assistance in dealing with his adversary." *Ash,* 413 U.S., at 313. For example, at arraignment an accused needs a lawyer to "advis[e] [him] on available defenses … [and] to allow him to plead intelligently." *Id.* at 312 (discussing *Hamilton v. Alabama,* 368 U.S. 52, 54-55 (1961); ***16** *White v. Maryland,* 373 U.S. 59, 60 (1963)). Likewise, he requires legal assistance at a post-indictment lineup given the peculiar pitfalls and "grave potential for prejudice" inherent in such encounters. *United States v. Wade,* 388 U.S. 218, 236-37 (1967). Finally, during interrogation - as the Court explained in a case where the prosecution secretly recorded the accused's conversations - "counsel could have advised [the accused] on the benefits of the Fifth Amendment and could have sheltered him from the overreaching of the prosecution." *Ash,* 413 U.S., at 312 (discussing *Massiah,* 377 U.S., at 205). In sum, the lawyer's Sixth Amendment role at these stages "has remained essentially the same as his function at trial … [*i.e.*] act[ing] as a spokesman for, or advisor to, the accused." *Ash,* 413 U.S., at 412. [2]

But even when counsel's pretrial assistance is constitutionally guaranteed, the accused can waive it. *See, e.g., Patterson,* 487 U.S., at 296 (explaining an accused's Sixth Amendment "waiver on [the basis of *Miranda* warnings] will be considered a knowing and intelligent one"). What a waiver demands depends on a "pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Id.*, at 298. Thus, waiver of counsel *at trial itself* is strait-jacketed by "the most rigorous restrictions," given the "enormous

importance and role that an attorney ***17** plays at a criminal trial." *Id.* (citing *Faretta v. California,* 422 U.S. 806, 835-36 (1975)).

Critically for the present case, however, *Patterson* emphasized that "the role of counsel at [post-indictment] questioning" - while protected by the Sixth Amendment" - is nonetheless "*relatively simple and limited" Id.*, at 300 (emphasis added). In contrast to "later phases of criminal proceedings," counsel's earlier role at questioning is "substantially different," even "unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer." *Id.*, at 294 n.6. Furthermore, although an indictment triggers the Sixth Amendment right to counsel, nonetheless it

> … does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities. *Id.*, at 298-99.

Finding counsel's Sixth Amendment role at questioning "simple and limited," the Court had "no problem in having a waiver procedure at that stage which is likewise simple and limited." *Id*, at 300. Consequently, *Patterson* held the same *Miranda* warnings supporting waiver of the Fifth Amendment right to counsel also support waiver of the Sixth Amendment right. *Id.*, at 298-300.

An accused's free, informed, and unilateral waiver of counsel under such circumstances is perfectly consistent with his enjoying a constitutionally-protected right to counsel. As the Court explained in *Cobb*, "there is no 'background ***18** principle' of our Sixth Amendment jurisprudence establishing that there may be no contact between a defendant and police without counsel present." 532 U.S., at 171 n.2. After all, "the Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor." *Moran v. Burbine,* 475 U.S. 412, 430 (1986).

B. *Jackson* exaggerates the required waiver by warping counsel's Sixth Amendment role in questioning.

In light of the general principles explained above, *Jackson* is an aberration. The problem with *Jackson* is not that it assigned counsel a Sixth Amendment role in post-indictment questioning, but that it misperceived that role and constructed an exaggerated waiver requirement based on that misperception.

Jackson's anti-coercion origins, *see supra* Part I, show it to be fundamentally at odds with the Court's general understanding of the Sixth Amendment right to counsel and the proper standards for its waiver during custodial interrogation. The Sixth Amendment furnishes a skilled advocate preeminently as a *trial* protection, and extends to earlier "trial-type confrontations" *Gouveia,* 467 U.S., at 190, only to safeguard the integrity of the trial event itself. [3] *See supra* Part II.A. In other ***19** words, the "defence" protected by the counsel guarantee "means defense at trial, not defense in relation to other objectives that may be important to the accused." *Rothgery,* 128 S. Ct., at 2594 (Alito, J., concurring) (interpreting U.S. Const. amend. VI). Against that backdrop, the Court has recognized that counsel's Sixth Amendment role during *pretrial* interrogation is "relatively simple and limited […] to advising his client as to what questions to answer and which ones to decline to answer." *Patterson,* 487 U.S., at 300, 294 n.6. And the Court consequently approved a "waiver procedure at that stage which is likewise simple and limited." *Id.* at 300; *see supra* Part II.A.

But *Jackson* implicitly assigned a far different Sixth Amendment role to counsel during post-indictment questioning, and explicitly demanded a far higher waiver standard. *Jackson* fancies counsel so critical at that stage that counsel's absence *presumptively invalidates* a waiver - even if voluntary, knowing, and intelligent. In *Jackson*'s world, then, counsel effectively acts as a shield, not against police badgering (which *Miranda-Edwards* already prevent), but against the accused's own free election to speak to the police in the first place. *See, e.g., Cobb,* 532 U.S., at 175 (Kennedy, J.,

concurring) (observing that "[w]hile the *Edwards* rule operates to preserve the free choice of a suspect ***20** to remain silent, if *Jackson* were to apply it would override that choice").

But that distorts the Sixth Amendment role this Court has described for counsel during questioning. At that stage, *Jackson* does not rationally safeguard counsel's role as a "guide through complex legal technicalities." *Ash,* 413 U.S., at 307; *see also supra* Part II.A. That *could not* be a function *Jackson* hoped to protect, since, as *Patterson* explained, counsel's role during questioning is "simple," "limited" and "unidimensional." *See* 487 U.S., at 300, 294 n.6. [4] More to the point, *Jackson* does not envision Sixth Amendment counsel as *merely* instructing the accused "as to what questions to answer and which ones to decline to answer." *Id.*, at 294 n.6. Instead, the upshot of *Jackson's* anti-waiver rule is that, during questioning, counsel should simply tell an accused to keep silent.

Well before *Jackson*, the Court explained counsel's function during questioning was to "advis[e] his client on the benefits of the Fifth Amendment and … shelter[] him from the overreaching of the prosecution." *Ash,* 413 U.S., at 312 (discussing *Massiah,* 377 U.S., at 205). The Court has since clarified that *Miranda* warnings perform the same function, by "convey[ing] [to the accused] … the sum and substance of the rights that ***21** the Sixth Amendment provide[s]." *Patterson,* 487 U.S., at 293. [5] But *Jackson* is at odds with these principles because it presumptively invalidates a properly Mirandized waiver.

Jackson's anti-waiver rule, then, must be premised on the notion that, if counsel were present during questioning, he should always *overstep* his proper Sixth Amendment role. That is, *Jackson* appears to expect counsel to go beyond merely explaining why the accused need not speak, and instead to make sure the accused says nothing, even if he *wants* to come clean. But as the Court explained in *Moran*, "[t]he Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor." 475 U.S., at 430. [6]

Jackson's conception of Sixth Amendment counsel violates that basic principle. It does not actually protect an accused's free will, but to the contrary "operates to invalidate a confession given by the free choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless." *Cobb,* 532 U.S., at 174-75 ***22** (Kennedy, J., concurring). While it may be true that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances," *Watts v. State of Indiana,* 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting), the Sixth Amendment itself is more ambivalent. It lets the accused decide for himself whether to talk.

Since *Jackson* fundamentally misperceives counsel's Sixth Amendment role during questioning, and erects an exaggerated anti-waiver rule based on that misperception, *Jackson* departs from this Court's Sixth Amendment jurisprudence and should be overruled. [7]

III. Eliminating *Jackson* Will Leave Undisturbed Fifth and Sixth Amendment Safeguards on an Accused's Right to Counsel.

Discarding *Jackson* and its dubious benefits will leave an accused with the robust protections already provided by the Fifth and Sixth Amendments. An accused will, for instance, still be able to raise his silence or his demand for counsel as a Fifth ***23** Amendment shield against police questioning, nullifying any subsequent police-initiated waivers. Furthermore, an accused will still have a Sixth Amendment right to counsel at post-indictment questioning - but he will simply be able to waive it on the same terms, and under the same safeguards, as his Fifth Amendment right. Finally, an accused will still be shielded by the Sixth Amendment from surreptitious tactics that would not furnish the opportunity for a *Miranda* waiver. *See, e.g.*, *Patterson,* 487 U.S., at 296 n.9; *Massiah,* 377 U.S., at 205-07. *Jackson*'s demise will, in short, have no real effect on an accused's ability to counteract the "inherently compelling" pressures of custodial interrogation through the medium of counsel. *See Miranda,* 384 U.S., at 467.

Even assuming an accused happens to "invoke" *Jackson* at or following Sixth Amendment attachment, [8] his subsequent confrontation with investigators reveals just how illusory and superfluous *Jackson*'s benefits are. "[T]here can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation." *Cobb,* 532 U.S., at 171 (citing *Miranda,* 384 U.S., at 479; *United States v. Dickerson,* 530 U.S. 428, 435 (2000)). Those warnings, of course, support a waiver of either the ***24** Fifth or Sixth Amendment rights to counsel. *Patterson,* 487 U.S., at 296. And this Court has explained that "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Davis,* 512 U.S., at 460.

But an accused who wants the help of counsel in dealing with the pressures of interrogation need only say four words, "I want my lawyer." From that moment, *Edwards* will shield him from any further police-initiated questioning and presumptively nullify any subsequent waiver of the right to counsel - even if the accused meant to waive it. And it will ensure him the *presence* of an attorney. *McNeil,* 501 U.S., at 177 (citing *Minnick v. Mississippi,* 498 U.S. 146 (1990)). Given this armory of constitutional and prophylactic rights that are activated by an accused's mouthing four simple words, one might ask: what is the purpose of the additional, dubious protection afforded by *Jackson?* The answer: none.

While *Jackson*'s benefits are scant, its costs are steep. Its disruption of Sixth Amendment jurisprudence has already been detailed. *See supra* Part II. But *Jackson* also undermines the very Fifth Amendment anti-coercion principles it purported to reinforce. After all, *Jackson* simply adopted *Edwards*, whose "essence" was "[p]reserving the integrity of an accused's choice to communicate with police only through counsel." *Patterson,* 487 U.S., at 291. *Edwards* was assertedly *not* about "barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." ***25** *Id.* But, as three members of this Court have already observed, *Jackson* undermines *Edwards* by doing precisely that: "[w]hile the *Edwards* rule operates to preserve the free choice of a suspect to remain silent, … *Jackson* … would override that choice." *Cobb,* 532 U.S., at 175 (Kennedy, J., concurring).

And when *Jackson* overrides an accused's "free choice," it does more than disrupt the Court's jurisprudential architecture. It also prevents the admission of otherwise valid confessions. No sensible rule of constitutional law should desire that outcome, particularly in an area that has not been plagued with the same "perceived widespread problem[s]" that inspired and justified the regime of *Miranda* and *Edwards. See Jackson,* 475 U.S., at 639-40 (Rehnquist, J., dissenting). Without tangible, compensating benefits, *Jackson* unreasonably hampers "the ready ability to obtain uncoerced confessions." *McNeil,* 501 U.S., at 181. Since that ability "is not an evil but an unmitigated good," *id.*, at 181, *Jackson* should go.

Conclusion

Jackson furthers "a thinly disguised constitutional policy of minimizing or entirely prohibiting the use of evidence of voluntary out-of-court admissions and confessions made by the accused." *Massiah,* 377 U.S., at 209 (White, J., dissenting). But since the law "rejoice[s] at an honest confession," *Minnick,* 498 U.S., at 167 (Scalia, J., dissenting), the Sixth Amendment should not bar one freely given by an accused who has not declared he will communicate only through counsel, ***26** and has even voluntarily waived that right. *Jackson*'s contrary rule furthers, not the Sixth Amendment, but a paternalism that "imprison[s] a man in his privileges and call[s] it the Constitution." *Adams v. United States ex rel. McCann,* 317 U.S. 269, 280 (1942).

The Court should overrule *Michigan v. Jackson.*

Footnotes

1 *See, e.g., Payne v. Tennessee,* 501 U.S. 808, 827 30 (1991) (explaining *stare decisis* is weakest when prior constitutional decisions are "unworkable or badly reasoned, "involv e] procedural and evidentiary rules, were "decided by the narrowest of margins,

over spirited dissents challenging the basic underpinnings of those decisions, or "have been questioned by Members of the Court in later decisions) (citations omitted).

2 *See, e.g., McNeil,* 501 U.S., at 176 (discussing "right to counsel found in Court's Fifth Amendment anti coercion jurisprudence).

3 Part II, *infra*, explains why *Jackson*'s exaggerated anti waiver rule is based on a fundamental misperception of counsel's Sixth Amendment role during questioning.

4 *See Davis v. United States,* 512 U.S. 452, 459 62 (1994) (requiring that an *Edwards* invocation be unambiguous); *see also infra* Part I.B.

5 *Planned Parenthood v. Casey,* 505 U.S. 833, 857 (1992); *see also United States v. Gaudin,* 515 U.S. 506, 521 (1995) (explaining that *stare deeisis* yields when a prior decision's "underpinnings have been] eroded … by subsequent decisions of the] Court).

6 An "important basis for *Patterson* was counsel's "rather unidimensional role in post indictment questioning, "largely limited to advising his client as to what questions to answer and which ones to decline to answer. 487 U.S., at 294 n.6; *see infra* Part II.A.

7 *See id.*, at 461 (reasoning that a bright line is needed because "it is police officers who must actually decide whether or not they can question a suspect).

8 *See also Johnson v. Zerbst,* 304 U.S. 458, 462 63 (1938) (explaining that Sixth Amendment protects defendants who lack "the professional legal skill to protect themselves] … before a tribunal … wherein the prosecution is presented by experienced and learned counsel).

9 *See, e.g., United States v. Wade,* 388 U.S. 218, 224 (1967) (explaining that "the Sixth Amendment guarantee … appl ies] to 'critical stages of the proceedings).

10 *See also Ash,* 413 U.S., at 310 (reasoning that the right to counsel extends to "pretrial events that might appropriately be considered … parts of the trial itself).

11 *See also Rothgery,* 128 S. Ct., at 2589 (explaining that a government's "commitment to prosecute triggers Sixth Amendment protection by "defin ing] the accused's] capacity and control ling] his actual ability to defend himself against a formal accusation that he is a criminal).

12 *See generally, e.g., Rothgery,* 128 S. Ct., at 2594 95 (Alito, d., concurring) (discussing application of Sixth Amendment right to critical pretrial stages).

13 *See, e.g., Gouveia,* 467 U.S., at 189 (explaining that Sixth Amendment counsel right extends to pretrial stages "where the results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a mere formality) (quoting *Wade,* 388 U.S., at 224); *see also Rothgery,* 128 S. Ct., at 2590 (observing that initial appearance triggers Sixth Amendment right to counsel since at that point, "a defendant … is headed for trim and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives).

14 *See also Rothgery,* 128 S. Ct., at 2594 (Alito, J., concurring) (interpreting Court's critical stage jurisprudence "to require the appointment of counsel only after the defendant's prosecution has begun, *and then only as necessary to guarantee the defendant effective assistance at trial*) (emphasis added).

15 *See also Davis,* 512 U.S., at 460 (explaining that "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves).

16 *See also Cobb,* 532 U.S., at 171 n.2 (explaining that "there is no 'background principle of our Sixth Amendment jurisprudence establishing that there may be no contact between a defendant and police without counsel present).

17 This Court's recent decision in *Rothgery* does not commit it to upholding, nor does it otherwise approve, *Jackson*'s anti waiver rule. *Rothgery s* "narrow holding only addresses when the Sixth Amendment counsel right *attaches,* 128 S. Ct., at 2592, and explicitly avoids deciding "the scope of an individual's postattachment right to the presence of counsel, *id.*, at 2591 n.15. Thus, *Rothgery* does not touch on the continuing validity of *Jackson*'s anti waiver rule. *See also id.*, at 2592, 2594 (Alito, J., concurring) (joining Court's opinion because it only addresses *when* the Sixth Amendment attaches and not "*what* the right guarantees).

18 *See Jackson,* 475 U.S., at 642 (Rehnquist, J., dissenting) (criticizing practical limit on availability of *Jackson* bar to "those defendants foresighted enough, or just plain lucky enough to have explicitly requested counsel outside the context of custodial interrogation).

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2009 WL 1111562 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Jesse Jay MONTEJO, Petitioner,
v.
STATE OF LOUISIANA, Respondent.

No. 07-1529.
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On Writ of Certiorari to the Louisiana Supreme Court

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***i** Supplemental Question Presented

Should *Michigan v. Jackson,* 475 U.S. 625 (1986), be overruled?

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***1 Argument**

I. Overruling *Jackson*'s Obsolete Rule Will Clarify Sixth Amendment Jurisprudence and Practice.

Without actually defending its reasoning, Montejo claims that *Michigan v. Jackson* "is fully consistent with the Court's Fifth and Sixth Amendment decisions over … nearly a quarter century." Pet'r Suppl. Br., at 15. That is stunningly wrong. As Louisiana's Supplemental Brief explains, subsequent decisions have left *Jackson* in tatters:

• *Jackson* said an indictment created "even stronger" reasons for barring questioning of an uncounseled accused, 475 U.S. 625, 631 (1986), but *Patterson v. Illinois* soon after explained an indictment "does not substantially increase the value of counsel … or expand [his] limited purpose … when the accused is questioned by authorities." 487 U.S. 285, 298 (1988).

• *Jackson* broadly construed a request for counsel to trigger *Edwards* and bar subsequent waivers, 475 U.S., at 633, but *Davis v. United States* then narrowly construed the same *Edwards* request. 512 U.S. 452, 459-61 (1994).

• *Jackson* interpreted a Sixth Amendment invocation to include a Fifth Amendment request for counsel, 475 U.S., at 632-33, but *McNeil v. Wisconsin* later explained that invoking the Sixth "is, as a matter of *fact, not* ***2** to invoke the [Fifth Amendment] interest." 501 U.S. 171, 178 (1991).

See also Resp't Suppl. Br., at 6-13. These cases do not "clarif[y] the scope of [*Jackson*'s] rule," Pet'r Suppl. Br., at 17. They clarify that *Jackson*' s rule has been orphaned.

Jackson's erosion has not occurred in secret. Moreover, what was being eroded was *Jackson*'s already brittle foundation in Fifth Amendment anti-coercion jurisprudence. Importing those concerns into the Sixth Amendment "ma[de] no sense at all," *Jackson,* 475 U.S., at 640 (Rehnquist, J., dissenting), as other Justices have since recognized. *See Texas v. Cobb,* 532 U.S. 162, 175 (2001) (Kennedy, J., concurring) (discussing *Jackson*'s subversion of *Edwards*); *see also* Resp't Suppl. Br., at 6-9.

Understandably, Montejo avoids explaining why "subsequent cases have [not] undermined [*Jackson*'s] doctrinal underpinnings." Pet'r Suppl. Br. at 15 (quoting *Dickerson v. United States,* 500 U.S. 428, 443 (2000)). Instead, Montejo defends *Jackson* on grounds of policy and practicality. Part II *infra* explains why Montejo's policy arguments ***3** fail. The remainder of this Part explains why overruling *Jackson* will not "create a host of difficulties that would cloud the Sixth Amendment for years to come," Pet'r Suppl. Br., at 9, but will instead clarify the Sixth Amendment.

Montejo argues that overruling *Jackson* will (1) raise "innumerable questions" about whether a defendant has sufficiently invoked *Edwards* at an arraignment (*id.*, at 10); (2) proliferate variations on *Miranda* waivers for different Sixth Amendment situations (*id.*, at 11-12); and (3) encourage police to undermine the Sixth Amendment by "try[ing] to reach defendants before they have had a chance to consult with counsel" (*id.*, at 13-14). These arguments exaggerate the consequences of abandoning *Jackson.*

Montejo is wrong that overruling *Jackson* would "replace [*Jackson*] with a Fifth Amendment rule designed to protect a completely different constitutional right." *Id.*, at 17. That is backwards. It was *Jackson* itself that dragged into the Sixth Amendment the *Edwards* rule - a "rule designed to protect a completely different constitutional right." *Id. Jackson* itself transplanted *Edwards* from its native interrogation environment into a context divorced from a "suspect's choice to speak with investigators." *Cobb,* 532 U.S., at 176 (Kennedy, J., concurring). And, finally, *Jackson* itself pegged its new rule to a fortuitous request for counsel that, as *McNeil* taught, does not implicate the Fifth Amendment. 501 U.S., at 178. Consequently, overruling *Jackson* would not "replace" its illogical rule with *anything*, but would rather "bring[] [the Court's] Fifth and Sixth Amendment jurisprudence ***4** into a logical alignment." *Id.*, at 183 (Kennedy, J., concurring).

Montejo's warnings thus ring hollow. First, courts will not face "innumerable questions" about a possible *Edwards* request at arraignment, because *Jackson*'s demise will remove the need to reach such questions. No longer could an accused potentially trigger *Edwards* in the alien context of an arraignment. That would be a wholesome development, since the Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.' " *McNeil,* 501 U.S., at 182 n.3 (citations omitted). By restoring the principle that "[m]ost rights must be asserted when the government seeks to take the action they protect against," *id.*, discarding *Jackson* would clarify rather than complicate arraignments.

Second, *Patterson* answers Montejo's fear that overruling *Jackson* would multiply *Miranda* variations. *Patterson* held that, for waiver-of-counsel purposes, pre- and post-indictment suspects occupy the same position. 487 U.S., at 298-99. Thus, standard *Miranda* warnings "convey[] … the sum and substance of the rights that the Sixth Amendment provide[s]." *Id.*, at 293. That is because counsel's "simple," "limited" and "unidimensional" role during questioning merits "a waiver procedure … likewise simple and limited." *Id.*, at 294 n.6, 298-300. [2]

***5** Moreover, *Patterson* rejected lower courts' "suggest[ions] that something beyond *Miranda* warnings is … required" to validate a Sixth Amendment waiver during questioning. *Id.*, at 294-95 & n.8. *Patterson* thus forecloses Montejo's "rather nebulous suggestion" to the contrary. *Id.*, at 294. Since *Jackson* applies only to questioning, one need not speculate about waivers in other situations - although the Court could readily formulate them in future cases. *Cf. Patterson,* 487 U.S., at 298.

Finally, Montejo suggests that overruling *Jackson* will "condition Sixth Amendment protections on the outcome of a race between the police and appointed defense counsel to meet with the defendant." Pet'r Suppl. Br., at 13. But retiring *Jackson* will not touch the Sixth Amendment's *substantive* protections. Counsel will still be guaranteed at critical stages, a guarantee buttressed by the "anti-subversion" protection of *Massiah* and by *Miranda-Edwards. See* Resp't Suppl. Br., at 22-25. What will change is *procedural: Jackson* will no longer presumptively invalidate free and informed waivers. The notion that there is something suspect about the police candidly seeking such waivers is based on a warped notion of counsel's Sixth Amendment role. *See* Resp't Suppl. Br., at 13-22.

***6 II. *Jackson* Does Not Rationally Further Distinct Sixth Amendment Interests.**

Montejo then flees to policy. He argues *Jackson* furthers an accused's "distinct" Sixth Amendment "right 'to rely on counsel as a "medium" between him and the State.' " Pet'r Suppl. Br., at 3 (quoting *Maine v. Moulton,* 474 U.S. 159, 176 (1985)). Louisiana agrees with Montejo that "[t]he Fifth and Sixth Amendments protect an accused in distinct ways." Resp't Suppl. Br., at 1. But, from that premise, Louisiana draws the opposite conclusion about *Jackson. Jackson* imported a Fifth Amendment anti-coercion rule that distorts counsel's Sixth Amendment role as a "guide through complex legal technicalities," *id.*, at 14 (quoting *United States v. Ash,* 413 U.S. 300, 307 (1973)), and exaggerates counsel's "simple and limited" role during questioning. *See Patterson,* 487 U.S., at 300; Resp't Suppl. Br., at 13-18, 18-22. In short, Sixth Amendment counsel is supposed to be an accused's expert mouthpiece, but *Jackson* turned him into a muffler.

Montejo's policy defense of *Jackson* rests on Sixth Amendment boilerplate, failing even to recognize counsel's variable Sixth Amendment roles at different critical stages. *See generally Patterson,* 487 U.S., at 298-99. Instead he simply defends precedents such as *Moulton, Massiah*, and *Henry*, mistakenly fearing them threatened by overruling *Jackson. See, e.g.*, Pet'r Suppl. Br., at 12 (warning that "*Henry* and *Moulton* … should arguably come out the other way"); *Massiah v. United States,* 377 U.S. 201 (1964); ***7** *United States v. Henry,* 447 U.S. 264 (1980). But Montejo misses that *Jackson* illogically *extends* those "surreptitious investigation" cases into a context where "the conduct of the police was totally open and above-board." *Jackson,* 475 U.S., at 641 n.4 (Rehnquist, J., dissenting). Overruling *Jackson* would not affect them. *See* Resp't Suppl. Br., at 3, 23. [3]

Finally, *amici* Public Defender Service *et al.* make a version of Montejo's policy argument by urging that *Jackson* is also supported by "no-contact" ethics rules. *See* Suppl. Br. of *Amici Curiae* Public Defender Service *et al.* ("Public Defender Br."), at 12-16. [4] But there are numerous problems with pegging Sixth Amendment protections to the "sub-constitutional recommendations of even so esteemed a body as the American Bar Association." *Moran,* 475 U.S., at 427-28. First, since ethical rules "vary in scope" across jurisdictions, *see* Public Defender Br., at 16 n.4, they would provide an unstable guide for constitutional law. Second, applying "no-contact" rules here would undermine *another* Sixth Amendment principle whose validity is admitted. Both Montejo and *amici* agree that the Sixth Amendment allows an accused to "come ***8** forward and confess to the police of his own accord." Pet'r Suppl. Br., at 14; *see also* Public Defender Br., at 11 (admitting that accused "can always … initiate contact" with the police). But the ABA no-contact rule would swallow that principle since it "applies even though the represented person initiates or consents to the communication." ABA Rule 4.2, cmt. 3.

Most importantly, the Court rejected this argument eight years ago in *Texas v. Cobb.* Declining the dissent's suggestion to use ABA Rule 4.2 to expand the Sixth Amendment, the Court explained that "[e]very profession is competent to define the standards of conduct for its members, but such standards are obviously not controlling in interpretation of constitutional provisions." *Cobb,* 532 U.S., at 171 n.2.

III. This Case Squarely Poses Whether *Jackson* Should Be Overruled.

This is the right case to overrule *Jackson*, because application of *Jackson*'s anti-waiver rule would invalidate Montejo's post-indictment admission, made after he had properly waived his Sixth Amendment right to counsel under *Patterson. See State v. Montejo,* 974 So.2d 1238, 1258-62 (La. 2008). [5] That admission - a written apology to the ***9** victim's wife - corroborated other damning evidence against Montejo, including a lengthy "video-taped police interrogation during which Montejo … admitted that he shot the victim who had unexpectedly returned home and interrupted Montejo's burglary." *Id.*, at 1244. [6] The Louisiana Supreme Court exhaustively analyzed Montejo's Fifth Amendment waivers during the videotaped statements and found them valid under *Miranda, Edwards*, and *Oregon v. Bradshaw. See id.,* at 1250-58; *id.*, at 1252-54 (discussing *Oregon v. Bradshaw,* 462 U.S. 1039 (1983) (plurality opinion)).

This Court originally granted certiorari only to address whether Montejo's silent acceptance of appointed counsel at a 72-hour hearing was enough to trigger *Jackson. See* 129 S. Ct. 30 (U.S. Oct. 1, 2008). The validity of Montejo's Fifth Amendment waivers is thus not before the Court. Nor is the question whether Montejo's subsequent Sixth Amendment waiver was valid under *Moran v. Burbine,* which protects (in a way distinct from *Jackson*) the Sixth Amendment counsel right against certain forms of police "interference." *See* 475 U.S. 412, 428 (1986). On the latter issue, the Louisiana Supreme Court noted the facts were unclear about what transpired between Montejo and police investigators on September 10, the morning of Montejo's Sixth Amendment waiver and ***10** subsequent admission. [7] But the court left those factual matters unresolved, reasoning that, "[e]ven if … the police did tell [Montejo] he did not have a lawyer, this does not rise to the level of the facts presented in *Moran v. Burbine.*" 974 So.2d, at 1262 n.69.

Montejo can claim this case is a "poor vehicle" for reconsidering *Jackson* only by re-arguing those Fifth and Sixth Amendment issues not even before this Court. Thus, he says allegedly "harsh tactics" should have invalidated his *Miranda* waivers during the videotaped interviews. Pet'r Suppl. Br., at 18-19. But the Louisiana Supreme Court found, to the contrary, that Montejo's initial *Miranda* invocation was "scrupulously honored." 974 So.2d, at 1254-55. The court found further that Montejo validly retracted his initial request for counsel, *id.*, at 1256, and later "validly waived his *Miranda* rights before the resumption of the interview." *Id.*, at 1258. Montejo cannot use his disagreement with the Louisiana Supreme Court on these issues - which, again, are not before this Court - to avoid the distinct *Jackson* issue that *is* squarely posed.

Montejo also raises the different Sixth Amendment claim that the police lied about whether he had appointed counsel and thus "interfered" with his Sixth Amendment right under ***11** *Moran,* 475 U.S., at 428-29. Pet'r Suppl. Br., at 19-21. But, as explained above, the Louisiana Supreme Court expressly declined to resolve factual issues about what actually happened, merely stating in *dicta* that Montejo's allegations, even if true, did "not rise to the level of … *Moran.*" 974 So.2d, at 1262 n.69. [8] That is a far cry from Montejo's bald assertion that "it is undisputed the police did not tell Montejo that he had counsel." Pet'r Suppl. Br., at 19-20 n.8. Montejo's version of the facts was contested at every step of this case, and has never been adopted by any court. More to the point, this unresolved factual dispute concerning a claim *not before this Court* is no reason to avoid the *Jackson* issue that assuredly *is.*

Furthermore, the record discloses how speculative Montejo's alternate *Moran* claim is. Aside from Montejo's self-serving assertion, there is no evidence that on the morning of September 10 the two detectives deliberately conspired to deceive Montejo about the status of his appointed counsel. To the contrary, there was evidence that, although fully advised of his rights multiple times that morning (JA, p. 67), Montejo *himself* denied he had or wanted counsel when asked by the officers. JA, pp. 82, 145, 179-80, 182. Montejo's tale of police "deceit" came out, not at his suppression hearing, but at the end of trial. By contrast, Montejo's ***12** motion to suppress simply argued that all his statements were involuntary, JA, p. 6, *not* that the police had deceived him. JA, pp. 92-93.

Montejo was a murder suspect with an extensive criminal record, who waived his rights no less than seven times. *See* JA, p. 13; ex. MTS1-7. Prior to the 72-hour hearing, he had already confessed on videotape. Thus, Montejo had a clear motive to accompany the detectives on September 10: he wished to show he had not intended to commit murder, but had only armed himself with the victim's gun once inside the home. Montejo hoped to prove this theory by finding the gun. JA, p. 51.

Montejo, then, was precisely that suspect who chooses to "go it alone" with the police. *See Patterson,* 487 U.S., at 291. He hoped to "avoid the laying of charges by demonstrating an assurance of innocence" - or at least a lesser degree of guilt - "through frank and unassisted answers to questions." *McNeil,* 501 U.S., at 178. To that end, Montejo freely and knowingly waived his Sixth Amendment right to counsel. Far from a "poor vehicle" to reconsider *Jackson*, this is the paradigm case. Here, "the *Edwards* rule operate[d] to preserve [Montejo's] free choice to remain silent," or to talk to police outside counsel's presence. But "if *Jackson* were to apply it would override that choice." *Cobb,* 532 U.S., at 175 (Kennedy, J., concurring).

***13 Conclusion**

The Court should overrule *Michigan v. Jackson.*

Footnotes

1 *See, e.g., Patterson,* 487 U.S., at 305 06 & n.3 (Stevens, J., dissenting) (arguing the majority "backs away from the significance previously attributed to the initiation of formal proceedings, citing, *inter alia, Jackson*); *McNeil,* 501 U.S., at 185 (Stevens, J., dissenting) (arguing majority's "approach of construing ambiguous requests for counsel … is the opposite of that taken in *Jackson*); *Davis,* 512 U.S., at 469 70 (Souter, J., concurring) (criticizing majority because "requests for counsel should] be 'give n] a broad, rather than a narrow, interpretation, quoting *Jackson*).

2 *Patterson* did not involve "a completely different situation, Pet'r Suppl. Br. at 11 n.3, because the accused had not retained or accepted counsel. *Patterson* pointed that out not to suggest that a different waiver standard would apply but to clarify it was not addressing a *Moulton* situation (where no waiver is *possible*) nor a *Jackson* situation (where any waiver is *presumptively invalidated*). *See Patterson,* 487 U.S., at 290 n.3; *Maine v. Moulton,* 474 U.S. 159, 163 66, 172 74 (1985).

3 Montejo also suggests that *Massiah et al.* separately invalidate his Sixth Amendment waiver. Pet'r Suppl. Br., at 18 23. But, as explained in Part III *infra*, Montejo lost that claim below and it is not properly before this Court.

4 Specifically, *amici* refer to ABA Model Rule of Professional Conduct 4.2 (Feb. 2009), which prohibits a lawyer and his agents, unless otherwise authorized, from "communicat ing] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter.

5 Of course, the Court could resolve the case on the narrower ground that, beyond mutely accepting appointed counsel, Montejo made no "assertion sufficient to trigger *Jackson. See* Resp't Br., at 10 16. But that would leave *Jackson* s anomalous rule in place. Moreover, while *Jackson* plainly requires a positive "assertion, by continuing to refine that requirement the Court will inevitably confront, in future cases, the kinds of record ambiguities and factual disagreements posed here. Better to discard *Jackson.*

6 The State also proved "the undisputable presence of Montejo's DNA under the victim's fingernails, and its expert "ruled out DNA transfer by coincidental contact. *Id.*, at 1242.

7 Montejo testified that he told the police he had appointed counsel and that the police said he did not. By contrast, one of the detectives testified that he was unaware that Montejo had received appointed counsel that morning and, more importantly, that Montejo "told him he had not been contacted by an attorney. *See* 974 So.2d, at 1261 62.

8 Montejo wrongly claims that the Louisiana Supreme Court "reason ed] … that the police would have been *permitted to lie* about the status of Montejo's counsel under this Court's decision in *Moran.* Pet'r Suppl. Br., at 19 20 n.8 (emphasis added). The court did no such thing.

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2009 WL 1541673 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Jean BOUDREAUX, and the victims of the Flood on April 6, 1983, on the Tangipahoa River, Petitioners,

v.

THE STATE OF LOUISIANA, Department of Transportation, et al., Respondents.

No. 08-1212.
May 29, 2009.

On Petition for a Writ of Certiorari to the New York Court of Appeals

Brief in Opposition to Petition for Writ of Certiorari

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Cases

***iv** State Cases:

*1 QUESTION PRESENTED

Petitioners secured a judgment against Louisiana in Louisiana state court, but they could not enforce that judgment because Louisiana's limited waiver of sovereign immunity makes any such judgment contingent on an authorization by the Louisiana Legislature to pay the judgment. Petitioners had tried to bypass Louisiana's sovereign immunity, by seeking to enforce the judgment in New York state court. They invoked the Full Faith and Credit Clause, which requires that the New York courts accord Louisiana judgments *the same* credit Louisiana courts would accord them. Was the New York Court of Appeals correct in holding that the Full Faith and Credit Clause does not require the New York courts to accord the Louisiana judgment more credit than the Louisiana courts would?

*2 LIST OF PARTIES AND RULE 29.6 STATEMENT

All parties to the proceedings in the New York Court of Appeals are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Not applicable.

*3 BRIEF FOR THE RESPONDENTS IN OPPOSITION

INTRODUCTION

Petitioners are Louisiana residents who obtained a final money judgment in a tort suit filed against the State of Louisiana, in Louisiana state court. No court in Louisiana can legally enforce that judgment because Louisiana law prohibits a

court from enforcing a judgment against the State unless the Louisiana Legislature appropriates funds from the State's treasury to pay it - a step the Louisiana Legislature has declined to take.

In an effort to bypass the limitations Louisiana has placed on its waiver of sovereign immunity, petitioners turned to the New York courts to enforce a Louisiana judgment that no Louisiana court would enforce. They insist that the Full Faith and Credit Clause somehow requires a New York court to accord *more* faith and *more* credit to the Louisiana judgment than the Louisiana courts do. In particular, they insist that the Clause requires New York courts to give full faith and credit to the Louisiana judgment, but to give no faith and no credit to the Louisiana constitutional and statutory limitations that made the judgment contingent.

No court anywhere in the country has ever reached such a conclusion. The New York Court of Appeals broke no new ground when it unanimously rejected petitioners' position, App. at 6a - a position that the trial court dismissed as "frivolous," *id.* at 46a. The New York Court of Appeals applied settled constitutional principles to the idiosyncrasies of ***4** Louisiana law. This Court should deny the petition.

STATEMENT

The Petitioners Obtain a Judgment in Louisiana

In April 1983, floodwaters damaged several hundred homes and businesses in Tangipahoa Parish, Louisiana. App. at 2a. Petitioners, Louisiana residents harmed by the flood, filed a class action suit blaming the Louisiana Department of Transportation's negligent construction of a bridge. *Id.* After prevailing in the trial court and appellate courts, Petitioners obtained a final judgment in the Louisiana Court of Appeal. *Id.* The Louisiana Supreme Court denied a writ of certiorari. *Boudreaux v. Louisiana,* 05-2242 (La. 2/17/06); 924 So.2d 1018.

Louisiana law considers this judgment "final." But it is nevertheless unenforceable in any Louisiana court. Louisiana waives sovereign immunity for tort suits, but only to a limited degree. The Louisiana Constitution provides that a money judgment against the State cannot be paid "except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered." La. Const. art. XII, § 10(c).

Petitioners have petitioned the Louisiana Legislature to appropriate funds for payment of the judgment. App. at 11a. The Legislature has declined to appropriate the funds. Petitioners have also attempted to enforce the Louisiana judgment by docketing it in eighteen Louisiana parishes. App. at 2a. Docketing, however, is a futility in this case because the State's sovereign immunity waiver ***5** makes legislative appropriation the exclusive means of enforcement. No court in Louisiana will enforce the judgment.

Petitioners Unsuccessfully Attempt to Enforce the Louisiana Judgment in New York

Petitioners then turned to the New York courts, in hopes of persuading them to enforce a Louisiana judgment that no Louisiana court will enforce. In August 2006, petitioners attempted to docket their Louisiana judgment in the office of the County Clerk of New York County pursuant to New York Civil Practice Law & Rules ("CPLR") Article 54 ("Enforcement of Judgments Entitled to Full Faith and Credit"). App. at 2a. Their plan was to find assets of Louisiana in New York and to execute on them using the CPLR procedure - even though the Louisiana Legislature did not take the steps necessary to make the judgment enforceable and even though the limitations on Louisiana's sovereign immunity waiver insulated those assets. *Id.*

Noting this "infirmity," the New York trial court precluded petitioners from docketing the judgment. App. at 42a, 48a. The court reasoned that the provision of the Louisiana Constitution requiring legislative approval of any judgment effectively stayed enforcement of the judgment. App. at 44a-47a.

On appeal, the Appellate Division affirmed. App. at 16a. The Appellate Division recognized that the Louisiana judgment was a contingent award of damages and should not be considered an enforceable "judgment" within the meaning of CPLR Article 54. App. at 14a. The court refused to accord ***6** the judgment greater effect in New York than it would have in Louisiana. *Id.*

The New York Court of Appeals unanimously affirmed. It reasoned that New York courts are not required to enforce a money judgment against Louisiana that Louisiana's own courts are legally barred from enforcing. App. at 2a. The Court of Appeals noted that Louisiana courts know that a judgment creditor of the State may be left unable to collect when the Legislature refuses to appropriate the funds necessary to satisfy a judgment. App. at 5a. It further observed: "In seeking to enforce the Louisiana judgment in New York, plaintiffs attempt to circumvent Louisiana's clear mandate that no judgment rendered against it shall be paid unless its Legislature appropriates funds." App. at 4a. The Full Faith and Credit Clause, the court concluded, does not override this mandate: "what the Full Faith and Credit Clause requires is that a court provide a foreign judgment with the same credit, validity, and effect it would have in the state that pronounced it." App. at 4a-5a. The only way to give effect to Louisiana law, the Court of Appeals concluded, was to refuse to enforce the judgment in New York exactly as a Louisiana court would. App. at 5a-6a.

The Court of Appeals further held that the doctrine of comity did not require enforcement of the Louisiana judgment. App. at 6a. To the contrary, comity counseled that the Court of Appeals "defer to the Constitution of Louisiana and the public policy embodied within the statute enacted by its legislature," *id.*, which, in this case meant that the judgment could not be enforced except by an appropriation of the Louisiana legislature.

***7 REASONS FOR DENYING THE PETITION**

This Court should deny certiorari for two reasons. First, by petitioners' own admission, this case involves the application of "settled law" to a peculiar set of facts. Pet. at 16. Petitioners do not even try to point to any opinion from any court that reached the opposite conclusion on similar facts. There are no directly contrary holdings because Louisiana's limitation on enforcement of judgments against the State is virtually unique. *See infra* Point I. Second, the New York Court of Appeals, applying long-settled principles of law, reached the correct conclusion. *See infra* Point II.

I. THE LOWER COURTS ARE NOT SPLIT AS TO HOW THE FULL FAITH AND CREDIT CLAUSE APPLIES TO THE UNIQUE FACTS OF THIS CASE.

The petition's central theme is that the Court of Appeals' ruling is "completely inconsistent with over a century of settled full faith and credit law as established and re-emphasized by this Court time and again." Pet. at 4; *see id.* at 16. Petitioners do not suggest that the New York Court of Appeals' holding conflicts directly with the holding of the highest court of any other state, or with the holding of any federal court of appeals, on similar facts.

Specifically, petitioners do not cite a single case, like this one, with the following elements: (1) a state court in State X renders a judgment; (2) the law of State X provides, as a matter of sovereign immunity, that the judgment cannot be enforced against State X; and (3) a court in State Y nevertheless enforces the judgment, in defiance of State X's sovereignty. We are unaware of any case that so holds. In fact, ***8** we are unaware of any case - on either side of ledger - that presents this peculiar scenario.

The reason is plain. Louisiana's waiver of sovereign immunity is virtually unique among the states. Most states that waive sovereign immunity grant state courts the power to enforce judgments against the state. Some grant state courts the power to enforce judgments, but dictate from where the funds are to be paid. [2] Others grant state courts the power to enforce judgments, but impose upon the state legislature a legal obligation to appropriate the funds, so that the funds

are properly budgeted and accounted for.[3] But so far as we have been able to ascertain only one other state - Hawaii - that takes the same approach as Louisiana, in making the enforceability of the judgment contingent on legislative authorization. *See* Haw. Rev. Stat. § 662-11 (2008) (larger "[c]laims arbitrated, compromised, or settled … shall be paid only after funds are appropriated by the legislature for the payment of those claims").

If, as petitioners insist, the law has been "settled" for a century, then this Court's intervention is unnecessary. By petitioners' own terms, there is no ***9** compelling reason for this Court to assume the unaccustomed role of court of errors to correct a supposed misapplication of "settled" principles to a fact scenario that has never before arisen, and might never again arise.

II. THE COURT OF APPEALS' HOLDING IS CONSISTENT WITH ESTABLISHED DOCTRINE ON THE FULL FAITH AND CREDIT CLAUSE.

Petitioners are correct when they note that the Full Faith and Credit Clause doctrine applicable here is "settled." *See* Pet. at 16. They are just wrong about how those settled principles apply to the facts of this case. The truth is that the New York Court of Appeals followed settled law, and petitioners are the ones advocating a radical - indeed, unprecedented - departure from long-accepted constitutional doctrine.

A. The Settled Rule Is that a State Court Need Not Give Greater Credit to the Judgment Rendered By a Sister State than Would the Courts in the Rendering State.

The United States Constitution provides that "Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State." U.S. Const. art. IV, § 1. The purpose of this clause was to avoid conflicts created by courts in different states adjudicating the same matters, and to "transform[] an aggregation of independent, sovereign States into a nation." *Sherrer v. Sherrer,* 334 U.S. 343, 355 (1948). The operative principle has been the same not just for a century, but for nearly *two* centuries: "the judgment ***10** of a state court should have *the same* credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced." *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n,* 455 U.S. 691, 704 (1982) (emphasis added) (citing *Hampton v. McConnel,* 16 U.S. (3 Wheat.) 234, 235 (1818)).

This Court has never read this clause to require an enforcing state to give a judgment *greater* effect than it would have in the courts of the rendering state. To the contrary, this Court has held that under the Full Faith and Credit Clause, "a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered." *New York v. Halvey,* 330 U.S. 610, 614 (1947). Therefore, "the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered." *Id.* at 615.

B. The New York Court of Appeals Faithfully Followed the Settled Rule By Declining to Give the Louisiana Judgment Greater Credit Than Louisiana Courts Would Accord It.

Following this settled rule, the New York Court of Appeals unanimously concluded that the New York courts are not required to enforce a Louisiana judgment that the Louisiana courts, themselves, would be constitutionally barred from enforcing, because the judgment was subject to the condition that payment could be made only by specific legislative appropriation. That conclusion was correct.

It is undisputed that petitioners' judgment is ***11** judicially unenforceable in Louisiana as a matter of state law. Pet. at 4. The constitutional provision, quoted above, is unequivocal that:

> No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated by therefor by the legislature or by the political subdivision against which the judgment is rendered.

La. Const. art. XII, § 10(c). There is no serious question that this provision limits the State's waiver of its sovereign immunity. [4]

The statute implementing Louisiana's constitutional sovereign immunity waiver explains why the State thought it important to impose the limitation:
(1) That judgments against public entities have exceeded ability to pay on current basis.

(2) That the public fisc is threatened by these judgments to the extent that the general health, safety and welfare of the citizenry may be threatened.

***12** (3) That the limitations set forth in this Section are needed to curb the trend of governmental liability abuses, to balance an individual's claim against the needs of the public interests and the common good of the whole society, and to avoid overburdening Louisiana's economy and its taxpaying citizens with even more new and/or increased taxes than are already needed for essential programs.

La. Rev. State. Ann. § 13:5106(E) (2008).

Louisiana courts have consistently recognized the Legislature's exclusive control over the decision to allow the enforcement of a money judgment against the State. As the Supreme Court of Louisiana recently explained: "the judicial branch is empowered to render judgments against the state. However, the constitution does not provide the judiciary with the ability to execute those judgments. The constitution reserves that power to the legislature." *Newman Marchive P'ship Inc. v. City of Shreveport,* 07-1890, p. 4 (La. 4/8/08); 979 So.2d 1262, 1265 (internal citations omitted). [5]

***13** Thus, while Louisiana law may refer to a court's judgment against the State as "final," *see* La. Code Civ. Proc. Ann. art. 1841 (2003) ("A judgment that determines the merits in whole or in part is a final judgment."), the consequence of these constitutional and statutory provisions is to make that judgment contingent: It is unenforceable unless and until the Legislature embraces it and appropriates money to cover it.

In insisting that the New York courts must nevertheless enforce a Louisiana judgment that Louisiana courts, themselves, are prohibited from enforcing, petitioners are urging a drastic departure from settled law. They are arguing that New York courts must give *more* faith and *more* credit to a Louisiana judgment than the Louisiana courts themselves would accord it. They are insisting that the New York courts give full credit to the Louisiana judgment, but *no* credit to the State's constitutional limitation on its own waiver of sovereign immunity.

C. Petitioners' Arguments, and Analogies to Other Lines of Cases, Are Unpersuasive.

Unable to point to any case with facts even close to the facts of this case, petitioners invoke several lines of cases that have no bearing on the question at issue here. We address each argument in turn.

"Final" judgments are preclusive. Petitioners' central argument revolves around splicing a part of Louisiana substantive law (the conditional waiver of sovereign immunity that allows litigation of the tort claim) to parts of New York procedural law (providing for the enforcement of foreign judgments). Their argument goes something like this: *Louisiana*

***14** law refers to the judgment as "final," even if it is contingent on legislative authorization. Pet. at 17-18 (quoting La. Code Civ. Proc.. art. 1841). *New York* law says that "final" judgments from sister states must be docketed. Pet. at 6 (citing CPLR art. 54). Ergo, Louisiana's final judgment must be docketed under New York law.

The problem with this analysis is that New York's highest court, in this case, interpreted the New York statute *not* to require any such thing, because Louisiana's judgment was not "final" within the meaning of New York's enforcement statute. *See* App. at 6a. Petitioners object that this conclusion is incorrect. But it is not up to this Court to override state courts on their interpretation of their own statutes.

So petitioners then try to federalize the requirement. They do so mainly by snatching quotes from various cases out of context. For example, they quote (Pet. at 15) from cases to the effect of: "A *final* judgment in one State … qualifies for recognition throughout the land." *Baker v. Gen. Motors Corp.,* 522 U.S. 222, 233 (1998) (emphasis added; other citations omitted). But those cases all involved judgments that were "final," in every sense of the term. Those cases did not involve the oddity of a state judgment that might have been "final" in form, but contingent in fact. So whatever they said about "truly" final judgments has no bearing on Louisiana's unique type of judgment in a case applying the State's sovereign immunity waiver. But, in any event, the cases cited in that passage were not about the requirement that courts enforce the judgments of sister states. They were about the completely different, and irrelevant, principle of ***15** claim preclusion - that the final determination of any issue fully and fairly considered must be given preclusive effect. [6] Because Louisiana did not try to *re*litigate any facts or law before the New York courts, the preclusion cases are irrelevant.

Courts of one state do not recognize a sister state's sovereign immunity. Citing *Nevada v. Hall,* 440 U.S. 410 (1979), and two New York State cases, [7] petitioners contend that New York courts should not give effect to Louisiana's limitation on sovereign immunity that allows a judgment against the state to be enforced by specific legislative appropriation. Pet. at 19-20. *Hall* and the two New York cases, however, involved transactions that the defendant state had voluntarily conducted in the forum state, and litigation in the forum state where jurisdiction was otherwise established over the defendant state. This case is totally different. Petitioners obtained a judgment against Louisiana ***16** in that State's own courts and pursuant to that State's sovereign immunity waiver, concerning conduct that all occurred in Louisiana. The conditions attached to Louisiana's sovereign immunity waiver are baked into the judgment. This case does not involve litigation against Louisiana that properly occurred in the courts of New York or some other state. Nothing happened outside of Louisiana here except for petitioners' carrying a foreign judgment to New York. The Full Faith and Credit clause requires New York courts to honor Louisiana law, not to cast it aside.

"Enforcement measures" follow the forum. Petitioners next try another way to federalize the rule that New York cannot enforce Louisiana limitations on enforcement of Louisiana judgments. They quote (Pet. at 22) another snippet from the same case, to the effect that: "Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law." *Baker,* 522 U.S. at 235 (citing *Bailey v. Cohen,* 38 U.S. (13 Pet.) 312, 325 (1839)). Petitioners interpret this proposition as a command that New York courts must completely ignore the legal constraints of Louisiana law.

As petitioners confirm with their numerous citations, the classic example of this rule is where a plaintiff secures a judgment in State X, but does not succeed in collecting using methods available in State X - so the plaintiff files the judgment in State Y, which has other enforcement tools. Petitioners' particular example are cases in which the rendering state does not allow wage garnishment but the ***17** enforcing state does. [8] These cases hold that just because State X does not allow its court to garnish wages to collect an otherwise enforceable judgment does not mean that State Y cannot provide for that vehicle of enforcement.

That is a completely different scenario. In those cases, there was no question that State X's judgment was enforceable in State X. There was no bar to collecting the judgment. There was nothing in the law of State X that made the judgment

contingent on some future state action. And there was certainly nothing in the law limiting the waiver of sovereign immunity. Not so here, where: (1) the New York courts are recognizing a condition inherent in the Louisiana judgment and inextricably tied to Louisiana's sovereign immunity; and (2) Louisiana law emphatically does not treat the judgment as enforceable - by any means, except legislative authorization. [9]

Privileges and Immunities Clause. Finally, ***18** petitioners assert that the Privileges and Immunities Clause requires reversal because "New York may not constitutionally close the doors of its courts to out of state citizens when they are freely open to citizens of New York." Pet. at 27. The short answer is that petitioners never raised the Privileges and Immunities Clause in any of the courts below, and cannot raise it for the first time now. *See Youakim v. Miller,* 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

In any event, petitioners are wrong. As petitioners correctly point out, the Privileges and Immunities Clause requires only that "any policy the State may choose to adopt must operate in the same way on its own citizens and those of other states." Pet. at 28 (quoting *Chambers v. Baltimore & Oh. R.R. Co.,* 207 U.S. 142, 149 (1907)). New York law *does* apply the same to both New York *citizens* and Louisiana *citizens.* If a New York citizen had secured a judgment against Louisiana in Louisiana state court, he, too, would be unable to enforce the judgment in New York, absent an appropriation from the Louisiana Legislature. To be sure, New York law treats Louisiana *judgments* differently from New York *judgments*, but that is because Louisiana law says Louisiana judgments *are* different.

***19 CONCLUSION**

The petition for a writ of certiorari should be denied.

Footnotes

1 *See, e.g.*, Idaho Code Ann. § 6 922 (2009); Iowa Code § 669.11 (2009); Me. Rev. Stat. Ann. Court Procedure Civil 14 § 8115 (2009); Minn. Stat. § 3.736 (2009); Neb. Rev. Stat. § 13 918 (2008); N.J. Stat. Ann. § 59:12 1 (2009); Nev. Rev. Stat. § 41.037 (2008); S.D. Codified Laws § 21 32 14 (2008).

2 *See, e.g.*, Idaho Code Ann. § 6 922 (2009); Iowa Code § 669.11 (2009); Me. Rev. Stat. Ann. Court Procedure Civil 14 § 8115 (2009); Minn. Stat. § 3.736 (2009); Nev. Rev. Stat. § 41.037 (2008).

3 *See, e.g.,* Neb. Rev. Stat. § 13 918 (2008); N.J. Stat. Ann. § 59:12 1 (2009); S.D. Codified Laws § 21 32 14 (2008).

4 At points petitioners seem to dispute that this condition represents a limitation on the scope of Louisiana's waiver of sovereign immunity. *See* Pet. at 19 20. But whether the New York Court of Appeals correctly interpreted a provision of the Louisiana Constitution as a limitation on the waiver of sovereign immunity is a state law question not worthy of this Court's attention.

5 *See also Henderson v. Bigelow,* 07 1441, p. 16 (La. App. 4 Cir. 4/9/08); 982 So.2d 941,950 ("The constitution vests in the legislature *not the judiciary* the discretionary function of appropriating public funds.) (emphasis in original); *Hoag v. State,* 04 0857, p. 8 (La. 12/1/04); 889 So.2d 1019, 1025 ("Although we recognize that plaintiffs are entitled to payment of the judgment, a writ of mandamus directing the legislature to appropriate funds is an impermissible usurpation of legislative power by the judiciary. So finding we are compelled to exercise judicial restraint and refrain from encroaching upon the constitutional delegation of power to the legislative branch by compelling it to appropriate funds to pay the *Hoag I* judgment.).

6 *See Baker,* 522 U.S. at 233 (1998) ("For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force."); *Durfee v. Duke,* 375 U.S. 106, 115 (1963) ("The question remains whether, once a matter has been fully litigated and judicially determined, it can be retried in another State in litigation between the same parties. Upon the reason and authority of the cases we have discussed, it is clear that the answer must be in the negative.); *Underwriters Nat l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass n.,* 455 U.S. 691, 710 (1982) ("The issue having been fully and fairly considered by the Indiana court, its final determination was entitled to full faith and credit in North Carolina).

7 *Deutsche Bank Sec., Inc. v. Montana Bd. of Inv.,* 7 N.Y.3d 65 (2006) and *Ehrlich Bober & Co., Inc. v. Univ. of Houston,* 49 N.Y.2d 574 (1980).

8 *See Morris Plan Indus. Bank v. Gunning,* 67 N.E.2d 510, 513 (N.Y. 1946) (determining New York court could garnish wages of a nonresident employed by a corporation doing business in New York to enforce judgment rendered in Pennsylvania); *People s Nat l Bank v. Hitchcock,* 428 N.Y.S.2d 850, 852 (Sup. Ct. 1980) (same); *see also Downs v. Am. Mut. Liab. Ins. Co.,* 243 N.Y.S.2d 640, 645 (App. Div. 1963) (determining New York resident could use New York judgment enforcement procedures to garnish wages of a nonresident employed in foreign state to enforce judgment rendered in New York).

9 Once again, much of petitioners' argument here seems to revolve around trying to prove that the New York Court of Appeals misapplied New York law an issue that is neither within this Court's domain nor worthy of this Court's attention. *See* Pet. at 24 26 (quoting a New York case at length, and citing six others).

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2001 WL 34115638 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division, Petitioner,

v.

Calvin Jerold BURDINE, Respondent.

No. 01-0495.
September 21, 2001.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petition for Writ of Certiorari

John Cornyn, Attorney General of Texas, Howard G. Baldwin, Jr., First Assistant Attorney General, Michael T. McCaul, Deputy Attorney General for Criminal Justice, Julie Caruthers Parsley, Solicitor General, Counsel of Record, S. Kyle Duncan, Assistant Solicitor General, Gena Blount Bunn, Chief, Capital Litigation Division, P.O. Box 12548, Austin, Texas 78711-2548, (512) 936-1700, Counsel for Petitioner.

***i This is a capital case.**

QUESTIONS PRESENTED

i.

Should prejudice be presumed when defense counsel intermittently "dozed and actually fell asleep" during portions of trial?

ii.

If prejudice must be presumed under such circumstances, may that rule be retroactively applied on habeas review under *Teague v. Lane,* 489 U.S. 288 (1989)?

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*iii INDEX OF AUTHORITIES

*1 PETITION FOR WRIT OF CERTIORARI

In *Burdine,* the en banc Fifth Circuit decided that a criminal defendant is automatically entitled to a new trial because of lapses in his attorney's trial performance caused by unspecified episodes of dozing or sleeping-regardless of the nature, length, or timing of those lapses, regardless of the evidence of guilt, and regardless of any showing that counsel's lapses undermined the outcome. That decision alters this Court's framework for analyzing deficient attorney performance and invites certiorari review for three reasons. First, *Burdine* creates a test for weighing the seriousness of counsel's sleeping that conflicts with tests from the Second and Ninth Circuits. Second, it treats temporary absences of defense counsel from trial as automatically reversible, in conflict with other federal and state courts. Third, it earmarks one kind of attorney-impairment for a presumption of prejudice, while other federal courts have analyzed similar impairments under the traditional prejudice test. The Court should grant this petition to resolve these important constitutional questions.

CITATION OF UNITED STATES COURT OF APPEALS'S OPINION

Calvin Jerold Burdine v. Gary L, Johnson, 262 F.3d 336, 2001 WL 914267 (CA5 Aug. 13, 2001) (en banc) (Pet. App. 1a-133a)

BASIS FOR JURISDICTION

The Fifth Circuit delivered its judgment and opinion in *Burdine* on August 13, 2001. The Court has jurisdiction to entertain the Director's petition for writ of certiorari under 28 U.S.C. §1254(1).

*2 CONSTITUTIONAL PROVISION INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

U.S. CONST. amend VI.

STATEMENT OF THE CASE

On April 20, 1983, the body of W.T. Wise was found in his trailer in Houston, Texas. Wise's hands and legs were bound with electrical cord, and his mouth was gagged with socks and a sheet. His scalp was lacerated, but he had died of two stab wounds to the back, one hard enough to break a rib. Later that month, Calvin Jerold Burdine, Wise's former lover, was arrested in California with his accomplice, Douglas McCreight. In fleeing from Houston to California, the men had pawned several items stolen from Wise's trailer, used his bank cards to obtain cash, and were finally arrested when they pawned Wise's gun for thirty dollars. Two Houston detectives were soon summoned to California, where they interviewed Burdine and McCreight separately. After being Mirandized twice, Burdine confessed to robbing and murdering Wise. *See generally Burdine v. State,* 719 S.W.2d 309, 312-14 (Tex. Crim. App. 1986); 13SR248-52.

According to his confession, Burdine and Wise had lived together for several months in Wise's trailer in 1982, but, after quarreling over money and whether Burdine would prostitute himself for Wise, Burdine had moved out. After Burdine met ***3** McCreight in 1983, the men decided to rob Wise. They confronted Wise in his trailer and bound his hands with a telephone cord. Burdine told McCreight they needed something to keep Wise quiet because he would "squeal like a pig in a slaughterhouse." They therefore gagged Wise with the socks and sheet and moved his body to the bedroom.

After gathering up some of Wise's belongings, the men decided something needed to be done to prevent Wise, from identifying Burdine. They bound Wise's feet with electrical cord, and Burdine held Wise's legs while McCreight tried to smother Wise with a pillow. Smothering did not work, because Wise thrashed on the bed and finally sat up, whimpering

and crying. Burdine then suggested that McCreight hit Wise in the head with a lead-filled police sap. McCreight beat Wise in the head until Wise lay still, bleeding profusely.

The men loaded Wise's belongings into their truck, and then decided something more was needed to silence Wise, They reentered the trailer and McCreight, after making the sign of the cross, stabbed Wise in the back with a large hunting knife. Burdine then told McCreight "what the hell, hand me the knife," and also stabbed Wise in the back. *See generally Burdine,* 719 S.W.2d, at 312-14; 13SR248-52; *see also* Pet. App. 45a-49a (Barksdale, J., dissenting).

Burdine attempted to recant his confession at trial, but actually corroborated most of its major aspects except his participation in holding down and stabbing Wise. 14SR392-404. Burdine admitted that he and McCreight had planned the crime before going to Wise's trailer, and that robbing Wise was Burdine's idea. 13SR394; 14SR445. Burdine's court-appointed attorney, Joe Cannon, argued strenuously to suppress Burdine's confession, 12SR140-184; 13SR193-96, which was ultimately held to be admissible. *Burdine,* 719 S.W.2d, at 318. Cannon also actively participated in all phases of Burdine's six-day trial. For instance, ***4** Cannon examined numerous witnesses, repeatedly objected to both testimony and photographic evidence, requested and participated in numerous bench conferences, elicited Burdine's testimony on direct and re-direct examination, and presented closing arguments at both the guilt-innocence and punishment phases. *See generally* 12SR43-17SR694; Pet. App. 91a-101a (Barksdale, J., dissenting) (detailing Cannon's participation in the trial). But the jury found Burdine guilty of capital murder and sentenced him to death.

At Burdine's request, Cannon represented him on direct appeal. He raised seventeen points of error, including numerous issues about the admissibility of Burdine's confession. *See Burdine,* 719 S.W.2d, at 312, 317; *see also* Pet. App. 50a-51a & n.12 (Barksdale, J., dissenting). The Texas Court of Criminal Appeals affirmed his conviction and sentence. *Burdine,* 719 S.W.2d, at 309. This Court denied certiorari. *Burdine v. Texas,* 480 U.S. 940(1987).

Represented by new counsel, Burdine filed his first state habeas petition in 1987, and a supplemental petition in 1988. *See* Pet. App. 52a & nn.13-15 (Barksdale, J., dissenting). A three-day evidentiary hearing was held before a special master, at which Cannon testified about his defense theory and investigation of mitigating evidence. *Id.* In 1990, the special master recommended relief based on the prosecutor's remarks about homosexuality during closing arguments and on Cannon's performance at the penalty phase, but, in 1994, the state habeas court recommended denial. *Ex Parte Burdine,* No. 379,444-A (183d Dist. Ct. Harris Cty., Tex., June 29, 1994); Pet. App. 50a-52a. The court of criminal appeals denied relief. *Ex parte Burdine,* No. 16,725-02 (Tex. Crim. App. Dec. 12, 1994).

Later in December 1994-nearly eleven years after his trial-Burdine filed a second state habeas application alleging for the first time that Cannon had slept or dozed during trial. At the evidentiary hearing in February 1995, Burdine did not testify or ***5** submit an affidavit regarding the sleeping, but testimony was heard from three jurors, the prosecutor, the trial judge, the court clerk, the trial judge's court coordinator, and an attorney who had been Cannon's co-counsel in another capital murder case. *See* Pet. App. 52a-53a (Barksdale, J., dissenting). Although the trial court credited the testimony of the prosecutor and trial judge that they never saw Cannon sleeping, Pet. App. 177c, and noted that one juror never saw Cannon sleep, Pet. App. 179c, the court found from the testimony of three jurors and the court clerk that "defense counsel dozed and actually fell asleep during portions of [Burdine's] trial on the merits, in particular during the guilt-innocence phase when the State's solo prosecutor was questioning witnesses and presenting evidence." Pet. App. 175c; *see id.* 3a-5a; *id.* 36a-37a (Barksdale, J., dissenting).

The trial court concluded that prejudice should be presumed under these facts, but the court of criminal appeals disagreed. Although the court of criminal appeals found support in the record for the trial court's fact findings, it concluded that Burdine had not shown prejudice. *Exparte Burdine,* No. 16,725-06 (Tex. Crim. App. Apr. 6,1995). This Court again denied certiorari. *Burdine v. Texas,* 515 U.S. 1107 (1995).

Burdine sought federal habeas relief in April 1995, asserting numerous grounds including ineffective-assistance based on Cannon's sleeping. *See* Pet. App. 54a & nn.18-19 (Barksdale, J., dissenting). In September 1999, without conducting a separate evidentiary hearing, the district court granted relief on the sleeping claim. *See Burdine v. Johnson,* 66 F.Supp.2d 854 (S.D.Tex. 1999) (Pet. App. 134b-60b). The court adopted the rule of *Javor v. United States,* 724 F.2d 824, 831 (CA9 1984), that prejudice must be presumed if counsel sleeps through a "substantial portion" of trial. Pet. App. 150b-52b. To determine what a "substantial portion" of trial was, the district court adopted the analysis in ***6** *Tippins v. Walker,* 77 F.3d 682, 687 (CA2 1996). Pet. App. 151b-54b; *see* Part I, *infra* (discussing tests in *Javor* and *Tippins*).

A divided panel of the Fifth Circuit reversed, holding that (1) the district court's sleeping test may have implicated an additional exception to *Teague v. Lane,* 489 U.S. 288 (1989), created by the Fifth Circuit for claims susceptible of vindication only on habeas review, but (2) nonetheless, the evidence of Cannon's sleeping did not trigger any presumption of prejudice and was amenable to the general prejudice analysis of *Strickland v. Washington,* 466 U.S. 668 (1984). *See Burdine v. Johnson,* 231 F.3d 950, 956-58, 964 (CA5 2000); *see also Jackson v. Johnson,* 217 F.3d 360, 364 (CA5 2000) (creating third *Teague* exception). The en banc court vacated the panel decision, 234 F.3d 1339 (CA5 2000), and affirmed the district court's judgment granting Burdine habeas relief. *See Burdine v. Johnson,* 262 F.3d 336, 2001 WL 914267 (CA5 Aug. 13, 2001) (en banc) (Pet. App. 1a-133a).

A nine-judge majority held that prejudice must be presumed because the evidence of Cannon's sleeping established that Burdine had been "denied counsel at a critical stage of his trial." Pet. App. 2a (quoting *United States v. Cronic,* 466 U.S. 648, 659 (1984)). The majority also reasoned that Burdine did not seek the benefit of a "new rule" under *Teague,* but sought only a fact-specific application of *Cronic*'s "critical stage" rule. *See* Pet. App. 15a-18a. Finally, the majority articulated a general test that "a defendant's Sixth Amendment right to counsel is violated when that defendant's counsel is repeatedly unconscious through not insubstantial portions of the defendant's capital murder trial." Pet. App. 7a. Four judges concurred, agreeing with the majority opinion but writing separately to clarify their view of *Teague. See* Pet. App. 21a-29a (Higginbotham, J., concurring). Five judges dissented in two separate opinions and would have found that (1) the evidence of counsel's sleeping did not trigger a presumption of prejudice under *Cronic,* and (2) any rule imposing such a presumption could not be ***7** retroactively applied under *Teague. See* Pet. App. 29a-30a (Jolly, J., dissenting); *id.* 30a-102a (Barksdale, J., dissenting).

On September 12, 2001, the Fifth Circuit stayed its mandate pending this Court's disposition of the Director's certiorari petition. The Director timely petitioned for certiorari review on September 21, 2001. SUP. CT. R. 13(1).

SUMMARY OF ARGUMENT

The Fifth Circuit's decision to presume prejudice under the circumstances of this case implicates three important conflicts among state and federal courts. First, *Burdine* creates a test for analyzing the prejudicial impact of attorney sleeping that conflicts with tests from two other circuits. Three circuits now apply some form of "presumed" prejudice based on three different tests for evaluating attorney sleeping. Second, *Burdine* equates sleeping with physical absence and automatically reverses a conviction based on counsel's temporary absences during the evidentiary portion of trial. That approach accords with some courts, but diverges from others that evaluate such absences under a harmless error analysis. Third, the decision in *Burdine* illogically segregates attorney sleeping from other attorney impairments that have indistinguishable effects on an attorney's ability to function during trial. That decision conflicts with courts that have analyzed such impairments under the traditional prejudice standard.

Burdine therefore implicates this Court's certiorari jurisdiction. It conflicts with decisions of other United States courts of appeals and state courts of last resort, and also decides important questions of federal constitutional law that have not been, but should be, settled by this Court. *See* SUP. CT. R. 10(b), (c).

*8 ARGUMENT

The three conflicts posed by the Fifth Circuit's decision must be understood in light of the Court's familiar framework for analyzing claims of deficient representation. *See Strickland v. Washington,* 466 U.S. 668 (1984); *United States v. Cronic,* 466 U.S. 648 (1984). The Court consistently recognizes that the core purpose of the Sixth Amendment counsel clause is to safeguard the fundamental truth-seeking function of trial and thereby "to ensure that criminal defendants receive a fair trial." *Strickland,* 466 U.S., at 689; *see also Cronic,* 466 U.S., at 656-57 (core Sixth Amendment concern is whether "a true adversarial criminal trial has been conducted"). Thus, ineffective assistance claims generally must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Roe v. Flores-Ortega,* 528 U.S. 470, 482 (2000) (quoting *Strickland,* 466 U.S., at 694).

But the Court has identified narrow circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic,* 466 U.S., at 658; *see Smith v. Robbins,* 528 U.S. 259, 287 (2000). First, prejudice is presumed "when a defendant has suffered an '[a]ctual or constructive denial of the assistance of counsel altogether.'" *Smith,* 528 U.S., at 286 (quoting *Strickland,* 466 U.S., at 692, and citing *Cronic,* 466 U.S., at 659 & n.25). Second, the Court has also found that "'various kinds of state interference with counsel's assistance' can warrant a presumption of prejudice." *Smith,* 528 U.S., at 287 (quoting *Strickland,* 466 U.S., at 692, and citing *Cronic,* 466 U.S., at 659 & n.25). Finally, a more limited presumption of prejudice attaches "'when counsel is burdened by an actual conflict of interest,'" provided the defendant shows the conflict adversely affected counsel's performance. *Smith,* 528 U.S., at 287 (quoting *Strickland,* 466 U.S., at 692).

***9** In *Burdine,* the en banc Fifth Circuit concluded that prejudice must be presumed if a defendant's counsel repeatedly sleeps through "not insubstantial" portions of trial, because such deficient performance amounts to an "actual denial" of counsel. *See* Pet. App. 2a, 7a. That decision implicates the following conflicts among state and federal courts.

I. THE SECOND, FIFTH, AND NINTH CIRCUITS HAVE CREATED CONFLICTING TESTS FOR ANALYZING COUNSEL'S LAPSES CAUSED BY SLEEPING.

Three circuits have now adopted tests that, given the same evidence of attorney sleeping, would reach different results as to whether prejudice has been established. These tests conflict because they apply different presumptions-sometimes *per se,* sometimes limited-that are triggered by different evidentiary thresholds. Behind the arbitrary contours of the tests lurks a fundamental misperception about the framework this Court crafted in *Strickland* and *Cronic*. The Court should resolve that quandary and clarify that episodes of sleeping, while reprehensible, are nonetheless amenable to the traditional prejudice test like any other similar attorney impairment.

The Ninth Circuit first addressed attorney sleeping in *Javor v. United States,* 724 F.2d 831 (CA9 1984). Faced with evidence of counsel's repeated sleeping or dozing during the presentation of evidence, the Ninth Circuit refused to determine from the trial record whether such lapses were prejudicial because "unconscious or sleeping counsel is equivalent to no counsel at all." *Id.,* at 834. Instead, the court "conclude [d] that when an attorney for a criminal defendant *sleeps through a substantial portion of the trial* such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary." *Id.,* at 833 (emphasis added). The court did not particularize which episodes of sleeping triggered the presumption, but its opinion, and the evidence before the court, suggest the same result for "dozing" as for complete ***10** unconsciousness. *See id.,* at 832 (magistrate's finding that counsel "was asleep or dozing, and not alert to proceedings"); *id.,* at 833 (noting that trial judge "was at times concerned about [counsel's] inattentiveness"); *id.,* at 834 (referring to "unconscious or sleeping counsel"); *id.* (referring to trial judge's testimony that counsel was "dozing"). Nor did the court quantify what it meant by "substantial portions" of trial, although it referred by way of illustration to periods "while testimony pertaining to the petitioner was being adduced." *Id.*

Twelve years later, the Second Circuit relied on *Javor* to craft its own test to analyze sleeping, but in the process criticized *Javor*'s analysis. *See Tippins v. Walker,* 77 F.3d 682, 685-86 (CA2 1996). The court rejected *Javor*'s focus on the "substantiality" of counsel's sleeping as a reliable indicator of prejudice:
"The word 'substantial'... is unhelpful. It can refer to the length of time counsel slept, or the proportion of the proceedings missed, or the significance of those proceedings. The *Javor* court did not expound on the meaning of the word." *Id.,* at 685.

Tippins therefore morphed the Ninth Circuit's test into a three-part inquiry that asks (1) whether the sleeping constituted "repeated and prolonged lapses," *id.,* at 687-88; (2) whether counsel was "actually unconscious," *id.,* at 688-89; and (3) whether those lapses occurred "when [the defendant's] interests were at stake." *Id.,* at 689-90.

Unlike the Ninth Circuit, *Tippins* did not apply a *per se* presumption of prejudice. Instead, the Second Circuit analogized sleeping to "another, more limited type of presumed prejudice" that *Strickland* reserved for "cases in which counsel is burdened by a conflict of interest." *Id.,* at 686 (citing *Strickland,* 466 U.S., at 692). The court emphasized that it had extended a *per se* rule of prejudice only to cases in which defense counsel was not a member of the bar or had an actual conflict arising from involvement in the ***11** defendant's crime. *Tippins,* 77 F.3d, at 686 (citing *Bellamy v. Cogdell,* 974 F.2d 302, 306 (CA2 1992) (en banc)). Indeed, *Tippins*'s own holding equivocates on whether prejudice was presumed in that case or actually demonstrated. 77 F.3d, at 687 (concluding that Tippins "suffered prejudice, *by presumption or otherwise*") (emphasis added). [2]

In *Burdine,* the Fifth Circuit did not completely embrace either *Javor* or *Tippins,* but rather scavenged parts from both decisions to build a third test. Pet. App. 7a, 18a-19a. The Fifth Circuit will presume prejudice when (I) a "defendant's counsel is repeatedly unconscious" (2) "through not insubstantial portions of the defendant's capital murder trial." *Id.* 7a. *Burdine* applies a *per se* presumption of prejudice-not the more limited presumption of *Tippins*-because the court reasoned that such sleeping episodes amount to the "absence or denial of counsel at a critical stage of a criminal proceeding." *Id.* 12a-13a (citing *Cronic,* 466 U.S., at 659; *Strickland,* 466 U.S., at 692). The court defined the relevant "critical stage" as the period when "evidence was being produced against Burdine," and was thus able to conclude from the nonspecific fact findings that counsel had been unconscious, and hence absent, during a critical stage of the proceeding. *See id.* 15a-20a, 2a.

Although these three tests address similar issues-*i.e.,* the depth, length, and timing of sleeping episodes-twenty-five years ***12** of jurisprudential evolution has resolved those issues in conflicting ways. First, the tests require different threshold depths of sleeping-ranging from total unconsciousness, Pet. App. 7a; *Tippins,* 77 F.3d, at 688, to "dozing," *Javor,* 724 F.2d, at 832. Second, they require different lengths of sleeping-through "substantial" trial portions, *Javor,* 724 F.2d, at 833, for "repeated and prolonged lapses," *Tippins,* 77 F.3d, at 687, or, most elusively, through "not insubstantial" trial portions, Pet. App. 7a. Third, they demand that sleeping be localized during trial phases of varying descriptions-periods when "testimony pertaining to" a defendant is adduced, *Javor,* 724 F.2d, at 834, when the defendant's "interests are at stake," *Tippins,* 77 F.3d, at 689, or when "evidence is being produced against" a defendant, Pet. App. 18a. Finally, the tests apply different presumptions of prejudice-either a *per se* presumption based on a "critical stage" concept, Pet. App. 2a; *Javor,* 724 F.2d, at 833, or a limited presumption related to the "actual conflict of interest" rationale, *Tippins,* 77 F.3d, at 686. The tests have this rough-hewn quality because they are judicial answers to a question-when is attorney sleeping so likely to undermine a trial outcome that prejudice must be presumed?-that has infinite degrees of variation.

The differences in the tests are not mere semantics. As for depth of sleep, common experience plainly shows that "consciousness and sleep form a continuum, and that there are states of drowsiness that come over everyone from time to time during a working day, or during a trial." *Tippins,* 77 F.3d, at 689. Consequently, there is a fundamental practical difference between presuming prejudice for extended periods of unconsciousness and presuming it for drowsiness, inattention, or even momentary sleep. As for length of sleep, the Fifth and Ninth Circuits have adopted similar

measures-"substantial" or "not insubstantial" trial periods-that the Second Circuit has condemned as vague and "unhelpful." *Compare* Pet. App. 7a *and Javor,* 724 F.2d, at 833, *with Tippins,* 77 F.3d, at 685. Arguably, however, the Second ***13** Circuit's solution-requiring sleep for "repeated and prolonged lapses"-raises similar difficulties. *See Tippins,* 77 F.3d, at 687. As for timing of sleep, the three tests each set standards so vague that they fail to reliably specify any particular part of trial. Presumably, *all* evidence at trial "pertains to" a defendant, *Javor,* 724 F.2d, at 834, and all of the prosecution's evidence is "against" him, Pet. App. 18a. Moreover, it is self-evident that the defendant's "interests are at stake" during each and every moment of the trial (and pre-trial and post-trial) process. *Tippins,* 77 F.3d, at 689. Not only do these labels provide no guidance to a court seeking to discern precisely *when* sleeping must occur before prejudice is presumed, but they will result in a presumption of prejudice "irrespective of... whether counsel could have done anything to improve the defendant's circumstances had he been alert." Pet. App. 78a (Barksdale, J., dissenting).

At bottom, these tests represent a flawed application of the *Strickland-Cronic* categories of presumed-prejudice to a class of trial error for which they are ill-suited: intermittent, isolated lapses in an attorney's trial performance. *See Smith,* 528 U.S., at 286-87; *Strickland,* 466 U.S., at 693. Federal courts have now made three attempts to fashion a blanket rule to account for an attorney error with a broad range of possible effects on the trial, and, unsurprisingly, the result is inconsistency. The Court should resolve this conflict.

II. STATE AND FEDERAL COURTS CONFLICT OVER WHETHER COUNSEL'S TEMPORARY ABSENCES FROM TRIAL ARE AUTOMATICALLY REVERSIBLE OR SUBJECT TO HARMLESS ERROR ANALYSIS.

Burdine's holding is bottomed on the court's equation of counsel's sleeping with temporary absence from trial. Pet. App. 7a, 20a. *Burdine* therefore implicates an additional conflict with state and federal courts over the treatment of such temporary absences.

***14** Some courts, like the Sixth Circuit and the South Carolina Supreme Court, agree with the Fifth Circuit and find reversible error from any temporary absence of counsel during the evidentiary portion of trial. *See, e.g., Green v. Arn,* 809 F.2d 1257, 1263 (CA6), *vacated on other grounds,* 484 U.S. 806 (1987), *reinstated,* 839 F.2d 300 (CA6 1988); *McKnight v. State,* 465 S.E.2d 352, 354 (S.C. 1995). Other courts, like the Seventh Circuit, the Eleventh Circuit, and a New Jersey intermediate appellate court, disagree and analyze such temporary absences under a harmless error analysis. *See, e.g., Vines v. United States,* 28 F.3d 1123, 1128 (CA11 1994); *United States v. Morrison,* 946 F.2d 484, 503 (CA7 1991); *State v. Scherzer,* 694 A.2d 196, 237-40 (N.J. Super.), *cert. denied,* 700 A.2d 878 (N.J. 1997). This divergence goes to the heart of a sleeping counsel's perceived impact on a criminal trial-*i.e.,* whether intermittent sleeping will result in a new trial without any weighing of the harm caused by sleeping episodes within the context of the entire record.

As the New Jersey appellate court explained in *Scherzer,* the courts actually diverge on two distinct issues. First, courts disagree over whether the entire evidentiary portion of trial constitutes a "critical stage" under *Cronic. See Scherzer,* 694 A.2d, at 237. The Sixth Circuit maintains that "the evidentiary portion of the trial [is] always critical." *Id.* (citing *Green,* 809 F.2d, at 1263); *see also Carter v. Sawders,* 5 F.3d 975, 979 (CA6 1993) (confirming *Green*'s rule that the "taking of evidence on the defendant's guilt" is always a critical stage). By contrast, the Seventh and Eleventh Circuits do not presumptively consider all evidentiary portions of trial as critical without first scrutinizing any particular portion in the context of the entire record. *See Scherzer,* 694 A.2d, at 237 (citing *Vines,* 28 F.3d, at 1128; *Morrison,* 946 F.2d, at 503). Second, the same courts disagree over whether counsel's temporary absence from even critical evidentiary portions of trial is amenable to harmless error analysis. *See Scherzer,* 694 A.2d, at 239-40. The Sixth Circuit rejects applying harmless error analysis, ***15** *Green,* 809 F.2d, at 1263, while the Seventh and Eleventh Circuits inquire whether "the temporary absence of defense counsel during a portion of the actual trial did not affect the conduct of the entire trial." *Scherzer,* 694 A.2d, at 240 (interpreting *Morrison,* 946 F.2d, at 503, and *Vines,* 28 F.3d, at 1129). The South Carolina Supreme Court follows the Sixth Circuit's *per se* approach, *McKnight,* 465 S.E.2d, at 353-54, while the New Jersey appellate court accepts the contrary view that "a temporary absence of counsel is not such a defect as to prevent a court from pursuing the issue of harmless error." *Scherzer,* 694 A.2d, at 240 (citing *Vines,* 28 F.3d, at 1129).

Burdine squarely places the Fifth Circuit on one side of this conflict and strengthens the disagreement. First, agreeing with the Sixth Circuit and the South Carolina Supreme Court, *Burdine* treats every segment of the evidentiary phase of trial as critical, regardless of the context of a particular portion within the overall record. *See, e.g.,* Pet. App. 2a (finding that intermittent sleeping occurred "as evidence was being introduced against [Burdine]"), 5a (state court finding that counsel dozed or slept "during portions of [Burdine's] trial on the merits, in particular the guilt-innocence phase when the State's solo prosecutor was questioning witnesses and presenting evidence"), 18a (observing that sleeping episodes were interspersed "throughout the guilt-innocence phase of Burdine's trial as evidence was being produced against Burdine"); *cf. Scherzer,* 694 A.2d, at 237 (observing that, in contrast to Seventh and Eleventh Circuits, Sixth Circuit holds that "the evidentiary portion of the trial was always critical"). Indeed, as Judge Barksdale's dissent explained, the majority effectively overruled a prior panel decision, *Russell,* that had refused to hold that the evidentiary phases of trial are always critical. *See* Pet. App. 77a-79a (Barksdale, J., dissenting) (stating that "the majority has overruled *Russell* and established a new rule"); *see United States v. Russell,* 205 F.3d 768, 769-71 (CA5 2000).

***16** Second, *Burdine* equated sleeping with physical absence, and held that counsel's sleeping during any evidentiary portion of trial will always result in automatic reversal and a new trial. Pet. App. 2a, 20a. That is so, reasoned the majority, because under such circumstances the defendant has been "'denied counsel at a critical stage of his trial.'" *Id.* 2a (quoting *Cronic,* 466 U.S., at 659). That holding accords with the *per se* rule adopted by the Sixth Circuit and the South Carolina Supreme Court, *see Scherzer,* 694 A.2d, at 240, and contradicts the approach of other courts that would measure temporary attorney absences against the entire trial record, determine whether they occurred at critical junctures, and, even then, ask whether they were harmless beyond a reasonable doubt. *See, e.g., Morrison,* 946 F.2d, at 503-04.

The Fifth Circuit's decision to apply an automatic reversal rule-as opposed to a more balanced rule, such as *Strickland* or harmless error analysis-sealed the outcome of this case. Had the majority measured the evidence of counsel's sleeping against the entire trial record, it would have found no reason to reflexively overturn the jury's verdict. It was uncontested that evidence of sleeping could not be linked to any particular part of the trial. *See, e.g.,* Pet. App. 36a-37a (Barksdale, J., dissenting) (explaining state fact findings regarding sleeping). Thus, it is doubtful that Burdine could show that any sleeping occurred during a critical juncture of his trial. *See id.* 77a-78a (Barksdale, J., dissenting); *see also id.* 29a (Jolly, J., dissenting) (stating there is "no suggestion in the record that Burdine suffered any prejudice on account of counsel's alleged sleeping" and "no evidence in the record that shows that counsel's sleeping occurred at a critical stage in the trial").

Furthermore, the record plainly shows that "Burdine's counsel actually provided competent representation throughout the trial." *Id.* 29a (Jolly, J., dissenting); *see also id.* 91a-100a (Barksdale, J., dissenting) (detailed narrative of defense counsel's active participation in Burdine's defense). The trial transcript reveals ***17** "very few long stretches... in which no activity by [counsel] is reflected," and those inactive periods typically correspond to the introduction of demonstrative evidence on which the court had previously overruled counsel's objections. *See id.* 99a (Barksdale, J., dissenting) (discussing introduction of crime scene and property photographs). Finally, counsel vigorously contested the admissibility of the most damning evidence against Burdine-his detailed confession to the murder-unsuccessfully arguing at trial and on appeal that the confession had been coerced. *See id.* 100a-01a (Barksdale, J., dissenting).

Measured against the overall record in this case, the sparse evidence of counsel's sleeping would not have merited automatic reversal under the more tempered rules of the Seventh and Eleventh Circuits. *See Vines,* 28 F.3d, at 1128; *Morrison,* 946 F.2d, at 503; *see generally Scherzer,* 694 A.2d, at 237-41. Moreover, if measured by this Court's general prejudice standard for deficient attorney performance-as it should have been-Burdine could not have demonstrated a reasonable probability that, absent counsel's sleeping episodes, the outcome of his trial would have been different. *See Strickland,* 466 U.S., at 693-94.

The Court should resolve this conflict among state and federal courts and determine whether defense counsel's temporary absences during trial merit a presumption of prejudice, whether they are amenable to harmless error analysis, or whether they should be governed by the general prejudice standard of *Strickland*.

III. INTERMITTENT SLEEPING IS INDISTINGUISHABLE FROM OTHER ATTORNEY IMPAIRMENTS ANALYZED UNDER THE TRADITIONAL PREJUDICE STANDARD.

Finally, a core aspect of *Burdine* inviting certiorari review is the Fifth Circuit's decision to set aside one kind of attorney-impairment for a presumption of prejudice. The Court distinguished "the drunk or drugged attorney" from the sleeping ***18** lawyer because the sleeping lawyer "does not, indeed cannot, perform at all," and "is simply not capable of exercising judgment." Pet. App. 19a-20a, But that elevation of sleeping is, as Judge Barksdale's dissent argues, in tension with other courts' treatment of similar attorney-impairments. *See id.* 90a-91a (Barksdale, J., dissenting). Furthermore, it overlooks that even instances of "repeated unconsciousness" have much in common with similar episodes of mental impairment-whether due to illness, drug-or alcohol-based incapacity, or inattention-that have consistently been treated under the traditional prejudice standard. Thus, reserving a presumption of prejudice for sleeping episodes alone presents a conflict the Court should resolve.

A representative conflicting decision is *Johnson v. Norris,* 207 F.3d 515 (CA8 2000). In *Norris,* the court addressed the petitioner's ineffective-assistance claim based on his attorney's "unprofessional... perhaps bizarre" conduct during and after trial, stemming from a bipolar disorder. *Id.,* at 517. The court rejected the petitioner's reliance on *Javor* and *Tippins* and held that "[e]ven if we assume that [counsel's] bipolar condition existed during the petitioner's trial, we decline to adopt the petitioner's proposed rule." *Id.,* at 518. Reaffirming its decision to reject a *per se* presumption of prejudice for counsel's mental illness, the court reasoned that "[b]ipolar disorder, like most mental illnesses, can have varying effects on an individual's ability to function, and the disease can vary widely in the degree of its severity." *Id.* (citing *Pilchak v. Camper,* 935 F.2d 145, 149 (CA8 1991)). Thus, the court applied the traditional prejudice analysis, confident that "[a]ny errors [counsel] made, even as a result of his mental illness, should be apparent from the face of the record, or otherwise susceptible of proof, and thus readily reviewable." *Norris,* 207 F.3d, at 518.

The Eighth Circuit's approach in *Norris* conflicts with *Budine* because sleeping counsel-even if characterized as "repeatedly ***19** unconscious" counsel-is not so different from mentally impaired counsel to warrant an entirely different prejudice analysis. *See also Pilchak,* 935 F.2d, at 147-48 (evaluating counsel's impaired trial performance under prejudice standard, although counsel suffered from Alzheimer's disease, "prompt[ing] disorientation, loss of memory, [and] inability to concentrate"); *Smith v. Ylst,* 826 F.2d 872, 875-76 (CA9 1987) (applying traditional prejudice analysis to evaluate "mentally unstable" counsel's performance during trial, distinguishing *Javor); Hernandez v. Wainwright,* 634 F.Supp. 241, 245 (S.D. Fla. 1986) (evaluating under prejudice analysis counsel's alcohol-impaired performance during trial and pre-trial stages), *aff'd,* 813 F.2d 409 (CA11 1987). [3] It is doubtful that there is any qualitative difference between repeated sleeping and other attorneyimpairments, insofar as they effect an attorney's ability to function mentally during trial. Consequently, these decisions present a conflict with *Burdine* that the Court should resolve.

The Fifth Circuit draws an arbitrary distinction between an attorney who intermittently sleeps during trial and an attorney impaired during trial by intoxicants, addiction, or illness. The court reasoned that the unconscious attorney "does not, indeed cannot perform, at all," that he "is simply not capable of exercising judgment," and "is in fact no different from an attorney that is physically absent from trial since both are equally unable to exercise judgment on behalf of their clients." Pet. App. 19a-20a. ***20** But precisely the same thing could be said of attorneys suffering during trial from Alzheimer's disease, *see Pilchak,* 935 F.2d, at 147-48; *Buckelew v. United Stales,* 575 F.2d 515, 521 (CA5 1978); from intoxication or drug addiction, *see Burnett v. Collins,* 982 F.2d 922, 928-30 (CA5 1993); *Hernandez,* 634 F.Supp., at 245; or from any number of mental disorders, *see Norris,* 207 F.3d, at 518; *Ylst,* 826 F.2d, at 875-76. It cannot be reasonably claimed that an attorney suffering the symptoms of mental illness or the effects of addiction is "capable of exercising judgment" at all times during trial. Moreover, what unifies these examples with *Burdine* is that all involve

an attorney's impaired trial performance whose prejudicial impact can be evaluated in light of the entire trial record. *See, e.g., Strickland,* 466 U.S., at 693 (aside from actual conflict of interest, "deficienc[ies] in attorney performance" are subject to general prejudice requirement). The *Burdine* majority offered no logical basis for carving "intermittent attorney sleeping" from the class of all possible attorney-impairments and elevating it to presumed-prejudice status. *See* Pet. App. 90a-91a (Barksdale, J., dissenting).

That elevation will invite countless ineffective-assistance claims based on any type of intermittent "unconsciousness" by counsel during trial. "Unconscious," after all, is a malleable term-it may refer to "not knowing or perceiving," "not aware," "not marked by conscious thought," or "having lost consciousness." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, at 1284-85 (1988). In *Burdine*'s wake, imaginative habeas petitioners will parade expert witnesses into their writ hearings to testify that-given trial counsel's subsequently-diagnosed Alzheimer's, or bipolar condition, or alcoholism, or attention-deficit disorder-it is likely that periods of "unconsciousness" occurred during trial, and therefore prejudice should be presumed. The argument has been made before, *see, e.g., Norris,* 207 F.3d, at 518, and *Burdine* will give it new life.

***21** The Court should close this arbitrary breach in the law and clarify that *Strickland* meant what it said: An actual conflict of interest is the only instance of deficient attorney performance that merits a presumption of prejudice. *See* 466 U.S., at 693. Intermittent episodes of attorney sleeping are indistinguishable from other kinds of impaired attorney performance that, while lamentable, "are subject to a general requirement that the defendant affirmatively prove prejudice." *Id.*

CONCLUSION

The Fifth Circuit's decision in this case implicates three important issues of Sixth Amendment law on which courts sharply disagree. The Court should grant the Director's petition.
Respectfully submitted,

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Footnotes

1 At trial, Burdine argued that his confession was illegally obtained, but the judge determined after a bench hearing that it was admissible. 12SR140 86; 13SR190 203; 14SR405 12. The Texas Court of Criminal Appeals affirmed that decision on direct review. *See Burdine,* 71 9 S.W.2d, at 317 18.

2 Subsequent decisions in the Second Circuit continue to vacillate over whether *Tippins* adopted a *per se* rule of prejudice, or something less. *Compare United States v. O Neil,* 118 F.3d 65, 70 71 (CA2 1997) (noting that *Tippins* "suggested that sleeping "may constitute a *per se* violation); *United States v. Muyet,* 994 F.Supp. 550, 560 (S.D.N.Y. 1998) (stating that *O Neil* "clarified that *Tippins* did not create a *per se* rule), *with Morales v. United States,* 143 F.3d 94, 97 (CA2 1998) (suggesting that *Tippins* created a *per se* rule).

3 Indeed, this entire line of cases contradicts *Javor* itself. In formulating its *per se* rule, the *Javor* court relied on *State v. Keller,* 223 N.W. 698 (N.D. 1929), in which counsel was "intoxicated to such an extent that he did not know what was transpiring at all times in the court room. *Javor,* 724 F.2d, at 834. Thus, *Javor* derived its *per se* rule at least in part by analogy to a case involving an attorney impaired by alcohol during trial. By contrast, courts that apply a prejudice analysis to exactly that kind of impaired performance implicitly reject *Javor*'s main premise.

2001 WL 826715 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

STATE OF ALABAMA, Petitioner,
v.
LeReed SHELTON, Respondent.

No. 00-1214.
July 19, 2001.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF THE STATES OF TEXAS, OHIO, MONTANA, NEBRASKA, DELAWARE, LOUISIANA, AND VIRGINIA, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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*i QUESTION PRESENTED

Should the right to State-appointed counsel, which this Court has recognized under the Sixth Amendment but has limited to cases of "actual imprisonment," be extended to misdemeanor offenders who are never imprisoned but instead receive a suspended sentence?

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CASES

*1 INTERESTS OF *AMICI CURIAE*

Amici Curiae are States that oppose further expansion of the federal right to State-appointed counsel that was first adopted, as to felony cases, in *Gideon v. Wainwright,* 372 U.S. 335 (1963). As a matter of State law, some States provide appointed counsel to indigent defendants in all or virtually all misdemeanor cases. Others provide such a right only in relatively serious misdemeanor cases, such as those in which the maximum potential punishment includes imprisonment greater than a certain duration. Still others provide State-appointed counsel to misdemeanor defendants only when required to do so by this Court's decisions in *Argersinger v. Hamlin,* 407 U.S. 25 (1972), and *Scott v. Illinois,* 440 U.S. 367 (1979). Those decisions hold that a misdemeanor defendant has a Sixth Amendment right to appointed counsel only when the proceeding results in "actual imprisonment," not when it results in a lesser punishment such as a fine, probation or a mere "threat of imprisonment." *Id.* at 373.

Regardless of the prevailing practices in their own States, *amici* believe that, aside from these established federal parameters, the right to appointed counsel in State proceedings should be determined as a matter of State law, not as a matter of federal constitutional right. Recent statistics from the U.S. Department of Justice indicate that the States already pay well over $1.2 billion annually for appointed counsel. The States, through their elected representatives, should determine whether to spend additional State funds on appointed counsel rather than on other pressing governmental priorities. *Amici* also believe it would be unseemly and unwise to require them, as a matter of federal law, to provide counsel to indigent defendants for ***2** misdemeanor cases in which most non-indigent defendants would not even bother to retain a lawyer. See *Argersinger*, 407 U.S. at 50 (Powell, J., concurring in result).

Extending the right to State-appointed counsel could have other harmful effects on *amici* and their citizens. For example, as Justice Powell noted in his *Argersinger* concurrence, an expanded right to State-appointed counsel likely would produce "over lawyering" of relatively minor cases, thereby "stretching out … the process with consequent increased costs to the public." *Id.* at 58-59 (Powell, J., concurring in result). Such an expansion, moreover, could require the States to provide trained prosecutors for cases that are now effectively prosecuted by police and other non-lawyers. *Id.* Finally, invalidating suspended sentences on the ground that the defendants lacked appointed counsel would interfere with the operation of State probation systems and recidivism rules, thereby subjecting the citizens of some States to an increased risk of crime by repeat offenders.

For these reasons, and others discussed below, *amici* oppose the effort by the Supreme Court of Alabama in this case, and a few courts in other cases, to extend the federal right to State-appointed counsel to misdemeanor defendants who are never imprisoned, but who receive suspended or conditional sentences.

SUMMARY OF ARGUMENT

In *Scott*, this Court reiterated the holding of *Argersinger* that, under the Sixth Amendment (as applied to the States through the Fourteenth Amendent), "incarceration [is] so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense." *Scott v. Illinois,* 440 U.S. 367, 372-73 (1979). The Court further explained that "the central premise of *Argersinger*-that actual imprisonment is a penalty different in kind from fines or the ***3** mere threat of imprisonment-is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Id.* at 373.

Notwithstanding this "bright line between imprisonment and lesser criminal penalties," *Nichols v. United States,* 511 U.S. 738, 750 (1994) (Souter, J., concurring in judgment), the Supreme Court of Alabama and a few other courts have held that *Scott* also makes it unconstitutional for trial courts to impose suspended or conditional sentences in misdemeanor cases involving uncounseled defendants. See Pet. App. 8-11; 34 (collecting cases). In so holding, these decisions have seized upon the statement in *Scott* that "no indigent criminal defendant [can] be *sentenced* to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." 440 U.S. at 374 (emphasis added). Reasoning that a suspended or conditional sentence is still a "sentence of imprisonment," these decisions hold that such sentences violate the Sixth Amendment even when no incarceration results.

But this reading of *Scott*-like the interpretation of the Sixth Amendment on which it rests-is patently incorrect.

I. First, it is contrary to this Court's decisions interpreting that Amendment, especially *Argersinger* and *Scott* themselves. This Court's earliest known decision expressly interpreting the Sixth Amendment right to counsel concluded that, although the Sixth Amendment guarantees a defendant's right to retain counsel on his own, it did not create a "general obligation on the part of the *government* … to … retain counsel for defendants." *United States v. Van Duzee,* 140 U.S. 169, 173 (1891) (emphasis added), *on rehearing on another point*, 140 U.S. 199 (1891).

To be sure, the Court later departed from this understanding when it concluded that the Sixth and Fourteenth Amendments impose such an obligation with respect to felony proceedings. ***4** See *Johnson v. Zerbst,* 304 U.S. 458, 468 (1938) (federal trials); *Gideon v. Wainwright,* 372 U.S. 335, 339 (1963) (State trials). And this right was, of course, extended to certain misdemeanors in *Argersinger.* But *Argersinger* and its progeny make perfectly clear that the right so recognized is limited to misdemeanor cases that "*end up* in the *actual* deprivation of a person's liberty." 407 U.S. at 40 (emphases added).

Nothing in *Scott* purports to expand the class of misdemeanors that qualify for State-appointed counsel. Indeed, the defendant in *Scott* was neither sentenced to nor served any term of imprisonment. While the statute he was accused of violating authorized both a fine and a term of imprisonment, he was only sentenced to pay a fine. Accordingly, the Court's reference to a defendant's being "sentenced to a term of imprisonment" is properly read as an effort to distinguish a fine from an actual imprisonment, not as an effort to broaden the holding of *Argersinger.* As ably shown by petitioner, moreover, this conclusion is consistent with the clear weight of authority in other courts, both State and federal.

II. Even if *Argersinger* and *Scott* did not squarely foreclose the Supreme Court of Alabama's extension of the right to appointed counsel, such an extension should be rejected in light of the language and history of the Sixth Amendment. The Amendment's plain language-providing that an "accused shall enjoy the right … to have the Assistance of Counsel for his defence"- suggests no right to counsel funded or provided by the government. For that and other reasons, as the *Scott* Court noted, "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused … to *employ* a lawyer to assist in his defense." 440 U.S. at 370 (emphasis added) (citing William M. Beaney, *The Right to Counsel in American Courts* 27-30 (Greenwood 1972) (1955)).

***5** Indeed, as the Court explained in *Argersinger*, the fundamental problem addressed by the Sixth Amendment's right to counsel provision had nothing to do with the inability of indigent defendants to retain counsel. Rather, the problem was that under English common law, " 'parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel' " while " 'a person charged with treason or felony was denied the aid of counsel," ' even when he was willing and able to retain one. 407 U.S. at 30. Careful examination of the pertinent historical materials confirms that the Sixth Amendment's original meaning was limited to filling that particular gap.

Perhaps the most instructive piece of historical evidence is a statute passed by the first Congress in 1790, almost contemporaneously with its passage of the Bill of Rights. That statute provided that a defendant "indicted of treason" or "other capital offenses"-and no other crimes-would be entitled to have "*assign*[*ed*] to such person such counsel, not exceeding two, as such person shall desire." Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112, 118. If the first Congress had interpreted the Sixth Amendment as providing a right to *appointed* counsel in "all criminal prosecutions," this statute would have been at once redundant and under-inclusive. Accordingly, its passage clearly indicates that the first Congress interpreted the Sixth Amendment as providing only a right to retained counsel, paid for by the defendant himself.

But even if the Sixth Amendment could have been viewed as having a broader meaning, its reach could not possibly have extended to misdemeanor cases, particularly those in which no incarceration was actually imposed. The historical evidence suggests that only a few States gave any criminal defendants a right to appointed counsel. Even then, that right extended only to those accused of felonies, and usually only to capital offenses. The "right to counsel" in the proposed Sixth Amendment would doubtless have elicited a public outcry, or at least significant debate, if it had been viewed as ***6** creating a right broader than that created by even the most expansive State statutes. And, of course, the fact that some States provided some right to appointed counsel while other States did not shows that the Framers knew how to create such a right if they wished to do so.

III. This Court should also refuse to expand the right to State-appointed counsel beyond that recognized in *Argersinger* and *Scott* because doing so would impose significant burdens on the States without any assurance of significant

additional benefit to misdemeanor defendants. As outlined above, such an expansion would perversely require that State resources be used to provide counsel in cases where most defendants would not even obtain counsel for themselves. It would increase burdens on already overburdened State courts and prosecutors' offices throughout the Nation. And it would jeopardize the operation of State probation policies and recidivism statutes, thereby putting the public safety at risk.

In short, this Court should reject the expansion of the right to appointed counsel countenanced by the court below, and should enforce the limitations already established in *Argersinger* and *Scott.*

STATEMENT OF FACTS

Amici adopt the statement of facts presented in the petitioner's brief.

ARGUMENT

The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. At bottom, the question in this case is whether, as the Supreme Court of Alabama held, this provision provides a right to State-appointed counsel in a misdemeanor proceeding that results in ***7** a suspended or conditional sentence of incarceration, but no actual imprisonment. As explained below, there is no basis for such a right in this Court's decisions, in the Amendment's text and history, or in sound public policy.

I. This Court's "Actual Imprisonment" Jurisprudence Squarely Forecloses Extending The Federal Right To State-Appointed Counsel To Misdemeanor Cases That Result In Suspended Sentences But No Jail Time.

Although this Court's reading of the Sixth Amendment has, since the 1930s, departed from the Amendment's strict text and history, and indeed from this Court's own early interpretation (see *infra*, Section II), the Court consistently has held that the right to State-appointed counsel in misdemeanor cases is limited. And the Court consistently has ruled that "the line should be drawn between criminal proceedings that *resulted in* imprisonment, and those that did not." *Nichols v. United States,* 511 U.S. 738, 746 (1994) (citing *Scott v. Illinois,* 440 U.S. 367, 372 (1979)) (emphasis added).

The Supreme Court of Alabama crossed over this line in holding that a suspended sentence triggers the right to State-appointed counsel even though it does not "result in imprisonment." The court justified its holding by attempting to read this Court's opinion in *Scott* as though it were a statute. Cf., *e.g., Reiter v. Sonotone Corp.,* 442 U.S. 330, 341 (1979) ("the language of an opinion is not always to be parsed as though we were dealing with language of a statute"); *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515 (1993) (criticizing the practice of "dissect[ing] the sentences of the United States Reports as though they were the United States Code"). Specifically, the Alabama court pointed to the statement that "no indigent criminal defendant [can] be *sentenced* to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Scott v. Illinois,* 440 U.S. 367, 373-74 (1979) ***8** (emphasis added); see Pet. App. 32. The court below then reasoned that, because a suspended or conditional sentence is still a " 'sentence of imprisonment,' " such a sentence is invalid under *Scott* even though it does not actually result in imprisonment. See Pet. App. 34-35. But this conclusion, based on one isolated sentence in the *Scott* opinion, is impossible to square with this Court's precedents.

1. To begin with, the lower court's interpretation of *Scott* is flatly contrary to *Argersinger*, which both established and delimited the right to State-appointed counsel in misdemeanor cases. In *Argersinger*, the Court held that absent a waiver, "no person may *be imprisoned* for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger v. Hamlin,* 407 U.S. 25, 37 (1972) (emphasis added). [2] The Court further

emphasized that "[u]nder the rule we announce today, every judge will know when the trial of a misdemeanor starts that *no imprisonment may be imposed*, even though local law permits it, unless the accused is represented by counsel." *Id.* at 40 (emphasis added).

The Court thus recognized the apparent oddity in the fact that the right to appointed counsel, which must be provided at the outset of the criminal proceedings, is judged by reference to the ultimate disposition of the case. But, as the Court noted, this approach essentially puts the issue in the control of the State and the court, and forces them to live with the choice they make prior to trial. If the State believes that the offense potentially warrants a prison sentence, or if the court wishes to preserve the option of imposing an actual jail term, the State must provide counsel. If, however, both the State and the court expect a penalty not involving incarceration, the indigent defendant is fully protected. He can retain counsel if he wishes but, given the unavailability of prison time as a ***9** sentencing option, it is almost certain that he will proceed as any other defendant ordinarily would- without the assistance of counsel.

Accordingly, the Court specifically acknowledged in *Argersinger* that "[t]he run of misdemeanors will not be affected" by its decision. *Id.* That was because, under the Court's holding, only "those that *end up* in *actual deprivation* of a person's liberty" will trigger the right to appointed counsel. *Id.* (emphases added). Thus, for example, according to the Court, "[t]he fact that traffic charges technically fall within the category of 'criminal prosecutions' does not necessarily mean that many of them will be brought into the class … where imprisonment actually occurs," thereby triggering the right to State-funded representation in that inevitably large number of cases. *Id.* at 38. The court below neither cited nor discussed these key portions of the *Argersinger* opinion.

Obviously, a misdemeanor case that produces a suspended or probated sentence does not ordinarily "end up" in any "actual deprivation of a person's liberty." Nor, as in this case, does it ordinarily create a situation in which "imprisonment actually occurs." The decision of the court below thus cannot be squared with *Argersinger*'s holding or its rationale.

2. The same is true of *Scott* itself. There, the Court emphasized that imprisonment-the starkest deprivation of personal liberty-is distinct from lesser deprivations of liberty and property and warrants particular Sixth Amendment protection. *Scott* involved a misdemeanor conviction in which the offender was sentenced to pay a fine. No incarceration was imposed, although it would have been permitted by the governing State statute. The Court rejected the defendant's argument that counsel is mandated whenever a statute authorizes the imposition of imprisonment, even though none is, in fact, imposed. *Scott*, 440 U.S. at 368-69. The Court also rejected the contention that lesser deprivations ***10** of liberty and property trigger a right to State-appointed counsel. *Id.* at 372-73.

In so doing, the Court reviewed *Argersinger* at some length. The Court emphasized that *Argersinger* had "conclu[ded] that *incarceration* [is] so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense." *Id.* (emphasis added). The Court also pointed out that the *Argersinger* opinion "repeatedly referred to trials 'where an accused is deprived of his liberty,' and to 'a case that actually leads to imprisonment even for a brief period.' " *Id.* at 373 (citation omitted) (quoting *Argersinger*, 407 U.S. at 32, 33). The Court further explained that "[e]ven were the matter *res nova*, we believe that the central premise of *Argersinger*-that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment-is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Id.*

This distinction-between "actual imprisonment" and a "mere threat of imprisonment"-forecloses the Supreme Court of Alabama's view that a suspended sentence triggers the right to State-appointed counsel. Just as the mere *possibility* of a court's imposing a statutorily permitted term of incarceration constituted a "mere threat" of imprisonment in *Scott*, so too does the possibility that a suspended sentence will ultimately result in incarceration. In both cases, incarceration is still a "threat." It is not "actual incarceration." [3]

***11** To be sure, as the Supreme Court of Alabama noted, the Court in *Scott* went on to state in passing that "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be *sentenced* to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Id.* at 373-74 (emphasis added). However, that comment came in the context of a case in which the statute authorized both a fine and a sentence of imprisonment, but in which only a fine had been imposed by the lower court. The Court's language, occurring as it did in a case in which no sentence of incarceration was imposed, cannot fairly be read to suggest that the mere imposition of a suspended sentence poses the sort of deprivation of liberty recognized in *Scott* and *Argersinger* as triggering constitutional protection.

Accordingly, the Court's reference to "sentenc[ing]" to a "term of imprisonment" is best understood as a shorthand way of distinguishing a mere fine from an actual deprivation of liberty.[4] That reference could not have been intended to ***12** expand the right to State-appointed counsel beyond that established in *Argersinger.*

3. The lower court's reading of *Argersinger* and *Scott* is also foreclosed by this Court's subsequent characterizations of that opinion. For example, in *Lassiter v. Department of Social Services,* 452 U.S. 18 (1981), a case not addressed by the court below, the Court expressly relied upon those two decisions in observing that the Court "has refused to extend the right to appointed counsel to include prosecutions which, though criminal, do not *result* in the defendant's loss of personal liberty." *Id.* at 26 (emphasis added). And Justice Blackmun, in dissent, correctly characterized *Scott* as holding that "the right to counsel is not constitutionally mandated when imprisonment is not actually imposed." *Id.* at 36 n. 1 (Blackmun, J., dissenting).

Likewise, in *Nichols v. United States,* 511 U.S. 738 (1994), the Court characterized *Scott* as holding that "so long as no imprisonment [i]s actually imposed, the Sixth Amendment right to counsel d[oes] not obtain," and that "the line should be drawn between criminal proceedings that *resulted in* imprisonment, and those that did not." *Id.* at 746 (emphasis added). In his separate concurrence, Justice Souter agreed that *Scott* "drew a bright line between imprisonment and lesser criminal penalties." *Id.* at 750 (Souter, J., concurring in judgment). Although the Supreme Court of Alabama discussed *Nichols*, it did not acknowledge this critical language from either the majority or the concurring opinion. See Pet. App. 33 n.4.

***13** The same characterization of *Scott* was repeated in *M.L.B. v. S.L.J.,* 519 U.S. 102 (1996), which involved the appellate rights of indigents. Citing *Scott*, the Court noted that "the right to counsel at state expense, as delineated in our decisions, is less encompassing" than other rights facilitating access to a State's courts. *Id.* at 112-13. As the Court put it, "A State must provide trial counsel for an indigent defendant charged with a felony, … but that right does not extend to nonfelony trials if no term of imprisonment is *actually imposed.*" *Id.* (emphasis added) (citation omitted).

Similarly, in *Martinez v. Court of Appeal of California,* 528 U.S. 152, 154 (2000), the Court cited *Scott* for the proposition that "[t]he Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted *and punished by imprisonment.*" *Id.* (emphasis added). And just last Term, in *Glover v. United States,* 531 U.S. 198 (2001), a unanimous Court cited *Argersinger* and *Scott* for the proposition that "any amount of actual jail time has Sixth Amendment significance." *Id.* at 203.

In contrast to *Lassiter, Nichols, M.L.B., Martinez*, and *Glover*, the lower court's interpretation of *Scott* would trigger a right to State-appointed counsel even when the proceeding did not "result in" or "actually impose" imprisonment, and the defendant therefore is not actually "punished by imprisonment." That interpretation of *Scott* thus cannot be squared with these decisions.

***14 II. The Sixth Amendment's Text And History, As Well As Early Interpretations Of That Provision By The First Congress And This Court, Militate Against Any Further Extension Of The Right To State-Appointed Counsel.**

The text and history of the Sixth Amendment also militate strongly against any extension of the right to State-appointed counsel. As this Court recognized in *Scott*, "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." *Scott v. Illinois,* 440 US. 367, 370 (1979). Indeed, there appears to be no serious dispute among legal scholars and historians that the Amendment, as enacted, provided nothing more than a right of an accused to the assistance of his or her own, personally funded counsel and in no way mandated that counsel be provided by the government, be it federal or State. See, *e.g.*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 114 (1998) ("[T]he Sixth Amendment gave the accused some freedom, some autonomy, in controlling the shape of 'his defence' [including] … whom (if anyone) to hire as a lawyer."); Anthony Lewis, *Gideon's Trumpet* 110 (Vintage Books 1989) (1964) ("Historically speaking, the amendment was almost certainly not envisaged by its framers as reaching the problem of the man too poor to hire a lawyer for his defense.").

Amici recognize, of course, that the Court departed from this understanding of the Sixth Amendment some 70 years ago. In *Powell v. Alabama,* 287 U.S. 45 (1932), the Court held that in some circumstances, which the Court said would be determined on a case-by-case basis, "the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel." *Id.* at 72. Six ***15** years later, the Court interpreted the Sixth Amendment to require the appointment of counsel in all federal cases where a defendant's "life or liberty is at stake." *Johnson v. Zerbst,* 304 U.S. 458, 468 (1938). However, for the next 25 years, the Court refused to incorporate this interpretation of the Sixth Amendment against the States. Instead, it adhered to its holding in *Betts v. Brady,* 316 U.S. 455, 461-62 (1942), that "[t]he Sixth Amendment of the national Constitution applies only to trials in federal courts," and that due process required appointed counsel in State cases only where necessary to avoid "a denial of fundamental fairness, shocking to the universal sense of justice." But in 1963, the Court, in *Gideon v. Wainwright,* 372 U.S. 335 (1963), overruled *Betts* and held that the Sixth and Fourteenth Amendments provide indigent defendants a right to State-provided counsel in felony proceedings. *Id.* at 344-45.

Amici have no quarrel with that settled precedent. Nevertheless, in deciding whether to extend the right recognized there beyond the limits imposed in *Scott* and *Argersinger*, the Court should be mindful of the pertinent textual and historical evidence. That evidence includes (a) the English common law as it existed just prior to the adoption of the Sixth Amendment; (b) the Framers' decision not to follow State laws that expressly provided a right to appointed counsel in certain circumstances; (c) the interpretation of the Amendment's right-to-counsel provision by the first Congress; and (d) this Court's earliest interpretations of that same provision. These materials show beyond any serious doubt that the Sixth Amendment was not viewed as granting any right to government-provided representation.

***16 A. The Amendment's Right-To-Counsel Provision Represented An Affirmative Rejection Of The English Common Law, Which Severely Limited A Defendant's Ability To Retain Counsel.**

The Sixth Amendment's right-to-counsel provision was a response to the traditional English common-law rule, which severely limited the assistance of counsel in serious criminal cases. Under that rule, "a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest." *Powell*, 287 U.S. at 60; see William M. Beaney, *The Right to Counsel in American Courts* 8-10 (Greenwood 1972) (1955). By contrast, "parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel." *Powell*, 287 U.S. at 60. Thus, as this Court has recognized, the English rule "perversely gave less in the way of right to counsel to accused felons than to those accused of misdemeanors." *Scott*, 440 U.S. at 372; *Powell*, 287 U.S. at 60 (noting that the English rule was "outrageous" in that it gave "the right to the aid of counsel in petty offenses" but not "in the case of crimes of the gravest character, where such aid is most needed").

Contemporaneous commentators also challenged the English rule. Blackstone inquired: "Upon what face of reason can that assistance be denied to save the life of a man, which is yet allowed him in prosecutions for every petty trespass?" 4 William Blackstone, *Commentaries on the Laws of England* 355 (12th ed. 1795), *quoted in* Beaney, *supra*, at 11. And Zephaniah Swift referred to the English rule as a "cruel and illiberal principle." 2 *A System of Laws of the State of Connecticut* 398-99 (1795-96).

Because of the absurdity of the English rule, many Colonies abandoned it before the Sixth Amendment even was drafted. See *Betts*, 316 U.S. at 465 (noting that that Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, and Pennsylvania had abandoned the English Rule ***17** before the Sixth Amendment was adopted). As this Court has explained, in "light of th[e] common law practice, it is evident that the[se] constitutional provisions … were intended to do away with" that rule. *Id.* at 466. Or, as one commentator recently put it, the intent of the Framers "was clearly to abrogate this perverse English common law rule by constitutional amendment and to provide the defendant with the right to be represented by counsel, presumably of his own choice and at his own expense." B. Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged With Misdemeanors Entitled To Court Appointed Counsel?*, 5 Roger Williams U. L. Rev. 417, 425-26 (2000).

B. The Amendment's Framers Deliberately Did Not Include An Express Right To Government-Provided Counsel Even Though Some States Provided Such A Right In Limited Cases.

While making a decisive break with the English rule, the Sixth Amendment did not adopt the more expansive right to appointed counsel already recognized by some States. In fact, a comparison of the language of the Sixth Amendment with the language of contemporaneous State statutes mandating appointed counsel reveals that the Sixth Amendment's drafters deliberately avoided creating any right to appointed counsel.

When the Sixth Amendment was drafted, apparently only Connecticut and New Jersey appointed counsel for defendants facing felony indictments generally. [5] See *Betts*, 316 U.S. at 467 n.20. New Jersey's first constitution and an early statute guaranteed "assigned counsel" to indigent criminal defendants accused of "indictable offenses," which were limited to capital crimes and felonies. *See* Robert Martin & ***18** Walter Kowalski, *A Matter of Simple Justice: Enactment of New Jersey's Municipal Public Defender Act*, 51 Rutgers L. Rev. 637, 644 & n.37 (1999); Acts of the General Assembly of N.J. 1012 (1791-96), *quoted in* Beaney, *supra*, at 20 (requiring courts, upon an indictment, to "assign to [defendant], if not of ability to procure counsel, such counsel, not exceeding two, as he or she shall desire").

Another five States provided counsel for defendants only in capital cases. See *Betts*, 316 U.S. at 467 n.20 (Delaware, Pennsylvania, Massachusetts, and New Hampshire); Beaney, *supra*, at 17 (South Carolina). Like New Jersey, these States did so through explicit statutory language providing for "assigned" counsel. [6] Moreover, these appointed counsel provisions supplemented more general statutory language ***19** providing the right to retain one's own counsel. See Beaney, *supra*, at 16-21.

The language of the Sixth Amendment, by contrast, made no mention of "assigned" or appointed counsel. This silence is particularly telling given that the 55 delegates to the Constitutional Convention were generally aware of the developments in State law at the time. See Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and its Influences on American Constitutionalism*, 62 Temp. L. Rev. 541, 542-43 (1989) (noting that the delegates "had wide experience" with the contemporary state constitutional debates). Moreover, the federal Constitution was modeled in many ways after State constitutions. *Id.* at 541-42. Accordingly, the Sixth Amendment's silence on the right to appointed counsel reveals that- unlike the State laws that explicitly required appointed counsel-the Amendment was not designed to impose such a requirement.

In all events, as these examples show, the "right to counsel" provided in the Sixth Amendment could not possibly have swept more broadly than the right to State-appointed counsel expressly provided in the most expansive State statutes. Thus, it could not have provided any right to appointed counsel in misdemeanor cases, even if it were read to create such a right with respect to some or all felonies.

C. The First Congress Interpreted The Amendment As Not Providing Government-Appointed Counsel.

Actions of the first Congress support the conclusion that the Sixth Amendment did not require appointed counsel. For example, the Judiciary Act of 1789, which was signed the day before the Sixth Amendment was proposed in Congress, contained the following provision: "[I]n all the courts of the United States, the parties may plead and manage their own causes personally *or* by the assistance of such counsel or ***20** attorneys at law as by the rules of the said courts … shall be permitted to manage and conduct causes therein." Ch. 20, § 35, 1 Stat. 73, 92 (1789) (emphasis added). Unlike the State statutes providing for appointed counsel in some circumstances, the Judiciary Act made no mention of that subject. As Beaney noted, "If Congress had thought that the proposed Sixth Amendment counsel provision embodied a startling change from this statutory rule, some discussion concerning the proposal would undoubtedly have occurred on the floor." Beaney, *supra*, at 28.

Even more telling is a 1790 statute requiring that anyone indicted for treason or other capital crimes be offered "assigned counsel":

> [Such a defendant] shall also be allowed and admitted to make his full defense by counsel learned in the law; and the court before whom such person shall be tried … shall, and they *are hereby authorized and required immediately upon his request to assign to such person such counsel*, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours ….

Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112, 118 (emphasis added).

The enactment of this statute contemporaneously with the Sixth Amendment quite clearly indicates that Congress did not believe the Sixth Amendment itself required "assigned" counsel in such cases. See Beaney, *supra*, at 28 (questioning why Congress would have passed this statute if it understood that the Sixth Amendment already provided this protection). For if the Sixth Amendment itself provided such a right, the right provided in the statute would have been both redundant and woefully under-inclusive. As this Court has repeatedly held, "[a]n Act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, … is contemporaneous and weighty ***21** evidence of its true meaning.' " *Marsh v. Chambers,* 463 U.S. 783, 790 (1983) (omission in original) (quoting *Wisconsin v. Pelican Ins. Co.,* 127 U.S. 265, 297 (1888)); see *Franklin v. Massachusetts,* 505 U.S. 788, 803-04 (1992) ("[I]nterpretations of the Constitution by the First Congress are persuasive"); *Bowsher v. Synar,* 478 U.S 714, 723-24 & n.3 (1986) (listing 20 members of the first Congress who had been delegates to the Philadelphia Convention).

D. This Court's Earliest Decision Construing The Amendment's Counsel Provision Concluded That It Did Not Create A Right To Government-Provided Counsel.

This Court echoed this same view some 100 years later when it had what appears to have been its first opportunity to address expressly the scope of the Sixth Amendment's right-to-counsel clause. In *United States v. Van Duzee,* 140 U.S. 169, 173 (1891), the Court addressed a claim by several federal court clerks for reimbursement for the cost of providing copies of indictments to criminal defendants. This required the Court to determine whether such copies were required by the Sixth Amendment.

The Court held they were not. Under the Sixth Amendment, the Court held, "[t]here is … no general obligation on the part of the government either to furnish copies of indictments, summon witnesses or retain counsel for defendants or prisoners." *Id.* The Court reasoned that "[t]he object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to [criminal defendants]; but it was not contemplated that this should be done at the expense of the government." *Id.*

Given that this was (apparently) the first decision expressly interpreting this provision of the Bill of Rights, *Van Duzee* is entitled to significant weight. Like the other historical evidence discussed above, that decision casts substantial ***22** doubt on the propriety of further expanding the federal right to appointed counsel.

III. A Holding That Misdemeanor Defendants Who Receive Only Suspended Sentences Are Entitled To State-Appointed Counsel Would Lead To Anomalous Treatment Of Indigent And Non-Indigent Defendants And Would Impose Significant Costs On States And Their Citizens.

Besides being unsupported by this Court's decisions or the text and history of the Sixth Amendment, the rule adopted by the Supreme Court of Alabama- mandating a Sixth Amendment right to State-funded counsel whenever a misdemeanor offender receives a suspended or probated sentence (see Pet. App. 35)-would create anomalous results and impose undue, significant burdens on States.

The States currently employ a broad array of approaches to government-appointed counsel. Some States have expanded the right to counsel for indigents charged with misdemeanors beyond what this Court has held to be the federal minimum, and thus provide a right to appointed counsel in a broader class of cases than that required by this Court's decisions. Specifically, some States and the District of Columbia appoint counsel for indigents charged with misdemeanors if a jail sentence is *authorized* or otherwise could result from a conviction. [7] Some States require the appointment of counsel for indigents when imprisonment, a substantial fine, or other "consequences of magnitude" could result. [8] Other States ***23** appoint counsel for indigents charged with misdemeanors regardless of the penalty. [9]

But many States have not gone beyond the minimum federal requirements imposed by this Court's decisions. Several States, consistent with *Scott* and *Argersinger*, guarantee State-appointed counsel only if a defendant is actually imprisoned. [0] Several other states provide a right to appointed counsel in misdemeanor cases, but only if the authorized jail sentence exceeds a certain minimum, or only where certain other requirements are met. Thus, in these states as well, the *Scott* and *Argersinger* rule provides a right to appointed counsel in some cases where State law does not. Expanding the federal appointed-counsel requirement would require these States, at a minimum, to change their procedures in some or all of their misdemeanor cases.

Although States are free to confer rights in excess of the constitutional minimum, the Court has been properly mindful that it "do[es] not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement." *Argersinger v. Hamlin,* 407 U.S 25, 38 (1972). States may therefore choose to require and to fund a greater right to counsel than that required by the United States Constitution "based on their own constitutions or public policy." *Nichols v. United States,* 511 U.S. 738, 748 n.12 (1994). But the Court should not impose significant ***24** burdens on all the States where, as here, there is no constitutionally significant liberty interest at stake, and where additional requirements would actually undermine federal and State policies.

A. The Rule Adopted Below Perversly Guarantees Indigent Defendants A Right To State-Appointed Counsel In Circumstances Where Similarly Situated Non-Indigents Would Not Hire Counsel For Themselves.

First, expanding the federal right to State-appointed counsel further from its core of providing counsel in capital cases, see *Powell v. Alabama,* 287 U.S. 45 (1932), and other felony cases, see *Gideon v. Wainwright,* 372 U.S. 335 (1963), creates a real danger of undermining the equality rationale that undergirds those decisions. The Court's early decisions emphasized placing indigent defendants charged with serious crimes on an "equal" footing with non-indigent defendants such that the indigent would be entitled to counsel in cases where non-indigents would naturally hire their own counsel. See *Gideon*, 372 U.S. at 344-45; cf *Powell*, 287 U.S at 72-73. Yet the interpretation of the Sixth Amendment by the court below would mandate State-funded counsel for indigent defendants in circumstances where non-indigent defendants would be unlikely to hire their own counsel.

Indeed, a study by the United States Department of Justice confirms that many misdemeanor defendants already choose not to hire attorneys. That study found that, while only three of every 1000 felony defendants opt for self-representation, nearly 40 percent of misdemeanor defendants choose to forgo counsel, even when court-appointed counsel is available. Bureau of Justice Statistics, U.S. Dep't of Justice, *Defense Counsel in Criminal Cases* 1 (Nov. 2000). Moreover, the report indicates a sharp drop in the percentage of defendants who hire a private attorney when accused of a misdemeanor rather than a felony. One third of accused felons hire private attorneys, while less than one fifth of misdemeanor ***25** defendants hire counsel. *Id.* at 3 tbl.2. In sum, non-indigent individuals are far more likely to represent themselves in misdemeanor cases than to hire counsel.

Thus, if the Court were to adopt the rule of constitutional law adopted by the Supreme Court of Alabama, one effect of that ruling would be "to favor defendants classified as indigents over those not so classified, yet who are in low-income groups where engaging counsel in a minor petty-offense case would be a luxury the family could not afford." *Argersinger*, 407 U.S. at 50 (Powell, J., concurring in result). This mandate would lead to the anomalous result that indigent defendants would be in a superior position, rather than an equal position, vis-à-vis most non-indigent defendants.

B. The Rule Adopted Below Imposes Significant Burdens On State Courts And Prosecutors And Undermines State Probation Systems And Recidivism Policies.

A rule granting misdemeanor defendants an expanded right to State-funded counsel also would greatly expand the burdens on State courts and prosecutors, and undermine State probation systems and recidivism policies.

1. As Justice Powell noted in *Argersinger*, "[t]here are thousands of [State] statutes and ordinances which authorize imprisonment for six months or less, usually as an alternative to a fine." 407 U.S. at 52 (Powell, J., concurring in result). Likewise, there are thousands of State statutes and ordinances amenable to suspended sentences. The offenses covered by these statutes include the "broad spectrum of petty-offense cases [that] daily flood [] the lower criminal courts" including "some of the most trivial of misdemeanors, ranging from spitting on the sidewalk to certain traffic offenses." *Id.*

One of the virtues of the *Scott-Argersinger* doctrine is that it permits judges to screen the most serious cases from the beginning, with the full realization that, if the case is proven, an indigent defendant may only be incarcerated if he has had ***26** the opportunity for State-funded counsel. The rule adopted by the Supreme Court of Alabama would remove this discretion and significantly widen the circle of mandatory representation. In such a case, "nearly every misdemeanor sentence would be within the scope of 'actual imprisonment,' " thereby requiring a Sixth Amendment right to counsel. *People v. Reichenbach,* 587 N.W.2d 1, 7 (Mich. 1998). This possibility would greatly expand the right to counsel and place extensive additional burdens on States.

This rule, in turn, would have several implications for scarce State resources. First, "in many sections of the country, there simply will not be enough lawyers available to meet this demand either in the short or long term." *Argersinger*, 407 U.S. at 56 (Powell, J., concurring in result). This problem is likely to be particularly acute in rural areas.

Second, judicial resources will be overburdened with the inevitable "over lawyering" of relatively minor cases. See *id.* at 59 (Powell, J., concurring in result). "The absence of direct economic impact on the client, plus the omnipresent ineffective-assistance-of-counsel claim, frequently produces a decision to litigate every issue." *Id.* at 58. Moreover, "[i]t is likely that young lawyers, fresh out of school" will pursue every angle of relatively simple matters, thereby "stretching out … the process with consequent increased costs to the public." *Id.* at 58-59.

Third, an expanded appointed-counsel requirement would require States to hire additional lawyers. Many lesser crimes are currently not prosecuted by lawyers, but by, for example, an uncounseled police officer presenting the State's case. An expanded right to appointed counsel will create additional pressures for States to provide prosecutors in minor case. See *id.* at 49 (Powell, J., concurring in result) ("[G]overnment often does not hire lawyers to prosecute petty offenses; instead the arresting officer presents the case.").

***27** An expanded right to appointed counsel will also inevitably require more State-funded defense lawyers. The costs of providing counsel to indigent defendants are already substantial. In 1999, for example, the one hundred largest counties spent $1.2 billion on indigent defense. U.S. Dep't of Justice, *Indigent Defense Services in Large Counties, 1999* 1 (Nov. 2000). Requiring states to provide defense counsel for misdemeanor defendants who receive only suspended or probated sentences of incarceration would send this figure still higher, placing significant mandatory burdens on States in cases where there is no constitutionally significant deprivation of a defendant's liberty.

2. The rule adopted by the court below could also interfere with State probation systems. As petitioner points out, courts in Alabama can impose probation only if they first sentence a defendant to a term of incarceration, and then suspend the sentence. Pet. Br. 15 n.5 (citing Ala. Code § 15-22-50). Under the Supreme Court of Alabama's view, judges in States with similar systems would have to provide counsel to indigent defendants, not only when they expect to impose a jail sentence, but also when they expect to sentence the defendant to probation if he or she is found guilty.

3. Finally, a rule invalidating suspended or conditional sentences could also gravely undermine the anti-recidivism policies of many States. Just as the United States Sentencing Guidelines permit the consideration of uncounseled misdemeanor convictions to enhance punishment in subsequent offences, see *Nichols*, 511 U.S at 749, it is an important public policy of many States to punish recidivism by enhancing punishment in future cases based on criminal history. See, *e.g., Parke v. Raley,* 506 U.S. 20, 26 (1992) (observing that recidivism laws "have a long tradition in this country that dates back to colonial times" and currently are in effect in all 50 States). Such policies deter crime even as they protect the public from the most dangerous criminals.

***28** The Court's ruling in this case will likely have a significant impact on whether States can continue to utilize suspended sentences to enhance an offender's sentence for a subsequent offense. That is because sentences obtained in violation of the Sixth Amendment likely cannot be relied upon for sentence-enhancement purposes. See *Nichols*, 511 U.S. at 749 (holding that uncounseled misdemeanor conviction was valid under *Scott* because no prison term was imposed and, accordingly, could be used to enhance subsequent offenses). A rule invalidating a conditional or suspended sentence imposed on an uncounseled misdemeanor offender would undermine these State policies. In so doing, it would create an increased risk of harm from repeat offenders.

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This Court should reject the Supreme Court of Alabama's attempt to expand the right to appointed counsel beyond that recognized in *Argersinger* and *Scott.* That expansion has no basis in the text or history of the Sixth Amendment, in sound public policy, or in this Court's decisions. The line that this Court drew in those decisions is both clear and sound. It should be respected and enforced in this case.

CONCLUSION

For these reasons, the decision of the Supreme Court of Alabama should be reversed.

*1A APPENDIX OF STATE AUTHORITIES

Alabama: Ala. R. Crim. P. 6.1(a) (providing that an indigent is entitled to appointment of attorney "in all criminal proceedings in which representation by counsel is constitutionally required").

Alaska: Gregory v. State, 550 P.2d 374, 378 (Alaska 1976) (providing indigent defendants with counsel ' "when the penalty upon conviction of the misdemeanor may result in incarceration in a jail or penal institution, or the loss of a valuable license, or a fine so heavy as to indicate criminality' ").

Arkansas: Ark. R. Crim. P. 8.2(b) (requiring appointment of counsel for indigents "unless [defendant] is charged with a misdemeanor and the court has determined that under no circumstances will imprisonment be imposed as a part of the punishment if he is found guilty").

Arizona: Ariz. R. Crim. P. 6.1(a) (providing that a defendant is "entitled to be represented by counsel … except … where there is no prospect of imprisonment or confinement"); but see *Neilson v. Superior Court,* 767 P.2d 1185, 1186 (Ariz. Ct. App. 1988) (holding that Rule 6.1(b) "is founded on" *Gideon* and *Argersinger*); *Campa v. Fleming,* 656 P.2d 619, 621 (Ariz Ct. App. 1982) ("there is no authority that Arizona has standards which are more strict in this area than the U.S. Constitution").

California: Cal. Penal Code § 686; *Tracy v. Municipal Court,* 587 P.2d 227, 230 (Cal. 1978) (interpreting § 686 to guarantee appointed counsel to all indigent misdemeanor defendants).

Colorado: Colo. Rev. Stat. §§ 21-1-103, 16-5-501 (requiring the public defender to represent indigents, unless the prosecutor states in writing that he will not seek jail time upon conviction).

***2a** *Connecticut*: Conn. Gen. Stat. § 51-296 (providing counsel for indigent defendants wherever a sentence "will involve immediate incarceration or a suspended sentence of incarceration with a period of probation").

Delaware: Del. Code Ann. tit. 29, § 4602 (1997) ("The Public Defender shall represent, without charge, each indigent person who is under arrest or charged with a crime….").

District of Columbia: D.C. Code Ann. §§ 11-2601, 11-2602 (providing appointed counsel for indigent defendant who "faces a loss of liberty").

Florida: Fla. R. Crim. P. 3.111(b)(1) (providing that appointment of counsel for an indigent charged with a misdemeanor is not required if the judge states in writing, before trial, that the defendant will not be imprisoned if convicted).

Georgia: *Brawner v. State,* 296 S.E.2d 551, 552 (Ga. 1982) ("A defendant in a misdemeanor *criminal* prosecution is entitled to counsel only where the defendant is sentenced to actual imprisonment.").

Hawaii: Haw. Rev. Stat. § 802-1 (providing indigent defendants with appointed counsel when "punishable by confinement in jail").

Idaho: Idaho Code § 19-852(a)(1) (requiring appointment of counsel for "needy person" charged with a "serious crime"); *id.* § 19-851(d)(2) (defining "serious crime" to include "any misdemeanor or offense the penalty for which, excluding imprisonment for non-payment of a fine, includes the possibility of confinement for more than six (6) months"); *State v. Hardman,* 818 P.2d 782, 785 (Idaho Ct. App. 1991).

Illinois: 725 Ill. Comp. Stat. 5/113-3(b) (providing appointed counsel to indigent defendants "[i]n all cases, except where the penalty is a fine only").

***3a** *Indiana*: Ind. Const. art. I, § 13; *Brunson v. State,* 394 N.E.2d 229, 231 (Ind. Ct. App. 1979) (interpreting § 13 to requiring appointed counsel "for all persons charged with a criminal misdemeanor, regardless of whether the charge ultimately results in the misdemeanant's imprisonment").

Iowa: Iowa R. Crim. P. 26 (providing indigents with the right to appointed counsel).

Louisiana: La. Const. art. I, § 13 (providing appointed counsel if defendant is "indigent and charged with an offense punishable by imprisonment").

Kansas: Kan. Stat. Ann. § 12-4405 (requiring appointed counsel where judge "has reason to believe that if found guilty, the accused person might be deprived of his or her liberty and is not financially able to employ counsel").

Kentucky: Ky. Rev. Stat. Ann. §§ 31.110(1), 31.100(4)(b) (providing appointed counsel to needy persons charged with "[a] misdemeanor or offense any penalty for which includes the possibility of confinement or a fine of five hundred dollars ($500) or more").

Maine: *State v. Cook,* 706 A.2d 603, 605 (Me. 1998) (holding, "consistent with the reasoning in *Scott*, that an indigent misdemeanor defendant has a right to counsel under … the Maine Constitution when imprisonment will actually be imposed").

Maryland: Md. Ann. Code art. 27A, §§ 2(h)(2), 4(b) (providing appointed counsel for indigent defendants "where constitutionally required" and where charged with a "[s]erious crime," including misdemeanors punishable by "the possibility of confinement for more than three months or a fine of more than $500").

Massachusetts: Mass. Sup. Jud. Ct. R. 3:10; Mass. R. Crim. P. 8 (stating that the court shall appoint counsel if the defendant is "charged with a crime for which a sentence of imprisonment … may be imposed").

***4a** *Michigan*: Mich. R. of Ct. 6.610(D)(2) (providing for appointed counsel for indigent defendant charged with an offense punishable by "more than 93 days in jail").

Minnesota: Minn. R. Crim. P. 5.02(2) (providing appointed counsel to indigent charged with "misdemeanor punishable by incarceration").

Mississippi: Miss. Code Ann. § 25-32-9(1) ("No … indigent … shall be imprisoned as a result of a misdemeanor conviction unless he was represented by the public defender or waived the right to counsel."); see also *id.* § 99-15-15 (providing for the appointment of counsel).

Missouri: Mo. Rev. Stat. § 600.042.4.(2) (requiring appointment of counsel for indigents, *inter alia*, charged with a misdemeanor "which will probably result in confinement in the county jail upon conviction").

Montana: Mont. Code Ann. § 46-8-101(3)(b) ("The defendant, if unable to employ counsel, is entitled to have counsel assigned if … the offense charged is a misdemeanor and the court desires to retain imprisonment as a sentencing option ….").

Nebraska: Neb. Rev. Stat. Ann. § 29-3902 (providing appointed counsel for indigent defendants "in misdemeanor cases punishable by imprisonment").

Nevada: Nev. Rev. Stat. Ann. § 171.188(3)(b) (providing for appointment of counsel where "required"); *id.* § 178.397 (providing appointed counsel for every indigent defendant "accused of a gross misdemeanor or felony").

New Hampshire: N.H. Rev. Stat. Ann. §§ 604-A:2, 625:9 (providing appointed counsel where defendant charged with a felony or Class A misdemeanor in which maximum punishment one year); *State v. Scarborough,* 470 A.2d 909, 913 (N.H. 1983) (noting New Hampshire's right to appointed counsel "covers a broader range of criminal defendants than … the Sixth and Fourteenth Amendments").

***5a** *New Jersey*: *Rodriguez v. Rosenblatt,* 277 A.2d 216, 223 (N.J. 1971) (holding that counsel should be appointed for indigents when conviction "entail [s] imprisonment in fact or other consequence of magnitude").

New Mexico: N.M Stat. Ann § 31-16-3(A) (providing appointed counsel to indigent defendants accused of "a serious crime," including misdemeanor carrying "a possible penalty of confinement for more than six months").

New York: N.Y. Crim. Proc. Law § 170.10(3)(c)(providing for assigned counsel to indigent defendants, except for traffic infractions).

North Carolina: N.C. Gen. Stat. § 7A-451(a)(1) (providing that, among other things, an indigent is entitled to counsel if conviction carries a penalty or imprisonment with a fine of $500 or more).

North Dakota: N.D. R. Crim. P. 44 ("[E]very indigent defendant is entitled to have counsel appointed at public expense … unless the magistrate has determined that sentence upon conviction will not include imprisonment.").

Ohio: Ohio R. Crim. P. 2, 44(A) (requiring appointed counsel to defendant charged with "a serious offenses," including misdemeanors punishable by more than six months confinement); see *id.* 44(B) (prohibiting imposition of "sentence of confinement" on defendant charged with petty offense who is unable to obtain counsel).

Oklahoma: Okla. Stat. tit. 22, § 1355.6.A (providing appointed counsel to all indigent defendants who are charged with an offense "punishable by incarceration").

Oregon: Or. Rev. Stat. § 135.050(4) (providing for court-appointed counsel for all "indigents charged with a crime").

***6a** *Pennsylvania*: Pa. R. Crim. P. 316 (providing for assigned counsel in all "summary cases" for "all defendants who are without financial resources or who are unable to employ counsel when there is a likelihood that imprisonment will be imposed" and in all "court cases"); see 18 Pa. Cons. Stat. § 106(c)(2) (defining summary offenses to include offenses providing for a maximum of 90 days imprisonment).

Rhode Island: In re Advisory Opinion to the Governor, 666 A.2d 813, 818 (R.I. 1995) (advising the Governor that the Court's interpretation of the Sixth Amendment in *Argersinger, Scott*, and *Nichols* "as a guarantee of a criminal defendant's right to counsel only when imprisonment is actually imposed represents the appropriate standard that should be applied under … the Rhode Island Constitution").

South Carolina: S.C. Code Ann. § 17-3-10 (providing counsel to any defendant "financially unable to retain counsel" and "entitled to counsel under the Constitution of the United States"); S.C. App. Ct. R. 602 (informing accused of right to counsel "if a prison sentence is likely to be imposed following any conviction").

South Dakota: S.D. Codified Laws §§ 22-6-2, 23A-40-6.1 (no appointed counsel is required for indigent defendant who is not in custody and for whom court has stated on the record that no incarceration shall be imposed following any conviction, when charged with crime with a maximum penalty of thirty days imprisonment and/or $200 fine).

Tennessee: Allen v. McWilliams, 715 S.W.2d 28, 32 (Tenn. 1986) (amending Supreme Court Rule 13 to provide appointed counsel in all cases where misdemeanor defendant "is in jeopardy of incarceration").

***7a** *Texas*: Tex. Crim. Proc. Code Ann. § 26.04 (providing for the appointment of counsel whenever an indigent is charged with a misdemeanor punishable by imprisonment); *Fortner v. State,* 764 S.W.2d 934, 935 (Tex. App. 1989) (interpreting article 26.04 "to require the appointment of counsel only when the court knows that the punishment it will assess includes imprisonment or when the trial is before the jury and the possible punishment includes imprisonment").

Utah: Utah R. Crim. P. 8(a) (providing appointed counsel where indigent defendant "faces a substantial probability of deprivation of liberty"); *Webster v. Jones,* 587 P.2d 528, 530 (Utah 1978) ("[W]here a person is charged with an offense which may be punished by imprisonment, he is entitled to the assistance of [court-appointed] counsel"); cf. *Layton City v. Longcrier,* 943 P.2d 655, 658 (Utah Ct. App. 1997) (stating that no counsel was required where the sentence was suspended because "*Scott* establishes an after-the-fact test that requires a reviewing court to find an uncounselled misdemeanor conviction constitutional when the defendant was not sentenced to jail").

Vermont: Vt. Stat. Ann. tit. 13, §§ 5201, 5231 (providing assigned counsel to needy defendants charged with a "serious crime," including "[a] misdemeanor the maximum penalty for which is a fine of more than $1,000.00 or any period of imprisonment unless the judge, at the arraignment but before the entry of a plea, determines and states on the record that he will not sentence the defendant to a fine of more than $1,000.00 or a period of imprisonment if the defendant is convicted of the misdemeanor").

Virginia: Va. Code Ann. §§ 19.2-159, 19.2-160 (providing appointed counsel to indigents charged with crime that may be punishable by imprisonment).

***8a** *Washington*: Wash. Super. Ct. Crim. R. 3.1(a), (d) (providing for assignment of appointed counsel to indigents in "all criminal proceedings for offenses punishable by loss of liberty").

West Virginia: W. Va. Code § 50-4-3 (providing for appointment of counsel to indigents in any criminal proceeding where the applicable statutes "authorize a sentence of confinement").

Wisconsin: Wis. Stat. § 967.06 (providing indigent defendants with appointed counsel in "any offense which is punishable by incarceration").

Wyoming: Wyo. Stat. Ann. §§ 7-6-102, 7-6-104 (providing indigent defendants with appointed counsel in all "serious crime[s]," including a "misdemeanor … for which incarceration as a punishment is a practical possibility, provided, however, that counsel need not be appointed for a misdemeanor if the judge, at the initial appearance, determines and states on the record that he will not sentence the defendant to any period of imprisonment if the defendant is convicted of the misdemeanor").

Footnotes

FN

* Counsel of Record

1 As States, *amici* are not required to seek leave to file an *amicus curiae* brief. *See* Sup. Ct. R. 37.4.

2 In that case, the defendant was sentenced to serve 90 days in jail. *Argersinger v. Hamlin,* 407 U.S. 25, 26 (1972).

3 Other courts have held that the "mere threat of imprisonment language in *Scott*, "can only be read to include suspended sentences. *See, e.g., United States v. Smith,* No. 94 5627, 1995 WL 314892, at **2 (6th Cir. May 23, 1995) (per curiam) (unpublished disposition), *cert. denied*, 516 U.S. 897 (1995); *cf.* Sheldon Krantz et al., *Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin* 30 (1976) ("A suspended sentence places no conditions upon a defendant and, if the sentence is never imposed, it will have no effect on a defendant's liberty; " a]s long as the sentence is not imposed, the defendant is in no way restricted by the action of the court.). Moreover, as the Texas Court of Criminal Appeals has persuasively explained, in any case "in which one convicted of a misdemeanor and assessed a fine faces the possibility that he may later be subject to imprisonment if he refuses to pay the assessed fine ,] t]his sort of likelihood is no more than the mere threat of imprisonment addressed by the C]ourt in *Scott.* *Former v. State,* 764 S.W.2d 934, 935 (Tex. App. 1989); *see also, e.g., People v. Reichenbach,* 587 N.W.2d 1, 6 (Mich. 1998) (rejecting defendant's contention that "a conditional sentence, under which he might have been imprisoned had he not paid the fine, constitutes 'actual imprisonment under *Argersinger* because "the prospect of imprisonment was never more than a threat).

4 The United States Sentencing Guidelines provide analogous support for a distinction between the suspension of a "sentence of imprisonment and the deprivation of liberty as a consequence of actual incarceration. *See* U.S.S.G. § 4A1.2(b) (2000). Significantly, the Guidelines, promulgated after *Scott*, expressly exclude a suspended sentence from the definition of "sentence of imprisonment : "If part of a sentence of imprisonment was suspended, 'sentence of imprisonment refers only to the portion that was not suspended. *Id.* § 4A1.2(b)(2). Moreover, the commentary to that provision states that " t]o qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence. *Id.* § 4A1.2 Commentary Application Note 2.

5 In Connecticut, according to one commentator, "the custom of appointing counsel if the accused requested this assistance apparently existed after 1750. Beaney, *supra*, at 16. We are, however, unaware of any evidence suggesting that this custom extended beyond felonies.

6 *See, e.g.*, 3 Statutes at Large of Pa. 199 (Busch 1896), *quoted in* Beaney, *supra*, at 16 (" U]pon all trials of said capital crimes, lawful challenges shall be allowed, and learned counsel assigned to the prisoners.); Act of Aug. 20, 1731, 43 Laws of the Province of S.C. 518 19 (Trott 1736), *quoted in* Beaney, *supra*, at 17 (stating that if a capital defendant "shall desire coun sel], the court … is hereby authorized and required, immediately, upon his or their request, to assign … such and so many council not exceeding two, as the person or persons shall desire) (omissions in Beaney); 1791 N.H. Laws 247 (Melcher 1792), *quoted in* Beaney, *supra*, at 21 (stating that a capital defendant "shall at his request have counsel learned in the law assigned him by the court); 2 Laws of the Commonwealth of Massachusetts from November 28, 1780 to February 28, 1807, ch. 71 app. at 1049 (providing for assigned counsel for defendants accused and indicted for treason: "And in case any person or persons, so accused and indicted, shall desire council, the Court before whom such person or persons, shall be tried, or some Judge of that Court, shall, and is hereby authorized and required, immediately upon his or their request, to assign to such person or persons, such and so many council, not exceeding two, as the persons shall desire, to whom such counsil shall have free access at all seasonable hours.) Act of 1719, ch. 22, § 4, 1 Del. Laws 64, 66 (S. Adams & J. Adams, 1797) (requiring counsel in capital cases: "And that upon all trials of the said capital crimes, lawful challenges shall be allowed, and learned council assigned to the prisoners.).

7 District of Columbia, Hawaii, Louisiana, Massachusetts, Minnesota, Nebraska, New York, Oklahoma, Tennesse, Virginia, Washington, West Virginia, and Wisconsin. For the Court's convenience, a catalogue of the States' law on appointed counsel is annexed as an Appendix to this brief.

8 Alaska, Kentucky, Maryland, New Jersey, and North Carolina. *See* Appendix.

9 California, Delaware, Indiana, Iowa, Oklahoma, and Oregon. *See* Appendix. Other States have unique approaches that appear to impose stricter requirements than those imposed in *Argersinger* and *Scott:* Connecticut, Illinois, Kansas, and Missouri. *See* Appendix.

10 Alabama, Arkansas, Colorado, Florida, Georgia, Maine, Mississippi, Montana, North Dakota, Rhode Island, South Carolina, and Texas; *cf.* Vermont and Wyoming. *See* Appendix.

11 Idaho, Michigan, New Hampshire, New Mexico, Ohio, Pennsylvania, and South Dakota. *See* Appendix. Several States apparently have not clearly decided the issue: Arizona, Nevada, and Utah. *See* Appendix.

2000 WL 33979556 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF TEXAS, Petitioner,
v.
Raymond Levi COBB, Respondent.

No. 99-1702.
April 21, 2000.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

Petition for Writ of Certiorari

John Cornyn, Attorney General of Texas, Andy Taylor, First Assistant Attorney General, Gregory S. Coleman [*], Solicitor General, S. Kyle Duncan, Assistant Solicitor General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 936-1700, Counsel for Texas

***i THIS IS A CAPITAL CASE.**

QUESTIONS PRESENTED

I.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

II.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

III.

If the Court decides in *Dickerson v. United States*, No. 99-5525, that *Miranda* is not constitutionally mandated, could *Jackson*-which grafted *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1984), into the Sixth Amendment context-constitutionally require the result in this case?

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*iv INDEX OF AUTHORITIES

Cases

*1 PETITION FOR WRIT OF CERTIORARI

The Texas Court of Criminal Appeals erroneously held that Respondent Raymond Cobb's voluntary confession was taken in violation of the Sixth Amendment right to counsel and reversed his capital murder conviction. The court's decision places it on one side of an irreconcilable conflict among numerous state and federal decisions regarding the ability of represented defendants to waive their Sixth Amendment right to counsel. The decision also wrongly applies an exception to this Court's Sixth Amendment jurisprudence that has been developed in the lower courts but never adopted by the Court. The Court should grant this petition to resolve these important, unsettled questions of federal constitutional law.

CITATION OF COURT OF CRIMINAL APPEALS'S OPINION

Raymond Levi Cobb v. State, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000).

BASIS FOR JURISDICTION

The Texas Court of Criminal Appeals delivered its judgment and opinion in *Cobb* on March 15, 2000. This Court has jurisdiction to entertain the State's petition for writ of certiorari under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

U.S. CONST. amend VI.

*2 STATEMENT OF THE CASE

Early in the morning of Monday, December 27, 1993, two days after Christmas, Lindsey Owings kissed his sleeping wife, Maggie, and his sleeping sixteen-month-old daughter, Kori Rae, goodbye and left for work. He never saw them again.

The day before, the Owings had met their neighbor, Raymond Cobb, who was living across the street with his sister and her boyfriend, when he knocked on their door looking for his dog. In the late morning or early afternoon of December 27, Cobb burglarized the Owings' home, stealing a VCR, a stereo, some Walt Disney videotapes, and a bottle of tequila. In the course of that burglary, Cobb stabbed Maggie to death and buried her and Kori Rae in a wooded area about a mile from the house. Kori Rae was alive when Cobb buried her, and she died soon after of suffocation.

Lindsey arrived home after work and found his wife and child missing. Aside from the few missing items, there were no signs of a struggle or foul play. He reported the burglary and the disappearances to the Walker County police. The police searched the surrounding area, canvassed the neighbors, and published fliers with photos of Maggie and Kori Rae, but no trace of them was found.

In February 1994 an anonymous tip led police to suspect Cobb in the burglary. Cobb initially denied involvement, but eventually admitted to Walker County detectives that he had burglarized the Owings' home on December 27, 1993. Cobb made a voluntary, written statement to that effect in July 1994, but steadfastly denied any involvement in the disappearances.

Based on his statement, Cobb was indicted for burglary of the Owings' home. In August 1994, an attorney, Hal Ridley, was *3 appointed to represent Cobb. App., at B-2. Ridley's representation of Cobb was limited to the pending burglary charge. *Id.* Based on a conversation with Walker County District Attorney David Weeks, Ridley understood that Cobb was not yet a suspect in the disappearances, but that the police believed Cobb knew more than he was saying. App., at B-3. This was important to Ridley, because Ridley had recently been involved in a capital murder trial and "really didn't want to get involved in another one right behind that, if Mr. Cobb was in fact a suspect." *Id.*

Over the next fourteen months, the Walker County detectives continued to investigate the disappearances of Maggie and Kori Rae. On two occasions, the detectives asked Ridley for permission to question Cobb about the disappearances. The first of these occasions was at Cobb's arraignment for burglary, shortly after Ridley was appointed. App., at B-5, When asked for permission to talk to Cobb, Ridley stated, "I gave my permission and told them that it wasn't necessary for me to be there." *Id.* The second occasion was in September 1995; Ridley again gave his permission for Cobb to be interrogated about the disappearances outside Ridley's presence. *Id.*, at B-5 to B-6. [2]

By November 1995 Cobb was out on bond on the burglary charge and had moved back to Odessa, Texas, where Cobb's father, Charles, lived. On November 11, 1995, Charles Cobb telephoned Walker County detective Judy James, the lead investigator on the case, and told her that Raymond had confessed to killing Maggie and Kori Rae during the burglary, James advised Charles to make *4 a statement to the Odessa police, and he did. The Odessa police faxed Charles's statement to James and she used it to obtain an arrest warrant for Raymond Cobb, which she then faxed back to Odessa. James did not inform the Odessa police that Cobb was represented by an attorney on the burglary charge.

By this time, Odessa detectives Vic Sikes and Harold Thomas had already ascertained Cobb's whereabouts-he was at a hospital with his girlfriend, Kandy, who was pregnant with Cobb's son and was experiencing labor pains. Around 2 a.m. on the morning of November 12, the detectives identified Cobb and Kandy as they emerged from the hospital (the labor had been false). They arrested Cobb, Mirandized him, and brought him to the police station. They telephoned James and informed her that they had Cobb in custody. When they asked her if they could question him, James agreed.

Detectives Sikes and Thomas brought Cobb to an interview room and Mirandized him again. Beginning around 3 a.m., Sikes questioned Cobb for approximately an hour, without success. After a five-minute break, Thomas took over the interrogation. Ascertaining that Cobb was a churchgoer, Thomas spoke to Cobb about his faith. This approach worked, and Cobb soon confessed to the murders. Both orally and thereafter in writing, Cobb explained that on December 27, 1993, he had entered the Owings' home and begun removing the stereo. Maggie Owings confronted him, and Cobb stabbed her in the stomach with a double-edged knife he was carrying. Cobb carried and dragged Maggie's body to a wooded area several hundred yards from the house. He then stated:

> "I went back to her house and I saw the baby laying in its bed. I took the baby out there and it was sleeping the whole time. I laid the baby on the ground four or five feet away from its mother. I went back to my house and got a flat edge shovel. That's all I could find. Then I went back over to where they were and started digging a hole between ***5** them. After I got the hole dug the baby was awake. It started going toward its mom and it fell in the hole. I put the lady in the hole and I covered them up. I remember stabbing a different knife I had in the ground where they were. I was crying right then."

Afterwards, Cobb returned to the Owings' house and completed his theft of the stereo, VCR, videotapes, and the bottle of tequila. Cobb stated that he had been drinking beer and tequila and smoking marijuana that day and "had a pretty good buzz."

Cobb confessed just after 5 a.m. on the morning of November 12, 1995. He said that he thought he still had the murder weapon and consented to a search of his home in Odessa, accompanying Sikes and Thomas there around 6 a.m. Cobb was unable to find the knife, but he did retrieve a gold ring that he gave to the officers, saying, "This is the wedding band that I took off Margaret Owings when I killed her."

Around 9 a.m., Cobb was arraigned on capital murder charges in Odessa. Cobb was then flown, with Thomas and Sikes, to Walker County, where they were met by Walker County investigators and a justice of the peace. Cobb was arraigned again at the airport and then taken to the Owings' residence. He then led the police from the house to the wooded area where he had buried Maggie and Kori Rae. As crime technicians began to secure the grave, Cobb was taken to jail and booked. Not once, from the time Cobb was arrested through the time he showed police the burial site, did Cobb ever indicate that he wanted to speak to an attorney or that he was represented by an attorney on the burglary charge.

That evening, just near dark, the crime technicians found at the grave site clothing and bone fragments later determined to belong to Maggie Owings. They found Kori Rae's clothing, but no sign of her body. Later that evening, Walker Court District Attorney ***6** Weeks telephoned Hal Ridley, Cobb's attorney on the burglary charge, and told him what had transpired.

Ridley met with Cobb in jail the next day, November 13, 1995, While there, Ridley talked with the Walker County investigators; regarding that conversation, Ridley testified:
"In fact [Walker County detective] Judy [James] asked me if I was going to be representing him. I told her I didn't know. I was his lawyer for the burglary case; that, you know, that decision hadn't been made to my knowledge yet, but we talked a little bit." App., at B-10.

Either that evening or the following evening, investigators contacted Ridley and asked permission to bring Cobb back to the grave site. [3] The crime technicians had been unable to find any sign of Kori Rae's body and hoped that Cobb could provide assistance. Ridley agreed to let Cobb help, but Cobb was unable to lead the investigators to the child's remains. [4]

On the evening of the 14th, Ridley was summoned to jail to help Cobb cope with "emotional problems"-Cobb was apparently distressed because his son had been born that day. Ridley helped arrange a telephone call to Cobb's girlfriend, Kandy. App., at B-11. ***7** Shortly after that, Ridley was appointed to represent Cobb on the murder charges:
"A: ... And ultimately, I was appointed to represent him, and after that I pretty much-well, after that I pretty much cut off the (sic) any more contact that he had with law enforcement.

Q: To the best of your knowledge he has not had any further contact?

A: Shouldn't have had after the 14th. If he did, it was without my permission." App., at B-11.

Before Cobb's capital murder trial began, the defense moved to suppress Cobb's confession as having been obtained in violation of, *inter alia*, the Sixth Amendment. After a hearing, the trial court denied the motion to suppress. *See* App. D. The jury found Cobb guilty of capital murder and Cobb was assessed the death penalty. *See* App., at E-12; App. F.

In a 6-3 decision, the Texas Court of Criminal Appeals reversed Cobb's conviction and remanded for a new trial. *See Cobb v. State*, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15,2000) (en banc) (App. A). The court found that Cobb's Sixth Amendment right to counsel, which had attached when Cobb was indicted for burglary, also attached to the murder investigation, because the two offenses were "factually interwoven." App., at A-7. The court also determined that Cobb had "asserted" his Sixth Amendment right to counsel "by accepting Ridley's appointment as his counsel." *Id.* These facts, the court reasoned, implicated the prophylactic rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), and rendered presumptively involuntary Cobb's unilateral waiver of his right to counsel during the November 12, 1995 interrogation. A vigorous dissent from Judges McCormick, Keller, and Keasler would have found that: (1) *Michigan v. Jackson* did not apply to these facts and that Cobb had validly waived his Sixth Amendment right to counsel ***8** under *Brewer v. Williams*, 430 U.S. 387 (1977), and made a voluntary confession, and (2) in any event, under *McNeil v. Wisconsin*, 501 U.S. 171 (1991), Cobb's Sixth Amendment right to counsel had not attached with regard to the capital murder offense at the time he confessed. App., at A-25 & n.20.

SUMMARY OF ARGUMENT

In suppressing Cobb's confession to the murders, the Court of Criminal Appeals committed two errors, each implicating an important and unsettled question of Sixth Amendment law on which numerous state and federal courts disagree. First, the court misconstrued this Court's decisions in *Michigan v. Jackson, supra*, and *Patterson v. Illinois*, 487 U.S. 285 (1988), by ruling that Cobb's mere acceptance of appointed counsel qualified as an "assertion" of his right to counsel. Second, by ruling that Cobb's right to counsel had attached to the as-yet-uncharged murder offenses, the court both violated this Court's offense specific rule in *McNeil v. Wisconsin, supra*, and also misapplied the "inextricably intertwined" exception to that rule that has developed in the state and federal courts, but has never been adopted by the Court.

The court's erroneous decision in *Cobb* implicates two aspects of this Court's certiorari jurisdiction. The decision conflicts with decisions of other state courts of last resort and one United States court of appeals; it also decides an important question of federal constitutional law that has not been, but should be, settled by this Court. *See* SUP. CT. R. 10(b), (c).

***9** ARGUMENT

I. THE COURT OF CRIMINAL APPEALS'S DECISION IMPLICATES AN IMPORTANT AND UNSETTLED QUESTION REGARDING THE APPLICATION OF *MICHIGAN V. JACKSON* AND *PATTERSON V. ILLINOIS*.

The Court of Criminal Appeals reversed Cobb's conviction because it erroneously believed that his mere acceptance of appointed counsel in the burglary case barred Cobb's waiver of his right to counsel prior to his murder confession. In so holding, the court reiterated its expansive view of *Jackson* and placed itself irreconcilably in conflict with the majority of courts to decide the issue, which require some affirmative assertion of the right to counsel to invoke *Jackson*'s prophylactic rule. *Compare Raymond Levi Cobb v. State*, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000), *Bradford v. State*, 927 S.W.2d 329, 333-34 (Ark. 1996), *Dew v. United States*, 558 A.2d 1112, 1116 (D.C. 1989), *and Hollaway v. State*, 780 S.W.2d 787, 795-96 (Tex. Crim. App. 1989), *with Montoya v. Collins*, 955 F.2d 279, 283 (CA5 1992), *Skaggs v. Parker*, 27 F.Supp.2d 952, 977 (W.D. Ky. 1998), *Genry v. State*, 735 So.2d 186, 195-96 (Miss. 1999), *Smith v. State*, 699 So.2d 629, 638-39 (Fla. 1997), *State v. Carter*, 664 So.2d 367, 370 (La. 1995), *and People v. Anderson*, 521 N.W.2d 538, 543-44 (Mich. 1994). The conflict is best understood in light of *Jackson* and the Court's subsequent Sixth Amendment jurisprudence.

A. *Jackson* and Its Progeny Do Not Support the Court of Criminal Appeals's Decision in this Case.

In *Michigan v. Jackson*, the Court held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 474 U.S. 625, 636 (1986). The Court in *Jackson* imported into Sixth Amendment jurisprudence the "prophylactic" ***10** rule of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1984), which provides, in the Fifth Amendment context, that once an accused in custody expresses his desire to deal with police only through counsel, the accused is no longer subject to further police-initiated interrogation until he is provided with counsel. *See Jackson*, 474 U.S., at 626. In *Jackson*, two defendants had requested appointed counsel at arraignment, but before they consulted with counsel, the police initiated questioning, secured written waivers of their right to counsel, and obtained their confessions. *Id.*, at 627-28. Applying *Edwards*, the Court held that the written waivers were presumptively ineffective to waive the defendants' previously invoked Sixth Amendment right to counsel. *Id.*, at 635.

Long before *Jackson*, the Court delineated the pretrial contours of an accused's Sixth Amendment right to counsel. In *Kirby v. Illinois*, the Court held that the right attaches upon the "initiation of judicial criminal proceedings." 406 U.S. 682, 689 (1972). The right, however, only protects defendants at post-attachment proceedings deemed "critical stages." *See, e.g., United States v. Wade*, 388 U.S. 218, 224 (1967). Pretrial proceedings are critical when "the results might well settle the accused's fate and reduce the trial to a mere formality." *Id.; see also United States v. Gouveia*, 467 U.S. 180, 189 (1984). The Court has often recognized that police interrogation, occurring after attachment of the Sixth Amendment right to counsel, is a critical stage at which an accused is entitled to the assistance of counsel. *See, e.g., Jackson*, 475 U.S., at 629-30; *Brewer v. Williams*, 430 U.S. 387, 400-01 (1977); *Massiah v. United States*, 377 U.S. 201, 206 (1964).

Equally clear from the Court's Sixth Amendment cases is the general proposition that an accused may waive the benefits of his right to counsel, if he does so knowingly, intelligently, and voluntarily. In *Brewer v. Williams*, for example, the police elicited statements from a previously arraigned defendant during a long automobile trip; the defendant had already consulted with two ***11** lawyers, and the police, knowing this, had agreed not to question him during the trip. 430 U.S., at 391-93. The Court concluded that the defendant had been denied the assistance of counsel during this post-attachment interrogation and that his mere responses to the officers' subtle questioning did not establish an "intentional relinquishment or abandonment" of his right to counsel. *Id.*, at 404-05 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Although the Court did not find a waiver in *Brewer*, its opinion was founded on the bedrock proposition that a post-attachment waiver of the Sixth Amendment right to counsel is possible. *See, e.g., Brewer*, 430 U.S., at 403-04 (agreeing with lower courts about "the proper standard to be applied in determining the question of waiver"). The Court took pains to clarify the scope of its holding:

"The Court of Appeals did not hold, nor do we, that under the circumstances Williams could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not" *Id.*, at 405-06 (footnote omitted).

This real possibility of post-attachment waiver has been consistently reaffirmed by the Court. [5]

***12** Having developed the concepts of "attachment" and "waiver" in the Sixth Amendment context, the Court in *Jackson* introduced an additional strand-the effect of an accused's "assertion" of his right to counsel. As discussed above, *Jackson* grafted the *Edwards* prophylactic rule onto the Sixth Amendment, rendering presumptively invalid an accused's unilateral waiver of the right to counsel if the accused has already invoked that right. *Jackson*, 475 U.S., at 636. The unmistakable premise of *Jackson* is that mere attachment of the Sixth Amendment is not enough to trigger the *Edwards* rule; rather, the accused must make some positive "assertion" or "invocation" to enjoy the prophylactic benefits of *Edwards*. *See Jackson*, 475 U.S., at 626 (framing question as whether *Edwards* applies to a formally charged defendant "who has requested appointment of counsel at his arraignment"); *id.*, at 636 (holding unilateral waiver invalid "after a defendant's assertion, at an arraignment or similar proceeding, of [defendant's] right to counsel"); *id.*, at 635 (observing that written waivers cannot justify police-initiated interrogations "after the request for counsel in a Sixth Amendment analysis"); *id.*, at 631 (discussing "reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer").

Although disagreeing with applying *Edwards* in the Sixth Amendment context, the dissenting Justices in *Jackson* carefully noted the limits of the majority's holding:
"[T]he Court most assuredly does not hold that the *Edwards* per se rule prohibiting all police-initiated interrogations applies from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant. Such a holding would represent, after all, a shockingly dramatic restructuring of the balance this Court has traditionally struck between the rights of the defendant and those of the larger society. Applying the *Edwards* rule to situations in which a defendant has not ***13** made an explicit request for counsel would also render completely nugatory the extensive discussion of "waiver" in such prior Sixth Amendment cases as *Brewer v. Williams*, 430 U.S. 387, 401-406, 97 S.Ct. 1232, 1241-1243, 51 L.Ed.2d 424 (1977)." *Jackson*, 475 U.S., at 640 (Rehnquist, J., dissenting, joined by Powell & O'Connor, JJ.).

The Court's subsequent Sixth Amendment cases have demonstrated that *Jackson* was not, as Justice Rehnquist admonished, the "shockingly dramatic restructuring" of the Court's prior waiver jurisprudence. In *Patterson v. Illinois*, for example, the Court held that *Jackson* did not apply to an accused's postindictment interviews with police, because the accused "at no time sought to exercise his right to have counsel present." 487 U.S. 285, 290 (1988). The Court observed that its holding in *Jackson* "turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with police," and that the accused in *Patterson* could have put an end to questioning by "indicat[ing] that he wanted the assistance of counsel." *Id.*, at 291 (quoting *Jackson*, 475 U.S., at 631). Language in the Court's cases following *Patterson* has confirmed that view of *Jackson*. [6]

The Court's Sixth Amendment jurisprudence in this area is not seamless, however. *Patterson* dealt with a situation in which the right to counsel had attached, but the accused had not requested a lawyer and had not, in fact, consulted with a lawyer. In *Patterson*, the Court appended the following cryptic footnote to its discussion:
***14** "We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney client relationship takes effect. *See Maine v. Moulton*, 474 U.S. 159, 176, 106 S.Ct. 477, 487-88, 88 L.Ed.2d 481 (1985). . . . Indeed, the analysis changes markedly once an accused even requests the assistance of counsel. *See Michigan v. Jackson, supra" Patterson*, 487 U.S., at 290 n.3.

The Court did not make clear what "distinct set of constitutional safeguards" it was referring to. *Id.* The portion of *Moulton* the Court cited stands for the unremarkable proposition that the state violates the Sixth Amendment by

obtaining incriminating statements from an accused through surreptitious, post-indictment interrogation by a police informant. *See Moulton*, 474 U.S., at 176. *Patterson*'s footnote three is particularly confusing in light of the Court's unequivocal statement two years later in *Michigan v. Harvey*, that "nothing in the Sixth Amendment prevents a suspect charged with a crime *and represented by counsel* from voluntarily choosing, on his own, to speak with police in the absence of an attorney." 494 U.S. 344, 352 (1990) (emphasis added).

B. The Lower Courts Are Split on the Proper Interpretation of *Jackson*.

That footnote three evidences an ambiguity in the Court's Sixth Amendment jurisprudence is clear from the widespread disagreement among state and federal courts about the proper application of *Jackson* and *Patterson*. Specifically, the courts disagree about whether an accused may unilaterally waive his Sixth Amendment right to counsel when he has been appointed counsel, and may in fact have consulted with counsel, but when he has made no "assertion" within the meaning of *Jackson* of his desire to deal ***15** with the police only through counsel. There is a widespread and irreconcilable conflict in state and federal courts about this question of federal constitutional law, and the Court should grant this petition to resolve this important constitutional issue.

The leading cases holding that a represented defendant cannot unilaterally waive his right to counsel, even when he has not previously asserted that right, are *Dew v. United States*, 558 A.2d 1112 (D.C. 1989), and *Holloway v. State*, 780 S.W.2d 787, 795-96 (Tex. Crim. App. 1989). In *Dew*, the accused was indicted for robbery and was appointed counsel; when he failed to appear for arraignment, he was arrested and Mirandized, and he subsequently gave an incriminating statement. 558 A.2d, at 1114. Based on its reading of *Moulton* and footnote three in *Patterson*, the District of Columbia Court of Appeals held that "appointment of counsel" is equivalent to the "request for counsel" necessary to trigger *Jackson. Dew*, 558 A.2d, at 1116. In a footnote, the court observed that "[t]he record is clear that [the accused] did not affirmatively request counsel within the meaning of *Michigan v. Jackson*." *Id.* (citations omitted). *See generally* 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE ("LAFAVE") §6.4(f), at 495 & n.110, 497 & n.123 (2d ed. 1999). [7]

In *Holloway*, the Texas Court of Criminal Appeals reached the same result as *Dew*, albeit through somewhat different reasoning. The defendant in *Holloway* was indicted for capital murder and an attorney was appointed to represent him. 780 S.W.2d, at 788-89. ***16** The attorney first attempted, unsuccessfully, to refuse the appointment, but soon after met with the defendant and advised him not to submit to questioning. *Id.*, at 789. When police later initiated questioning, the defendant waived his right to counsel and gave incriminating statements. *Id.* The Court of Criminal Appeals initially held that police had not violated the defendant's Sixth Amendment right to counsel, [8] but this Court vacated and remanded for consideration in light of *Jackson* and *Moran v. Burbine*, 475 U.S. 412 (1986). *Holloway*, 780 S.W.2d, at 788.

On remand, the Court of Criminal Appeals reversed itself and found that the defendant's Sixth Amendment rights had been violated. *Id.*, at 789. Surprisingly, the first part of the court's analysis concluded that, because the defendant never requested counsel, *Jackson* did not apply. *Id.*, at 789-90 ("*Jackson*'s ban on police-initiated interrogation . . . was based not on the mere existence of the right to counsel but upon the accused's actual invocation of that right."). Nevertheless, the court reasoned in the second part of its analysis that, because the defendant was in fact represented by counsel and had developed a "relationship" with counsel, the defendant could not thereafter unilaterally waive his right to counsel. *Id.*, at 795. The court relied heavily on *Patterson*'s footnote three and interpreted *Patterson*'s "distinct set of constitutional safeguards" as prohibiting unilateral waiver when an accused has consulted with an attorney, despite the fact that the defendant had never "asserted" his right to counsel under *Jackson*. *See id.*, at 791, 794. Functionally, then, *Holloway* mirrors the conclusion of the *Dew* court that appointment of counsel equals a "request for counsel" under *Jackson, see Dew*, 558 A.2d, at 1116, as the Court of Criminal Appeals made clear in this case.

***17** The leading cases in conflict with *Dew* and *Holloway* are *Montoya v. Collins*, 955 F.2d 279 (CAS 1992), and *State v. Carter*, 664 So.2d 367 (La. 1995). These cases, and those that follow them, stand for the proposition that an accused whose Sixth Amendment rights have attached and who has been appointed counsel must nevertheless make "an actual, positive statement or affirmation of the right to counsel" in order to enjoy the prophylactic benefits of *Jackson* and its progeny. *Montoya*, 955 F.2d, at 282. *Montoya* and *Carter* stand in direct, irreconcilable conflict with the rule set forth in *Dew* and *Holloway* that an accused who has been appointed counsel cannot unilaterally waive his right to counsel, regardless of whether he has expressly invoked the right.

In *Montoya*, the defendant did not request appointed counsel when arraigned on capital murder charges. 955 F.2d, at 282. Because of the nature of the charges, however, the magistrate appointed counsel to represent the defendant. *Id.*, at 282-83. When the police subsequently initiated questioning, the defendant waived his rights and confessed. *Id.*, at 282. The Fifth Circuit held that defendant's waiver was not presumptively invalid, because he had not effectively asserted his right to counsel under *Jackson*:
"For purposes of *Jackson*, an 'assertion' means some kind of positive statement or other action that informs a reasonable person of the defendant's 'desire to deal with the police only through counsel.'" *Id.*, at 283 (quoting *Jackson*, 475 U.S., at 626).

Significantly, the court explained that the oft-cited language in footnote three of *Patterson* refers only to the attachment of the substantive Sixth Amendment safeguards surrounding the attorney-client relationship, and *not* to the question of what constitutes an acceptance or invocation of the right to counsel. *Montoya*, 955 F.2d, at 283 (construing *Patterson*, 487 U.S., at 290 n.3). *Patterson*, explained the court, reaffirmed that "*Jackson* applies when a defendant has indicated he wanted the assistance of ***18** counsel." *Montoya*, 955 F.2d, at 283 (quotations omitted). *See generally* LAFAVE, §6.4(f), at 497 & n.123. [9]

In *State v. Carter*, the Louisiana Supreme Court followed *Montoya* and held that a defendant who had not asserted or invoked his right to counsel could validly waive that right, even though he had already been appointed counsel at his initial appearance. 664 So.2d, at 370. After an exhaustive survey of this Court's Sixth Amendment cases, *Carter* concluded that "the Supreme Court has not erected a per se barrier against the validity of waivers made in response to interrogation, *even where a defendant is represented by counsel*." *Id.*, at 377 (emphasis added) (citing *Harvey*, 494 U.S., at 352-53). Examining *Jackson* and *Patterson* in light of *Brewer*, the court also found that "the mere fact of appointment of counsel" does not alone preclude subsequent interrogation. *Carter*, 664 So.2d, at 380. [0] The court explicitly disagreed with the decisions in *Dew* and *Holloway*. *Id.*, at 380 n.12.

***19** This Court has observed that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991). But the disagreement among state and federal courts regarding the application of this Court's Sixth Amendment jurisprudence weakens the likelihood of law enforcement realizing this "unmitigated good." As exemplified by *Dew* and *Holloway* on one side, and *Montoya* and *Carter* on the other, courts fundamentally disagree about the scope of the *Jackson* prophylactic rule. The consequences of this disagreement are critical: an overly expansive application of *Jackson* will result in the unwarranted suppression of voluntary confessions that are perfectly valid under *Brewer*. This Court has established that *Jackson* applies only when an accused has affirmatively demonstrated that he desires the buffer of counsel between himself and the criminal judicial mechanism of the state. Applying *Jackson* outside that context-when its protections are not actively sought-will contribute nothing towards "[p]reserving the integrity of an accused's choice to communicate with police only through counsel." *Patterson*, 487 U.S., at 291.

The Texas Court of Criminal Appeals's erroneous decision to suppress Cobb's uncoerced confession in the case at bar conflicts with *Jackson, Patterson, Montoya*, and *Carter*, and perfectly demonstrates the unjustified costs of misapplying

Jackson. With no citation to authority, the court simply ruled that "once [Cobb's] right to counsel attached, he asserted it by accepting Ridley's appointment as his counsel." App., at A-7. By echoing the language in *Patterson*'s footnote three ("... petitioner had not retained, or *accepted by appointment*, a lawyer . . ."), *Cobb* perpetuated the error condemned by *Montoya* and *Carter*: mere acceptance of appointed counsel does not suffice to trigger *Jackson*, because such conduct by the accused does not affirmatively demonstrate a desire to deal with the police only through counsel. ***20** The court's own prior decision in *Holloway*, as well as the parallel reasoning in *Dew*, dictated *Cobb*'s erroneous result. [2]

The court did not and could not point to a single instance in the record where Cobb affirmatively expressed a desire to interpose an attorney between himself and the state judicial process. The court emphasized that the police twice asked Ridley's "permission" to talk to Cobb. App., at A-7. Yet the court cited no authority (because there is none) for the proposition that Ridley could assert his client's Sixth Amendment rights on his behalf. Furthermore, Ridley's undisputed testimony at the suppression hearing indicates that at no time did he ever object to the police questioning Cobb-indeed, Ridley's consistent position was to leave any objections to questioning about the disappearances up to *his client*. App., at B-6. There is no evidence that his client ever objected to the questioning or asserted his right to deal with the police only through counsel. All the evidence is, in fact, to the contrary: wracked with remorse for what he had done, Cobb voluntarily detailed his gruesome acts and voluntarily led the police to Maggie and Kori Rae's grave.

***21 C. *Dickerson* May Provide an Additional Reason to Grant the Petition.**

As Judge McCormick observed in his *Cobb* dissent, the Court has granted a writ of certiorari and heard argument in *United States v. Dickerson* to decide whether Congress validly modifies the Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). App., at A-20 n.9; *United States v. Dickerson*, 166 F.3d 667, 672 (CA 4), *cert, granted*, 120 S.Ct. 578 (1999). A decision by the Court that *Miranda* did not embody a requirement of constitutional law-and was therefore effectively modified by 18 U.S.C. §3501-would draw both *Edwards* and *Jackson* into serious question: *Edwards* applies a prophylactic rule designed to safeguard the protections of *Miranda* in the Fifth Amendment context, and *Jackson* applies *Edwards* in the Sixth Amendment context. *See Edwards*, 451 U.S., at 481-85; *Jackson*, 475 U.S., at 626. Should the Court in *Dickerson* find that *Miranda* is not a constitutionally mandated rule, the Court should grant this petition to decide whether *Edwards* and *Jackson* have continuing validity and whether, in light of *Dickerson, Jackson* dictated the Court of Criminal Appeals's decision in *Cobb*.

II. THE COURT OF CRIMINAL APPEALS'S DECISION IMPLICATES AN IMPORTANT AND UNSETTLED QUESTION REGARDING THE ATTACHMENT OF THE SIXTH AMENDMENT RIGHT TO COUNSEL TO FACTUALLY RELATED OFFENSES.

Cobb implicates an additional, independent issue of federal constitutional law that invites this Court's attention. Relying on its own decisions in *State v. Frye*, 897 S.W.2d 324, 328-29 (Tex. Crim. App. 1995), and *Upton v. State*, 853 S.W.2d 548, 555-56 (Tex. Crim. App. 1993), as well as on the decision of the Third Circuit in *United States v. Arnold*, 106 F.3d 37, 41 (CA3 1997), the court held that Cobb's Sixth Amendment right to counsel attached to the as-yet-uncharged capital murder offense, because it was "Very closely related factually" to the previously charged burglary ***22** offense. App., at A-6. This decision implicates the "inextricably intertwined" test that state and federal courts have developed as an exception to the "offense specific" nature of the Sixth Amendment right to counsel. *See McNeil*, 501 U.S., at 175-76. The Court, not having addressed the "inextricably intertwined" test, should take this opportunity to clarify its parameters. *Cobb* presents the right opportunity because the Court of Criminal Appeals has applied the test in such a way that frustrates the ability of law enforcement to investigate related but uncharged crimes, while in no way furthering an accused's Sixth Amendment protections.

Relying on *Moulton*, the Court in *McNeil* held that the Sixth Amendment right to counsel, in contrast to its Fifth Amendment counterpart, is "offense specific." *McNeil*, 501 U.S., at 175. Consequently, once the right has been invoked,

the police are prohibited from initiating interrogation outside the presence of counsel "regarding the charge at issue." *Id.*, at 179 (citing *Jackson*, 475 U.S., at 632-33). Questioning about uncharged offenses, "to which the Sixth Amendment right has not attached," does not fall within this prohibition. *Id.*, at 176 (quoting *Moulton*, 474 U.S., at 179-80).

Moulton does, however, suggest that the Sixth Amendment may attach to certain offenses that are uncharged but factually related to the charged offense. In that case, the defendant had been indicted for theft by receiving, arising from his possession of a variety of automobiles and automobile parts. *Moulton*, 474 U.S., at 162. Wishing to investigate the defendant's apparent plan to murder a witness in that case, the police used an informant to surreptitiously record the defendant's conversations. *Id.*, at 164-66. In that process, however, the police obtained more detailed incriminating information regarding the pending theft charges, leading them to reindict the defendant. *Id.*, at 167. The new indictments realleged the pending charges, but added a burglary charge; the defendant was convicted of both theft and burglary. *Id.*

***23** *Moulton* held that the police had violated the defendant's Sixth Amendment right to counsel by surreptitiously eliciting incriminating statements pertaining to the pending theft charges, *Id.*, at 179-80. The Court therefore ruled his statements inadmissible at the trial of the burglary and theft charges and vacated the defendant's convictions on those charges. *Id.* The Court recognized, however, that the police "have an interest in investigating new or additional crimes"; therefore, "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Id.*, at 489 & n.16.

Relying primarily on *Moulton*, [3] state and federal courts have developed two related exceptions to the *McNeil* rule of "offense specific" Sixth Amendment attachment. The first exists when the uncharged offense is "inextricably intertwined" with the charged offense such that they "arose from the same predicate facts, conduct, intent and circumstances." *United States v. Arnold*, 106 F.3d 37, 41 (CA3 1997); *see United States v. Covarrubias*, 179 F.3d 1219, 1223-24 (CA9 1999); *United States v. Melgar*, 139 F.3d 1005, 1013 (CA4 1998); *United States v. Doherty*, 126 F.3d 769, 776 (CA6 1997); *United States v. Williams*, 993 F.2d 451, 457 (CA5 1993); *In re Pack*, 420 Pa. Super. 347, 356-57, 616 A.2d 1006, 1010-11 (1992); *United States v. Cooper*, 949 F.2d 737, 743-44 (CAS 1991); *People v. Clankie*, 530 N.E.2d 448, 451-52 (Ill. 1988). *See generally* ***24** *Commonwealth v. Rainwater*, 425 Mass. 540, 681 N.E.2d 1218 (1997) (collecting state and federal cases); *Whittlesey v. State*, 665 A.2d 223, 233-36 (Md. 1995) (same); LAFAVE, §6.4(e), at 490-92 & n.92, 498 & n.127.

The second exception applies when there is evidence that the police have deliberately sought to circumvent an accused's Sixth Amendment right to counsel. *See Covarrubias*, 179 F.3d at 1223 & n.6; *United States v. Martinez*, 972 F.2d 1100, 1105 (CA9 1992); *United States v. Hines*, 963 F.2d 255, 258 (CA9 1992); *United States v. Mitcheltree*, 940 F.2d 1329, 1339, 1342-43 (CA10 1991). *See generally Whittlesey*, 665 A.2d at 234-35 (collecting cases). Such governmental conduct has been seen to violate the government's "affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Hines*, 963 F.2d at 258 (quoting *Moulton*, 474 U.S., at 171).

An unsettled question regarding these exceptions to *McNeil* is the nature and degree of relatedness required between two offenses-one charged, the other uncharged-before the Sixth Amendment will attach to both. As the Sixth Circuit observed in *Doherty*:
"The question of how 'inextricably intertwined' two offenses must be so that the Sixth Amendment right to counsel attaches simultaneously with respect to both offenses is open to some doubt, and we leave consideration of that question to another day." 126 F.3d, at 776.

The Court of Appeals of Maryland has observed that courts appear to interpret the "inextricably intertwined" or "closely related" exception more broadly when there is evidence of deliberate police misconduct, suggesting an analytical relationship between the two exceptions. *See Whittlesey*, 665 A.2d, at 234-35. Indeed, the Maryland court questioned whether the "inextricably intertwined" doctrine "is in fact compelled by Supreme Court precedent," but ***25** declined to

resolve the question. *Id.*, at 233-34 & n.8. *But see Melgar*, 139 F.3d, at 1013 & n.1 (identifying implicit "closely related" rule in *Moulton*).

A brief summary of some of the exemplary cases will illustrate the evolving nature of the "inextricably intertwined" exception. The seminal case is *People v. Clankie*, 530 N.E.2d 448 (Ill. 1988), in which the Supreme Court of Illinois interpreted *Brewer* and *Moulton* as standing for the proposition that the "[S]ixth [A]mendment rights of one formally charged with an offense extend to offenses closely related to that offense and for which a defendant is subsequently formally accused." *Clankie*, 530 N.E.2d, at 452. The court noted that this Court "has not yet explained just how closely related the two offenses ... must be for the rule to apply." *Id.* The *Clankie* court, however, explicitly declined to delineate those parameters. *Id.* This was not necessary, the court observed, because in *Clankie* the subsequently charged offense involved precisely the same criminal conduct as the previously charged offense. *Id.*

Two more recent circuit cases, in an attempt to synthesize earlier case law, have developed complex, multi-factor versions of the "inextricably intertwined" exception. In *Melgar*, the Fourth Circuit stated that, to fall within the exception, "the offense being investigated must derive from the same factual predicate as the charged offense." 139 F.3d 1005, 1014 (CA4 1998) (quoting *United States v. Kidd*, 12 F.3d 30, 32 (CA4 1993)). Application of this test involves a consideration of whether the old and new charges "involve the same time, place and conduct." *Melgar*, 139 F.3d, at 1014-15. The court carefully noted, however, that a coincidence of "time, place and conduct" is not alone sufficient to invoke the exception: a defendant "must also demonstrate that the interrogation on the new offenses produced incriminating evidence as to the previously charged offenses." *Id.*, at 1015. In this context, ***26** the court construed "incriminating" evidence to include "any evidence damaging to the defendant's case." *Id.* [4]

In *Covarrubias*, the Ninth Circuit further elaborated upon the exception. 179 F.3d 1219 (CA9 1999). From *Brewer* and *Moulton*, the court gleaned the "indisputable implication" that "the right to counsel may attach to other offenses as long as there is a close enough relationship to the conduct that formed the basis for the initially charged crime." *Id.*, at 1224. Generally, the court advocated "an examination and comparison of all of the facts and circumstances relating to the conduct involved," considering in particular (1) the identity of the persons involved (including the victim, if any), and (2) the timing, motive, and location of the crimes. *Id.*, at 1225. In *Covarrubias*, the initially charged offense was a state kidnapping charge; the subsequently charged offense was the federal crime of transporting illegal immigrants. *Id.*, at 1221-22. In applying its test to the two offenses (and finding them "closely related" for Sixth Amendment attachment purposes), the court stressed that they "involved a continuous course of conduct" and that the federal charge was a "continuing offense." *Id.*, at 1225-26. [5]

***27** This Court should clarify the parameters of the "inextricably intertwined" exception to *McNeil*. The Court's decisions in *Brewer, Moulton*, and *McNeil* leave open the question of what relationship must exist between charged and uncharged offenses before the panoply of Sixth Amendment protections will attach to both. Clarity in this area is essential because, as the Court observed in *Moulton*,

"to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached, simply because other charges were pending at the time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." 474 U.S., at 180.

Nowhere is that concern more apparent than in a case like *Cobb*, where the majority's inappropriate application of the "inextricably intertwined" test resulted in the suppression of an otherwise valid confession without furthering any Sixth Amendment interest. Any extension of the Sixth Amendment beyond the charged offense is intended to protect the defendant's invoked right to counsel as to the charged offense. But it cannot be disputed that the police in this case were not attempting to gather additional evidence relating to the burglary charge, to which Cobb had already confessed.

The facts of *Cobb* do not implicate the "inextricably intertwined" exception as developed in the lower courts. Specifically, while there was a similarity of "time" and "place" in Cobb's conduct that resulted in both burglary and murder, the murder charge, as prosecuted, was based on criminal acts distinct from the burglary. *See, e.g., Cooper*, 949 F.2d, at 744 (declining to ***28** apply exception to two offenses involving "different conduct"). Additionally, the interrogation of Cobb that resulted in his confession to the murders could not possibly have produced evidence incriminating him on the burglary charge-Cobb, after all, had already confessed to the burglary. *See, e.g., Melgar*, 139 F.3d, at 1015 (applying "incriminating evidence" prong of exception); *Pack*, 420 Pa. Super., at 356, 616 A.2d, at 1011 (applying "evidence of both offenses" test). Furthermore, the two offenses did not share an "identity of persons." *See, e.g., Covarrubias*, 179 F.3d, at 1225 (considering the "identity of the persons involved"). The focus of Cobb's burglary was the Owings' property, while the focus of his murders was the Owings themselves. Moreover, by its very nature burglary is not a "continuing offense." *See id.*, at 1225-26 (considering the "continuing nature" of the offense). The offense was completed the moment Cobb entered the Owings home with the intent to commit a theft. TEX. PENAL CODE §30.02(a)(1); *see Garcia v. State*, 571 S.W.2d 896, 899 (Tex. Crim. App.1978) (offense of burglary complete upon entering habitation with intent to commit felony or theft).

Most fundamentally, however, Cobb was convicted of capital murder based-*not* on burglary as a predicate felony-but rather on multiple murders committed in the same transaction. *See* App., at C-1, D-4 ¶13, E-4. Thus, even if Cobb had previously "asserted" his right to counsel in response to the burglary charge, [6] no statements thereafter made by Cobb were ever used against him *with respect to burglary*, but only with respect to murder. Because of the legal basis for Cobb's capital murder conviction, the burglary and the murders were legally and factually distinct. *Cf. Moulton*, 474 U.S., at 167 (improperly elicited statements used to convict defendant on *both* the subsequently charged burglary *and* the previously charged theft). The lower courts do not appear to have ***29** developed this aspect of the "inextricably intertwined" exception. [7] This Court should address it in this case.

Finally, the policy justification behind the "inextricably intertwined" exception cannot support the result in *Cobb*. Courts have applied the exception for one overriding purpose: to prevent the government from "circumvent[ing] the Sixth Amendment right to counsel merely by charging a defendant with additional related crimes." *See Arnold*, 106 F.3d, at 41 (quoting *In re Pack*, 420 Pa. Super., at 356, 616 A.2d, at 1011). There is no suggestion here that the police plotted to circumvent Cobb's right to counsel by charging him with "additional related crimes." Undisputedly, Cobb had already confessed to the burglary when new evidence-his father's testimony-came to light. It was this new evidence, and not some malevolent design of the police to deny Cobb his right to counsel, that led to his arrest for the murders. What makes this even plainer is that the murders and the burglary, while fortuitously linked by time and place, were legally distinct: burglary was not ***30** the predicate felony for Cobb's capital murder conviction and the elements of the two crimes did not overlap.

Cobb committed burglary by entering the Owings' home with the intent to steal their property. Soon after that, Cobb cruelly and brutally murdered Maggie and Kori Rae Owings. Under the Court of Criminal Appeals's application of the "inextricably intertwined" test, Cobb had the good fortune to commit his murders close on the heels of his burglary. The Court should grant the State's petition both to correct that unjustifiable result, and also to clarify the appropriate test for attachment of the Sixth Amendment right to counsel to factually related offenses.

CONCLUSION

The Court of Criminal Appeals's decision in this case implicates two important and unsettled areas of Sixth Amendment law. This Court should grant the State's petition to resolve these critical aspects of federal constitutional jurisprudence.

Respectfully submitted,

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Appendix not available.

Footnotes

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1 A transcript of Ridley's suppression hearing testimony appears in the Appendix to this petition (App. B).

2 In fact, on this occasion, Cobb led investigators through a wooded area near the Owings' residence, retracing his steps during the burglary. A subsequent search of the area with cadaver dogs uncovered no evidence, however.

3 The suppression hearing testimony of Ridley and James seems inconsistent regarding the date that Cobb was brought back to the grave site after being booked. James testified that this occurred on the evening of November 13, but Ridley seemed to testify that it occurred on the evening of November 14 (App., at B 10). The inconsistency appears entirely inadvertent and, in any event, the date is irrelevant since it is undisputed that Ridley consented to the officers' request to bring Cobb back out to the grave.

4 Expert testimony during trial established the likelihood that Kori Rae's body was either entirely consumed by scavengers or that her immature bones simply disintegrated in the decomposition process.

5 *See. e.g., Moran v. Burbine*, 475 U.S. 412, 428 (1986) ("It is clear that, absent a valid waiver, the defendant has the right to the presence of an attorney during post attachment interrogation].); *Jackson*, 475 U.S., at 630 (posing question as "whether respondents validly waived their right to counsel at the postarraignment custodial interrogations); *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (addressing whether unrepresented defendant made a "'knowing and intelligent waiver of his Sixth Amendment right (citing *Brewer*, 430 U.S., at 401, 404)); *Michigan v. Harvey*, 494 U.S. 344, 352 (1990) (" N]othing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney.).

6 *See, e.g., Harvey*, 494 U.S., at 352 (observing that *Jackson* changes the waiver analysis "once a defendant obtains, or even requests counsel); *McNeil v. Wisconsin*, 501 U.S. 171, 179 (1991)(stating that *Jackson* applies "after the Sixth Amendment right to counsel attaches and is invoked).

7 The Arkansas Supreme Court followed *Dew*'s reasoning in *Bradford v. State*, 927 S.W.2d 329, 333 34 (Ark. 1996). In *Bradford*, the court held that appointment of counsel was equivalent to a request for counsel under *Jackson*, even though neither the

accused nor the interrogating police were aware of the appointment. *Id.* It is passing strange that a defendant who is unaware that counsel has been appointed can to be said have "invoked his right to counsel under *Jackson*.

8 *See Holloway v. State*, 691 S.W.2d 608, 614 15 (Tex. Crim. App. 1984).

9 The Fifth Circuit has applied *Montoya* to the situation where an indicted defendant waived his right to counsel and made incriminating statements, even though unaware that counsel had been appointed to represent him. *Wilcher v. Hargett*, 978 F.2d 872, 874, 876 (CA5 1992); *see also West v. Johnson*, 92 F.3d 1385, 1403 04 (CAS 1996) (following *Montoya*).

10 Other state supreme courts have followed this reading of *Jackson* and *Patterson. See Genry v. State*, 135 So.2d 186, 195 96 (Miss. 1999); *Smith v. State*, 699 So.2d 629, 638 39 (Fla. 1997); *People v. Anderson*, 521 N.W.2d 538, 543 44 (Mich. 1994). The District Court for the Western District of Kentucky has adopted *Montoya*'s reasoning. *See Skaggs v. Parker*, 27 F.Supp.2d 952, 977 (W.D. Ky. 1998).

11 *See generally* Meredith B. Halama, *Loss of a Fundamental Right: The Sixth Amendment as a Mere "Prophylactic Rule*, 1998 U. Ill. L. Rev. 1207, 1230 37 (1998) (noting conflict among *Montoya, Carter, Dew*, and *Holloway*).

12 Ironically, the author of *Holloway*, Judge McCormick, disavowed *Holloway* in his dissent in *Cobb*. App., at A 23 to A 25. McCormick criticized his opinion in *Holloway* for failing to address *Brewer* and for relying on footnote three in *Patterson. Id.* Consequently, McCormick would have declined to follow *Holloway* and would have decided that Cobb's confession was voluntary under *Brewer*. App., at A 25. To the extent that *Jackson* dictated a contrary result based on Cobb's "acceptance of appointed counsel, McCormick would have declined to follow *Jackson*, citing *United States v. Dickerson*, 166 F.3d 667, 672 (CA4), *cert. granted*, 120 S.Ct. 578 (Dec. 6, 1999). App., at A 25.

13 Courts have also recognized that this principle in *Moulton* was an implicit part of the Court's decision eight years before in *Brewer. See, e.g.. People v. Clankie*, 530 N.E.2d 448, 451 (Ill. 1988). In *Brewer*, the defendant had been indicted for abduction; the Court held that the police violated his right to counsel by deliberately eliciting incriminating statements pertaining to his murder of the abduction victim. 430 U.S., at 404 05.

14 The "incriminating evidence prong of the *Melgar* test is reminiscent of the test applied in *In re Pack*, in which the Superior Court of Pennsylvania found that the improperly elicited statement "tended to prove both the subsequently charged and the previously charged offenses. *In re Pack*, 420 Pa. Super., at 356, 616 A.2d, at 1011; *see Whittlesey*, 665 A.2d, at 235 (citing *Pack*, and observing that " a]nother test employed by at least one court is whether the statements elicited by the police constituted evidence of both offenses).

15 In *Whittlesey*, the Maryland Court of Appeals surveyed the application by state and federal courts of the "inextricably intertwined exception. *See* 665 A.2d, at 235. The *Whittlesey* court noted the variety of factors applied by the courts, including: (1) whether new charges arise from "the same acts on which the pending] charges were based ; (2) whether there is an "identity of time, place, and conduct ; (3) whether there is an "identity of prosecuting sovereign ; and (4) "whether the statements elicited by the police constitute evidence of both offenses. *Id.* (citations omitted).

16 Part I, *supra*, shows that he did not, however.

17 Indeed, the only decision on this issue appears to be from the Texas Court of Criminal Appeals in *Upton*, a case relied upon by the majority in *Cobb*. App., at A 6. In *Upton*, the defendant had been indicted for theft and burglary; the police then obtained incriminating statements from the defendant about a murder arising from the same factual scenario as the pending charges. 853 S.W.2d, at 554. The prosecution charged the defendant with capital murder, the aggravating element being that he committed the murder in the course of the previously charged robbery. *Id.*, at 555. In ruling that the defendant's right to counsel had been violated, the court reasoned that, when the police questioned the defendant about the murders, they were not investigating "new or additional crimes under *Moulton* because "adversarial proceedings had begun against the defendant] on at least one important element of the offense for which he was later charged. *Id.*, at 555 56.

2000 WL 33979557 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF TEXAS, Petitioner,

v.

Raymond Levi COBB, Respondent.

No. 99-1702.
June 22, 2000.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

Reply to Brief in Opposition

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***1 ARGUMENT**

In his Brief in Opposition, not only has Cobb utterly failed to explain why the Court should not grant certiorari in this case, but he has even underscored why the Court *should* grant certiorari. The State briefly replies to Cobb's arguments as follows.

I. COBB DOES NOT DENY A DEEP SPLIT IN STATE AND FEDERAL COURTS OVER THE APPLICATION OF *MICHIGAN V. JACKSON.*

The first question presented in the State's petition was whether *Michigan v. Jackson*, 475 U.S. 625 (1986), prevents an accused from unilaterally waiving his Sixth Amendment right to counsel when he has made no previous "assertion" of that right beyond accepting appointed counsel. Pet., at i, 9-20. Cobb claims he can ignore this issue, however, because he had a "full-blown" and "ongoing" relationship with his appointed attorney, Hal Ridley, throughout the State's murder investigation. Opp., at 5-7. Cobb has misunderstood the State's petition.

Question one assumes that Cobb had an attorney-client relationship with Ridley, but then asks whether Cobb could have unilaterally waived his right to have counsel present during police interrogation. Pet., at 9-14. The Texas Court of Criminal Appeals held that Cobb's mere "acceptance" of appointed counsel triggered *Jackson* and presumptively barred Cobb's waiver. Pet., at 9. The State contends this was wrong under *Jackson* and its progeny and, moreover, that the court's error implicates a deep split among state and federal courts. *Id.*

***2** Cobb does not dispute the existence of the split. Nor does Cobb claim that the record shows that he *ever* affirmatively invoked his right to counsel. Indeed, the record shows that Cobb voluntarily talked to police on numerous occasions outside the presence of counsel. *See* Pet., at 20. Ignoring these issues, Cobb attempts to take refuge behind his "on-going" relationship with appointed counsel.

But implicit in *Jackson* is the idea that an accused, having established a relationship with his appointed attorney, may nonetheless validly waive his right to have counsel present during an interrogation. *See Jackson*, 475 U.S. at 626 (citing *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Solem v. Stumes*, 465 U.S. 638 (1984)). The Court made this explicit when, following *Jackson*, it stated that "[n]othing in the Sixth Amendment prevents a suspect charged with a crime *and represented by counsel* from voluntarily choosing, on his own, to speak with police in the absence of an attorney." *Michigan v. Harvey*, 494 U.S. 344, 352 (1990) (emphasis added); Pet., at 11 n.5. The issue here, as the Court of Criminal Appeals recognized, [2] is whether *Jackson* restricted the circumstances under which Cobb could validly waive the right to counsel. Pet., at 12-14.

Cobb's underlying position appears to be that his on-going relationship with Ridley was itself an "assertion" of his right to counsel sufficient to trigger *Jackson*. If this is Cobb's argument, he offers no authority for it. Ironically, however, the Ninth Circuit Court of Appeals issued an opinion on May 30, 2000, that superficially supports Cobb's position. *See United States v.* ***3** *Harrison*, No. 99-10496, 2000 WL 684805 (CA9 May 30, 2000). In *Harrison*, the court held that an accused "invokes" his Sixth Amendment right to counsel under *Jackson* when (1) he retains counsel on an on-going basis to assist in a pending criminal investigation, (2) the government knows or should know about the representation, and (3) the government *then* indicts the defendant on "charges precisely anticipated by the scope of the pre-indictment investigation." 2000 WL 684805, at * 8.

Harrison misreads *Jackson* and is wrongly decided, but that is beside the point here. At this stage, the Ninth Circuit's decision is significant because it further deepens the conflict surrounding the interpretation of *Jackson. See* Pet, at 14-19.

Harrison distinguishes the Fifth Circuit's decisions in *Montoya v. Collins*, 955 F.2d 279, 283 (CAS 1992), and *Wilcher v. Hargett*, 978 F.2d 872, 874, 876 (CA5 1992), on the basis that neither case involved an accused's "affirmative act of retaining counsel." *Harrison*, 2000 WL 684805, at * 5; *see* Pet., at 17-18. By drawing this meaningless distinction, the Ninth Circuit has aligned itself with cases from other jurisdictions that wrongfully equate "appointment of counsel" or a "relationship with counsel" with the "assertion" necessary to trigger *Jackson. See Holloway v. State*, 780 S.W.2d 787, 795 (Tex. Crim. App. 1989); *Dew v. United States*, 558 A.2d 1112, 1116 (D.C. 1989); Pet., at 15-16.

Far from explaining why the Court should not grant certiorari in this case, Cobb's argument shows that the conflict surrounding the application of *Jackson* has only deepened since the State filed its petition.

*4 II. THE "CLOSELY RELATED" EXCEPTION TO *MCNEIL V. WISCONSIN* HAS NOT BEEN CONSISTENTLY DEVELOPED BY THE STATES AND THE FEDERAL CIRCUITS.

The Sixth Amendment right to counsel, as well as the *Jackson* fence around it, are "offense specific" and consequently apply only to offenses for which "adversary judicial criminal proceedings"-such as a formal charge or indictment-have been brought. *McNeil v. Wisconsin*, 501 U.S. 171, 175-76 (1991); Pet., at 22. Over the past decade, however, state and federal courts have developed an exception to this rule, under which the Sixth Amendment may attach to an uncharged offense if it is sufficiently "related" to a previously charged offense. *See, e.g., Whittlesey v. State*, 665 A.2d 223, 232-26 (Md. 1995) (collecting cases). During that time, courts have expressed confusion about the degree of "relatedness" required to trigger the exception. *See, e.g., United States v. Doherty*, 126 F.3d 769, 776 (CA6 1997); *People v. Clankie*, 530 N.E.2d 448, 452 (Ill. 1988). This Court has never adopted or rejected the exception, nor has it provided any guidance as to its application.

Question two in the State's petition tests the parameters of this "closely related" exception. Pet., at i. In his opposition, Cobb erroneously claims that this Court's own precedent-particularly *Maine v. Moulton*, 474 U.S. 159 (1985)-disposes of question two. Opp., at 7-11. He also mistakenly argues that lower courts' application of the exception forms a seamless web that does not merit this Court's attention. Opp., at 11-15.

Moulton addressed the government's "knowing exploitation" of the opportunity to surreptitiously interrogate a defendant outside the presence of counsel. 474 U.S., at 176; *see* Pet., at 22-23 (discussing *Moulton*). There, the government wired an informant, deliberately recorded an indicted defendant's incriminating statements, and used them at the defendant's trial on pending theft charges. 474 U.S., at 176-77. The Court held that the state violated the Sixth ***5** Amendment by "knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent" *Id.*, at 176.

Many state and federal courts have gleaned a "closely related" exception from a subsidiary aspect of *Moulton. See, e.g., United States v. Melgar*, 139 F.3d 1005, 1013 (CA4 1998). In *Moulton*, the state used the secret recording not only to bolster the pending theft charges, but also to add a burglary count to the indictment. 474 U.S., at 167. The theft charges concerned receiving stolen automobiles and parts; the added burglary charge concerned precisely the same items. *Id.* The defendant was convicted for both offenses. *Id.*

The Court reversed the convictions. *Id.*, at 180. The Court did not explicitly rule, however, that the defendant's Sixth Amendment right to counsel had attached to *both* the theft and the burglary charges. Instead, the Court simply held that use of the recorded statements to bolster the pending theft charge violated the Sixth Amendment. *Id.*, at 179-80. Significantly, the opinion is completely silent about the "relatedness" of the two charges.

Moulton's reasons for striking down both convictions are unclear. The Court seemed concerned primarily with the state's deliberate, surreptitious recording of an indicted defendant's conversation when it was certain that the defendant would incriminate himself as to the pending theft charge. *Id.*, at 176-77. The Court also may have reasoned that the improperly

obtained statements incriminated the defendant for both theft and burglary. *See id.*, at 165-67. In any event, the Court's opinion contains *no* discussion of the factual or legal "relatedness" of the theft and burglary charges. Indeed, a leading case doubts whether *Moulton* gives rise to the "closely related" exception at all. *See Whittlesey*, 665 A.2d, at 233 & n.8.

***6** *Moulton* does not answer question two in the State's petition. This case contains nothing like the deliberate, surreptitious circumvention of the Sixth Amendment in *Moulton*. Indeed, there is no hint of intentional police misconduct at all, and the Court of Criminal Appeals's opinion did not even address the issue. *See* Pet., at 3-6, 29; Pet, at A-7. Moreover, Cobb's murder confession *could not* have incriminated him on the burglary, because he had already confessed to it. Pet., at 28. Finally, Cobb was convicted of capital murder based on killing two persons in one transaction, and not based on burglary as a predicate felony. Pet., at 28-29. Cobb's statement, therefore, was never used against him with respect to the previously charged burglary, but only with respect to murder. Pet., at 28. In sum, even if *Moulton* contains an implicit "closely related" exception, it does not resolve whether the two charges were sufficiently related to require the conclusion that Cobb's lawyer for the burglary charge was necessarily his lawyer for the murder charge.

Cobb also errs in his reading of the state and federal courts' development of the "closely related" exception. Opp., at 11-13. A decade's worth of opinions has produced a bewildering kaleidoscope of factors that courts may apply to determine whether two offenses are "closely related," "very closely related," "extremely closely related," or "inextricably intertwined." *See Whittlesey*, 665 A.2d, at 234-35 (discussing cases). These are more than mere labels: application to this case shows that these shifting combinations of factors lead to diametrically opposed results depending on the circumstances of a given case.

For example, some courts have narrowly scrutinized the *conduct* underlying two separate charges to determine whether they are "closely related." *See, e.g., United States v. Williams*, 993 F.2d 451, 456 (CA5 1993); *United States v. Cooper*, 949 F.2d 737, 743-44 (CA5 1991); *Clankie*, 530 N.E.2d, at 452. Other courts have required that an allegedly improper interrogation have elicited ***7** *incriminating evidence* as to the previously charged offense, or, relatedly, that the two offenses have *overlapping elements. See. e.g., Melgar*, 139 F.3d, at 1014-15; *Commonwealth v. Rainwater*, 681 N.E.2d 1218, 1224 (Mass. 1997); *In re Pack*, 616 A.2d 1006, 1011 (Pa. Super. 1992).

In stark contrast to these cases, other courts have taken a broader view of the general factual situation giving rise to the two offenses. For example, in *United States v. Covarrubias*, the Ninth Circuit posited an extremely broad test, requiring "an examination and comparison of all of the facts and circumstances relating to the conduct involved." 179 F.3d 1219, 1225 (CA9 1999); *see also United States v. Arnold*, 106 F.3d 37, 41 (CA3 1997) (looking to "similarities of time, place, person, and conduct" to determine "whether the same acts and factual predicates underlie both the pending and the new charges"). A leading case has posited that courts may take a more expansive view of the "closely related" exception where "there is evidence of deliberate police misconduct," *Whittlesey*, 665 A.2d, at 234-35, but the analytical relationship between these factors remains murky. [3]

This cornucopia of factors yields starkly different results when applied to the facts in *Cobb*. If "conduct" is the touchstone, then the burglary and murder charges at issue are clearly unrelated: the ***8** burglary consisted of Cobb's entering the Owings' home with the intent to steal their property, while the murder involved his brutal killing of Maggie and Kori Rae. Pet., at 27-28. The charges are also unrelated if considered from an "evidence" standpoint: the evidence gathered from Cobb's confession to murder was not used, and indeed *could not be used*, to convict Cobb of a burglary he had already admitted to. Pet., at 28. By the same token, burglary was not the predicate felony for Cobb's capital murder conviction. Pet., at D-4, E-2. In a practical sense, then, Cobb's murder confession was never used to "prove" anything about the previously charged burglary.

Application of a broader, "fact-based" test could achieve the opposite result. A court might conclude that, because the burglary and the murder fortuitously occurred during similar times and places, both offenses shared the same "factual

predicate" and were therefore "closely related." Indeed, the Court of Criminal Appeals's analysis in *Cobb* rests on the foundation that "the capital murder offense ... was factually interwoven with the burglary." Pet., at A-7.

Cobb has thus failed to consider the complexity of the "closely related" exception that has propagated in the lower courts over the last fifteen years. Cobb's offenses might be considered "inextricably intertwined" or "separate," depending on jurisdiction and geography. In fact, had Cobb been prosecuted in a Texas *federal* court, the court would have applied the narrow conduct-based test in *Cooper* and concluded that the burglary and the murders were based on wholly separate conduct.

Neither federal constitutional law nor the state's ability to investigate crime can tolerate these fortuitous and irrational differences.

*9 III. THE TEXAS COURT OF CRIMINAL APPEALS'S DECISION DOES NOT REST ON ANY STATE GROUNDS.

Finally, Cobb improperly argues that, because Texas procedural law would permit the offenses of burglary and murder to be joined for trial if part of the same criminal transaction, the Court of Criminal Appeals's decision therefore rests on "adequate state law grounds." Opp., at 18-22. The "independent and adequate state law" doctrine bars the Court's review only when a state court decides a question of federal law but its decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The adequacy and independence of state grounds, moreover, must be "clear from the face of the [state court] opinion." *Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)). In this case, the Court of Criminal Appeals's decision is grounded wholly on the Sixth Amendment and does not even mention state law. *See* Pet., at A-6, A-7. Cobb concedes this, Opp., at 20, and thus his argument must fail.

CONCLUSION

The Court of Criminal Appeals's decision in this case implicates two important and unsettled areas of Sixth Amendment law. This Court should grant the State's petition to resolve these critical aspects of federal constitutional jurisprudence.

***10** Respectfully submitted,

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Footnotes

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1 Question one even assumes that Cobb's Sixth Amendment right to counsel had attached to the as yet uncharged murders. Question two of the petition, however, demonstrates that, when Cobb confessed to the murders, his Sixth Amendment right to counsel had attached only to the burglary offense. Pet, at i, 21 30.

2 Incredibly, Cobb claims that the "decision by the Texas Court of Criminal Appeals has little, if any, application to this question. Opp., at 5. This is a mystifying claim, given that the court's opinion explicitly recognizes *twice* that Cobb's "assertion of his right to counsel under *Jackson* was a pivotal issue. *See* Pet., at A 6, A 7.

3 Cobb waxes on about the "law enforcement misconduct issues in this case. Opp., at 15 18. His discussion, however, merely confirms *Whittlesey*'s observation that courts may consider evidence of deliberate police misconduct when assessing the "relatedness of charged and uncharged offenses. Cobb does not bother to explain why the Court of Criminal Appeals's opinion does not contain a single word about police misconduct. That is so because there was not the slightest hint that the police deliberately attempted to circumvent Cobb's right to consult with counsel. Pet., at 29. Police misconduct is simply not an issue in this case.

2000 WL 1236042 (U.S.) (Appellate Brief)
Supreme Court of the United States.

TEXAS, Petitioner,
v.
Raymond Levi COBB, Respondent.

No. 99-1702.
August 24, 2000.

On Writ Of Certiorari to the Texas Court of Criminal Appeals

PETITIONER'S BRIEF

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***i** QUESTIONS PRESENTED

I.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine v. Moulton,* 474 U.S. 159 (1985), and *McNeil v. Wisconsin,* 501 U.S. 171 (1991), to questioning about a factually related murder when his eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

II.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson,* 475 U.S. 625 (1986), and *Patterson v. Illinois,* 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

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Cases

***1** The fundamental question presented in this case is whether a criminal defendant, who has had unhampered access to counsel at every stage of a prosecution, may nonetheless choose to confess his guilt in a different, but related, crime. The Texas Court of Criminal Appeals erroneously held that Respondent Raymond Cobb's voluntary confession was taken in violation of his Sixth Amendment right to counsel and improperly reversed his capital murder conviction. The court erred for two independent reasons. First, Cobb's Sixth Amendment right had not yet attached when he confessed to the uncharged murders. Second, even if it had, the Sixth Amendment did not bar Cobb's waiver of his right to counsel (1) because he had not invoked the extraordinary protections of *Michigan v. Jackson,* 475 U.S. 625 (1986), and (2) because *Jackson* should be overruled.

CITATION OF COURT OF CRIMINAL APPEALS'S OPINION

Raymond Levi Cobb v. State, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000).

BASIS FOR JURISDICTION

The Texas Court of Criminal Appeals decided *Cobb* on March 15, 2000. The State timely petitioned for writ of certiorari on April 21, 2000. Sup. Ct. R. 13(1). This Court granted a writ of *certiorari* pursuant to 28 U.S.C. § 1257(a) on June 26, 2000. *Texas v. Cobb,* 120 S.Ct. 2716 (2000).

CONSTITUTIONAL PROVISION INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence."

U.S. Const. amend VI.

*2 STATEMENT OF THE CASE

Early on a Monday morning in 1993, two days after Christmas, Lindsey Owings kissed his sleeping wife, Maggie, and his sleeping sixteen-month-old daughter, Kori Rae, goodbye and left for work. He never saw them again.

In the late morning or early afternoon of December 27, the Owings's neighbor Raymond Cobb burglarized the Owings's home, stealing a VCR, a stereo, some Walt Disney videotapes, and a bottle of tequila. In the course of that burglary, Cobb stabbed Maggie to death and buried her and Kori Rae in a wooded area about a mile from the house. Kori Rae was alive when Cobb buried her, but she soon suffocated in her own grave.

When Mr. Owings arrived home after work, his wife and daughter were gone. Aside from the few missing items, there were no signs of a struggle or foul play. He reported the burglary and the disappearances to the Walker County police. The police searched the surrounding area, canvassed the neighbors, and published fliers with photos of Maggie and Kori Rae, but no trace of them was found.

In February 1994, detectives received an anonymous tip that Cobb had been seen with the stereo stolen from the Owings's home. Cobb initially denied involvement in the burglary, but eventually admitted that he had burglarized the Owings's home. Cobb made a voluntary, written statement to that effect in July 1994, but continued to deny any involvement in the disappearances.

Based on his statement, Cobb was indicted for burglary. In August 1994, the district court appointed an attorney, Hal Ridley, to represent Cobb. Pet., at B-2. Ridley's representation of Cobb was limited, by Ridley's own

For the next fourteen months, detectives continued to investigate the disappearances. On two occasions, the detectives asked Ridley for permission to question Cobb about the disappearances. The first of these occasions was at Cobb's arraignment for burglary, shortly after Ridley was appointed. Pet., at B-5. When asked for permission to talk to Cobb, Ridley stated, "I gave my permission and told them that it wasn't necessary for me to be there." *Id.* The second occasion was in September 1995, when Ridley again gave his permission for Cobb to be interrogated about the disappearances outside Ridley's presence. *Id.*, at B-5 to B-6. [2]

Some time after Cobb was released on bond, he moved to Odessa, Texas, where his father, Charles, lived. On November 11, 1995, Charles telephoned Walker County detective Judy James, the lead investigator on the case, and told her that Raymond had confessed to killing Maggie and Kori Rae. James advised Charles to make a statement to the Odessa police, and he did. The Odessa police faxed Charles's statement to James and she used it to obtain an arrest warrant for Raymond, which she then faxed back to Odessa. *See* R.17.147-48; 19.451-53.

***4** By then, Odessa detectives Vic Sikes and Harold Thomas had already ascertained Cobb's whereabouts. On the morning of November 12, the detectives arrested Cobb, Mirandized him, and brought him to the police station. They telephoned James and informed her that they had Cobb in custody. When they asked her if they could question him, James agreed. The detectives were not aware that Cobb was represented by an attorney on the previous burglary charge. R.17.148-51,196.

Detectives Sikes and Thomas brought Cobb to an interview room and Mirandized him again. Beginning around 3 a.m., Sikes questioned Cobb for approximately an hour, without success. Cobb never indicated that he was tired and in fact told the officers that "he usually slept during the day and stayed up most of the night." R.2.366. After a five-minute break, Thomas took over questioning. Ascertaining that Cobb was a churchgoer, Thomas spoke to Cobb about his faith. This approach worked, and Cobb soon confessed to the murders. R.17.149-61. Both orally and thereafter in writing, Cobb explained that on December 27, 1993, he had entered the Owings's home and begun removing the stereo. When Maggie Owings confronted him, Cobb stabbed her in the stomach with a double-edged knife he was carrying. Cobb then dragged her body to a wooded area several hundred yards from the house. He described the ensuing events:
"I went back to her house and I saw the baby laying in its bed. I took the baby out there and it was sleeping the whole time. I laid the baby on the ground four or five feet away from its mother. I went back to my house and got a flat edge shovel. That's all I could find. Then I went back over to where they were and started digging a hole between them. After I got the hole dug the baby was awake. It started going toward its mom and it fell in the hole. I put the lady in the hole and I covered them up. I remember stabbing a different knife I had in the ***5** ground where they were. I was crying right then." *See* R.18.230-32; State Exh. 20.

Afterwards, Cobb returned to the Owings's house and completed his theft of the stereo, VCR, videotapes, and the bottle of tequila. Cobb stated that he had been drinking beer and tequila and smoking marijuana that day and "had a pretty good buzz." R.18.232.

Cobb confessed just after 5 a.m. on the morning of November 12, 1995. He said that he thought he still had the murder weapon and consented to a search of his home in Odessa, accompanying Sikes and Thomas there around 6 a.m. Cobb was unable to find the knife, but the detectives did seize nearly twenty other knives and swords, local newspaper articles about the disappearances that Cobb had kept since 1993, and several Walt Disney video tapes. R.2.373. Cobb also retrieved a gold ring that he gave to the officers, saying, "This is the wedding band that I took off Margaret Owings when I killed her." R.17.166-67.

Around 9 a.m., Cobb was arraigned on capital murder charges in Odessa. Cobb was then flown, with Thomas and Sikes, to Walker County, where they were met by Walker County investigators and a justice of the peace. Cobb was arraigned again at the airport and told the arraigning judge that "he just couldn't live with this any more." R.2.236. He was then taken to the Owings's residence, where he led the police to the wooded area where he had buried Maggie and Kori Rae. As crime technicians began to secure the grave, Cobb was taken to jail and booked. Not once from the time Cobb was arrested through the time he showed police the burial site did he ever indicate that he wanted to speak to an attorney or that he was represented by an attorney on the burglary charge. *See* R.18.287-89.

That evening, just near dark, the crime technicians found clothing and bone fragments that were later determined to ***6** belong to Maggie Owings. They found Kori Rae's clothing, but no sign of her body. Later that evening, Walker

County District Attorney Weeks telephoned Hal Ridley, Cobb's attorney for the burglary charge, and told him what had transpired. Pet., at B-9.

Ridley met with Cobb in jail the next day. While there, Ridley talked with the Walker County investigators. Regarding that conversation, Ridley testified:
"In fact [Walker County detective] Judy [James] asked me if I was going to be representing him. I told her I didn't know. I was his lawyer for the burglary case; that, you know, that decision hadn't been made to my knowledge yet, but we talked a little bit." Pet., at B-10.

Either that evening or the following evening, investigators contacted Ridley and asked permission to bring Cobb back to the grave site. [3] The crime technicians had been unable to find any sign of Kori Rae's body and hoped that Cobb could provide assistance. Ridley agreed to let Cobb help, but Cobb was unable to lead the investigators to the girl's remains. [4]

On the evening of the 14th, Ridley was summoned to jail to help Cobb cope with "emotional problems" and shortly thereafter Ridley was appointed to represent Cobb on the murder charges:
***7** "A: … And ultimately, I was appointed to represent him, and after that I pretty much well, after that I pretty much cut off the (sic) any more contact that he had with law enforcement.

Q: To the best of your knowledge he has not had any further contact?

A: Shouldn't have had after the 14th. If he did, it was without my permission." Pet., at B-11.

Before Cobb's capital murder trial began, the defense moved to suppress his confession as having been obtained in violation of, *inter alia*, the Sixth Amendment. After a hearing, the trial court denied the motion to suppress. *See* Pet. D. The jury found Cobb guilty of capital murder and Cobb was assessed the death penalty. *See* Pet., at E-7; Pet. F.

In a 6-3 decision, the Texas Court of Criminal Appeals reversed Cobb's conviction and remanded for a new trial. *See Cobb v. State,* No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) (en banc) (Pet. A). The court found that Cobb's Sixth Amendment right to counsel, which had attached when Cobb was indicted for burglary, also attached to the murder investigation because the two offenses were "factually interwoven." Pet., at A-7. The court also determined that Cobb had "asserted" his Sixth Amendment right to counsel "by accepting Ridley's appointment as his counsel." *Id.* These facts, the court reasoned, implicated the prophylactic rule of *Michigan v. Jackson,* 475 U.S. 625 (1986), and barred Cobb's unilateral waiver of his right to counsel during the November 12, 1995 interrogation. In vigorous dissent, Judges McCormick, Keller, and Keasler would have found that: (1) *Michigan v. Jackson* did not apply to these facts and that Cobb had validly waived his Sixth Amendment right to counsel under *Brewer v. Williams,* 430 U.S. 387 (1977), and made a voluntary confession, and (2) in any event, under *McNeil v. Wisconsin,* 501 U.S. 171 (1991), ***8** Cobb's Sixth Amendment right to counsel had not attached with regard to the capital murder offense at the time he confessed. Pet., at A-25 & n.20.

SUMMARY OF ARGUMENT

Cobb's murder confession was properly admissible because he made a voluntary, intelligent, and knowing waiver of his right to counsel before confessing. The Sixth Amendment did not bar Cobb's confession because:

• The Sixth Amendment right to counsel had not attached to the murder charges when Cobb confessed. It had attached only to the burglary for which Cobb had been indicted over a year earlier. The Sixth Amendment's protections are offense specific and therefore did not bar Cobb's confession to the separate, uncharged murders.

• Alternatively, Cobb validly waived his right to counsel. *Michigan v. Jackson* rested on weak premises and was illfitted to the Sixth Amendment context. Subsequent decisions have abandoned *Jackson*'s analytical framework. *Jackson's* promised safeguards against police coercion are superfluous because they duplicate the protections afforded by *Edwards v. Arizona* in the Fifth Amendment context. *Jackson* is a dead letter and should be overruled.

• Even if *Jackson* is still good law, Cobb never triggered *Jackson* by invoking his right to counsel. Cobb's mere acceptance of appointed counsel on the burglary charge was not a sufficiently clear and unambiguous assertion that Cobb desired the buffer of counsel during future custodial interrogation. Cobb never objected to this questioning and never invoked his right to counsel. *Jackson* therefore did not bar his waiver.

• Even if Cobb invoked his right to counsel and triggered *Jackson*, Cobb was free from police custody for fifteen months before he confessed to the murders. This lengthy ***9** break in custody, during which Cobb consulted with counsel, eliminated the inherently compelling pressures of continued custody and dissolved the *Jackson* bar.

ARGUMENT

I. COBB'S SIXTH AMENDMENT RIGHT TO COUNSEL HAD NOT YET ATTACHED TO THE MURDER CHARGES WHEN COBB CONFESSED.

The Court may resolve this case on the basis that Cobb was not entitled to the benefits of the Sixth Amendment right to counsel at the time he confessed to the murders. The Texas Court of Criminal Appeals reasoned that, when Cobb was indicted for burglary, his Sixth Amendment right to counsel also automatically attached to the capital murder offense because it was "factually interwoven with the burglary." Pet., at A-7. The court relied on the purported rule that "once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged." Pet., at A-6 (citing *State v. Frye,* 897 S.W.2d 324, 328-29 (Tex. Crim. App. 1995); *Upton v. State,* 853 S.W.2d 548, 555-56 (Tex. Crim. App. 1993); *United States v. Arnold,* 106 F.3d 37, 41 (CA3 1997)).

The court erred by expansively applying an "exception" to the general rule of Sixth Amendment attachment that (1) is based on a misreading of the Court's precedents, and (2) disrupts the balance the Court has already struck between a criminal defendant's right to the assistance of counsel as to a charged offense and the government's interest in investigating additional, uncharged criminal activity.

***10** A. State and Federal Courts Have Developed an Amorphous, Multifactor Exception to the Court's Bright-Line Rule that the Sixth Amendment Attaches Only to a Charged Offense.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This guarantee applies to the states via the due process clause of the Fourteenth Amendment. *Powell v. Alabama,* 287 U.S. 45, 68-69 (1932). Due process also requires that state courts appoint counsel for criminal defendants who cannot afford it. *Gideon v. Wainwright,* 372 U.S. 335, 343-45 (1963).

A criminal defendant's Sixth Amendment right to counsel arises in advance of his actual trial. It attaches upon the "initiation of adversary judicial criminal proceedings whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois,* 406 U.S. 682, 689 (1972). The right, however, protects defendants only at postattachment proceedings deemed "critical" because their "results might well settle the accused's fate and reduce the trial to a mere formality." *See United States v. Wade,* 388 U.S. 218, 224 (1967); *see also United*

States v. Gouveia, 467 U.S. 180, 189 (1984). Postattachment police interrogation is considered a critical stage at which an accused is entitled to the assistance of counsel. *See, e.g., Brewer v. Williams,* 430 U.S. 387, 400-01 (1977); *Massiah v. United States,* 377 U.S. 201, 206 (1964).

Attachment of the Sixth Amendment right to counsel grants a defendant certain heightened protections. Following attachment, if a defendant "asserts" his right to counsel at an arraignment or similar proceeding, the police may not thereafter approach the defendant outside the presence of counsel and secure a waiver of his right to counsel. Any such ***11** waiver, even if valid under ordinary standards, will be presumed invalid. *Michigan v. Jackson,* 475 U.S. 625, 636 (1986).

The Sixth Amendment right to counsel, as well as the *Jackson* fence around it, are offense specific. *McNeil v. Wisconsin,* 501 U.S. 171, 175 (1991). This is so because the right itself springs into existence only when the government initiates a criminal prosecution for a particular offense. *Id.* Thus the protection afforded by the right to counsel, by definition, only covers the substance of the "formal charge, preliminary hearing, indictment, information, or arraignment" that heralds, and limits, a criminal prosecution. *Id.* (quoting *Gouveia*, 467 U.S., at 188).

In *Maine v. Moulton,* the Court confirmed this principle and explained some of its consequences:
"[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, *simply because other charges were pending at that time*, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements *pertaining to pending charges* are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to counsel." 474 U.S. 159, 180 (1985) (emphasis added).

See id., at 179 (police "have an interest in the thorough investigation of crimes for which formal *charges* have already been filed" but "also in investigating new or additional crimes"); *id.*, at 179-80 (Sixth Amendment limits police investigative powers when "seeking evidence pertaining to pending *charges*"); *see also* ***12** *McNeil*, 501 U.S., at 179 (stating that *Jackson* precludes subsequent questioning "regarding the *charge at issue*"); *Jackson*, 475 U.S., at 632 (right to counsel triggered "after formal accusation has been made"); *id.*, at 633 (presuming that a defendant "requests a lawyer's services at every critical stage of *the prosecution*") (emphasis added). The charge-limited nature of the Sixth Amendment right to counsel contrasts with the Fifth Amendment's proscription of compelled self-incrimination: the Fifth Amendment is not offense specific, and, once invoked, it forbids questioning as to any offense, whether charged or uncharged. *See McNeil*, 501 U.S., at 177; *Arizona v. Roberson,* 486 U.S. 675, 678 (1988); *Edwards v. Arizona,* 451 U.S. 477, 484-85 (1981).

Over the last decade, state and federal courts have improperly divined in two of the Court's precedents *Brewer* and *Moulton* an implicit, unstated exception to the brightline rule that the Sixth Amendment right to counsel attaches only to the charged offense. *See generally United States v. Covarrubias,* 179 F.3d 1219, 1224-25 (CA9 1999); *United States v. Melgar,* 139 F.3d 1005, 1012-13 (CA4 1998); *Commonwealth v. Rainwater,* 681 N.E.2d 1218, 1223-25, 1228 (Mass. 1997). Variously denominated as the "inextricably-intertwined," "closely-related," "very-closely-related," and "extremely-closely-related" exception, courts have generally determined that some degree of factual relatedness between a charged and an uncharged offense will cause the right to counsel to attach to *both* offenses. *See, e.g., Whittlesey v. State,* 665 A.2d 223, 232-26 (Md. 1995) (collecting cases).

A recent Ninth Circuit decision provides a comprehensive and complex catalog of the factors undergirding the purported exception:
"Deciding whether the exception is applicable requires an examination of all of the facts and circumstances ***13** relating to the conduct involved, including the identity of the persons involved (including the victim, if any), and the timing, motive, and location of the crimes. No single factor is ordinarily dispositive; nor need all of the factors favor application

of the exception in order for the offenses to be deemed inextricably intertwined or closely related which concepts we, like some of the other circuits, deem to be the same. The greater the commonality of the factors and the more directly linked the conduct involved, the more likely it is that courts will find the exception to be applicable." *Covarrubias*, 179 F.3d, at 1225 (citations omitted).

Covarrubias also relied heavily on the "continuing nature" of the two offenses, *Id.*, at 1225-26 ("the continuous course of conduct [of the two offenses] would be controlling"); *see also Arnold*, 106 F.3d, at 41 (looking to "similarities of time, place, person, and conduct" to determine "whether the same acts and factual predicates underlie both the pending and the new charges").

In contrast to the broad approach in *Covarrubias*, other courts have narrowly scrutinized the "conduct" underlying two separate charges to determine whether they are closely related. *See, e.g. United States v. Williams,* 993 F.2d 451, 456 (CA5 1993); *United States v. Cooper,* 949 F.2d 737,743-44 (CA5 1991); *People v. Clankie,* 530 N.E.2d 448, 452 (Ill. 1988). Several courts have also focused on the degree of police misconduct associated with the tainted interrogation. *See, e.g., United States v. Martinez,* 972 F.2d 1100, 1105-06 (CA9 1992); *United States v. Hines,* 963 F.2d 255, 258 (CA9 1992); *United States v. Mitcheltree,* 940 F.2d 1329, 1339, 1342-43 (CA10 1991). Other courts have inquired "whether the statements elicited by the police constituted evidence of both offenses." *Whittlesey*, 665 A.2d, at 235 (citing *In re Pack*, 616 A.2d 1006, 1011 (Pa. Super. 1992)); *see also Melgar*, 139 F.3d, at 1015 (requiring defendant to show ***14** additionally that "the interrogation on the new offenses produced incriminating evidence as to the previously charged offenses").

B. The Court's Precedents Support No Exception to the General Rule that the Sixth Amendment Attaches Only to the Charged Offense.

This multiheaded exception springs from a widespread misreading of the Court's decisions in *Brewer* and *Moulton.* Both cases are entirely consistent with *McNeil*'s offense-specific rule and cannot support the open-ended exception widely employed by lower courts. Significantly, a leading case has doubted whether this Court's precedents compel the exception at all. *Whittlesey*, 665 A.2d, at 233 & n.8.

1. Neither *Moulton* Nor *Brewer* Supports An Exception to *McNeil.*

In *Moulton*, the primary source of the so-called exception, Moulton and Colson were indicted on four counts of theft for having "received, retained, or disposed of" three automobiles and assorted auto parts. 474 U.S., at 162. Colson decided to cooperate with the police and confessed that he and Moulton, in addition to the charged thefts, had also broken into a local dealership to steal the auto parts. *Id.*, at 162-63. Colson added that he had received anonymous threats concerning the pending charges and that Moulton had suggested they kill one of the state's witnesses. *Id.* When a tap on Colson's phone conversations with Moulton revealed nothing inculpatory, Colson consented to wear a body wire to a meeting with Moulton. *Id.*, at 163-65. Ostensibly, the wire was intended to protect Colson and gather evidence about Moulton's plan to kill the witness, but the police also admitted that they were "aware that Moulton and Colson were meeting to discuss the charges for which Moulton was under indictment." *Id.*, at 165. The two men met and, as the police expected, engaged in "a prolonged discussion of the pending charges." *Id.* ***15** "[M]uch of the discussion," the Court observed, "involved recounting the crimes" in great detail, largely at Colson's prompting. *Id.* The men even spun a plan to create false alibis for their defense at trial. *Id.*

Based on the new evidence, the state dismissed the pending charges and obtained seven new indictments against Moulton: #1-#4) for the previous theft charges; (#5) for burglary of the dealership where the auto parts were kept; (#6) for arson of one of the stolen vehicles; and (#7) for three more thefts. *Id.*, at 167. Moulton pleaded guilty to some of these charges, and the trial court dismissed others for improper venue. *Id.* The case then proceeded to a bench trial "on the remaining

three indictments, which covered the subjects of the original indictments and charged him with burglary, arson, and theft." *Id.* The state introduced as evidence portions of the surreptitiously recorded meeting with Colson, "principally those [portions] involving direct discussion of *the thefts for which Moulton was originally indicted.*" *Id.* (emphasis added). The court acquitted Moulton of arson, but found him guilty of "burglary and theft in connection with the Ford pickup truck, the Chevrolet dump truck, and the Ford automotive parts." *Id.*

The Supreme Judicial Court of Maine reversed Moulton's convictions, finding that use of the recordings at trial violated his right to counsel, because they were made under circumstances where the state knew or should have known that "Moulton would make incriminating statements *regarding crimes as to which charges were already pending.*" *Id.*, at 167-68 (emphasis added). This Court agreed. The Court reasoned that the Sixth Amendment imposes on the government "an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Id.*, at 171. The Court characterized the recordings as the fruit of "knowing exploitation by the State of an opportunity to confront the accused without ***16** counsel being present," and concluded that the use at trial of Moulton's incriminating statements violated the Sixth Amendment. *Id.*, at 176.

The final section of the Court's opinion rejected the argument that the incriminating statements should not be suppressed because the police had obtained them in a legitimate effort to uncover evidence of Moulton's alleged plan to murder a witness. *Id.*, at 178. The Court reiterated its statement in *Massiah* that even legitimate police investigations are limited by an accused's Sixth Amendment rights. *Id.*, at 179 (quoting *Massiah*, 377 U.S., at 207). The Court carefully noted, however, that the rule in *Moulton* would exclude only "incriminating statements pertaining to *pending charges* … at the trial of those charges" and would not exclude "evidence pertaining to charges as to which the Sixth Amendment had not attached at the time the evidence was obtained." 474 U.S., at 180 (emphasis added); *see also id.*, at 180 n.16 ("Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those charges.").

Contrary to *McNeil*'s plain holding, some courts have mined the closely-related exception from a solitary aspect of *Moulton*: that the Court affirmed the reversal of Moulton's convictions for *both* theft *and* burglary, even though the initial charge was only for theft. *See, e.g., Covarrubias*, 179 F.3d, at 1224; *Melgar*, 139 F.3d, at 1013; *Clankie*, 530 N.E.2d, at 451. From this, courts have reasoned that the Sixth Amendment must also attach to some class of uncharged offenses that are "so closely related" to the charged offense that they "cannot be constitutionally isolated" from the right to counsel for the charged offense. *See Clankie*, 530 N.E.2d, at 451. The courts have distinguished the burglary of the auto parts in *Moulton* which, they say, "occurred at the same time and place and involved the same victims and ***17** circumstances" as the charged theft from Moulton's plan to kill the witness, which "was planned at a different time and place, and involved a different victim." *Melgar*, 139 F.3d, at 1013 n.1; *see Covarrubias*, 179 F.3d, at 1224. Finally, the courts have intuited these principles while admitting that *Moulton* never states that the right to counsel attached to the burglary charge, and does not contain a single word about the "relatedness" between the burglary and theft charges. *See Melgar*, 139 F.3d, at 1013 (closely-related exception is recognized "sub silentio" by *Moulton*). In fact, a review of the briefs before the Court in *Moulton* shows that the issue of attachment to the burglary charge was never raised or discussed.

Moulton supports no closely-related exception whatsoever. Instead, *Moulton* itself is consistent with and implicitly relies on *McNeil*'s offense-specific definition of the scope of the Sixth Amendment's protection. The lower courts' wholesale adoption of the erroneous closely-related principle (dating back to *dicta* in the Supreme Court of Illinois's 1988 decision in *Clankie*) is the result of two basic errors.

First, the courts have overlooked the fact that a Sixth Amendment violation occurs only when the government improperly obtains evidence pertaining to a pending charge and admits the evidence at trial to prove *that previously charged offense.* *Moulton* itself is replete with proof of this principle. Its opening paragraph posits the issue as whether Moulton's right to counsel was violated "by the *admission at trial* of incriminating statements … made by him to his codefendant … after indictment and at a meeting of the two to plan defense strategy for *the upcoming trial.*" 474 U.S., at 161 (emphasis

added). The Court's description of the secretly obtained evidence hammers home its relevance to the *pending theft charges*: the Court noted that Colson recorded "a prolonged discussion of *the pending charges* what actually had occurred," that the two men "discuss[ed] the ***18** case" and planned their defense strategy for trial, and that "much of their discussion involved recounting the crimes." *Id.*, at 165-66. The Court carefully noted that "[e]ach of these [incriminating] statements was later admitted into evidence against Moulton at trial" and, crucially, that the recorded portions used were "principally those involving direct discussion of *the thefts for which Moulton was originally indicted.*" *Id.*, at 166-67 (emphasis added). Finally, in its conclusion, the Court explained that "incriminating statements *pertaining to pending charges* are inadmissible at the trial of *those charges*" if the police violated the defendant's right to counsel in obtaining that evidence. *Id.*, at 180 (emphasis added). The courts could declare that the Sixth Amendment reaches uncharged, related offenses only by ignoring *Moulton*'s consistent linking of the Sixth Amendment violation to the pending charges.

Second, the lower courts have overlooked the fact that Moulton was tried for theft and burglary *in the same proceeding. See id.*, at 167 ("Moulton … proceeded to trial on the remaining three indictments, which … charged him with burglary, arson, and theft."). The illegally obtained statements, which were inadmissible at Moulton's trial on the theft charge, also constituted the key evidence that Moulton had committed the burglary. *See id.*, at 165-66 & n.5. This explains the result in *Moulton.* Moulton's right to counsel was violated because the prosecution introduced the recorded statements at trial to prove the previously charged *theft* offense. But his *burglary* conviction also depended on this impermissible evidence and had to be reversed as well.

Moulton does not support an exception to the general rule of Sixth Amendment attachment. Although *Moulton* is plain enough, the Court clarified that proposition in *Moran v. Burbine,* 475 U.S. 412 (1986), which described *Moulton* as having "considered the constitutional implications of a surreptitious investigation that yielded evidence pertaining to ***19** two crimes. For one, the defendant had been indicted; for the other, he had not." *Id.*, at 431. When discussing the "two crimes," *Moran* was referring to the initially charged theft and the as-yet-uncharged murder conspiracy. *See id.* (discussing the "former" crime as one for which defendant "had been indicted" and as relating to the "first charging proceeding"); *id.* (observing that the evidence would be admissible as to the second, unindicted crime); *see also Moulton*, 475 U.S., at 162 (original indictment for theft); *id.*, at 180 & n.16 (discussing unindicted conspiracy to murder). *Moran* said nothing about the burglary charge, nor did it hint that Moulton's Sixth Amendment right to counsel had somehow attached to the burglary. Instead, *Moran* focused on the only two offenses that are relevant in *Moulton*: the charged theft and the uncharged conspiracy. *Moran* strongly reaffirms that *Moulton* erected no "sub silentio" exception to the general bright- line rule of Sixth Amendment attachment.

Brewer is even weaker authority for an exception to *McNeil.* Lower courts have found license to mint the exception from the following aspects of *Brewer*: (1) Williams was arrested and arraigned on an abduction charge, based on a witness's testimony that Williams had placed in his car a bundle containing what appeared to be a child missing from the YMCA where Williams resided; (2) the police explicitly agreed with Williams's two attorneys not to interrogate him on the 160-mile car trip back to the police station, but did anyway by piquing Williams's religious sensibilities with the so-called "Christian burial speech," prompting him to lead the officers to the child's body; and (3) the Court ruled that Williams's subsequent trial for first-degree murder based on the illegally obtained evidence violated his right to counsel. 430 U.S., at 390-94, 398-401. Courts have reasoned that *Brewer* must have "implicitly recognized, though without discussion" the principle that the Sixth Amendment attached both to the charged abduction and the subsequently tried murder. *Clankie*, 530 N.E.2d, at 451; *see* ***20** *Covarrubias*, 179 F.3d, at 1224 (abduction and murder in *Brewer* "involv[ed] the same incident and victim"); *Melgar*, 139 F.3d, at 1013 n.1 (right to counsel also attached to "later-charged, closely-related, crime of murder").

Brewer does not discuss whether Williams's right to counsel attached to both the abduction and the first-degree murder charges, nor whether the two offenses were related in any factual or legal sense. In fact, *Brewer* was concerned with quite a different matter: whether the government had proven Williams's effective relinquishment of his right to counsel by demonstrating that Williams responded affirmatively to the officer's statements. 430 U.S., at 401-06. As to attachment,

however, *Brewer* merely applied the now familiar rule that the Sixth Amendment attaches upon initiation of criminal judicial proceedings. *Id.*, at 398 (citing, *inter alia, Kirby*, 406 U.S., at 689). Indeed, the state conceded that Williams's Sixth Amendment right to counsel had attached to the murder charges. *Id.*, at 399. [5]

In sum, neither *Moulton* nor *Brewer* can bear the weight of the closely-related exception that has been attributed to them for over a decade. Consideration of *Moulton* and *Brewer* makes clear that the exception is unwarranted.

2. The Court's Precedents Establish a Sensible Rule of Attachment, Tempered by a Same-Elements Protective Rule.

The Court's decisions in *Massiah, Moulton*, and *McNeil* support a more balanced rule of Sixth Amendment attachment. Any rule of Sixth Amendment attachment must address two competing interests: the accused's right to the assistance of counsel at critical stages of a particular criminal prosecution, and the government's interest in amassing ***21** evidence of new or additional crimes the accused has committed or may be planning to commit. *See Moulton*, 474 U.S., at 179-80. The Court's precedents already contain a principled rule that protects both interests the charged-offense rule suggested by *Massiah* and *Moulton* and confirmed by *McNeil.* Under this straightforward rule, if a defendant has been indicted for an offense and the police elicit evidence from the defendant without securing a valid waiver of the right to counsel, the prosecution violates the Sixth Amendment and may not then introduce that improperly obtained evidence at the trial of the pending charge. The charged-offense rule, and a common-sense corollary described below, answer the concerns the courts have attempted to address through the closely-related exception. Unlike that standardless test, however, the charged-offense test finds substance in the balance the Court has already struck between the accused and the government.

McNeil best explicated this principle by linking the scope of the Sixth Amendment protections to the scope of the "adversary judicial proceedings" that trigger attachment of the right itself. *See* 501 U.S., at 175 (citing *Gouveia*, 467 U.S., at 188, and *Kirby*, 406 U.S., at 689). Those Sixth Amendment protections, as *McNeil* confirmed, are therefore offense specific. *Id.* In other words, because the Sixth Amendment protects a defendant's right to counsel in adversary criminal proceedings, it would not be appropriate to extend those protections to crimes for which there is no criminal proceeding. Until the police bring a charge, there is simply no Sixth Amendment right to counsel to protect.

The charged-offense rule flows directly from this principle. The police have an interest in investigating new and additional crimes, even those committed by a defendant currently under indictment. Crucially, *McNeil*'s discussion of offense specificity was directly responsive to the principle recognized by *Massiah* and *Moulton* that the police have a ***22** legitimate interest in investigating uncharged crimes as to which the Sixth Amendment has not yet attached. *Id.*, at 175-76 (citing *Moulton*, 474 U.S., at 179-80; *Moran*, 475 U.S., at 431). The police's investigatory powers, however, are limited by the Sixth Amendment right to counsel. But the protections afforded by the right to counsel are only as broad as the formal criminal prosecution that triggered the right in the first place. Once the right is properly invoked, the government may not improperly interrogate a defendant charged with an offense and then use the fruits of the interrogation to convict him of that charged offense.

This simple rule provides an objective, easily ascertainable protection for the accused and his attorney. They can rely on the substance of the pending charge to delimit the scope of permissible police interrogation outside the presence of counsel and, more importantly, to restrict the uses of any improperly obtained evidence. Fundamentally, of course, this rule simply reaffirms what defense attorneys already know from the Court's precedents: the scope of an accused's Sixth Amendment protection during pretrial interrogation extends only as far as the substance of the charge. *See McNeil*, 501 U.S., at 175-76.

The rule also protects "the other side of the *Miranda* equation: the need for effective law enforcement." *Moran*, 512 U.S., at 461. The police must decide when they may and may not approach an indicted defendant and rely on a waiver of his right to counsel. But when faced with an ongoing investigation into a prospectively undefinable "factual scenario," the police will not be able to foresee what distinct crimes may come to light. After all, the law recognizes that multiple

offenses may arise out of the same conduct and be separately prosecuted. *See United States v. Dixon,* 509 U.S. 688, 711-12 (1993) (overruling *Grady v. Corbin,* 495 U.S. 508 (1990)).

***23** During an investigation the police may decide they have enough evidence to indict a defendant for a discrete offense. At that point, the charged-offense rule would prohibit the police from using any information to convict the defendant of the charged offense if that information was obtained pursuant to, for example, an invalid Sixth Amendment waiver. But the police must be free to continue their investigative efforts as to new or additional crimes even those that unexpectedly arise out of the same "factual predicates" or "course of conduct" as the charged offense. *Moulton*, 474 U.S., at 179-80 & n.16; *Massiah*, 377 U.S., at 207. The police cannot know where their interrogation of a defendant will lead; of course, if they are questioning an indicted defendant outside the presence of counsel, they *will* know that they will not be able to use that information to bolster their case on the pending charge. The rule, therefore, has a built-in deterrent. But it would be unfair (and, moreover, contrary to *Moulton* and *Massiah*) to prohibit the use of statements that incriminate the defendant as to uncharged offenses for which prosecution has not even begun.

Arguments for some form of a closely-related exception overlook a crucial irony: while the police are not omniscient and cannot predict the ins and outs of a particular factual scenario (indeed, an "investigation" would be unnecessary if they could), the accused most certainly can. The accused ordinarily has a perfect knowledge of whether an offense for which he has already been charged is somehow related by "time, place, or conduct" to an offense the police have not yet uncovered. The accused, in short, knows with certainty whether he killed or raped during the burglary or the robbery. And although the accused does not yet have a Sixth Amendment right to counsel as to these inchoate offenses (because they have not yet been discovered and charged), he does have a Fifth Amendment right not to be compelled to incriminate himself, and has in fact been told so in the *Miranda* warnings. Thus, if the accused becomes ***24** uncomfortable with the direction of an interrogation, he can cut off questioning as to *all* subjects and receive the aid of an attorney by saying four simple words that require no knowledge whatsoever of the intricacies of Fifth and Sixth Amendment law: "I want a lawyer." *See Edwards*, 451 U.S., at 484-85.

Any exception to *McNeil*'s offense-specific rule necessarily creates uncertainty about whether crimes under investigation may be factually "related" and could force prosecutors to defensively and irresponsibly bring charges based on mere suspicion. But this Court has roundly rejected the notion that prosecutors are "constitutionally required" to file charges before their investigations are complete, even if they have already marshaled enough evidence to prove guilt beyond a reasonable doubt. *See Gouveia*, 467 U.S., at 192 n.7; *United States v. Lovasco,* 431 U.S. 782, 791, 792-95 (1977). Instead, the Court has accorded prosecutors broad deference over when and whether to bring formal charges, cognizant that the decision to prosecute is "seldom clear-cut" and demands "a necessarily subjective evaluation of the strength of the circumstantial evidence and the credibility of the [suspect's] denial." *Lovasco*, 431 U.S., at 793. Above all, the Court has declined to badger prosecutors into unripe and futile prosecutions that would "make obtaining proof of guilt … impossible by causing potentially fruitful sources of information to evaporate before they are fully exploited." *Id.*, at 791. These concerns reach their apex when a prosecutor is faced with a case, like this one, "in which a criminal transaction involves more than one … illegal act." *Id.*, at 792-93. The law must give the government a fair opportunity to uncover evidence of crime, without the specter of a potential Sixth Amendment violation brooding over every step of a criminal investigation.

Contrary to some statements, the charged-offense rule does not invite police to "circumvent the Sixth Amendment right to counsel merely by charging a defendant with additional ***25** related crimes." *Arnold*, 106 F.3d, at 41 (quoting *In re Pack*, 616 A.2d, at 1011); *see also McNeil*, 501 U.S., at 187-88 (Stevens, J., dissenting) (warning of the danger of the police "fil[ing] charges selectively in order to preserve opportunities for custodial interrogation"). First, these warnings are not validated by practical reality, and their premises are counterintuitive. If the police want to avoid Sixth Amendment pitfalls, they will simply not file any charges at all until they have completed their investigation, rather than charging selectively and later adding related charges. *Gouveia* and *Lovasco* will protect an officer who holds back on all charges

leaving an officer free from Sixth, but not Fifth, Amendment limitations but there is little or no strategic advantage to selective charging.

Second, even if the police may deliberately circumvent the charged-offense rule by charging "additional related crimes" (assuming that is even possible or likely), a simple corollary to the rule would foreclose such an attempt. Suppose the police indict a defendant for robbery, subject him to custodial interrogation, and, without securing a valid waiver of his asserted right to counsel, obtain incriminating statements. It should be obvious that the police cannot dismiss the robbery indictment, bring an identical robbery indictment, and then use the illegally obtained evidence to convict the defendant. The rule is offense specific, not indictment specific. But it should be equally obvious that the police cannot then bring a felony murder indictment against the defendant and use the *same* robbery evidence to prove the predicate felony. Using the tainted evidence to convict the defendant of felony murder under those circumstances would be the functional equivalent of convicting him of the previously charged robbery. *See, e.g., Upton*, 853 S.W.2d, at 555-56 (illegally obtained evidence as to charged car theft could not be subsequently used to convict defendant of felony murder predicated on robbery of same car).

***26** Properly understood, the felony murder scenario falls within the charged-offense rule itself. Prosecution for greater- and lesser-included offenses would be, for purposes of the rule, prosecution for the same offense because the two share common elements. In other words, the rule prohibits use of illegally obtained evidence, not only to prove the previously charged offense, but also to prove another offense that includes all the elements of the previous charge *i.e.*, that is the same offense. This corollary would share the parameters of the well known same-elements test used for double jeopardy purposes. *See, e.g., Dixon*, 509 U.S., at 696; *Blockburger v. United States,* 284 U.S. 299, 304 (1932). The same-elements test, of course, applies in the distinct context of double jeopardy and protects different interests than the Sixth Amendment right to counsel. *See, e.g., Dixon*, 509 U.S., at 696 (same-elements test protects against multiple punishment and multiple prosecution for the same "offence" under Fifth Amendment double jeopardy clause). But application of the test, which looks solely to the elements of a particular offense, is appropriate in the offense-specific Sixth Amendment context, because *McNeil* requires the parameters of the right to counsel to be measured by the particular offense charged. *See McNeil*, 501 U.S., at 175-76.

Third, even assuming that the government may devise nefarious ways to circumvent an accused's right to counsel that are not covered by the rule and its corollary which emphatically has not happened in this case the Court has already devised a protective rule to counter such practices. The cornerstone principle in *Massiah, Brewer*, and *Moulton* was that the government has "an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Moulton*, 474 U.S., at 171. Once a defendant has invoked the Sixth Amendment's protection, the government may not "knowingly exploit" an opportunity to confront an indicted defendant outside counsel's presence, whether by employing ***27** an informant to surreptitiously record conversations with the defendant (*Massiah; Moulton*) or by deliberately eliciting responses from a defendant in flagrant breach of an agreement with his attorney not to do so (*Brewer*).

Some courts have found that this knowing-exploitation standard represents an independent check on governmental attempts to circumvent the offense-specific right to counsel. *See, e.g., Whittlesey*, 665 A.2d, at 234-35 (collecting cases); *Hines*, 963 F.2d, at 258; *Martinez*, 972 F.2d, at 1105-06; *Mitcheltree*, 940 F.2d, at 1342. Although this standard is consistent with *Moulton, Brewer*, and *Massiah*, it should be noted that allegations of police bad faith have nothing to do with the objective inquiry of whether or not the Sixth Amendment protections have attached to an offense. Evidence that the government has somehow manipulated the order or timing of charges to defeat a defendant's right to counsel should constitute a violation only if the defendant's Sixth Amendment rights have already attached and been invoked. But the extent to which the Sixth Amendment applies to particular offenses cannot expand and contract based on the subjective mental state of the prosecution. *Moulton* makes clear that "the Government's investigative powers are limited by the Sixth Amendment rights of the accused," and not by the good or bad faith of the police or the prosecutor. 474 U.S., at 179-80.

In sum, the Court should not abandon the charged-offense rule derived from its own precedents. Under this rule, once the right to counsel has been invoked, the government may not improperly elicit evidence from a defendant as to a pending charge and then use the evidence at trial to convict the defendant of that charge. Similarly, the police may not use the same evidence to convict the defendant of a subsequent charge that incorporates the previous charge as a lesser-included offense. The government may, however, properly obtain and use evidence relating to a different, ***28** uncharged offense because the Sixth Amendment right to counsel will not have attached to that charge.

3. Cobb's Right to Counsel Had Not Attached to the Murder Charges When He Confessed.

Swearing he knew nothing about the disappearances of Maggie and Kori Rae Owings, Cobb confessed in July 1994 to the burglary of their home and was indicted for that offense. Fifteenth months later and 500 miles away, he was arrested based on new information that he had, in fact, murdered the missing mother and daughter. It is uncontested that Cobb made a knowing, voluntary, and intelligent waiver of his right to counsel and confessed to the murders. Based in part on that confession, he was convicted of capital murder for killing two persons in a single transaction. Pet., at C-1, D-4 ¶ 13, E-2 ¶ 3. Cobb was not convicted of capital murder based on the predicate felony of burglary; he was initially indicted for that offense also, but the government abandoned that part of the indictment before trial. Pet., at D-4 ¶¶ 10, 13.

Cobb's Sixth Amendment right to counsel attached to the burglary offense when he was indicted for burglary. Because the Sixth Amendment is offense specific, however, Cobb's right to counsel did not attach at that time to the distinct offense of capital murder for killing two persons in a single transaction. *McNeil*, 501 U.S., at 175. When Cobb later confessed to the murders, he was not entitled to the heightened protections of the Sixth Amendment and was therefore able to validly waive his right to counsel. Cobb was never tried for the previously charged burglary. Nor was he functionally tried for it, because his murder conviction did not depend on the burglary as a predicate felony. In sum, under a charged-offense test derived from the Court's precedents, Cobb's Sixth Amendment rights were not violated when his incriminating statements were admitted at trial to prove his guilt.

***29** To the extent an independent knowing-exploitation standard may be derived from the Court's cases, it has no application here. Ridley had been appointed as counsel for the burglary, but he testified repeatedly that he did not represent Cobb regarding the disappearances. Pet., at B-2 to B-4, B-10. In fact, Ridley told the police on two occasions that there was no need for his presence if the police wanted to question Cobb about the disappearances. Pet., at B-5 to B-6. According to Ridley, Cobb never objected to the questioning. Pet., at B-6. Finally, even after Cobb had confessed to the murders, Ridley told the police that he did not represent Cobb as to those offenses and that he did not know if he would be appointed. Pet., at B-10. These undisputed facts show that the police behaved with the utmost good faith on all the occasions when they questioned Cobb about the murders, including the occasion that led to his voluntary confession.

The police suspected Cobb all along of having some knowledge about the disappearances. As a result of his confession to the burglary, the police had enough evidence to indict him for that offense, but they had no idea what had happened to Maggie and Kori Rae, under what circumstances they had disappeared, or what the extent of Cobb's knowledge about them was. Cobb made sure of that by burying their bodies and denying any knowledge of his foul acts.

This was the undefined and unknowable factual situation that confronted the police when they received information, through Cobb's father, linking Cobb to the murders. Cobb cannot rationally argue that the police somehow manipulated the laying of the separate burglary and murder charges to circumvent Cobb's right to counsel. They did no such thing. Rather, they independently investigated two distinct offenses ***30** that, as it turned out when Cobb revealed the truth, were linked by common circumstances.

4. Even Under a Principled Application of the Closely-Related Test, Cobb's Right to Counsel Did Not Attach to the Uncharged Murders.

If the Court adopts some formulation of the closely-related test, it should favor the Fifth Circuit's narrow application in *United States v. Cooper* as the version that best balances the competing concerns of law enforcement and the accused. 949 F.2d 737, 742-44 (CA5 1991); *see supra* Part I.B.2. In *Cooper*, state police suspected Cooper in a convenience store holdup. When an inventory search of his car revealed a sawed-off shotgun, Cooper was arrested, arraigned for aggravated robbery, and appointed counsel. Soon after, a federal agent visited Cooper in jail and obtained a waiver of Cooper's right to counsel without notifying his attorney. Cooper was convicted of the state crime of aggravated robbery and was then indicted for the federal crime of unlawful possession of an unregistered firearm. The federal district court denied Cooper's motion to suppress his statements to the federal agent and he was convicted. *Id.*, at 740-41.

Affirming the district court, the Fifth Circuit held that the state armed robbery charge and the federal weapons charge were not the same for Sixth Amendment purposes. The court declined to apply what it termed the extremely-closely-related rule of *Moulton*, reasoning that "[h]ere, the federal and state crimes concern *different conduct*, although, efficiently for the governments, both prosecutions could use much of the same evidence." *Id.*, at 743-44 (emphasis added).

The Fifth Circuit's narrow focus on conduct represents a principled version of the closely-related test. Determining relatedness based on the specific acts that constitute a ***31** criminal offense provides a more objective and a more reliable guide than the open-ended "time, place, and conduct" tests devised by other circuits. *See, e.g., Covarrubias*, 179 F.3d, at 1225. This conduct-based test may also be easily applied, as this case shows. While the burglary and murders occurred during the same general time and place, the acts constituting those offenses were distinct. Specifically, the burglary consisted of Cobb entering the Owings's home with the intent to commit theft. Tex. Penal Code §30.02(a)(1); *see Garcia v. State,* 571 S.W.2d 896, 899 (Tex. Crim. App. 1978) (offense of burglary complete upon entering habitation with intent to commit felony or theft). By contrast, the acts constituting the murder offense were entirely separable: Cobb was convicted of capital murder for having murdered Maggie and Kori Rae during a single episode. Pet., at C- 1, D-4 ¶ 13, E-2 ¶ 3. The fortuity that Cobb committed the murders close on the heels of the burglary does not obscure the fact that the two offenses were separate for Sixth Amendment purposes.

II. ALTERNATIVELY, *MICHIGAN V. JACKSON* DOES NOT BAR COBB'S WAIVER OF HIS RIGHT TO COUNSEL.

Even assuming that Cobb's Sixth Amendment right to counsel attached to the capital murder charge at the time he was indicted for burglary, the Court may resolve this case on the alternative basis that the extraordinary postattachment protections of *Michigan v. Jackson,* 474 U.S. 625 (1986), did not presumptively invalidate Cobb's otherwise valid confession. *See* Pet., at A-6 to A-7.

Jackson must be understood in light of the Sixth Amendment right to counsel it is said to protect. That right to counsel arises, in advance of trial, upon the initiation of "adversary judicial proceedings whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *See Kirby*, 406 U.S., at 689. Thereafter, the right protects the criminal defendant at proceedings deemed ***32** "critical stages," one of which is custodial interrogation. *See Brewer*, 430 U.S., at 400-01.

But there is another "right to counsel," arising not from the Sixth Amendment but from the Court's Fifth Amendment jurisprudence. *See McNeil*, 501 U.S., at 176. Upon request, a suspect undergoing custodial interrogation (whether before or after attachment of the Sixth Amendment) has the right to have counsel present, in order to counteract the "inherently compelling pressures" of such interrogation. *Miranda v. Arizona,* 384 U.S. 436, 467-74 (1966).

In *Edwards v. Arizona,* 451 U.S. 477, 484-85 (1981), the Court enacted a prophylactic rule to protect the *Miranda* right to counsel. *See also Solem v. Stumes,* 465 U.S. 638, 644-45 & n.4 (1984) (*Edwards* is a "prophylactic rule, designed to implement pre-existing rights"). *Edwards* holds that, once a suspect has invoked his right to counsel during custodial interrogation, he will not be subject to further questioning "until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police." *Id.* An *Edwards* invocation must be a clear and unambiguous request for the assistance of an attorney during custodial interrogation. *Davis v. United States,* 512 U.S. 452, 459-60 (1994).

The *Edwards* bar was "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Minnick v. Mississippi,* 498 U.S. 146, 150 (1990) (quoting *Michigan v. Harvey,* 494 U.S. 344, 350 (1990)). If a suspect makes an *Edwards* invocation, the police may not re-initiate questioning until counsel is present. *Minnick*, 498 U.S., at 153. Moreover, an *Edwards* invocation triggers the following *per se* rule: a suspect's subsequent waiver of his right to counsel even if voluntary, knowing, and intelligent will be presumed invalid when obtained by police-initiated interrogation outside the presence of counsel. *Edwards*, 451 U.S., at 484; *see, e.g., Arizona v. Roberson,* 486 U.S. 675, 680-81 (1988); *Solem*, 465 U.S., at 646-47.

***33** Five years later, *Michigan v. Jackson* grafted *Edwards* onto the Sixth Amendment. 475 U.S., at 635-36. The Court accorded to a defendant's "assertion" of his right to counsel "*at an arraignment or similar proceeding*," the *Edwards* effect of barring subsequent police-initiated interrogation outside counsel's presence and, significantly, its effect of presumptively barring otherwise valid waivers of a defendant's right to counsel under such circumstances. *Id.* (emphasis added). *Jackson* thus applied the *Edwards* anti-coercion rule outside the immediate context of custodial interrogation.

A. *Jackson* Should Be Overruled Because It Rested on Weak Foundations that Have Been Completely Eroded by Subsequent Decisions of the Court.

Jackson was based on three distinct premises that were either faulty when the case was decided, are untenable today in light of subsequent precedent, or both.

One. The Court reasoned that the anti-coercion principles underlying *Edwards* applied with even more force to custodial interrogation occurring after a suspect has been formally charged: "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before." *Jackson*, 475 U.S., at 631-32.

Two. Relying on its precedents concerning waiver of constitutional rights (especially *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)), the Court believed it was required "to give a broad, rather than a narrow, interpretation to a defendant's request for counsel." *Jackson*, 475 U.S., at 632-33. The Court therefore rejected the petitioner's argument that when an accused requests counsel at arraignment, he "may not have ***34** actually intended [his] request to encompass representation during any further questioning by the police." *Id.* [6]

Three. The core of *Jackson* was its wholesale adoption of *Edwards*'s holding, in the Fifth Amendment context, that categorically bars post-invocation waivers of the right to counsel in response to police-initiated questioning. The Court found "no warrant for a different view under a Sixth Amendment analysis," and therefore concluded:
"Just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in the Sixth Amendment analysis." 475 U.S., at 635.

1. From the Beginning, *Jackson* Was Only Tenuously Linked to the Prevention of Coercion in Police-Initiated Custodial Interrogation.

Refuting *Jackson*'s premises begins with then Justice Rehnquist's dissent (joined by Justices Powell and O'Connor), because subsequent decisions of the Court have adopted and reinforced the dissent's fundamental objections to *Jackson.* The dissenting Justices focused on three weaknesses in the majority's analysis.

First, the *Edwards* prophylactic rule was intended to reinforce only the ***35** Fifth Amendment's prohibition on compelled self-incrimination. 475 U.S., at 638-40 (Rehnquist, J., dissenting). Applying the *Edwards* anti-coercion rule in the Sixth Amendment context, the dissent explained, "cut[s] the *Edwards* rule loose from its analytical moorings." *Id.*, at 640.

Second, application of the new *Jackson* rule "graphically reveal[ed] the illogic of the Court's position." *Id.* The dissent observed that the *Jackson* bar was triggered by an accused's "assertion" of his right to counsel. *Id.* The dissent pointed out, however, that attachment of the Sixth Amendment right to counsel is not tied to any assertion by a defendant. *Id.*, at 641. By contrast, the Fifth Amendment right arises only when invoked: linking a prophylactic rule to a defendant's assertion, as *Edwards* does, thus makes sense in the Fifth Amendment context. *Id.* But applying *Edwards* to the Sixth Amendment, which does not depend on any assertion, left the *Jackson* majority in an "analytical straitjacket." *Id.*

Third, *Jackson* was viewed as an anomalous extension of the Court's waiver jurisprudence. The dissent observed that the Court had previously erected *per se* barriers against certain police conduct. *See id.*, at 641 n.4 (citing *Maine v. Moulton,* 474 U.S. 159 (1985); *United States v. Henry,* 447 U.S. 264 (1980); *Massiah v. United States,* 377 U.S. 201 (1964)). These were "surreptitious informant" cases, however, in which an accused did not realize he was being questioned by a government agent and therefore had no opportunity to waive his right to counsel. *Id.* It made little sense to extend these precedents to the circumstances of *Jackson*, in which "the conduct of the police was totally open and aboveboard." *Id.*

There was another critical inconsistency in *Jackson* that was not discussed by the dissent. *Jackson*'s second premise was based on a flawed conflation of a defendant's "assertion" and his "waiver" of the right to counsel. ***36** *Jackson*, 475 U.S., at 632-33 (citing *Zerbst*, 304 U.S., at 464). A defendant's effective or ineffective "assertion" of his right to counsel is in no sense a "waiver" of that right: the two concepts are analytically distinct, and therefore *Zerbst* provides no basis for "broadly" construing a defendant's assertion. *See id.* More concretely, however, this aspect of *Jackson* flatly contradicted the Court's statement two years earlier in *Smith v. Illinois* that "[i]nvocation and waiver [of the right to counsel] are entirely distinct inquiries, and the two must not be blurred by merging them together." 469 U.S. 91, 98 (1984). *Jackson* made precisely that error, and therefore contravened the Court's own precedent.

2. Subsequent Decisions Have Abandoned *Jackson*'s Analytical Framework.

The Court effectively discarded *Jackson*'s first premise a mere two terms later in *Patterson v. Illinois,* 487 U.S. 285 (1988). *Jackson* had reasoned that "the reasons for prohibiting the interrogation of an uncounseled accused are *even stronger* after he has been formally charged with an offense than before." 475 U.S., at 631 (emphasis added). But in deciding that *Miranda* warnings supported waiver of both the Sixth and Fifth Amendment rights to counsel, *Patterson* reasoned:
"The State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose[7] that an attorney serves when the accused is questioned by authorities. With respect to this inquiry, we do not discern a substantial difference ***37** between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning." 487 U.S., at 298-99.

Patterson relied on a proposition irreconcilably opposed to *Jackson*'s first premise. A clearer repudiation of *Jackson's* first premise is difficult to imagine. Moreover, as Part II.A.3 *infra* shows, whatever marginal benefit *Jackson* provides at arraignment is entirely duplicative of the protections *Edwards* already affords.

Jackson's second premise conceptually flawed and contrary to *Smith v. Illinois* from the beginning was further damaged by *Davis v. United States,* 512 U.S. 452 (1994). *Davis* held that a defendant's assertion of his right to counsel must be sufficiently clear and unambiguous "that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.*, at 459. An assertion that "fails to meet the requisite level of clarity" fails to trigger *Edwards. Id. Davis strictly* construes a defendant's request for counsel, resolving any ambiguity in favor of the police. *See id.*, at 461 (reasoning that a bright line is needed because "it is police officers who must actually decide whether or not they can question a suspect"). *Jackson*, on the other hand, *liberally* construed the same *Edwards* assertion. 475 U.S., at 633. There is no reason to assume that an *Edwards* assertion need be any less clear in the Sixth Amendment context, and *Davis* therefore directly undermines *Jackson*'s second premise.

Finally, *McNeil v. Wisconsin,* 501 U.S. 171 (1991), was the last nail in *Jackson*'s coffin. *McNeil* held that an accused's invocation of his Sixth Amendment right to counsel is not, as a matter of fact or policy, an invocation of his Fifth Amendment right to counsel. 501 U.S., at 177-81. *McNeil* reasoned that defendants invoke their Fifth and Sixth Amendment rights to counsel for distinctly different purposes: (1) the Sixth, to insure postindictment protection ***38** "at critical confrontations with his expert adversary, the government," *id.*, at 177-78; (2) the Fifth, "to protect a quite different interest: a suspect's 'desire to deal with the police only through counsel,' " *id.*, at 178 (quoting *Edwards*, 451 U.S., at 484). Assertion of the Sixth Amendment right (a *Jackson* assertion) was not, as a matter of fact, the assertion of the Fifth Amendment right (an *Edwards* assertion). *Id.* Nor would such a rule be sound policy, because it would effectively render any accused "unapproachable by police officers suspecting them of involvement in other crimes, even though they have never expressed any unwillingness to be questioned." *Id.*, at 180-81. The Court rejected that result as destructive of a paramount pubic interest: "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser." *Id.*, at 181.

McNeil obliterated *Jackson*'s third premise by completely severing the *Jackson* rule from any tie to *Edwards.* After *McNeil*, it is clear that a *Jackson* invocation is factually and legally different from an *Edwards* "wish to have counsel present during custodial interrogation." 501 U.S., at 179. But the reasons for *Edwards* that the police be prevented from badgering a suspect into waiving his already-invoked right to counsel were the lifeblood of *Jackson. See supra* Part II.A (discussing *Jackson*'s third premise); 475 U.S., at 635. *McNeil* leeched every bit of *Edwards* from *Jackson* and effectively transformed the *Jackson* rule into a dead letter.

3. As to Postindictment Interrogatees, *Jackson* Is Entirely Duplicative of the Protections Afforded by *Edwards*.

McNeil clarifies that the *Jackson* rule exists today only as a disembodied presumption, riven from its rational underpinnings in *Edwards. See* 501 U.S., at 179 (characterizing a *Jackson* assertion as only a "legally presumed … request for the assistance of counsel in custodial interrogation"). Practically speaking, though, eliminating *Jackson* from the ***39** Sixth Amendment canon will have no real effect on an accused's ability to counteract the "inherently compelling" pressures of custodial interrogation targeted by *Miranda. See* 384 U.S., at 467.

After *McNeil, Davis* and *Jackson* cannot peacefully coexist because *Davis* requires an express invocation that is inconsistent with the practical reality of how a criminal defendant receives appointed counsel. At arraignment, for example, an indigent accused will be appointed an attorney because the Sixth Amendment requires it. *See Gideon*, 372 U.S., at 344-45. This will occur whether the accused requests an attorney or not. *See* Tex. Code Crim. Proc. art. 26.04(a) (whenever court determines that defendant is indigent, "the court shall appoint one or more practicing attorneys to defend him"). Appointment is thus automatic and the defendant ordinarily will have no reason to invoke the right to counsel. Should a defendant be "foresighted enough, or just plain lucky enough" to make a further, unnecessary request

for counsel, then he will be entitled to the putative benefit of *Jackson* under current law. *See* 475 U.S., at 642 (Rehnquist, J., dissenting).

An accused's subsequent confrontation with police interrogators reveals just how illusory and superfluous the benefit of *Jackson* is. When faced with a postarraignment custodial interrogation, the police must read an accused his *Miranda* warnings, which inform him of his right to counsel, 384 U.S., at 489-70. These warnings, of course, are sufficient to support a waiver of either the Fifth or Sixth Amendment rights to counsel, *Patterson*, 487 U.S., at 296, and the Court has held that "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Davis*, 512 U.S., at 460. But an accused who wants the help of counsel in dealing with the pressures of interrogation need only say four words, "I want my lawyer," and *Edwards* will shield him from any further police-initiated ***40** questioning and will presumptively nullify any subsequent waiver of the right to counsel even if the accused meant to waive it. Given this armory of constitutional and prophylactic rights that are activated by an accused's mouthing four simple words, one might ask: what is the purpose of the additional, dubious protection afforded by *Jackson*? The answer: none.

Jackson should be overruled.

B. Alternatively, Cobb Never Made a Sufficiently Clear and Unambiguous Invocation of His Right to Counsel to Trigger *Jackson.*

If *Jackson* retains any precedential force, the Court should not extend it to the facts of this case. The Texas Court of Criminal Appeals held that Cobb had "asserted" his right to counsel "by accepting Ridley's appointment as his counsel." Pet., at A-7. Nothing in the record discloses that Cobb made any further assertion of his right to counsel under *Jackson.* Cobb's mere acceptance of appointed counsel was not a sufficient "invocation" to trigger *Jackson.*

1. A *Jackson* Assertion Should Be at Least as Clear as an *Edwards* Assertion.

Neither attachment of the Sixth Amendment nor actual representation by an attorney invokes the *Jackson* right. *See Patterson*, 487 U.S., at 291-92; *Harvey*, 494 U.S., at 352. Instead, the *Jackson* rule is triggered by a defendant's "assertion," a prerequisite borrowed directly from *Edwards. Jackson*, 475 U.S., at 636; *Patterson*, 487 U.S., at 291. Although the Court has not squarely addressed how clear a *Jackson* assertion must be, it has with an *Edwards* assertion.

In *Davis* the Court held that only a clear and unambiguous request for counsel will trigger *Edwards. Davis*, 512 U.S., at 459; *see supra* Part II.A.2. By contrast, if a suspect makes an "ambiguous or equivocal" assertion *i.e.*, one supporting the ***41** reasonable inference only that the suspect "*might* be invoking the right to counsel" the police are not barred by *Edwards* from further questioning or from obtaining uncoerced waivers. *Davis*, 512 U.S., at 459 (emphasis added). *Edwards* itself supported this rule of clarity by requiring a suspect to have "clearly asserted his right to counsel." 451 U.S., at 485.

Davis strongly invoked "the other side of the *Miranda* equation: the need for effective law enforcement," 512 U.S., at 461. The Court observed that "it is police officers who must actually decide whether or not they can question a suspect." *Id.* Applying *Edwards* only to clear and unambiguous requests for counsel helps the police understand when they may and may not continue questioning and, therefore, protects legitimate efforts to gather evidence of crime. *Id.* A contrary rule would force the police "to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong." *Id.*

This need for clear police guidance is equally strong in the *Jackson* context. A *Jackson* invocation has precisely the same effect as an *Edwards* invocation. *Jackson*, 475 U.S., at 635. Without an unequivocally expressed desire to consult counsel,

the police face the same uncertainty when deciding whether to question a postindictment or a preindictment defendant. And, of course, the price of guessing wrong is the same in both contexts: the suppression of an otherwise uncoerced confession. *Id.* The Court has never indicated that there should be a different standard of clarity for *Jackson* as opposed to *Edwards* assertions. [8]

Indeed, a *Jackson* assertion should require *greater* clarity than its *Edwards* counterpart. An *Edwards* assertion is made ***42** in the immediate context of custodial interrogation and has a narrowly circumscribed purpose: to cut off questioning and obtain the aid of a lawyer in dealing with custodial interrogation. *McNeil*, 501 U.S., at 178. By contrast, a *Jackson* invocation usually occurs during the relatively open-ended context of, for example, an arraignment or preliminary hearing. A *Jackson* invocation may refer, not only to custodial interrogation, but to any "critical stage" of the prosecution that may follow. *Id.*, at 177-78. Yet *Jackson*, if properly invoked, draws down an iron curtain over all future interrogations with the accused. That far-reaching prohibition should be invoked only by a correspondingly clear and unequivocal assertion.

The Fifth Circuit's decision in *Montoya v. Collins,* 955 F.2d 259 (CA5 1992), provides an appropriate test for determining a sufficient *Jackson* invocation. The Fifth Circuit ruled that a *Jackson* assertion "connotes an actual, positive statement or affirmation of the right to counsel." *Id.*, at 282. The court explained that "[f]or purposes of *Jackson*, an 'assertion' means some kind of positive statement or other action that informs a reasonable person of the defendant's 'desire to deal with the police only through counsel.' " *Id.*, at 283 (quoting *Edwards*, 451 U.S., at 484); *see Genry v. State,* 735 So.2d 186, 195-96 (Miss. 1999); *Smith v. State,* 699 So.2d 629, 638-39 (Fla. 1997); *State v. Carter,* 664 So.2d 367, 370 (La. 1995); *People v. Anderson,* 521 N.W.2d 538, 543-44 (Mich. 1994); *Skaggs v. Parker,* 27 F.Supp.2d 952, 977 (W.D. Ky. 1998) (all adopting *Montoya*).

Montoya's rule comports with the holding in *Davis* that an *Edwards* assertion must be clear and unambiguous. The Court should measure Cobb's mere acceptance of appointed counsel against the requirement that a *Jackson* invocation must "connote[] an actual, positive statement or affirmation of the right to counsel." *Montoya*, 955 F.2d, at 282.

43 2. Cobb's Mere Acceptance of Appointed Counsel Was Not an Assertion at All, Much Less an Assertion Sufficient To Trigger the Heightened Protections of *Jackson.

Merely accepting appointed counsel should not qualify as an "assertion" at all. The Court has strongly indicated that both *Edwards* and *Jackson* will be triggered only by a defendant's affirmative, clear, and unambiguous statement of his desire for counsel. *See, e.g., Davis*, 512 U.S., at 461 (*Edwards* "must be affirmatively invoked by the suspect"); *McNeil*, 501 U.S., at 175 (*Jackson* operates once the "right to counsel has attached and has been invoked"); *Patterson*, 487 U.S., at 291 (*Jackson* turned on the fact that the accused "had asked for the help of a lawyer"); *Jackson*, 475 U.S., at 636 (both *Edwards* and *Jackson* grounded on the defendant's "assertion of the right to counsel"); *Edwards*, 451 U.S., at 485 (barring reinterrogation if suspect "has clearly asserted the right to counsel"). Indeed, if something other than a defendant's statement may trigger the prophylactic bar, then *Davis* was entirely unnecessary. The record here is devoid of any statement by Cobb asserting his desire for counsel's assistance. The Court of Criminal Appeals therefore erred in applying *Jackson.*

Even if a defendant's behavior in accepting counsel may be regarded as "assertive," it is not the kind of clear and unambiguous assertion that triggers *Jackson* and *Edwards.* Hypothetically, of course, an accused who accepts counsel may be breathing a sigh of relief that he now has counsel to shield him from the vast machinery of the prosecutor. Conversely, an accused who has "accepted" counsel may well regard that counsel as completely unnecessary in one important instance: where the accused plans to confess his crime, whether from remorse or from a desire to obtain favorable treatment in a plea bargain. But even if it is *likely* that an accused who accepts counsel believes that he will thenceforth be shielded from any sort of police questioning, ***44** this Court has clearly stated that "the likelihood that

a suspect would wish counsel to be present is not the test for the applicability of *Edwards.*" *McNeil*, 501 U.S., at 178. Nor should it be for *Jackson.*

Mere acceptance of counsel falls far short of the clarity demanded by *Davis*, and consequently by *Jackson.* If *Jackson* requires anything less than the "clear assertion" demanded by *Edwards*, then *Jackson* has no meaning in the Sixth Amendment context. Because counsel must be appointed to every indigent accused, the attachment of the Sixth Amendment itself will invariably activate the harsh *Jackson* prohibitions. That rule would be "a thinly disguised constitutional policy of minimizing or entirely prohibiting the use of evidence of voluntary out-of-court admissions and confessions made by the accused." *Massiah*, 377 U.S., at 209 (White, J., dissenting). But the law should "rejoice at an honest confession." *Minnick*, 498 U.S., at 167 (Scalia, J., dissenting). The Sixth Amendment should not be read to invalidate a confession by a defendant who has never declared an intention to deal with the police only through counsel and who has voluntarily waived the right to counsel before confessing. The paternalistic rule of law that would prevent that laudable act "imprison[s] a man in his privileges and call[s] it the Constitution." *Adams v. United States ex rel. McCann,* 317 U.S. 269, 280 (1942).

An accused subject to postindictment questioning may enjoy the ample protections of *Jackson* by a simple, clear, and unequivocal request for the assistance of counsel in dealing with police interrogation. Linking *Jackson*' s pervasive rule to an accused's mere acceptance of appointed counsel, however, will unfairly cripple the police's legitimate efforts to obtain uncoerced confessions. Because Cobb merely accepted appointed counsel when arraigned for burglary, *Jackson* did not bar his subsequent confession to murder.

***45 3. Cobb Failed to Invoke *Jackson* and Demonstrated that He Did Not Wish the Aid of an Attorney in Dealing with the Police.**

The undisputed record in this case shows that neither Cobb nor his attorney, Ridley, ever objected to the police questioning Cobb outside Ridley's presence about the disappearances of Maggie and Kori Rae Owings. In fact, Ridley's uncontradicted testimony at the suppression hearing was that he "cut off any more contact [Cobb] had with law enforcement" only on November 14, 1995, two days after Cobb had already confessed to the murders. Pet., at B-11. Even assuming that Ridley could have "asserted" Cobb's right to counsel for him,[9] he did so only after Cobb had already confessed. Pet., at B-11.

It was undisputed that Ridley represented Cobb in connection with the burglary charge, beginning in August of 1994, and that the Walker County investigators knew this. Pet., at B-1 to B-4. The Court of Criminal Appeals placed great weight on the fact of Cobb's actual representation by Ridley and on the fact that, on two occasions before Cobb confessed to the murders, Walker County investigators had asked Ridley's "permission" to speak to Cobb about the disappearances. Pet., at A-4 to A-5, A-7. Yet the court ignored Ridley's responses to those police requests. Ridley acknowledged in his testimony that he consistently indicated to the police (1) that there was no reason for him to be present ***46** when they questioned Cobb about the disappearances, (2) that, if Cobb himself did not object to the questioning, Ridley also had no objection to it, and (3) that Ridley did not even represent Cobb with respect to any possible criminal investigation that arose out of the disappearances. *See* Pet., at B-3, B-5 to B-6, B-10 to B-11. [0] The undisputed facts thus confirm that Cobb's Sixth Amendment right to counsel was never violated or even in danger of being violated.

Of course, Cobb's actual, on-going representation by Ridley could not have triggered *Jackson.* That would flatly contradict the Court's statement that "nothing in the Sixth Amendment prevents a suspect charged with a crime *and represented by counsel* from voluntarily choosing, on his own, to speak with police in the absence of an attorney." *Harvey*, 494 U.S., at 352 (emphasis added). Indeed, the formation of the attorney-client relationship cannot trigger attachment of the Sixth Amendment itself, much less the heightened, prophylactic protections of *Jackson. See Moran*, 475 U.S., at 430 ("[T]he suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth

Amendment misconceives the underlying purpose of the right to counsel."). Thus, Cobb's actual ***47** representation by Ridley, both as a matter of the facts here and as a matter of law, did not "wrap a protective cloak around" him, nor did it "protect [Cobb] from the consequences of his own candor." *Id.*

C. Alternatively, the Fifteen-Month Break in Custody Between Cobb's Burglary Arraignment and His Murder Confession Lifted the *Jackson* Bar.

The Court may resolve this case on the alternative basis that Cobb's lengthy break in custody between August 1994 and November 1995 dissolved the *Jackson* bar. The courts of appeals have addressed this issue as to *Edwards*, but not *Jackson.* The circuit courts agree that a break in custody that is reasonably sufficient to allow a defendant to seek the advice of counsel eliminates the need for the *Edwards* rule. *See United States v. Arrington,* 215 F.3d 855, 856-57 (CA8 2000) (citing *Holman v. Kemna,* 212 F.3d 413, 419 (CA8 2000)); *Kyger v. Carlton,* 146 F.3d 374, 380-81 (CA6 1998); *United States v. Bautista,* 145 F.2d 1140, 1150 (CA10 1998); *United States v. Barlow,* 41 F.3d 935, 945-46 (CA5 1994); *United States v. Hines,* 963 F.2d 255, 256-57 (CA9 1992) (citing *United States v. Skinner,* 667 F.2d 1306, 1309 (CA9 1982)); *Dunkins v. Thigpen,* 854 F.2d 394, 397 (CA11 1988); *McFadden v. Garraghty,* 820 F.2d 654, 661 (CA4 1987); ***48** *United States ex rel. Espinoza v. Fairman,* 813 F.2d 117, 125 & n.6 (CA7 1987), *overruled on other grounds by McNeil*, 501 U.S., at 177-82. The courts are unanimous on this issue. *See Kyger*, 146 F.3d, at 380. This Court itself has indicated in *dictum* that *Edwards* applies only "assuming there has been no break in custody." *McNeil*, 501 U.S., at 177; *see Bautista*, 145 F.3d, at 1150 (relying on *dictum* in *McNeil*).

The reasons for the break-in-custody exception to *Edwards* apply equally to *Jackson.* A break in custody dissolves the *Edwards* effect because "if custody is broken, especially for a lengthy period of time, the inherently coercive nature of custody itself is diminished and there is little to no risk of badgering by the authorities." *Bautista*, 145 F.3d, at 1150; *see also Kyger*, 146 F.3d, at 381 (*Edwards*'s concern with police coercion "simply is not implicated when a suspect is not in continuous custody"). *Jackson*, of course, bars police-initiated questioning in precisely the same setting as *Edwards* custodial interrogation and shares *Edwards*'s concern for preventing badgering of defendants who have previously invoked their right to counsel. *See Jackson*, 475 U.S., at 635. In short, the break in custody exception unanimously adopted by eight circuits should apply with equal force to *Jackson.*

Even assuming that Cobb sufficiently invoked *Jackson* by accepting appointed counsel at his burglary arraignment, Cobb was released on bond after the August 1994 arraignment and was not taken into police custody again until November 1995. During this fifteen-month break in custody, Cobb was free to consult with his appointed counsel. Pet., at B-5. This lengthy period should have been sufficient to lift any *Jackson* bar lowered at Cobb's arraignment. Thus, when the Odessa police arrested Cobb in November 1995, Cobb was not prevented by *Jackson* from unilaterally making a valid waiver of his right to counsel and confessing.

*49 CONCLUSION

The Court should reverse the decision of the Texas Court of Criminal Appeals.

*1A APPENDIX

STATE DISTRICT COURT

WALKER COUNTY, TEXAS

12TH DISTRICT

Criminal Case No. 18,920

The State of Texas

v.

Raymond Levi Cobb

DOCKET ENTRIES

DATE	PROCEEDINGS
1/4/96	Record; Appearances - D. Weeks, Defendant (#), H. Ridley, B. Green; Hearing: Arraignment-waived reading of indictment, plea of not guilty; ▲ found indigent-appointed H. Ridley lead counsel, B. Green co-counsel (1st Chair & 2nd Chair)
12/18/96, 10:00 a.m. 6:20 p.m.	Record; Appeared-D. Weeks, J. Gaines, Defendant, H. Ridley, B. Green; Pretrial hearing: #'s motion to suppress and motion to suppress Defendant's statement pursuant to *Jackson v. Denno*: pursuant to #'s motion, per *Gannett Co., Inc., Petitioner, et al., v. De Pasquale, etc., et al.,* 99 S.Ct. 2898 (1979) and *Richmond Newspapers, Inc., etc., et al., Appellants et al., v. Commonwealth of Virginia, et al.,* 100 S.Ct. 2814 (1980), Court closed hearing on this motion to public including media and issued verbal gag order re: any at this hearing divulging contents of hearing; recessed after 3 witnesses/3 hours, balance of time involving other cases.
12/19/96, 9:45 a.m. 6:00 p.m.	Record; same appearances; resumed hearing, evidence (at 9:55); evidence concluded at 4:30 p.m.; argument; motions denied; abeyed until trial ruling re knives removed from house of ▲ by his father; findings/ conclusions will be prepared. Outside jury's presence; rule of witnesses invoked; jury seated, sworn, instructed (with 2 alternatives); state presented indictment-Section 19.03 Capital Murder-Defendant's plea not guilty; opening statement by State; State's evidence began at 9:55 a.m.; recessed at 5:20 p.m.
2/24/97, 9:10 a.m. 5:15 p.m.	Record; same appearances; resumed trial; State's evidence; State rested at 11:15 a.m.; recessed re jury; Defendant's motion for instructed verdict denied.
2/25/97, 9:00 a.m. 5:15 p.m.	Record; same appearances; resumed trial; Defense rested; Court presented charge to jury; final arguments; jury retired to deliberate re verdict at 10:10 a.m.; at 11:15

	a.m., jury returned verdict-Guilty, Capital Murder; jury presiding Juror Phillip Townsend; jury polled-unanimous verdict; verdict received, accepted.
2/26/97 1:00 p.m. 5:20 p.m.	Record; same appearances; punishment phase of trial began.
2/27/97	At 2:10 p.m., jury returned verdict: Special Issue 1 answered "Yes", Special Issue 2 answered "No," jury polled-unanimous verdict; verdict received, accepted; jury instructed and released; Court pronounced death sentence; Court advised Defendant of post trial and appellate rights; Judgment rendered, entered, signed.
10/28/97	Signed Findings of Fact and Conclusions of Law. William L. McAdams; by DB.

***4A TEXAS COURT OF CRIMINAL APPEALS**

Criminal Case No. 72,807

The State of Texas, Petitioner,

v.

Raymond Levi Cobb, Respondent.

DOCKET ENTRIES

DATE	PROCEEDINGS
6/23/1999	Case submitted
3/15/2000	Opinion issued (reversed and remanded).
4/4/2000	Motion for Stay of Mandate granted; 90-day extension from issuance of opinion.
5/1/2000	Petition for writ of certiorari to United States Supreme Court (filed 4/21/2000).
6/9/2000	Mandate stayed by United States Supreme Court (motion filed in USSC on 6/2/2000).
7/3/2000	Petition for writ of certiorari granted (limited to questions 1 & 2)

Footnotes

FN

* Counsel of Record

1 Relevant portions of Ridley's suppression hearing testimony are transcribed in an appendix to the petition for writ of certiorari (Pet. B). ***3** admission, to the pending burglary charge. *Id.* Based on his conversation with Walker County District Attorney David Weeks, Ridley understood that Cobb was not yet a suspect in the disappearances, but he knew that the police believed Cobb knew more than he was saying. Pet., at B 3. This was important to Ridley, because Ridley had recently been involved in a capital murder trial and "really didn't want to get involved in another one right behind that, if Mr. Cobb was in fact a suspect. *Id.*

2 On the second occasion, Cobb led investigators through a wooded area near the Owings's residence, retracing his steps during the burglary. A subsequent search of the area with cadaver dogs uncovered no evidence, however.

3 The suppression hearing testimony of Ridley and James seems inconsistent regarding the date that Cobb was brought back to the grave site after being booked. James testified that this occurred on the evening of November 13, R. 2.246 47, but Ridley seemed to testify that it occurred on the evening of November 14, Pet., at B 10. The inconsistency appears entirely inadvertent and, in any event, the date is irrelevant since it is undisputed that Ridley consented to the officers' request to bring Cobb back out to the grave. Pet., at B 10 to B 11.

4 Expert testimony during trial established the likelihood that Kori Rae's body was either entirely consumed by scavengers or that her immature bones simply disintegrated in the decomposition process. R.19.404 05.

5 As in *Moulton*, the briefs in *Brewer* do not discuss or suggest an exception to the Sixth Amendment's charge specific nature.

6 The *Jackson* majority also rejected the state's argument that the police may not know of the defendant's request for counsel at arraignment. 475 U.S., at 634. The Court reasoned that it must "impute the State's knowledge from one state actor to another. *Id.* It is undisputed that the Odessa police were working with the Walker County police when Cobb was arrested for murder. The fact that the Odessa detectives were unaware of Cobb's representation on the burglary charge is irrelevant to the application of *Jackson*, but highly relevant to the officers' good faith in questioning Cobb. *See supra* Part I.B.3.

7 An "important basis for *Patterson* was counsel's "rather unidimensional role in postindictment questioning: the Court characterized counsel's role as "largely limited to advising his client as to what questions to answer and which ones to decline to answer. 487 U.S., at 294 n.6.

8 Justice Kennedy has strongly recommended that the Court make consistent its Fifth and Sixth Amendment jurisprudence. *McNeil*, 501 U.S., at 183 (Kennedy, J., concurring).

9 It is far from clear that an attorney can assert the Sixth or Fifth Amendment rights to counsel on his client's behalf. *See, e.g., Moran*, 475 U.S., at 433 n.4 (noting the "elemental and established proposition that the privilege against compulsory self incrimination is, by hypothesis, a personal one that can only be invoked by the individual whose testimony is being compelled); *United States v. Muick*, 167 F.3d 1162, 1165 66 (CA7 1999) (interpreting *Moran* as "holding that only the accused may invoke the *Miranda* right to counsel). The Court need not resolve that question in this case.

10 Ridley tried to qualify his permission by testifying that he gave it "believing Cobb] wasn't a suspect. Pet., at B 6. At the same time, however, Ridley admitted that the police "always said they thought Cobb] knew more than he was saying. Pet., at B 7. Ridley never explained what difference, if any, exists between the police suspecting Cobb of "knowing more than he was saying about the disappearances and considering him a "suspect in the disappearances. Importantly, however, Ridley was never misled by the police regarding their suspicions of Cobb's involvement in the disappearances, and Ridley himself declined to testify that he had been misled. *See* Pet., at B 6.

11 These principles illustrate why the Ninth Circuit's recent decision in *United States v. Harrison,* 213 F.3d 1206 (CA9 2000), is in error. *Harrison* holds that a defendant may anticipatorily invoke his Sixth Amendment right to counsel by obtaining counsel on an on going basis, with the government's knowledge, as to the eventual offenses for which he is charged. *Id.*, at 1213. *Harrison* not only violates the Court's clear statements in *Harvey* and *Moran*, it also contradicts the Court's statement in *McNeil* that the Sixth Amendment "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced. 501 U.S., at 175. It should be elementary that the Sixth Amendment prophylaxis in *Jackson* cannot be "invoked until the Sixth Amendment itself attaches. *See, e.g., Muick*, 167 F.3d, at 1165 ("*McNeil* forecloses the argument that the Sixth Amendment right to counsel may be invoked before indictment.).

2000 WL 1634975 (U.S.) (Appellate Brief)
United States Supreme Court Reply Brief.

TEXAS, Petitioner,
v.
Raymond Levi COBB, Respondent.

No. 99-1702.
October 30, 2000.

On Writ of Certiorari to the Texas Court of Criminal Appeals

PETITIONER'S REPLY BRIEF

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*1 ARGUMENT

This case presents two different visions of the Sixth Amendment right to counsel. According to Cobb, the Sixth Amendment forbids police from questioning an accused outside his lawyer's presence not only about offenses charged in an indictment, but also about all other offenses that occurred at the same time as the charged offense. By contrast, Texas believes that the Sixth Amendment only reaches offenses for which a defendant has been formally accused "by way of formal charge, preliminary hearing, indictment, information, or arraignment," *Kirby v. Illinois,* 406 U.S. 682, 689 (1972), and that a defendant must rely on Fifth Amendment guarantees to shield him from questioning about other offenses-including those arising from the same transaction as the charged offense.[2] Unlike Cobb's position, Texas's position is supported by the text and purposes of the Sixth Amendment, and by this Court's jurisprudence.

I. THE SIXTH AMENDMENT RIGHT TO COUNSEL PROTECTS AN ACCUSED ONLY AS TO A CHARGED OFFENSE.

Cobb and his *amici* contend that the Sixth Amendment right to counsel has more than one trigger. They accept the familiar rule that an indictment activates the right to counsel as to the offenses charged. But, going further, they argue that formation of the attorney-client relationship also triggers the Sixth Amendment as to offenses-as yet uncharged-that arise from the same transaction as a charged offense. *See, e.g.,* Defense amici, at 12-18. They unjustifiably warn that, without this additional rule, attorneys will be unable to defend their clients, because the police will exploit unfettered access ***2** to uncounseled defendants and will wring confessions from them at will. *See, e.g.,* Defense amici, at 14-15. Nothing could be further from the truth. Bringing charges against an individual invokes a variety of constitutional protections. But charging a defendant with one crime while the police continue to investigate another factually related but uncharged crime does not deny the defendant the guidance of counsel nor otherwise put him at a disadvantage. If anything, it disadvantages the police by ensuring that a previously unrepresented defendant will have the benefit of counsel, not only for the charged offense which the Sixth Amendment protects, but also as a practical matter for the uncharged offense. In any event, Cobb's view of Sixth Amendment attachment was rejected by the Court over a decade ago. *See Moran v. Burbine,* 475 U.S. 412, 429-30 (1986).

A. The Court Has Consistently Interpreted the Right to Counsel as Extending Only to Charged Offenses.

The Sixth Amendment reserves its cluster of rights only for "criminal prosecutions."[3] The text refers to a distinct procedural event, *i.e.*, to "an action or proceeding instituted in a proper court on behalf of the public, for the purpose of securing the conviction and punishment of one accused of crime." Black's Law Dictionary 374 (6th ed. 1990). That language, combined with the amendment's references to the "accused" and the "accusation," confirms that Sixth ***3** Amendment rights are "accusation-based." Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 102-03, 139 (1997). Its promises accrue only when the government "accuses" by initiating a "criminal prosecution." *Id.*, at 102-03.

The Court has reinforced this reading by consistently holding that the Sixth Amendment right to counsel is triggered only by "the initiation of adversary judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby*, 406 U.S., at 689; *see McNeil v. Wisconsin,* 501 U.S. 171, 175 (1991) (quoting *Kirby*). This rule is "far from a mere formalism" because "it is only then that the government has *committed* itself to prosecute, and only then that the adverse positions of the government and defendant have *solidified.*" *Kirby*, 406 U.S., at 689-90 (emphasis added). Indeed, this line of demarcation is "*fundamental* to the proper application of the Sixth Amendment right to counsel." *Moran*, 475 U.S., at 431 (emphasis added). Consequently, "[w]hen the suspect is not yet 'accused' in the constitutional sense, the sixth amendment bestows no protection whatsoever." H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 Colum. L. Rev. 1137, 1156 (1987).[4]

Thus, only when the criminal prosecution reaches a certain procedural stage- one where the positions of government and defendant have "solidified"-do Sixth Amendment rights begin to flower. *Kirby*, 406 U.S., at 690. The Court's use of the words "solidified" and "committed" implies that there are investigatory phases leading up to a prosecution to which the ***4** Sixth Amendment does not apply. *See, e.g., Moran*, 475 U.S., at 429-30. To be sure, *other* constitutional guarantees may come into play. For instance, if a suspect is arrested and interrogated, he is entitled to an array of procedural safeguards arising from the Fifth Amendment ban on self-incrimination. *See, e.g., Edwards v. Arizona,* 451 U.S. 477, 484-85 (1981). And, of course, a pre-indictment suspect may hire an attorney and be advised how to deal with the police in the event he is questioned. But the *constitutional* right to counsel does not arise until the government formalizes its intent to prosecute.

Against this backdrop, *McNeil* articulated what was already implicit in the Court's jurisprudence-that the Sixth Amendment right to counsel, and its prophylactic counterpart, are "offense specific." 501 U.S., at 175; *see Michigan v. Jackson,* 475 U.S. 625, 636 (1986). That is, their protection is only as broad as the formal criminal proceedings that give them life. *See* Petitioner's Brief, at 11, 21. Thus, a charged offense would be covered by the Sixth Amendment, while an uncharged offense-even a "new or additional crime" committed by the defendant under indictment-would not. *See Maine v. Moulton,* 474 U.S. 159, 180 & n.16 (1985).

B. The Breadth of the Attorney-Client Relationship Cannot Describe an Accused's Constitutional Right to Counsel.

Cobb and his *amici* propose an additional rule of Sixth Amendment attachment. In their view, the attorney-client relationship itself causes the *constitutional* right to counsel to attach to offenses that have not been charged, but that arise from the same factual transaction as a charged offense. *See, e.g.,* Respondent's Brief, at 11; Defense amici, at 14-16. Without this "same transaction" rule, they argue, the police will have unfair access to criminal defendants and their attorneys will be unable to defend them adequately. *See* ***5** Respondent's Brief, at 11-14; Defense amici, at 29. The rule is supposedly grounded in the "lay impressions" of criminal defendants, in the practical necessities of defense counsel, and in the typically coordinated nature of police investigations. Defense amici, at 14-15. *Amici* cite a number of circuit and state cases as support for the rule, and their primary authority in this Court's jurisprudence appears to be *Moulton*'s

statement that the Sixth Amendment "guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." Defense amici, at 7 (quoting *Moulton*, 474 U.S., at 176).

But as explained above, none of the Court's precedents tie attachment of the right to counsel to the formation of the attorney-client relationship. Instead, the cases uniformly peg attachment on reaching a definite procedural stage- the "initiation of adversary judicial criminal proceedings." *See Kirby*, 406 U.S., at 689. *Moulton*'s observation that an accused can rely on counsel as a "medium" simply describes the role of counsel once adversary criminal proceedings have begun. *See* 474 U.S., at 176. In no sense does *Moulton* redefine the point at which the constitutional right to counsel attaches.

The Court rejected Cobb's expanded attachment argument fourteen years ago. In *Moran*, the Court considered whether formation of the attorney-client relationship itself triggered the Sixth Amendment right to counsel. 475 U.S., at 428-29. The defendant argued that the Sixth Amendment should protect the "integrity of the attorney-client relationship" regardless of the stage of the proceedings and that the Sixth Amendment ensures "the right to noninterference with an attorney's dealings with a criminal suspect." *Id.* The Court rejected these notions, explaining that the defendant's argument

"misconceives the underlying purpose of the right to counsel. The Sixth Amendment's intended function is ***6** not to wrap a protective cloak around the attorney-client relationship any more than it is to protect a suspect from the consequences of his own candor. Its purpose, rather, is to assure that in any 'criminal prosecutio[n],' U.S. Const. Amdt. 6, the accused shall not be left to his own devices in facing the prosecutorial forces of organized society." 475 U.S., at 430 (citations omitted).

Moreover, the Court rejected the notion that *Moulton* supports this "attorney-client" rule of attachment. 475 U.S., at 431 ("[B]ecause Moulton already had legal representation, the decision all but forecloses respondent's argument that the attorney-client relationship itself triggers the Sixth Amendment right."). The Court has since confirmed these principles by stating, in *Michigan v. Harvey,* that "nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of counsel." 494 U.S. 344, 352 (1990).

In arguing that the right to counsel extends to an entire transaction, *amici* seriously misread the "offense specific" requirement of *McNeil.* Defense amici, at 13. *Amici* admit that *McNeil* interprets a defendant's request for counsel at arraignment as indicating that he "might be willing to speak to the police without counsel present concerning many matters, *but not the matter under prosecution.*" *Id.* (quoting *McNeil*, 501 U.S., at 178) (emphasis added). But instead of taking this statement at face value, *amici* construe it as a gloss on what "offense specific" means. Namely, they believe that "offense specificity" must take into account an accused's subjective perceptions about how far his request for counsel extends. Thus, *amici* contend " 'offense specific' … mean[s] only that the crime about which the state wishes to question [the defendant] is unlikely to be *totally immaterial* to the defendant's determination of whether he needs the guiding hand of counsel." Defense amici, at 13 (emphasis in original). *Amici* have turned *McNeil* on its head.

***7** Their principal error lies in the belief that "offense specific" refers to a defendant's *invocation* of the right to counsel. *Id. McNeil* does not say that. Instead, *McNeil* emphasizes it is the *Sixth Amendment right to counsel* that is "offense specific":

"The Sixth Amendment right [to counsel] … is offense specific. It cannot be invoked once for all future prosecutions, for its does not attach until a prosecution is commenced …. And just as the right is offense specific, so also its *Michigan v. Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific." 501 U.S., at 175 (citations omitted).

McNeil then links the content of the phrase "offense specific" to the objective, verifiable offense under indictment, and *not* to anything as malleable as an accused's secret, subjective belief about what his invocation meant to cover. *See id.*, at 175-76 (quoting *Moulton*, 474 U.S., at 180 & n.16; citing *Moran*, 475 U.S., at 431); *see* Petitioner's Brief, at 21. Contrary to *amici*'s argument, *McNeil* discussed the accused's probable state of mind merely to emphasize that his Sixth Amendment request for counsel is, as a factual matter, not equivalent to a Fifth Amendment request. 501 U.S., at 178.

Expanding on their misreading of *McNeil, amici* speculate about the possible contours of "offense specificity." First, they would expansively rely on the accused's "lay impression" that his request for counsel covers the entire factual transaction and not just the crime for which he has been indicted. Defense amici, at 13-14. But defining the scope of the Sixth Amendment's protections in subjective terms would be disastrous and utterly unworkable. An investigating officer can objectively understand the prophylactic scope of a Fifth Amendment *Edwards* invocation and, once an accused is charged with a particular ***8** crime, an officer can understand a Sixth Amendment invocation objectively defined by the scope of the charge. But any expansion of the scope of the Sixth Amendment invocation unnecessarily forces a subjective determination, and *amici*'s proposition would require an investigator to undertake the impossible task of determining the accused's subjective state of mind before attempting to interrogate him. That radical assertion has no support in the text of the amendment, the Court's Sixth Amendment precedent, or logic. So interpreted, the Sixth Amendment would become nothing more than a charter for criminal evasion. [5]

Second, Cobb and *amici* warn that a charged-offense rule will hamstring defense attorneys' ability to effectively represent their clients as to factually-related but uncharged crimes. Respondent's Brief, at 12-13; Defense amici, at 14-15. This argument again confuses the scope of the attorney-client relationship with the scope of the constitutional right to counsel. The Sixth Amendment does not constitutionalize the attorney-client relationship; rather, it entitles an accused to rely on counsel's aid in defending against a criminal charge. *Moran*, 475 U.S., at 429-30; *Moulton*, 474 U.S., at 180 & n.16. [6] But in effectively representing a client, defense ***9** counsel undoubtedly will consider the possibility that the client may be more of a criminal than initially thought. Counsel may also urge a client to disclose the full extent of his criminal liability for the transaction in question. And counsel may advise a client that, if questioned by police about the yet-uncharged offenses, he should end the interview immediately by invoking his (Fifth Amendment) right to counsel. Thus, the charged-offense rule cannot *prevent* a lawyer from "guiding" his accused client as to police investigations of related but uncharged crimes. *See, e.g.,* Defense amici, at 15. But the Sixth Amendment will not assist in that endeavor until his client is actually indicted for those crimes. [7]

Amici wrongly suggest that this is a "textbook" case for applying some form of "same transaction" or "closely related" exception to *McNeil.* Defense amici, at 16. The assertion that Ridley "behaved as though his attorney-client relationship with Cobb extended to all same transaction charges" sorely misrepresents the record. *See* Petitioner's Brief, at 2-3, 6-7, 29, 45-46; *see infra* Part III.B. Further, Texas has always conceded that the police believed all along that Cobb knew something about the disappearances. *See, e.g.,* Petitioner's Brief, at 3, 29, 46 n.10. But the police's subjective suspicions cannot influence either attachment of the right to counsel or its scope. Even if the police and Ridley assumed there was a pre-existing attorney-client relationship covering the murder investigation, that merely ***10** begs the question whether the attorney-client relationship describes the scope of the Sixth Amendment right to counsel. The Court's precedents answer that question with a definitive "no." *See McNeil*, 501 U.S., at 175-76; *Moran*, 475 U.S, at 429-30; *Moulton*, 474 U.S., at 180 & n.16.

The expansive attachment rule urged by Cobb and his *amici* would transform the Sixth Amendment into a device for outlawing voluntary confession to crime. It would place an attorney at the defendant's elbow, even if he did not ask for one, during any interrogation concerning a crime even remotely related to a previously charged offense. The plain result-given that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances"-would be to muzzle confessions altogether. *Watts v. Indiana,* 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part). [8] This would be a strange and destructive interpretation of the

constitutional right to counsel, particularly in light of the Court's recent statement that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." *McNeil*, 501 U.S., at 181.

II. THE *BLOCKBURGER* COROLLARY APPLIES BY ANALOGY TO THE OFFENSE-SPECIFIC RIGHT TO COUNSEL.

Cobb and his *amici*'s attack on application of the charged-offense rule and a "same elements" *Blockburger* corollary to measure the extent of the Sixth Amendment right to counsel, Respondent's Brief, at 27-34; Defense amici, at 20-29, misapprehends Texas's position, the record, or both. The charged-offense rule arises directly from this Court's ***11** consistent interpretation of the Sixth Amendment right to counsel. The same-elements corollary, which mirrors the familiar *Blockburger* double jeopardy test, simply reinforces the charged-offense rule. *See* Petitioner's Brief, at 26; *Blockburger v. United States,* 284 U.S. 299, 304 (1932). The corollary would *protect* criminal defendants against mechanical circumvention of Sixth Amendment attachment. Moreover, its application to this case is fair, contrary to *amici*'s distortion of the undisputed record.

Amici attempt to establish textually that the gulf between the Fifth Amendment phrase "same offense" and the Sixth Amendment phrase "criminal prosecution" forecloses analogy between the two. Defense amici, at 20-21. Without citing a single authority, *amici* conclude that the "narrower" provisions of double jeopardy are inapposite to the "broader" Sixth Amendment provisions, *Id.* Had *amici* consulted a dictionary, they would have discovered that the two phrases share close kinship. "Offense" means, among other things, the "violation of law for which *penalty* is prescribed," and, specifically in the double jeopardy context, "the term means the same *crime* …." Black's Law Dictionary 1081 (6th ed. 1990) (emphasis added). Similarly, "prosecution" refers to "a proceeding instituted and carried on by due course of law … for the purpose of determining the guilt or innocence of a person charged with *crime.*" *Id.*, at 1221 (emphasis added). These definitions confirm what common sense suggests: an "offense" and a "prosecution" both center around a particular "crime." But more importantly, this Court has described the scope of the Sixth Amendment right to counsel as "offense specific" precisely because its attachment depends on the formal initiation of a "criminal proceeding." *McNeil*, 501 U.S., at 175-76. Text, context, and precedent thus reveal closer ties between the two clauses than *amici* wish to admit.

***12** *Amici*'s argument that precedent forbids cross-pollination between the clauses focuses on *Moulton* and *Brewer v. Williams,* 430 U.S. 387 (1977). They contend that both cases preclude a charged-offense or a same-elements rule because in each the Court, finding right-to-counsel violations, reversed not only charged offenses but also factually related, uncharged offenses. Defense amici, at 21-22. In its opening brief, Texas examined these cases at length, Petitioner's Brief, at 14-19 (*Moulton*); 19-20 (*Brewer*), and showed that (1) neither case addressed the relatedness issue, (2) the state neither raised nor briefed the issue in either case and even conceded Sixth Amendment attachment in *Brewer*, and (3) there were alternative explanations for reversal of the uncharged offenses. *See also* Brief of Amicus Curiae United States, at 19-24. Contrary to *amici*'s implicit assertion, Texas does not contend that *Brewer* and *Moulton* were wrongly decided. Rather, the lengthy treatment in Texas's brief reveals that its argument was, instead, that lower courts have read these cases for propositions they do not contain. *See, e.g.,* Petitioner's Brief, at 20.

Amici also draw inapt distinctions between the respective "purposes" and "interests" served by the double jeopardy and right to counsel clauses. Defense amici, at 24-25. It is unclear what pertinent difference there is between the purpose of double jeopardy (avoiding "successive prosecutions and … multiple punishments for the same offense") and the right to counsel (protecting an unaided defendant "at critical confrontations with his adversary"), at least regarding the definition of "offense." *Id.* The textual differences between the clauses are negligible now that *McNeil* has explicitly linked a Sixth Amendment "criminal proceeding" with a specific offense. 501 U.S., at 175-76. But in any event, to prove the alleged contrast *amici* must grossly overstate the interest protected by the Sixth Amendment. According to *amici*, that interest is "in having an expert assist [an accused] in all dealings with a sophisticated and committed adversary." ***13** Defense amici, at 25. But this description far exceeds the narrower, charge-limited focus of the constitutional right to counsel found in *McNeil, Moran*, and *Moulton.*

Without any textual, precedential, or policy reasons to support their Sixth Amendment interpretation, *amici* improperly hypothesize that the police manipulated the murder investigation in order to deprive Cobb of his attorney's guidance. But contrary to *amici*'s assertion, the record contains not even the slightest hint of police manipulation. Walker County detective Judy James became involved in this case in January 1995, long after Cobb had confessed to the burglary. R.2.207. She met Cobb's appointed counsel, Ridley, in September 1995, when Cobb appeared in Huntsville to plead on the burglary charge. R.2.211-12. At that time, Ridley told James that he did not object to her talking to Cobb about the disappearances, although nothing came of the subsequent interview. R.2.212-17.

In early November 1995, Cobb's stepmother Deborah left a telephone message with the Walker County District Attorney's Office. R.2.218. The message was given to James, who called Deborah back. R.2.218-19. Deborah asked James to speak to Charles (Cobb's father), who told James that he was worried about Cobb and "wanted to know what he could do to help his son." R.2.220. James testified: "I told him if he wanted to help him, that he would have his son call me and tell me the truth; that Raymond needed to tell the truth." R.221; *see* R.2.269. Cobb never called James, but three days later Charles did, informing James that his son had implicated himself in the murders. R.2.222-23. Charles also told James that she should "get a warrant for Raymond because he stated that he would be leaving there in the morning." R.2.224.

The undisputed events that led to Cobb's arrest and confession to the murders show, not that the police manipulated the charges and the investigations to deprive Cobb of his right to counsel, but rather that they carefully ***14** observed every safeguard to ensure both that they would secure the needed evidence, but also that they would be able to use it.

Finally, *amici*'s hypotheticals, purporting to demonstrate the "bizarre consequences" of applying Texas's attachment rule, Defense amici, at 28, do not articulate any legitimate harm that will result from applying Texas's rule. The only harm *amici* identify reveals their flawed conception of the breadth of the constitutional right to counsel. *Amici* hypothesize-without mentioning the broader Fifth Amendment protections-that a suspect's constitutional right to counsel is violated when, for instance, police question a suspect charged with statutory rape about a possible forcible rape offense, or a suspect charged with grand larceny about a possible robbery offense. Defense amici, at 28. But *amici* do not and cannot assert that failure to apply the Sixth Amendment to these hypothetical situations will deprive a suspect of the guidance of counsel, because a suspect faced with custodial interrogation may cut off questioning-and obtain counsel's aid-as to *any* subject simply by invoking his right to counsel under *Edwards. See, e.g.,* Petitioner's Brief, at 23-24. Neither Cobb nor his *amici* have ever addressed that overarching protection in protesting that criminal defendants will not be adequately protected without an expansive interpretation of "criminal proceeding."

The Sixth Amendment does not constitutionalize the attorney-client relationship, but ensures only that an accused may rely on counsel's advice in defending against a particular criminal charge. This is a narrower but far more balanced and manageable scope than *amici* propose. And, contrary to Cobb's and *amici*'s fears, *see* Respondent's Brief, at 28; Defense amici, at 29, its application is simple, depending only upon the substance of the charge that formally begins a "criminal proceeding." U.S. Const. amend. VI.

15 III. COBB IS NOT ENTITLED TO THE PROTECTION OF *MICHIGAN v. JACKSON.

A. *Jackson* Should Be Overruled.

Amici do not address Texas's argument that *Jackson* should be overruled. Petitioner's Brief, at 33-40. In his brief, however, Cobb wrongly asserts that Texas is, in effect, asking the Court to fundamentally alter its last quarter century of Sixth Amendment jurisprudence. Respondent's Brief, at 40-46. Cobb has overstated Texas's position.

Jackson is simply not woven into this Court's Sixth Amendment case law. Rather, it is an unwarranted extension of the *Edwards* rule outside the confines of custodial interrogation into a context where the rule makes no sense. Petitioner's Brief, at 34-35. In the fourteen years since it was decided, the Court has not revisited or expanded *Jackson*, but has, in fact, only limited its application. *See Harvey*, 494 U.S., at 350-54.

Since *Jackson* was decided, the Court has abandoned the already tenuous premises supporting the decision. Petitioner's Brief, at 36-38. *Patterson v. Illinois* clarifies that the state's decision to begin criminal proceedings does not perceptibly increase an accused's need for counsel during questioning. 487 U.S. 285, 298-99 (1988). *Davis* holds that an *Edwards* assertion- the Fifth Amendment equivalent to, and source of, a *Jackson* assertion-must be an unambiguous request for counsel's aid during custodial interrogation. *Davis v. United States,* 512 U.S. 452, 459 (1994). Neither the content nor the context of an accused's request for counsel at an arraignment or similar proceeding approaches the *Davis* standard of clarity. *See McNeil*, 501 U.S., at 178. Finally, *McNeil* completes the Court's abandonment of *Jackson*'s premises by holding that a defendant's Sixth Amendment request for counsel is not, as a matter of fact or policy, an invocation of his Fifth Amendment right to counsel. 501 U.S., at 177-81. ***16** There is no longer any basis in the Court's cases for interpreting an accused's request for counsel at arraignment as the clear expression of a desire for counsel during questioning. The logical and practical underpinnings of *Jackson* have therefore evaporated.

Overruling *Jackson* will not only leave the rest of the Court's Sixth Amendment precedents unaffected but will also have no real effect on an accused's ability to cope with custodial interrogation. *See Miranda v. Arizona,* 384 U.S. 436, 467 (1966). An uncounseled accused who wishes to cut off questioning on *any* subject need only say four words, "I want my lawyer," and the Fifth Amendment will shield him from further police-initiated interrogation. *See Arizona v. Roberson,* 486 U.S. 675, 680-81 (1988); *Edwards*, 451 U.S., at 484. Neither Cobb nor his *amici* have ever explained why these broader Fifth Amendment safeguards do not accomplish what *Jackson* promises. Because the Fifth Amendment and *Edwards* adequately shield an accused from unwanted interrogation, "there simply is no room or need for an awkward adaptation of a further constitutional limitation such as the counsel clause of the sixth amendment." Uviller, *supra*, at 1154.

Jackson should be overruled.

B. Cobb Never Asserted His Right to Counsel.

Cobb and *amici* argue that Cobb invoked his right to counsel under *Michigan v. Jackson* by accepting appointed counsel on the burglary charge. *See* Defense amici, at 7-8. But mere acceptance of appointed counsel without more is insufficient to trigger *Jackson*'s heightened protection. *See* Petitioner's Brief, at 43-44. *Jackson* is triggered only by a defendant's affirmative, clear, and unambiguous request for ***17** counsel, *id.*, at 43,[9] and simply accepting appointed counsel does not rise to that level of clarity.

No decision of this Court supports Cobb's argument. *Amici*'s claim that footnote 3 in *Patterson*, 487 U.S., at 290 n.3, shows that acceptance of appointed counsel activates *Jackson*, is unsupportable. Defense amici, at 8. [0] The accused in *Patterson* had been indicted but had not requested counsel. 487 U.S., at 290-91. Because the accused "at no time sought to exercise his right to have counsel present," the Court found *Jackson* inapplicable. *I d.*, at 291. The Court emphasized that "[o]ur decision in *Jackson* … turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with the police." *Id.* (quoting *Jackson*, 475 U.S., at 631, 633-35).

Patterson accepted the established rule that the accused was entitled to assistance of counsel at postindictment interviews. 487 U.S., at 290. But the Court added the following footnote to its discussion:
"We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect. [citing *Moulton*, 474 U.S., at

176]. The State conceded as much at oral argument. Indeed, the analysis changes ***18** markedly once an accused even requests the assistance of counsel. [citing *Jackson*, 475 U.S., at 629-30].” *Patterson*, 487 U.S., at 290 n.3.

The first sentence of that footnote means only that “retention or acceptance of a lawyer gives rise to the substantive Sixth Amendment safeguards of *Maine v. Moulton* [citation omitted].” *Montoya v. Collins,* 955 F.2d 279, 283 (CA5 1992). It does not address what constitutes an invocation under *Jackson.*

Patterson did not alter *Jackson*'s requirement that an accused invoke his right to counsel. To the contrary, *Patterson* reaffirmed *Jackson*'s assertion rule. *See Patterson*, 487 U.S., at 291. Moreover, this Court has uniformly declared, before and after *Patterson*, that an accused must affirmatively request counsel to trigger *Jackson*, and also that a represented accused may unilaterally waive his right to counsel and speak to police. *See* Petitioner's Brief, at 43 (collecting cases); *see also Harvey*, 494 U.S., at 352. [2] Additionally, *McNeil* did not “infer” an invocation of *Jackson* from the fact that a defendant had counsel at an initial appearance. Defense amici, at 8 (citing *McNeil*, 501 U.S., at 173). The defendant in *McNeil* contended as much, but the Court did not decide the issue because it was unnecessary to resolve the case. *See McNeil*, 501 U.S., at 175-76.

Finally, *amici* misrepresent the record when they erroneously contend that the police misled Ridley about their ***19** suspicions of Cobb. Defense amici, at 9; *see also id.*, at 27 n.7. This assertion is completely unsupported by the record. Ridley himself declined to testify that the police had misled him. Pet., at B-13. When Ridley was told that Cobb had confessed to the murders, Ridley did not complain that their attorney-client relationship had been “violated.” Instead, Ridley candidly told the police that he didn't even know if he would be appointed to represent Cobb for the murders. Pet., at B-10.

Ridley himself repeatedly limited his representation of Cobb to the charged burglary alone. Pet., at B-2 to B-3, B-10 to B-11, B-12. While stating that he permitted police to question Cobb about the disappearances “believing he wasn't a suspect,” Pet., at B-6, Ridley also confirmed that the police “always said they thought [Cobb] knew more than he was saying.” Pet., at B-7; *see* Pet., at B-3. Furthermore, even if Ridley was confused about the police's suspicions, the confusion ended a full two months before Cobb confessed. According to Ridley, in September 1995, Walker County Sheriff Meyers told him that “he thought Cobb was a suspect all along. [Meyers] flat out told me he thought Cobb was guilty; he just couldn't prove it.” Pet., at B-7; *see* Pet., at D-5 ¶17.

Amici's objection that the police's behavior “deprived” Cobb of his right to Ridley's guidance in dealing with the murder investigation, Defense amici, at 9, is also contradicted by the record. Ridley himself described the “guidance” he offered in an interview with Cobb and his father: “I gave [Cobb] my business card and told them if they were contacted by anyone, to get in touch with me.” R.3.472; *see* Pet., at D-6 ¶19. But when Cobb was later questioned about the murders, he declined Ridley's advice and “never invoked his right to counsel at any time.” *See* Pet., at D-3 ¶8.

That undisputed fact-that Cobb never invoked his right to counsel during custodial interrogation-is the beginning and ***20** end of this case. Even if Cobb had a Sixth Amendment right to counsel at the time he was questioned, he simply declined to use it. Nor did he elect to end the interrogation by asking to see his attorney, even though Ridley had explicitly advised him to do so. Instead, Cobb did what has never been disputed in this case. He voluntarily confessed to two cruel murders, for which he was properly convicted.

CONCLUSION

The Court should reverse the decision of the Texas Court of Criminal Appeals.

Footnotes

FN

* Counsel of Record

1 *See, e.g.*, Respondent's Brief, at 11 14; Brief of Amici Curiae the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association (Defense amici), at 12 20.

2 *See, e.g.,* Petitioner's Brief, at 20 30.

3 "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. Const. amend. VI.

4 *See also id.*, at 1164 (" T]he offer of the sixth amendment remains dormant until the actual commencement of legal proceedings against a defendant]. By its terms, and by consistent judicial reading, the constitutional guarantee of counsel accrues only to the charged defendant.).

5 Contrary to *amici*'s arguments, the charged offense rule demands no deep legal "sophistication from criminal defendants. *Id.*, at 14. The rule requires that an accused merely be able to understand the nature of the charges. Cobb surely understood that the burglary charge to which he had confessed did not encompass the murders for which he was ultimately convicted. *See* Petitioner's Brief, at 23 24.

6 *Amici*'s invocation of the ABA's "no contact rule, Defense amici, at 29 n.8, is a red herring. This Court has never indicated that ethical recommendations should govern the contours of the Sixth Amendment, and has in fact strongly suggested to the contrary. *See Moran*, 475 U.S., at 427 28 (rejecting as constitutional standards the "subconstitutional recommendations of the ABA); *United States v. Henry,* 447 U.S. 264, 275 n.14 (1980) (indicating that DR 7 104(a)(1) "does not bear on the constitutional question in this case). *See generally*, Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules Against Prosecutors to Control the Law of the State*, 9 Geo. J. Legal Ethics 665, 732 33 (1996); Uviller, *supra*, at 1176 83.

7 *Amici* illogically suggest that the coordinated nature of police investigations should also influence the scope of an accused's right to counsel. Defense amici, at 15 16. But, again, the scope of the right depends on the offense charged and not on the degree of police "cooperation among different investigations.

8 *See also* Uviller, *supra*, at 1161 ("To hold that an accused defendant shall not be interrogated, or even given the opportunity to speak to the police … except with a lawyer on hand, is simply to direct that they shall not be heard to speak their minds, period.).

9 Cobb repeatedly asserts that he did, in fact, request counsel. *See* Respondent's Brief, at 23, 24, 44. But this alleged request appears nowhere in the record, as Texas specifically pointed out in its merits brief and its certiorari petition. *See* Petitioner's Brief, at 40; Pet. for Cert., at 20. Cobb did not address this factual contention in his opposition to Texas's petition and has therefore waived any objection to it. Sup. Ct. R. 15(2).

10 *Patterson* held that *Miranda* warnings would support waiver of an accused's Sixth Amendment right to counsel during postindictment questioning. 487 U.S., at 296.

11 *Accord State v. Carter,* 664 So.2d 367, 377, 380 (La. 1995). *Contra Dew v. United States,* 558 A.2d 1112, 1116 (D.C. 1989); *Holloway v. State,* 780 S.W.2d 787, 795 96 (Tex. Crim. App. 1989).

12 *Harvey* does not, as Cobb implies, conclude that simply having defense counsel invokes *Jackson.* Respondent's Brief, at 8. In *Harvey*, the state conceded a violation of *Jackson.* 494 U.S., at 349. The Court therefore did not address the invocation issue, nor does it appear from the facts of *Harvey* how the defendant invoked his right to counsel. *Id.*, at 346.

2000 WL 33999473 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Nell NEINAST, Individually, Petitioner,
v.
State of Texas, et al. Respondents.

No. 00-0263.
2000.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Respondent's Brief in Opposition

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***1 THE COURT SHOULD HOLD OR DENY THE PETITION**

Petitioner correctly identifies a conflict between the Ninth Circuit, which upheld §35.130(f) against Eleventh Amendment challenge, and the Fourth and Fifth Circuits, which have both held to the contrary. *Compare Dare v. California,* 191 F.3d 1167 (CA9 1999), *with Neinast v. Texas,* 217 F.3d 275 (CA5 2000), *and Brown v. North Carolina Div. of Motor Vehicles,* 166 F.3d 698 (CA4 1999). Petitions are now pending in all three cases.

Petitioner also correctly notes that "[s]omebody is wrong," Pet. at 11, but it is not the Fifth Circuit. Rather, it was the ***2** Ninth Circuit's gross misapplication of the *Chevron*[2] doctrine in *Dare* that created the split. The congruence-and-proportionality evaluation conducted by the Fourth and Fifth Circuits correctly presupposes that the regulation is not inherently arbitrary or capricious under *Chevron* and that, but for its inability to satisfy the congruence-and-proportionality test, it would otherwise have the same force and effect as a legislative enactment. In other words, the Fourth and Fifth Circuits treated the regulation as if it were a statute and then determined whether Congress could have constitutionally applied that statute against the states' Eleventh Amendment immunity.

The Ninth Circuit's analysis, on the other hand, would never even examine the constitutionality of the regulation. Instead, it would generally determine only whether the challenged regulation is basically consistent with the statutory purpose under *Chevron* and would go no further. *Dare*'s erroneous application of the *Chevron* test in these circumstances produces absurd results. For instance, inherent in the Ninth Circuit's analysis is the supposition that the Department of Justice can constitutionally promulgate *as a regulation* what Congress lacks power to enact *as a law.* The Ninth Circuit's *Chevron*-based analysis is unsuitable for evaluating an Eleventh Amendment challenge precisely because it measures only compatibility with congressional intent and not whether that intent is constitutionally permissible.

***3** The petition for writ of certiorari in this case may appropriately be held pending the Court's resolution of *University of Alabama Board of Trustees v. Garrett,* No. 99-1240. If the Court rules in *Garrett* that Congress lacked authority to abrogate the states' Eleventh Amendment immunity under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.,* then the regulations promulgated pursuant to the ADA also lack abrogating power, and it will be unnecessary for the Court to resolve the more limited question presented in this case.

Alternatively, the Court may properly deny the petition even if Court upholds the ADA against Eleventh Amendment challenge. The Fifth Circuit decided this case having previously determined that the ADA validly abrogated the states' Eleventh Amendment immunity. *Coolbaugh v. Louisiana,* 136 F.3d 430 (CA5 1998). Against that backdrop, the Fifth Circuit correctly held that the regulation at issue in this case, 28 C.F.R. §35.130(f), cannot withstand Eleventh Amendment scrutiny because the regulation does not satisfy the congruence-and-proportionality test. Ultimately, then, the proper result in this case does not depend on the Court's resolution of *Garrett* and, although the Court may legitimately hold the petition for *Garrett,* it certainly is not necessary to do so.

CONCLUSION

For these reasons, the Court should hold the petition pending resolution of *Garrett* or, alternatively, should deny the petition.

Footnotes

1 *See Dare, petition for cert. filed,* 68 U.S.L.W. 3566 (U.S. Feb. 24, 2000) (No. 99 1417); *Brown, petition for cert. filed,* 68 U.S.L.W. 3164 (U.S. Sept. 8, 1999) (No. 99 424).

2 *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.,* 467 U.S. 837 (1984).

United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 19

STUART KYLE DUNCAN
Nominee to be United States Circuit Judge
for the Fifth Circuit

Admiralty and Maritime Law
Professor Kyle Duncan
Spring 2007
Course Syllabus

Office hours by appointment Rm. 559; 915-6859; kyled@olemiss.edu

Class meets Tuesdays and Thursdays, 9:30 to 10:50 a.m., in room 514
Exam: Monday, May 7, 2007, at 9 a.m.

Please come to class, having already read, *and taken notes on*, the assigned text. Your grade will be based on a final exam, but I reserve the right to adjust your grade *up or down* based on your class participation.

- At our first meeting, I will divide the class up into three roughly equal groups. Every third class, your group will be "on call," meaning that I will call on your group for discussion of the assigned text. Obviously, you should be especially well-prepared (and present!) when your group is on call. Of course, anyone may voluntarily participate in class discussion on any day, regardless of whose group is up.

Text: Robertson, Friedell & Sturley, *Admiralty and Maritime Law in the United States* (Carolina Academic Press 2001)

I.
(1). Historical Background; 3-19
(2). Admiralty Jurisdiction in Contract Cases; 20-32
(3). Admiralty Jurisdiction in Tort Cases; 32-53
(4). "Navigable Waters" and "Vessels"; 53-69
(5). Exclusive and Concurrent Jurisdiction; 69-83
(6). Federal Admiralty Court (i); 83-105
(7). Federal Admiralty Court (ii); 105-131
(8). Sources of Substantive Admiralty Law; 131-153

II.
(1). Basic Maritime Tort Law; 155-182
(2). Injuries to Seamen (i); 183-207
(3). Injuries to Seamen (ii); 208-239
(4). Injuries to Seamen (iii); 240-259
(5). LHWCA & Offshore Workers; 260-288
(6). Wrongful Death & Survival Actions; 289-312

III. (1). Intro to Carriage; Harter; COGSA; etc.; 315-337
(2). Perils, Packages, Limitation, Charters, etc.; 338-377

IV. Collision; 379-402

V. General Average; 425-441

VI. Salvage; 433-466

VII. (1). Maritime Liens (i); 469-484
(2). Maritime Liens (ii); 485-502

VIII. Limitation of Liability; 505-519

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Admiralty and Maritime Law (Law 628)
Professor Kyle Duncan
Spring 2008 Course Syllabus

Basic Course Information

- Class meets Mondays and Wednesdays, from 12:30 to 1:50 p.m., in room 112
- Exam: Thursday, May 1, 2008, at 9 a.m.
- My contact information: Rm. 559; 915-6859; kyled@olemiss.edu (office hours by appointment)

Classroom Requirements

- Please come to class, having already read, *and taken notes on*, the assigned text. Your grade will be based on a final exam, but I reserve the right to adjust your grade *up or down* based on your class participation.
- At our first meeting, I will divide the class up into three roughly equal groups. Every third class, your group will be "on call," meaning that I will call on your group for discussion of the assigned text. Obviously, you should be especially well-prepared (and present!) when your group is on call. Of course, anyone may voluntarily participate in class discussion on any day, regardless of whose group is up.

Disability Services

- Any student who may need academic accommodations or access accommodations based on the impact of a documented disability should contact the Office of Student Disability Services (234 Martindale Center) during the first week of classes. The center is open Monday through Friday from 8:00 a.m. until 5:00 p.m. Messages may be left on the office's voice mail system when the office is closed.
    - Phone: (662) 915-7128
    - TTY: (662) 915 7907
    - Fax: (662) 915-5972
    - sds@olemiss.edu
- Disability Services is the official office to assist students through the process of disability verification and coordination of appropriate and reasonable accommodations. Law students currently registered with Disability Services should obtain a new accommodation memo each fall semester. If you have a disability for which you are considering an accommodation, you are encouraged to contact Assistant Dean for Student Affairs, Cary Lee Cluck, clee@olemiss.edu, 515 Lamar Law Center, (662) 915-6815, as early as possible in the semester.

Dishonesty

No credit will be given for dishonest work. At the discretion of the instructor, a student caught engaging in any form of academic dishonesty may be:

1. Given a zero for that assignment.
2. Required to rework and resubmit the assignment.
3. Assigned a reduced grade for the course.

4. Dropped from the course.
5. Failed in the course.
6. In addition or in the alternative, the matter may be referred to the Honor Council for consideration of sanctions up to and including expulsion.

Reading Assignments

Text: Robertson, Friedell & Sturley, *Admiralty and Maritime Law in the United States* (Carolina Academic Press 2001) & 2007-2008 Supplement

I. (1). Historical Background; 3-19
(2). Admiralty Jurisdiction in Contract Cases; 20-32
(3). Admiralty Jurisdiction in Tort Cases; 32-53
(4). "Navigable Waters" and "Vessels"; 53-69
(5). Exclusive and Concurrent Jurisdiction; 69-83
(6). Federal Admiralty Court (i); 83-105
(7). Federal Admiralty Court (ii); 105-131
(8). Sources of Substantive Admiralty Law; 131-153

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(2). Injuries to Seamen (i); 183-207
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(5). LHWCA & Offshore Workers; 260-288
(6). Wrongful Death & Survival Actions; 289-312

III. (1). Intro to Carriage; Harter; COGSA; etc.; 315-337
(2). Perils, Packages, Limitation, Charters, etc.; 338-377

IV. Collision; 379-402

V. Towage & Pilotage; 403-423

VI. General Average; 425-441

VI. Salvage; 443-466

VII. (1). Maritime Liens (i); 469-484
(2). Maritime Liens (ii); 485-502

VIII. Limitation of Liability; 505-519

IX. Marine Insurance; 521-557

X. Sovereign Immunity; 559-573

XI. Forum Shopping; 575-607

Comparative Law (Law 643)
Course Syllabus

Professor Kyle Duncan
Rm. 559; 915-6859; kyled@olemiss.edu

Fall 2006
Office hours by appointment

Class meets: Tuesdays and Thursdays, 12:30 to 1:50 p.m. in room 104
Exam: December 15, 2006, at 9 a.m.

Please come to class, having already carefully read the assigned text. Class attendance is important; please let me know if you will miss more than three classes. Your grade will be based on a final exam, but I reserve the right to adjust your grade *up or down* based on class participation (or lack thereof).

Text

Glendon, Gordon & Osakwe, *Comparative Legal Traditions* (2nd ed. West)

Reading Assignments

All page references are to the Glendon text, unless otherwise indicated.

(1). "Introduction to the Comparative Study of Law," pp. 1-41
(a). Excerpt from Harold J. Berman, *The Western Legal Tradition in a Millenial Perspective: Past and Future*, 60 LA. L. REV. 739 (2000) (handout)

The Civil Law Tradition

(2). "History, Culture and Distribution of the Civil Law," pp. 44-62

(3). (a). "Legal Structures in Civil Law Nations," §§ 1-3, pp. 65-73
(b). § 4, pp. 73-118
(c). Compare French and German decisions in § 4, *supra*, with *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973) (available from Westlaw or Lexis).
(d). §§ 5-6, pp. 118-129

(4). "Procedure in Civil Law Systems," pp. 166-191

(5). "Sources of Law and the Judicial Process in Civil Law Systems"
(a). §§ 1-3, pp. 192-210
(b). § 4, pp. 210-241
(c). § 5, pp. 242-264

(6). "Fields of Substantive Law in Civil Law Systems"
(a). §§ 1-4, pp. 265-274
(b). § 5 & Problem Area 1, pp. 275-305

The Common Law Tradition

(7). "History, Culture and Distribution of the Common Law Tradition," pp. 438-454

(8). "Legal Structures in England"
(a). § 1, pp. 455-468
(b). § 2, 468-492
(c). § 3, 492-537

(9). "Procedure in England," pp. 608-654

(10). "Legal Rules in England"
(a). §§ 1-3, pp. 671-709
(b). §§ 3-7, pp. 709-744

(11). "Divisions of English Law," pp. 750-765

*****

Comparative Law (Law 643)
Course Syllabus

Professor Kyle Duncan
Rm. 559; 915-6859; kyled@olemiss.edu

Fall 2007
Office hours by appointment

Class meets: Tuesdays and Thursdays, 2:00 to 3:20 p.m. in room 550
Exam: Thursday, December 6, 2007, at 9 a.m.

Please come to class, having already carefully read the assigned text. Class attendance is important; please let me know if you will miss more than three classes. Your grade will be based on a **final exam** (three-quarters), and an **in-class presentation** (one-quarter). But I reserve the right to adjust your grade *up or down* one half-grade based on class participation (or lack thereof).

Your in-class presentation will take place during the final four or five class periods. They will be relatively short (about 15 minutes) presentations about a specific area of comparative law, which I will assign in advance. I will discuss this in greater detail with you during class.

Text

Glendon, Carozza & Picker, *Comparative Legal Traditions* (3rd. ed. West)

Reading Assignments

All page references are to the Glendon text, unless otherwise indicated.

(1). "Introduction to the Comparative Study of Law," pp. 1-23, 23-49

The Civil Law Tradition

(2). "History, Culture and Distribution of the Civil Law," pp. 52-75

(3). (a). "Legal Structures in Civil Law Nations," §§ 1-3, pp. 76-88
(b). § 4, pp. 88-106
(c). § 4, pp. 106-121
(d). §§ 5-6, pp. 121-136

(4). "Procedure in Civil Law Systems," pp. 185-225

(5). "Sources of Law and the Judicial Process in Civil Law Systems"
(a). §§ 1-3, pp. 226-248

(b). § 4, pp. 248-279

The Common Law Tradition

(7). "History, Culture and Distribution of the Common Law Tradition," pp. 306-324

(8). "Legal Structures in England"
- (a). § 1, pp. 325-349
- (b). § 2, pp. 349-372
- (c). § 3, pp. 372-393, 393-95, 405-417

(9). "Procedure in England,"
- (a). pp. 508-513, 519-532
- (b). pp. 533-550
- (c). pp. 550-575

(10). "Legal Rules in England"
- (a). §§ 1-2, pp. 593-622
- (b). §§ 3-7, pp. 632-661

(12). "Comparative Exercises: Abortion and Judicial Review," pp. 870-909

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Comparative Law (Law 643)
Course Syllabus

Professor Kyle Duncan
Rm. 559; 915-6859; kyled@olemiss.edu

Fall 2008
Office hours by appointment

Class meets: Mondays and Wednesdays, 2:00 to 3:20 p.m. in room 104
Exam: Wednesday, December 10, 2008, at 9 a.m.

Class attendance is important; please let me know if you will miss more than three classes. Your grade will be based on a **final exam** (two-thirds), and **in-class presentations** (one-third). But I reserve the right to adjust your grade *up or down* one half-grade based on class participation (or lack thereof).

Your in-class presentations will take place during the second half of the semester. They will be relatively short presentations about comparing a specific area of law, which I will assign in advance. I will discuss this in greater detail with you during class.

Required Texts

(1). *Roman Law in European History*, by Peter Stein (Cambridge University Press 1999) ("Stein)

(2). *Louisiana Civil Code*, Volume One (West 2008) ("CC")

Reading Assignments

Week #1: Introductory materials (start reading Stein, chs. 1 & 2)

Week #2: Stein, chapters 1 & 2 (Roman law in antiquity)

Week #3: Stein, chapters 3 & 4 (Revival of Justinian's law; Roman law and the nation state)

Week #4: (a). Stein, chapter 5 (Roman law and codification)
(b). Introduction to Louisiana Civil Law System and the *Louisiana Civil Code* (handout)

Week #5: (a). CC, Preliminary Title
(b). CC, Book I: Persons

Week #6: Presentations

Week #7: (a). CC, Book II: Things, Ownership, Servitudes
(b). CC, Book III: Obligations

Week #8: Presentations

Week #9: Presentations

Week #10: (a). CC, Book III: Successions & Donations
(b). CC, Book III: Matrimonial Regimes

Week #11: Presentations

Week #12: Presentations

Week #13: Review

Disability Services

- Any student who may need academic accommodations or access accommodations based on the impact of a documented disability should contact the Office of Student Disability Services (234 Martindale Center) during the first week of classes. The center is open Monday through Friday from 8:00 a.m. until 5:00 p.m. Messages may be left on the office's voice mail system when the office is closed.

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  - TTY: (662) 915 7907
  - Fax: (662) 915-5972
  - sds@olemiss.edu

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Dishonesty

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1. Given a zero for that assignment.
2. Required to rework and resubmit the assignment.
3. Assigned a reduced grade for the course.
4. Dropped from the course.
5. Failed in the course.
6. In addition or in the alternative, the matter may be referred to the Honor Council for consideration of sanctions up to and including expulsion.

*****

Constitutional Law (Law 507 § 2)
Professor Kyle Duncan
Spring 2008 Syllabus

Office hours by appointment Rm. 559; 915-6859; kyled@olemiss.edu

- Class meets Tuesdays and Thursdays, 12:30 to 1:50 p.m., in room 112
- Exam: Monday, April 28, 2008, at 1 p.m.
- Please come to class, having already read, *and taken notes on*, the assigned text. Your grade will be based on a final exam, but I reserve the right to adjust your grade *up or down* based on your class participation. If you must be absent from class, you must tell me beforehand, preferably by email.
- At our first meeting, I will divide the class up into several roughly equal groups. On a rotating basis, your group will be "on call," meaning that I will rely on your group for detailed discussion of the assigned text. You must be especially well-prepared (and present!) when your group is on call. Of course, everyone is strongly encouraged to participate voluntarily in class discussion every class, regardless of whose group is up.

***

Disability Services

Any student who may need academic accommodations or access accommodations based on the impact of a documented disability should contact the Office of Student Disability Services (234 Martindale Center) during the first week of classes. The center is open Monday through Friday from 8:00 a.m. until 5:00 p.m. Messages may be left on the office's voice mail system when the office is closed.

Phone: (662) 915-7128
TTY: (662) 915 7907
Fax: (662) 915-5972
sds@olemiss.edu

Disability Services is the official office to assist students through the process of disability verification and coordination of appropriate and reasonable accommodations. Law students currently registered with Disability Services should obtain a new accommodation memo each fall semester. If you have a disability for which you are considering an accommodation, you are encouraged to contact Assistant Dean for Student Affairs, Cary Lee Cluck, clee@olemiss.edu, 515 Lamar Law Center, (662) 915-6815, as early as possible in the semester.

***

Dishonesty

No credit will be given for dishonest work. At the discretion of the instructor, a student caught engaging in any form of academic dishonesty may be:

1. Given a zero for that assignment.
2. Required to rework and resubmit the assignment.
3. Assigned a reduced grade for the course.
4. Dropped from the course.
5. Failed in the course.
6. In addition or in the alternative, the matter may be referred to the Honor Council for consideration of sanctions up to and including expulsion.

***

Class Assignments

Text: Brest, Levinson, Balkin, Amar & Siegel, *Processes of Constitutional Decisionmaking: Cases and Materials* (5th edition 2006), *and* 2007 Supplement

(1). *Introduction*, 1-26	(9). *Chapter 4*, 412-456	(17). *Chapter 6*, 893-927	(25). *Chapter 8*, 1339-1370
(2). *Chapter 1*, 27-67	(10). *Ch. 4*, 471-484; *Intro. Ch. 5*, 485-497	(18). *Chapter 6*, 928-956	(26). *Chapter 8*, 1387-1409
(3). *Chapter 1*, 67-95	(11). *Chapter 5*, 499-530	(19). *Chapter 6*, 956-981	(27). *Chapter 8*, 1419-1465
(4). *Chapter 2*, 97-136	(12). *Chapter 5*, 549-564	(20). *Chapter 6*, 1071-1103	(28). *Chapter 8*, 1465-1505
(5). *Chapter 2*, 168-186	(13). *Chapter 5*, 600-629	(21). *Chapter 6*, 1120-1151	(29). *Chapter 8*, 1569-1592
(6). *Chapter 3*, 212-260	(14). *Chapter 5*, 649, 674-711	(22). *Chapter 6* (supp.), 59-103	
(7). *Chapter 4*, 301-337	(15). *Chapter 5*, 819-841	(23). *Chapter 7*, 1179-1202	
(8). *Chapter 4*, 351-385	(16). *Chapter 5*, 841-881	(24). *Chapter 7*, 1229-1255	

*****

Constitutional Law II

Professor Kyle Duncan

Contact Info: Office: Law Center 559
Phone: 915-6859
E-Mail: kyled@olemiss.edu

Office Hours: You may make an appointment to see me in my office or you may talk to me after class. You may also e-mail your questions and comments to me.

Grading: Your grade for the course will depend on your score on a final exam, possibly adjusted up or down based on your class participation.

Attendance: You must attend class. If you miss more than four class meetings, you will face serious consequences, which may include exclusion from the final exam and a failing grade for the course. Please contact me immediately should you confront extenuating circumstances affecting your class attendance.

Participation: You should come to class prepared to discuss the assigned materials – especially the discussion problems. I may adjust your grade for the course – by as much as A FULL LETTER GRADE – based on your class participation.

Electronics: Please turn off your cell phone during class. Please turn off the sounds on your computer and any other electronics you use during class. If you do use any electronics in class, you must confine yourself to class-related applications (e.g., word processing).

Seating: We will complete a seating chart early on.

Text: *Constitutional Law*, by Stone, Seidman, Sunstein & Tushnet (4th ed.), with 2003 Supplement

Course Info: 508 Constitutional Law II, § 2 (3 Hours) in Room 110
T & Th, 8:00 to 9:20 a.m.

Final Exam: Friday, December 10 (9 a.m.)

Constitutional Law II (Law 508)
Freedom of Religion and Expression in the U.S. Constitution
Course Syllabus

Professor Kyle Duncan Spring 2006
Rm. 559; 915-6859; kyled@olemiss.edu Office hours by appointment

Class meets: Tuesdays and Thursdays, 8:00 to 9:30 a.m.
Exam: May 2, 2006, at 9 a.m.

Please come to class, having already read, *and taken notes on*, the assigned text. Your grade will be based on a final exam, but I reserve the right to adjust your grade *up or down* based on class participation (or lack thereof).

Texts

- *American Constitutional Law: Powers & Liberties*, by Calvin Massey (2nd Ed. 2005) (along with most recent supplement).

Reading Assignments

[All page references are to the Massey text, unless otherwise indicated]

Introduction: Judicial Review & The Bill of Rights

(1). (a). U.S. CONSTITUTION, pp. xxxi–xlvi
(b). Origins & Theory of Judicial Review, pp. 3-23
(c). Utility, Methods, & Tiers of Judicial Review, pp. 38-49

(2). (a) Substantive Due Process & Incorporation, pp. 445-461
(b). Handout on Bill of Rights & Incorporation

The Religion Clauses: Free Exercise

(4). (a). Introduction, pp. 1073-1077
(b). Free Exercise: Generally Applicable Laws, pp. 1078-1090
(c). Handout on the debate over *Smith*
(d). Free Exercise: Laws Targeting Religion, pp. 1090-1100

The Religion Clauses: Establishment

(5). (a). Handout on founding-era establishments
(b). Establishment: Gov't Aid to Religion, pp. 1100-1113

(6). (a). Establishment: Gov't Endorsement, pp. 1123-33

(b). Endorsement, *continued*, pp. 1133-1140
(c). Establishment: Religious Symbols, pp. 1140-48
(d). *Elk Grove Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004) (handout)

(7). (a). Establishment: Gov't Accommodation, pp. 1148-52
(b). *Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (handout)

Freedom of Expression

(8). (a). Overview, pp. 797-809
(b). *Alien & Sedition Acts* (supplement)
(c). *Kentucky Resolutions* & *Virginia Resolutions* (supplement)
(d). John Marshall, *Report of the Minority on the Virginia Resolutions* (supplement)

Content-Based Regulation

(9). (a). Incitement, pp. 809-823
(b). Incitement & *Brandenburg*, pp. 824-827
(c). Incitement & True Threats, pp. 827-830

(10). (a). Obscenity, pp. 831-844
(b). Pornography, pp. 844-850

(11). (a). Fighting Words, pp. 851-854
(b). Hate Speech, pp. 854-870

(12). (a). Offensive Speech, pp. 870-895

(13). (a). Defamation, etc., pp. 895-910

(14). (a). Commercial Speech, 910-928

Content-Neutral Regulation

(15). (a). Time, Place, Manner Restrictions, pp. 928-936
(b). Symbolic Conduct, pp. 936-944

(16). (a). "Secondary Effects," pp. 944-954

Government as Sovereign & Proprietor

(17). (a). Public Forum, pp. 954-964
(b). Public Education, pp. 964-971

(18). (a). Public Employment, pp. 971-979
(b). Public Sponsorship, pp. 979-988

Vagueness, Overbreadth, & Prior Restraints

(19). (a). Overbreadth, pp. 988-994
(b). Vagueness, p. 995
(c). Prior Restraints, pp. 996-1003

Implicit Free Expression Rights

(20). (a). Freedom of Association, pp. 1003-1012
(b). Freedom *Not* to Speak, pp. 1013-1024

Constitutional Law II (Law 508)
Freedom of Religion and Expression in the U.S. Constitution

Course Syllabus

Professor Kyle Duncan Spring 2006
Rm. 559; 915-6859; kyled@olemiss.edu Office hours by appointment

Class meets: Tuesdays and Thursdays, 8:00 to 9:30 a.m.
Exam: May 2, 2006, at 9 a.m.

Please come to class, having already read, *and taken notes on*, the assigned text. Your grade will be based on a final exam, but I reserve the right to adjust your grade *up or down* based on class participation (or lack thereof).

Text

American Constitutional Law: Powers & Liberties, by Calvin Massey (2nd Ed. 2005) (along with most recent supplement).

Reading Assignments

All page references are to the Massey text, unless otherwise indicated.

Introduction: Judicial Review & The Bill of Rights

(1). (a). U.S. CONSTITUTION, pp. xxxi–xlvi
(b). Origins & Theory of Judicial Review, pp. 3-23
(c). Utility, Methods, & Tiers of Judicial Review, pp. 38-49

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(b). Handout on Bill of Rights & Incorporation

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(b). Free Exercise: Generally Applicable Laws, pp. 1078-1090
(c). Handout on the debate over *Smith*
(d). Free Exercise: Laws Targeting Religion, pp. 1090-1100

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(4). (a). Handout on founding-era establishments
(b). Establishment: Gov't Aid to Religion, pp. 1100-1123

(5). (a). Establishment: Gov't Endorsement, pp. 1123-33
(b). Endorsement, *continued*, pp. 1133-1140

(6). (a). Establishment: Religious Symbols, pp. 1140-48
(b). Symbols, *continued* in supplement, pp. 49-71

(7). (a). Establishment: Gov't Accommodation, pp. 1148-52 & p. 71 (supplement).

Freedom of Expression

(8). (a). Overview, pp. 797-809

Content-Based Regulation

(9). (a). Incitement, pp. 809-823
(b). Incitement & *Brandenburg*, pp. 824-827
(c). Incitement & True Threats, pp. 827-830

(10). (a). Obscenity, pp. 831-844
(b). Pornography, pp. 844-850

(11). (a). Fighting Words, pp. 851-854
(b). Hate Speech, pp. 854-870

(12). (a). Offensive Speech, pp. 870-895

(13). (a). Defamation, etc., pp. 895-910

(14). (a). Commercial Speech, 910-928

Content-Neutral Regulation

(15). (a). Time, Place, Manner Restrictions, pp. 928-936
(b). Symbolic Conduct, pp. 936-944

(16). (a). "Secondary Effects," pp. 944-954

Government as Sovereign & Proprietor

(17). (a). Public Forum, pp. 954-964
(b). Public Education, pp. 964-971

(18). (a). Public Employment, pp. 971-979
(b). Public Sponsorship, pp. 979-988

Vagueness, Overbreadth, & Prior Restraints

(19). (a). Overbreadth, pp. 988-994 (& p. 45 supplement)
(b). Vagueness, p. 995
(c). Prior Restraints, pp. 996-1003

Implicit Free Expression Rights

(20). (a). Freedom of Association, pp. 1003-1012 (& p. 45-46 supplement)
(b). Freedom *Not* to Speak, pp. 1013-1024

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Constitutional Law II (First Amendment)
Professor Kyle Duncan
Spring 2007
Syllabus

Office hours by appointment Rm. 559; 915-6859; kyled@olemiss.edu

Class meets Tuesdays and Thursdays, 2:00 to 3:20 p.m., in room 106
Exam: Friday, May 4, 2007, at 9 a.m.

Please come to class, having already read, *and taken notes on*, the assigned text. Your grade will be based on a final exam, but I reserve the right to adjust your grade *up or down* based on your class participation.

- At our first meeting, I will divide the class up into four roughly equal groups. Every fourth class, your group will be "on call," meaning that I will call on your group for discussion of the assigned text. Obviously, you should be especially well-prepared (and present!) when your group is on call. Of course, anyone may voluntarily participate in class discussion on any day, regardless of whose group is up.

Text: *The First Amendment and Related Statutes: Problems, Cases and Policy Arguments* (2nd ed. 2005), by Eugene Volokh.

First, read

(i). "Introduction—How Is This Textbook Different from Traditional Casebooks?" on pages vii-ix; and (ii). "Free Speech: A General Overview" on pages 1-2

Assignments

(1). Incitement (a). 3-20 (b). 20-58 (2). False Statements of Fact (a). 59-89 (b). 89-114 (3). Obscenity & Child Pornography (a). 115-131	(11). Religion Clauses Overview (a). 697-702 (12). Non-Discrimination (a). 703-736 (b). 736-763 (13). Non-Endorsement (a). 763-791 (b). 791-824

(b). 131-147

(4). Offensive Speech / Violent Reaction / Threats
(a). 147-171
(b). 171-184

(5). Commercial Advertising
(a). 194-224

(6). Strict Scrutiny
(a). 224-246

(7). Content Discrimination Within Exceptions
(a). 286-303

(8). Content-Neutral Restrictions
(a). 314-338
(b). 339-358

(9). Speech Compulsions
(a). 543-572

(10). Right of Expressive Association
(a). 579-596
(b). 605-647

(14). No Primary Religious Purpose
(a). 824-839

(15). Non-Coercion
(a). 839-852

(16). No Religious Decisions
(a). 853-863

(17). Facially Evenhanded Funding
(a). 864-895
(b). 895-930
(c). 930-946

(18). No Delegations
(a). 946-951

(19). Exemptions for Religious Observers
(a). 952-976
(b). 977-1005
(c). 1011-1023

Constitutional Law II:
Religion Clauses of the First Amendment
Professor Kyle Duncan Summer 2007

Syllabus

Office hours by appointment Rm. 559; 915-6859; kyled@olemiss.edu

Class meets Monday through Friday, 7/5 to 8/3, from 8:00 to 9:30 a.m., in room 106
Exam: 8/6 or 8/7 (tba)

Please come to class, having carefully read the assigned text. Your grade will be based on a final exam, but I reserve the right to adjust your grade *up or down* one-half letter grade based on your class participation.

Text: *The Religion Clauses and Related Statutes* (Foundation Press 2005), by Eugene Volokh.

Assignments

(1). *No-Discrimination I* (pp. 7-33)	(10). *Funding II* (pp. 265-290)
(2). *No-Discrimination II* (pp. 33-40; pp. 41-62)	(11). *Funding III* (pp. 290-309)
(3). *Non-Discrimination III* (pp. 62-89)	(12). *Funding IV* (pp. 309-329)
(4). *No-Endorsement I* (pp. 89-138)	(13). *No Delegation* (pp. 329-338)
(5). *No-Endorsement II* (pp. 138-186)	(14). *Exemptions I* (pp. 339-367)
(6). *No Primary Religious Purpose* (pp. 186-216)	(15). *Exemptions II* (pp. 367-396)
(7). *No-Coercion* (pp. 216-230)	(16). *Exemptions III* (pp. 396-414)
(8). *No Religious Decisions* (pp. 230-241)	(17). *Exemptions IV* (pp. 414-439)
(9). *Funding I* (pp. 242-265)	(18). *Non-Gov't Action* (pp. 440-452)

European Union Law (Law 630)
Course Syllabus

Professor Kyle Duncan
Rm. 559; 915-6859; kyled@olemiss.edu

Fall 2008
Office hours by appointment

Class meets: Tuesdays and Thursdays, 9:30 to 10:50 a.m., in room 550
Exam: Friday, December 12, 2008, at 9 a.m.

Class attendance is important; please let me know if you will miss more than three classes. Your grade will be based on a final exam, but I reserve the right to adjust your grade *up or down* one half-grade based on class participation (or lack thereof).

Required Text

The Law of the European Union: A New Constitutional Order, by Alain A. Levasseur & Richard F. Scott (Carolina Academic Press 2001).

Disability Services

- Any student who may need academic accommodations or access accommodations based on the impact of a documented disability should contact the Office of Student Disability Services (234 Martindale Center) during the first week of classes. The center is open Monday through Friday from 8:00 a.m. until 5:00 p.m. Messages may be left on the office's voice mail system when the office is closed.

    - Phone: (662) 915-7128
    - TTY: (662) 915 7907
    - Fax: (662) 915-5972
    - sds@olemiss.edu

- Disability Services is the official office to assist students through the process of disability verification and coordination of appropriate and reasonable accommodations. Law students currently registered with Disability Services should obtain a new accommodation memo each fall semester. If you have a disability for which you are considering an accommodation, you are encouraged to contact Assistant Dean for Student Affairs, Cary Lee Cluck, clee@olemiss.edu, 515 Lamar Law Center, (662) 915-6815, as early as possible in the semester.

Dishonesty

No credit will be given for dishonest work. At the discretion of the instructor, a student caught engaging in any form of academic dishonesty may be:

1. Given a zero for that assignment.
2. Required to rework and resubmit the assignment.
3. Assigned a reduced grade for the course.
4. Dropped from the course.
5. Failed in the course.
6. In addition or in the alternative, the matter may be referred to the Honor Council for consideration of sanctions up to and including expulsion.

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Law & Economics

Professor Kyle Duncan

Contact Info: Office: Law Center 559
Phone: 915-6859
E-Mail: kyled@olemiss.edu

Office Hours: You may make an appointment to see me in my office or you may talk to me after class. You may also e-mail your questions and comments to me.

Grading: Your grade for the course will depend on your score on a final exam, possibly adjusted up or down based on your class participation.

Attendance: Attend class! The more classes you miss, the less you will understand, and the worse you will do on the exam. Attending class will be crucial to understanding this material. I also reserve the right to lower your grade if you miss class excessively without telling me why. Please contact me immediately should you confront extenuating circumstances affecting your class attendance.

Participation: You should come to class having read, re-read, *and* thought about the assigned materials. I reserve the right to adjust your grade based on your class participation.

Electronics: Please turn off your cell phone during class. Please turn off the sounds on your computer and any other electronics you use during class. If you do use any electronics in class, you must confine yourself to class-related applications (e.g., word processing).

Seating: We will complete a seating chart early on.

Text: *Foundations of the Economic Approach to Law*, by Avery W. Katz (Foundation Press 1998); *Economic Analysis of Law*, by Steven Shavell (Foundation Press 2004). I will hand out a great deal of material in addition to these texts!

Course Info: Law & Economics 576 (3 Hours) in Room 106
T & Th, 2:00 to 3:20 p.m.

Final Exam: Monday, May 9 (9 a.m.)

Legal Profession

Professor Kyle Duncan

Contact Info: Office: Law Center 559
Phone: 915-6859
E-Mail: kyled@olemiss.edu

Office Hours: You may make an appointment to see me in my office or you may talk to me after class. You may also e-mail your questions and comments to me.

Grading: Your grade for the course will depend on your score on a final exam, possibly adjusted up or down based on your class participation.

Attendance: Attend class! The more classes you miss, the less you will understand, and the worse you will do on the exam. I also reserve the right to lower your grade if you miss class excessively without telling me why. Please contact me immediately should you confront extenuating circumstances affecting your class attendance.

Participation: You should come to class prepared to discuss the assigned materials. I reserve the right to adjust your grade based on your class participation.

Electronics: Please turn off your cell phone during class. Please turn off the sounds on your computer and any other electronics you use during class. If you do use any electronics in class, you must confine yourself to class-related applications (e.g., word processing).

Seating: We will complete a seating chart early on.

Text: *Regulation of Lawyers: Problems of Law & Ethics*, by Stephen Gillers (6th ed.); *Regulation of Lawyers: Statutes and Standards*, by Steven Gillers & Roy D. Simon (2005 ed.).

Course Info: Legal Profession 603 (3 Hours) in Room 108
M & W, 2:00 to 3:20 p.m.

Final Exam: Wednesday, May 11 (9 a.m.)

Legal Profession
Professor Kyle Duncan

Contact Info: Office: Law Center 559
Phone: 915-6859
E-Mail: kyled@olemiss.edu

Office Hours: You may make an appointment to see me in my office or you may talk to me after class. You may also e-mail your questions and comments to me.

Grading: Your grade for the course will depend on your score on a final exam, possibly adjusted up or down based on your class participation.

Attendance: Attend class! The more classes you miss, the worse you will do on the exam. I reserve the right to lower your grade if you miss class excessively without telling me why. Please contact me immediately should you confront extenuating circumstances affecting your class attendance.

Participation: You should come to class prepared to discuss the assigned materials. I reserve the right to adjust your grade based on your class participation.

Electronics: Please turn off your cell phone during class. Please turn off the sounds on your computer and any other electronics you use during class. If you do use any electronics in class, confine yourself to class-related applications (e.g., word processing).

Seating: We will complete a seating chart early on.

Text: *Regulation of Lawyers: Problems of Law & Ethics*, by Stephen Gillers (6th ed.); *Regulation of Lawyers: Statutes and Standards*, by Steven Gillers & Roy D. Simon (2005 ed.).

Course Info: Legal Profession, Law 603 (3 Hours) in Room 108
M & W, 9:30 to 10:50 a.m.

Final Exam: Thursday, May 4, 2006 at 9:00 a.m.

Schedule of Assigned Readings

January	February	March	April
Mon, 1/9 *Lawyer-Client* pp. 1-17, **21-26**, **27-39** (**h)**	Wed, 2/1 *To Kill a Mocking-bird* Handout	Wed, 3/1 *Anatomy of a Murder*, 457-87, 487-511	Mon, 4/3 *Const'al Protection* **881-900**
Wed, 1/11 *Entities; Exceptions* **39-43**, 43-50, **50-53 (h)**, **56-69**	Mon, 2/6 *Concurrent Conflicts* **229-45 (h)**, 245-56	Mon, 3/6 *Judges* **631-64; supple-ment 1019-40**	Wed, 4/5 *Free Speech* 943-48, **948-69**, 969-72
Mon, 1/16 *Holiday*	Wed, 2/8 *Concurrent, con't* **260-66, 271-78, 283-84 (hypo)**,	Wed, 3/8 *Real Evidence* **513-520**, 520-27, **527-39**	Mon, 4/10 *Free Speech* **972-82**
Wed, 1/18 *Agency, etc.* **69-85** (**h)**; *Autonomy*: 85-106	Mon, 2/13 *Concurrent, con't* **292-96, 301-10**	Mon, 3/13 Wed, 3/15 *Spring Break*	Wed, 4/12 *Marketing* 985-90, **990-97**, **997-1018**
Mon, 1/23 *Interference w. Rel.* **107-17 (civil)**, **122-34 (criminal)**; *Information*: 134-42	Wed, 2/15 *Concurrent, con't* **329-33, *Hartford and Moeller (handout)***; 333-38	Mon, 3/20 *Quality Control* 679-81, **682-90**, **690-96**, 696-707	Mon, 4/17 *Marketing* **1021-40**
Wed, 1/25 *Money* **143-63 (h)**, 163-79, 213-25	Mon, 2/20 *Successive Conflicts* **339-50**, **352-62 (h)**	Wed, 3/22 *Quality Control* 765-68, **768-75**, 776-90, **791-94**	Wed, 4/19 TBA
Mon, 1/30 *To Kill a Mocking-bird* Handout	Wed, 2/22 *Successive, con't* **362-78 (h)**, 378-89	Mon, 3/27 *Quality Control* 794-800 (**h**), **800-07**, 807-13, **813-22**, 822-34	Mon, 4/24 TBA
	Mon, 2/27 *Anatomy of a Murder*, 393-98, 412-31, 431-57	Wed, 3/29 *Quality Control* 834-39, **839-46**, 846-61, **861-75 (h)**	Wed, 4/26 *Review*

Constitutional Law Seminar (Law 703)
Structures & Powers in the U.S. Constitution
Course Syllabus

Professor Kyle Duncan Fall 2005
Rm. 559; 915-6859; kyled@olemiss.edu Office hours by appointment

Class meets: Mon. & Wed., 2:00 to 3:20 p.m., in seminar room 550

Please come to class, having already read, *and taken notes on*, the assigned text. Your grade will be based on a combination of (1) leading a class discussion and (2) a written assignment.

Texts

- *The Federalist: The Gideon Edition*, edited by George Carey and James McClellan (Liberty Fund 2001).
- Supplemental Reading Materials (available at Sir Speedy on West Jackson, at entrance to the Oxford Mall)

Reading Assignments

1. Introduction
   (a). United States Constitution (*Federalist*, pp. 526-551)
   (b). Editors' Introduction (*Federalist*, pp. xvii – lv)
   (c). Readers' Guide to *The Federalist* (*Federalist*, pp. lvii – lxxxiv)

2. Republics, Structures & Factions
   (a). *Federalist* nos. 1, 9, 10 & 14
   (b). *Brutus* no. 1 (supplement)
   (c). *Federal Farmer* no. 1 (supplement)

3. Enumerated Powers
   (a). *Federalist* nos. 23, 37 & 39
   (b). *Federalist* nos. 44, 45 & 46
   (c). *Brutus* no. 6 (supplement)
   (d). *Federal Farmer* no. 2 (supplement)

4. Separation of Powers
   (a). *Federalist* nos. 47, 48, 49 & 51
   (b). *Centinel* no. 1 (supplement)

5. Congress & Executive
   (a). *Federalist* nos. 53 & 63
   (b). *Federalist* nos. 70, 73, 76 & 77
   (c). *Cato* nos. 5 & 7 (supplement)

6. Judiciary & Bill of Rights
   (a). *Federalist* nos. 78, 80, 81 & 83
   (b). *Federalist* no. 84
   (c). *Brutus* nos. 11, 12 & 15
   (d). *John DeWitt* no. 2

7. Judicial Power and the Constitution
   (a). *Marbury v. Madison* (supplement)
   (b). *Martin v. Hunter's Lessee* (supplement)
   (c). Alexis de Tocqueville, *Democracy in America*, Vol. I, ch. 6 (supp.)

8. Enumerated Powers and the Commerce Clause
   (a). *McCulloch v. Maryland* (supplement) (w. Jefferson's Opinion)
   (b). *Gibbons v. Ogden* (supplement)
   (c). *Wickard v. Filburn* (supplement)
   (c). *Lopez v. United States* (supplement)
   (d). *Gonzales v. Raich* (supplement)

9. The Limit of State Sovereignty
   (a). *Garcia v. San Antonio Metro Transit Authority* (supplement)
   (b). *Printz v. United States* (supplement)
   (c). *Alden v. Maine* (supplement)
   (d). *U.S. Term Limits v. Thornton* (supplement)

10. Separation of Powers
   (a). *United States v. Curtiss-Wright Export Corp.* (supplement)
   (b). *Youngstown Sheet & Tube Co. v. Sawyer* (supplement)
   (c). *Hamdi v. Rumsfeld* (supplement)
   (d). *INS v. Chadha* (supplement)
   (e). *Morrison v. Olson* (supplement)
   (f). *United States v. Nixon* (supplement)
   (g). *Clinton v. Jones* (supplement)

Constitutional Law Seminar (Law 703)
Structures & Powers in the U.S. Constitution
Course Syllabus

Professor Kyle Duncan Fall 2006
Rm. 559; 915-6859; kyled@olemiss.edu Office hours by appointment

Class meets: Mondays & Wednesdays, from 2:00 to 3:20 p.m., in seminar room 514.

Please come to class, having already carefully read the assigned text. Class attendance is very important. Please let me know if you have to miss more than three classes. Your grade will be based on a combination of (1) class participation and (2) a paper (maximum 20 pages).

Texts

- *The Federalist: The Gideon Edition*, edited by George Carey and James McClellan (Liberty Fund 2001).
- Supplemental Reading Materials (downloadable from Westlaw, Lexis/Nexis, and the internet):

(a). *The Anti-Federalist Papers* can be found online at www.constitution.org/afp.htm (arranged by author's pseudonym).

(b). *The Founders' Constitution*, an excellent source of primary documents about the Constitution, can be found on-line at http://press-pubs.uchicago.edu/founders.

Paper Requirement

A research paper—maximum 20 pages—will be the strongest influence on your grade for this course. In the paper, you will take principles gleaned from the reading assignments and class discussions and apply them to a legal area of your choice. For example, you may choose to write about a judicial opinion or historical event not covered in class that illustrates the course themes. Or you may choose a current area of constitutional dispute and do the same. The range of possible topics is broad—students in past seminars have written on everything from the constitutionality of secession during the Civil War to the governmental response to Hurricane Katrina—but the topic must illuminate something about the structural relationships created by the Constitution.

I will set a date by which you must give me a brief summary of your topic. I will be available by appointment to discuss how to develop your topic. Although a first draft is not required, I do encourage you to submit a draft of your paper (by a date I will set). If you do that, I will give you feedback on your progress.

Reading Assignments

1. Introduction
   (a). United States Constitution (*Federalist*, pp. 526-551)
   (b). Editors' Introduction (*Federalist*, pp. xvii – lv)
   (c). Readers' Guide to *The Federalist* (*Federalist*, pp. lvii – lxxxiv)

2. Republic, Structure & Factions
   (a). *Federalist* nos. 1, 9, *10 & 14
   (b). *Brutus* no. 1 (www.constitution.org/afp/brutus01.htm)
   (c). *Federal Farmer* no. 1 (www.constitution.org/afp/fedfar01.htm)
   (d). Adams, *Defense of the Constitutions of Government of the United States* (http://press-pubs.uchicago.edu/founders/documents/v1ch4s10.html)
   (e). *Cato* no. 3 (http://press-pubs.uchicago.edu/founders/documents/v1ch4s16.html)
   (f). James Wilson, Pennsylvania Ratifying Convention (http://press-pubs.uchicago.edu/founders/documents/v1ch7s17.html)
   (g). A Freeman to the Minority of the Convention of Pennsylvania, No. 1 (http://press-pubs.uchicago.edu/founders/documents/v1ch7s20.html)
   (h). Jefferson, *First Inaugural Address* (http://press-pubs.uchicago.edu/founders/documents/v1ch4s33.html)

3. Judicial Review
   (a). Background
      (i) *Federalist* nos. *78-81
      (ii). *Federalist* no. *84
      (iii). *Brutus* nos. 11-12, 14-15 (www.constitution.org/afp/brutus00.htm)
      (iv). *John DeWitt* no. 2 (www.constitution.org/afp/dewitt02.htm)
      (v). James Wilson, *Lecture* (http://press-pubs.uchicago.edu/founders/documents/a3_2_1s30.html)
      (vi). *Calder v. Bull* (http://press-pubs.uchicago.edu/founders/documents/a1_10_1s10.html)

(vii). Alexis de Tocqueville, *Democracy in America*, Vol. I, ch. 6 (http://xroads.virginia.edu/~HYPER/DETOC/1_ch06.htm)

(b). *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 1803 WL 893 (1803)

4. Enumerated Powers

(a). Background

(i) *Federalist* nos. 23, 37 & 39; nos. 42, 44, 45 & 46

(ii). *Brutus* nos. 6-8 (www.constitution.org/afp/brutus00.htm)

(iii). *Fed. Farmer* nos. 1-2 (www.constitution.org/afp/fedfar00.htm)

(b). *McCulloch v. Maryland*, 17 U.S. 316, 1819 WL 2135 (1819)

(i). Jefferson's Opinion (http://press-pubs.uchicago.edu/founders/documents/a1_8_18s10.html)

(ii). Alexander Hamilton's Opinion (http://press-pubs.uchicago.edu/founders/documents/a1_8_18s11.html)

(iii) Andrew Jackson's Veto (http://press-pubs.uchicago.edu/founders/documents/a1_8_18s20.html)

(c). *Gibbons v. Ogden*, 22 U.S. 1, 1824 WL 2697 (1824)

(i) Hamilton, *Continentalist* no. 5 (http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces1.html)

(ii) Madison to Monroe (http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces4.html)

(iii) Jefferson to Gallatin (http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces10.html)

(iv) *Livingston v. Van Ingen*, (http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces13.html)

(d). *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82 (1942)

(c). *Lopez v. United States*, 514 U.S. 549, 115 S.Ct. 1624 (1995)

(d). *Gonzales v. Raich*, 125 S.Ct. 2195, 73 USLW 4407 (2005)

4. Separation of Powers / Executive Power

(a). Background

(i) *Federalist* nos. 47, 48, 49, *51 & 63; *Federalist* nos. 70, 73, 76 & 77

(ii) *Centinel* no. 1 (www.constitution.org/afp/centin01.htm)

(iii). *Cato* no. 5 (www.constitution.org/afp/cato_05.htm) & no. 7 (www.constitution.org/afp/cato_07.htm)

(iv) Blackstone's *Commentaries* (http://press-pubs.uchicago.edu/founders/documents/v1ch10s6.html)

(v) Adams *Thoughts on Government* (http://press-pubs.uchicago.edu/founders/documents/v1ch4s5.html)

(vi) *Records of the Federal Convention* (http://press-pubs.uchicago.edu/founders/documents/v1ch10s10.html)

(b). *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)
(c). *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)
(d). *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)
(e). *INS v. Chadha*, 462 U.S. 919 (1983)
(f). *Morrison v. Olson*, 487 U.S. 654 (1988)

(g). Special Problem in Separation of Powers: *Presidential Signing Statements* (handouts)

9. The Limits of State Sovereignty
(a). *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528 (1985)
(b). *Printz v. United States*, 521 U.S. 898 (1997)
(c). *Alden v. Maine*, 527 U.S. 706 (1999)
(d). *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995)

(e). Special Problem in State Sovereignty: *Congressional Enforcement Power Under the Fourteenth Amendment.*
(i) *City of Boerne v. Flores*, 521 U.S. 507 (1997)
(ii) Debate over *Boerne* (handout)

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Constitutional Law Seminar (Law 727)
Structures & Powers in the U.S. Constitution
Course Syllabus

Professor Kyle Duncan Fall 2007
Rm. 559; 915-6859; kyled@olemiss.edu Office hours by appointment

Class meets Tuesdays & Thursdays, from 9:30 to 10:50 a.m., in seminar room 550 (subject to moving to the mezzanine room in the library).

Please come to class, having already carefully read the assigned text. Class attendance is very important. Please let me know if you have to miss more than three classes. Your grade will be based on a combination of (1) general class attendance and participation, (2) leading class discussion of cases, and (3) a paper (maximum 20 pages).

Texts

- *The Federalist: The Gideon Edition*, edited by George Carey and James McClellan (Liberty Fund 2001).
- Supplemental Reading Materials (downloadable from Westlaw, Lexis/Nexis, and the internet):

(a). *The Anti-Federalist Papers* can be found online at www.constitution.org/afp.htm (arranged by author's pseudonym).

(b). *The Founders' Constitution*, an excellent source of primary documents about the Constitution, can be found on-line at http://press-pubs.uchicago.edu/founders.

Leading Class Discussion

At the first meeting, I will assign students to lead selected class discussions. Two students will lead each discussion, and each will take opposing points of view about the materials under discussion. In this way, the students will facilitate a class discussion of the materials. I will participate in the discussion only to the extent necessary to keep it on point. Your preparation for the class discussion assigned to you will account for one-quarter of your class grade. I will be happy to discuss your assigned class with you individually beforehand, so that my expectations are clear.

Paper Requirement

A research paper—maximum 20 pages—will account for three-quarters of your grade for this course. In the paper, you will take principles gleaned

from the reading assignments and class discussions and apply them to a legal area of your choice. For example, you may choose to write about a judicial opinion or historical event not covered in class that illustrates the course themes. Or you may choose a current area of constitutional dispute and do the same. The range of possible topics is broad—students in past seminars have written on everything from the constitutionality of secession during the Civil War to the governmental response to Hurricane Katrina—but the topic must illuminate something about the structural relationships created by the Constitution.

I will select a date by which you must give me a brief summary of the topic you have chosen. If you choose, you may give me a first draft of your paper. I will read it and give you feedback. You are not required to do this, however.

Reading Assignments

1. Introduction
   (a). United States Constitution (*Federalist*, pp. 526-551)
   (b). Editors' Introduction (*Federalist*, pp. xvii – lv)
   (c). Readers' Guide to *The Federalist* (*Federalist*, pp. lvii – lxxxiv)

2. Republic, Structure & Factions
   (a). *Federalist* nos. 1, 9, 10 & 14
   (b). *Brutus* no. 1 (www.constitution.org/afp/brutus01.htm)
   (c). *Fed. Farmer* no. 1 (www.constitution.org/afp/fedfar00.htm)
   (d). *Cato* no. 3 (http://press-pubs.uchicago.edu/founders/documents/v1ch4s16.html)
   (e). Adams, *Defense of the Constitutions of Government of the United States* (http://press-pubs.uchicago.edu/founders/documents/v1ch4s10.html)

3. Judicial Review
   (a). Background
      (i) *Federalist* nos. 78-81
      (ii). *Federalist* no. 84
      (iii). *Brutus* nos. 11-12, 15 (www.constitution.org/afp/brutus00.htm)
      (iv). James Wilson, *Lecture* (http://press-pubs.uchicago.edu/founders/documents/a3_2_1s30.html)

(b). Cases

(i). *Calder v. Bull*, 3 U.S. 386 (1798)
(ii). *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137 (1803)
(iii). *Fletcher v. Peck*, 6 Cranch 87, 10 U.S. 87 (1810)
(iii). *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (excerpted)
(iv). *Lochner v. New York*, 198 U.S. 45 (1905)
(v). *Griswold v. Connecticut*, 381 U.S. 479 (1965)
(vii). *Roe v. Wade*, 410 U.S. 113 (1973)
(vi). *Washington v. Glucksberg*, 521 U.S. 702 (1997)

(c). Articles

(i). Jeremy Waldron, *Banking Constitutional Rights: Who Controls Withdrawals?*, 52 ARK. L. REV. 533 (1999)

(ii). Handout from *Modern Constitutional Theory: A Reader* (Garvery, Alenikoff, Farber 2004), pp. 214-236:

(a). Charles Black, Jr., *The Building Work of Judicial Review* (1960)

(b). Alexander M. Bickel, *Establishment and the General Justification of Judicial Review* (1962)

(c). Rebecca L. Brown, *Accountability, Liberty, and the Constitution* (1998)

4. Enumerated Powers

(a). Background

(i) *Federalist* nos. 23, 37 & 39; nos. 42, 44, 45 & 46
(ii). *Brutus* no. 6(www.constitution.org/afp/brutus00.htm)

(b). *McCulloch v. Maryland*, 17 U.S. 316 (1819)

(i). Jefferson's Opinion (http://press-pubs.uchicago.edu/founders/documents/a1_8_18s10.html)

(ii). Alexander Hamilton's Opinion (http://press-pubs.uchicago.edu/founders/documents/a1_8_18s11.html)

(c). *Gibbons v. Ogden*, 22 U.S. 1, 1824 WL 2697 (1824)

(ii) Madison to Monroe (http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces4.html)

(iii) Jefferson to Gallatin (http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces10.html)

(iv) *Livingston v. Van Ingen*, (N.Y. 1812) (http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces13.html)

(d). *Wickard v. Filburn*, 317 U.S. 111 (1942)
(e). *Lopez v. United States*, 514 U.S. 549 (1995)
(f). *Gonzales v. Raich*, 545 U.S. 1 (2005)

5. Separation of Powers
(a). Background
(i) *Federalist* nos. 47, 48, 49, 51 & 63; *Federalist* nos. 70, 73, 76 & 77
(ii) Blackstone's *Commentaries* (http://press-pubs.uchicago.edu/founders/documents/v1ch10s6.html)

(b). Cases
(i). *INS v. Chadha*, 462 U.S. 919 (1983)
(ii). *Morrison v. Olson*, 487 U.S. 654 (1988)
(iii). *Mistretta v. U.S.*, 488 U.S. 361 (1989)
(iv). *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)

6. The Limits of State Sovereignty
(a). *Printz v. United States*, 521 U.S. 898 (1997)
(b). *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995)

Time permitting…
(c). *Civil Rights Cases*, 109 U.S. 3 (1883)
(d). *City of Boerne v. Flores*, 521 U.S. 507 (1997)

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