

CLE Program

SUPREME COURT TERM PREVIEW

Thursday, December 6 / 6:30-8:30 p.m.

Simpson Thacher & Bartlett LLP

CLE CREDITS: 1.5 Areas of Professional Practice

**Appropriate for both newly admitted and experienced attorneys.*

MODERATOR

Ngozi Nezianya, Associate, Simpson Thacher & Bartlett LLP

PANELISTS

Caroline Sacerdote, Staff Attorney, Center for Reproductive Rights

Elie Mystal, Managing Editor, Above The Law Blog

Eric Lesh, Executive Director, The LGBT Bar Association of New York (LeGal)

Richard Briffault, Joseph P. Chamberlain Professor of Legislation, Columbia Law School

Hosted by:

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Supreme Court Term Preview

*CLE Program presented by the LGBT Bar Association of Greater New York (LeGaL)
and the American Constitution Society New York Lawyer Chapter*

Thursday, December 6, 2018 | 6:30 – 8:30 p.m.
Simpson Thacher & Bartlett LLP | New York, NY

AGENDA

- 1) Welcome remarks** (3 minutes)
- 2) Opening remarks and speaker introductions** (5 minutes)
- 3) Panelist remarks** (50 minutes)
- 4) Moderator follow-up questions** (10 minutes)
- 5) Q&A with the audience** (20 minutes)
- 6) Closing remarks** (2 minutes)

This panel discusses how the retirement of Justice Anthony Kennedy and the confirmation of Brett Kavanaugh will shape the Supreme Court in the next term. The Court may consider questions related to the 2020 Census, abortion rights, sexual orientation and gender identity discrimination at school and in the workplace, voting rights, and more.

PANELIST BIOGRAPHIES

ERIC LESH is the Executive Director of The LGBT Bar Association and Foundation of Greater New York (LeGaL). Prior to joining LeGaL, Eric was the Fair Courts Project Director for Lambda Legal, the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and individuals living with HIV. In his role, Eric focused his efforts on eliminating bias in the legal system, increasing diversity of the judicial bench, and expanding access to justice for LGBT people and those with HIV. He has trained attorneys and judges across the country, briefed federal courts on issues ranging from juror discrimination to judicial misconduct, and assisted court users through Lambda Legal's help desk and educational resources. Eric has written and presented educational programs for legal professionals on topics like: "Addressing Racial, Sexual Orientation and Gender Identity Bias in Jury Selection" and "Emerging Transgender Legal Issues for Family Court Judges." In 2017, his publication, "Justice Out of Balance: How Judicial Elections and a Stunning Lack of Diversity on State Courts Threatens LGBT Rights" was featured by Adam Liptak in the *New York Times*. Eric's articles have been published in the *Family Court Review* and *Artificial Intelligence and Law*, the *Washington Post*, *The L.A. Times*, and *The Advocate*. He has spoken on panels with state supreme court justices and federal judges. In 2017, he was recognized as one of the Best LGBT Lawyers Under 40 by the National LGBT Bar Association.

CAROLINE SARERDOTE joined the Center for Reproductive Rights in 2016 as a legal fellow and became a staff attorney in 2018. She assists in litigating reproductive rights cases across the United States. Caroline first worked at the Center in 2014 as a Ford Foundation summer fellow.

Before rejoining the Center, Caroline served as a Ford Foundation fellow with Lambda Legal's HIV Project, where she worked on securing access to treatment and prevention for people living with and at higher risk of HIV. She received her J.D. from Harvard Law School, where she served as an Executive Submissions Editor of the Harvard Journal of Law & Gender and participated in the Harvard Negotiation and Mediation Clinic and International Human Rights Clinic. During law school, she also interned at the HIV Law Project and the Legal Resources Centre, Johannesburg Regional Office. Caroline graduated cum laude from the University of Florida, with a B.A. in economics and political science.

ELIE MYSTAL joined *Above The Law* Blog in 2008 by winning the ATL Idol Contest. Prior to joining ATL, Elie wrote about politics and popular culture at *City Hall News* and the *New York Press*. Elie received a degree in Government from Harvard University and a J.D. from Harvard Law School. He was formerly a litigator at Debevoise & Plimpton but quit the legal profession to pursue a career as an online provocateur. He's written editorials for the *New York Daily News* and the *New York Times*, and he has appeared on both MSNBC and Fox News without having to lie about his politics to either news organization.

RICHARD BRIFFAULT is the Joseph P. Chamberlain Professor of Legislation at Columbia Law School. His research, writing, and teaching focus on state and local government law, legislation, the law of the political process, government ethics, and property. He is co-author of the textbook, *State and Local Government Law*, 2016, (8th edition); principal author of "Dollars and Democracy: A Blueprint for Campaign Finance Reform," (a report of the New York City Bar Association's commission on campaign finance reform), 2000; and author of *Balancing Acts: The Reality Behind State Balanced Budget Requirements*, Twentieth Century Fund Press, 1996. He has also written more than 75 law review articles.

In 2014, Briffault was appointed chair of the Conflicts of Interest Board of New York City. He was a member of New York State's Moreland Act Commission to Investigate Public Corruption from 2013 to 2014, and served as a member of, or consultant to, several city and state commissions in New York dealing with state and local governance, including the New York State Commission on Local Government Efficiency & Competitiveness (2007-2008); the Temporary New York Commission on Constitutional Revision (1993-1995); the New York City Real Property Tax Reform Commission (1993); and the New York City Charter Revision Commission (1987-1989). He is currently the reporter for the American Law Institute's project on principles of government ethics. He is also vice-chair of Citizens Union of the City of New York. He was law clerk to the Honorable Shirley M. Hufstedler of the 9th U.S. Circuit Court of Appeals, and was assistant counsel to New York Gov. Hugh L. Carey. Briffault joined the Law School faculty in 1983. He received his J.D. from Harvard University and his B.A. from Columbia University.

NGOZI J. NEZIANYA is an Associate at Simpson Thacher & Bartlett LLP. Prior to joining Simpson Thacher, Ngozi worked as a Senior Research Analyst at the Democracy Alliance, a network of philanthropists, where his work included due diligence on and raising support for public interest law firms, public policy research institutes, and issue advocacy campaigns.

Ngozi graduated cum laude with his J.D. from the Northwestern University Pritzker School of Law, where he served as a Teaching Assistant in Constitutional Law. He earned his M.B.A. in Economics from the Northwestern University Kellogg School of Management and his B.A. in Political Science from Yale University. Ngozi is a former member of the national Board of Directors of the American Constitution Society.



AMERICAN
CONSTITUTION
SOCIETY

SUPREME COURT REVIEW

2017-2018

Second Edition

Edited by

Steven D. Schwinn

Foreword by

David A. Strauss

FEATURING

Case Analysis by:

**Mary L. Bonauto &
Jon W. Davidson**

Gilda R. Daniels

Catherine L. Fisk

Martin S. Flaherty

Charlotte Garden

Cristina M. Rodríguez

Marc Rotenberg

Steven D. Schwinn

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Introduction

Steven D. Schwinn*

We’re thrilled to bring you our Second Annual *American Constitution Society Supreme Court Review*. Building on our First Edition, this volume includes yet another outstanding collection of essays by some of the nation’s top constitutional scholars and practitioners, exploring the key cases and other highlights from the Court’s October Term 2017.

By any measure, this was an overwhelmingly conservative term, with a Court that tilted decidedly to the right in nearly every major case it decided. For example, the Court upheld President Trump’s infamous “travel ban.”¹ It overturned a ruling that a “cake artist” unlawfully discriminated against a gay couple when he declined to make them a wedding cake.² It made it easier for states to purge registered voters from their voting rolls.³ It struck down a state law designed to inform women of their right to an abortion.⁴ And it snatched the rug out from under public-sector unions by invalidating a state’s mandatory fair-share fee in the name of free speech.⁵ The Court also extended its trend to limit access to the courts in labor and human-rights cases by strictly enforcing

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¹ Trump v. Hawaii, 138 S. Ct. 2392 (2018). Christina Rodriguez covered this case for us.

² Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 138 S. Ct. 1719 (2018). Mary Bonauto and Jon Davidson wrote on Masterpiece for this volume.

³ Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018). Gilda Daniels contributed a piece on *Husted*.

⁴ Nat’l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

⁵ Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018). Catherine Fisk wrote about this case.

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employment contract arbitration clauses⁶ and further limiting the application of the Alien Tort Statute.⁷

In lower-profile, structural cases, too, the Court lurched to the right. Thus, the Court again permitted Congress in effect to dictate the outcome of pending litigation, trading on the independence of the federal judiciary.⁸ It also expanded its atextual, states-rights-affirming “anticommandeering principle” to cases where Congress tells a state what *not* to do.⁹ And it ruled that Securities and Exchange Commission administrative law judges are “officers” under the Appointments Clause,¹⁰ inviting broader challenges to congressionally imposed, merit-based appointment restrictions in the civil service.

Some of these cases drew some of the progressive justices in the majority. Others drew some of the conservatives in dissent. But here’s a measure of just how conservative this term was: Justice Kennedy did not side with the progressives in a single, significant, ideologically divided 5-4 decision.

Still, there were some bright spots for progressive constitutionalists in the areas of criminal procedure. In the most important of these cases, the Court ruled that the government’s acquisition of cell-site records from a wireless carrier was a “search” under the Fourth Amendment.¹¹ The Court also ruled that a driver in lawful possession of a rental car has a reasonable expectation of privacy for Fourth Amendment purposes,¹² and that the Fourth Amendment’s automobile exception does not allow the

⁶ Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018). Charlotte Garden wrote on arbitration at the Court this term.

⁷ Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018). Martin Flaherty wrote on this case for us.

⁸ Patchak v. Zinke, 138 S. Ct. 897 (2018).

⁹ Murphy v. Nat’l Collegiate Athletic Ass’n, 138 S. Ct. 1461 (2018).

¹⁰ Lucia v. SEC, 138 S. Ct. 2044 (2018). I’m thrilled to cover this one myself.

¹¹ Carpenter v. United States, 138 S. Ct. 2206 (2018). Marc Rotenberg contributed a piece on *Carpenter*.

¹² Byrd v. United States, 138 S. Ct. 1518 (2018).

warrantless entry of a home or its curtilage in order to search a motorcycle sitting under a carport, right outside the home.¹³ In an offbeat case involving repeat and eccentric Supreme Court litigant Fane Lozman, the Court held that the existence of probable cause for Lozman’s arrest did not bar his First Amendment retaliatory arrest claim.¹⁴ In a Sixth Amendment case, the Court held that a criminal defendant has the right to choose the objective of his defense and to insist that his attorney refrain from admitting guilt, even when the attorney thinks that admitting guilt gives the defendant the best chance of avoiding the death penalty.¹⁵

Finally, there were a couple of important cases that defy conventional left-right labeling. For example, the Court ruled that a state’s ban on wearing political apparel at a polling place violated the First Amendment.¹⁶ The ruling favored the politically conservative challengers of the state law, but the holding necessarily sweeps more broadly to protect any political apparel—right, left, or otherwise—at a polling place. And in one of the most important and politically charged issues this term—whether political gerrymandering violates the Constitution—the Court simply punted.¹⁷

Our very talented authors examine many of these cases in the excellent essays that follow. I’m honored to be able to share these pieces with you; I hope you enjoy them as much as I have.

I want to thank our authors for contributing these essays. I also want to thank Caroline Fredrickson, President, for her continued support for this project, and Kara H. Stein, Vice President of Policy and Program, Christopher Wright Durocher, Senior Director of

¹³ Collins v. Virginia, 138 S. Ct. 1663 (2018).

¹⁴ Lozman v. City of Riviera Beach, Fla., 138 S. Ct. 1945 (2018).

¹⁵ McCoy v. Louisiana, 138 S. Ct. 1500 (2018).

¹⁶ Minn. Voters Alliance v. Mansky, 138 S. Ct. 1876 (2018).

¹⁷ Gill v. Whitford, 138 S. Ct. 1916 (2018); Benisek v. Lamone, 138 S. Ct. 1942 (2018).

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Policy and Program, and Law Fellows Melissa Wasser and Tom Wright for their tireless efforts to keep this *Review* going strong in its second year, and beyond.

Foreword

David A. Strauss*

We didn't know it at the time, but the 2017 Term was a transitional year for the Supreme Court. It was, of course, the last Term in which Justice Anthony Kennedy had the deciding vote on many high-profile issues. It is not hard to predict that Justice Kennedy's replacement, Brett Kavanaugh, will make the Court more conservative. But as the essays in this collection show, the 2017 Term anticipated that conservative trend. When the Term began, progressives could be a little optimistic. There were cases in which, if the Court had done its job well, it would have moved the law in a progressive direction—protecting minority groups that are subject to unfair discrimination and making sure that the democratic process is truly democratic. But the Court did not do that. And then in other cases, in which there was little realistic basis for hope, the Court did what was expected—continuing to move the law in a conservative direction, sometimes very aggressively so. In these and other respects, the 2017 Term seems likely to be a toned-down trailer for the movie that we will see in the next few years.

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,¹ the owner of a bakery refused to sell a cake to a couple that wanted it for their same-sex wedding. That violated a Colorado law forbidding discrimination in public accommodations.

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¹ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

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The owner of the bakery claimed that by applying the law to him, Colorado had infringed his rights to freedom of speech and the free exercise of religion. Colorado courts rejected that claim.

As Mary Bonauto and Jon Davidson explain, it was not clear why the Supreme Court even agreed to hear the case. No lower court had ever accepted such a claim. The religious freedom argument was pretty clearly foreclosed by precedent, and the free speech claim, if taken seriously, would undermine antidiscrimination laws that have been a central part of the law in the United States for more than a half century. But claims like the baker's had been cropping up in the wake of the Court's decisions recognizing the rights of LGBT people, and maybe—some of us thought—the Court just wanted to make it clear that those claims would not succeed.

The Court did not do that. Instead, the Court ruled in favor of the baker for a very odd reason--because of supposed anti-religious bias shown by the Colorado authorities in this particular case. The claim of bias was weak and, more to the point, having taken the case, the Court decided it in a way that did not establish any general principle. As Bonauto and Davidson show, some of the language in the opinion will be helpful in the future in rebutting claims that there is a constitutional right to discriminate against gay people. But the Court did not close the door to those claims.

Protecting the right to vote has, for a long time, been a central progressive priority. Recently, various techniques of vote suppression—voter ID laws, purging voting rolls, manipulating registration requirements—have become more and more popular among conservatives. In *Husted v. A. Philip Randolph Institute*,² the Court dealt with a procedure adopted by Ohio that removed

² *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

people from the list of registered voters because they did skip voting in a few elections and did not return a postcard. The Court rejected the argument that that procedure violated the National Voter Registration Act. As Gilda Daniels explains, the decision in *Husted*, based on an interpretation of the NVRA that was at least highly questionable, encourages even more aggressive efforts to suppress voting.

Early in the Term, though, *Husted* did not even seem to be the most important case about the kind of democracy we will have. In *Gill v. Whitford*,³ it looked as if the Court might do something about partisan gerrymandering. The question whether there are constitutional limits on partisan gerrymanders had come before the Court before. There was not much doubt that this was one of those questions on which Justice Kennedy's vote would be decisive. Justice Kennedy had suggested before that he was open to an argument that partisan gerrymandering is unconstitutional, but he said that he had not yet seen a standard that could be applied in resolving that question.

After spending practically the whole Term considering the case—it was one of the first cases argued and one of the last decided—the Court again left the central issue undecided. Instead, the Court ruled, without dissent, that the plaintiffs had not shown that they had standing to sue and remanded the case to the district court to give the plaintiffs a chance to do that. The effect of the Court's ruling was, probably, to preclude some but not all of the theories the plaintiffs had offered as workable standards for determining the constitutionality of partisan gerrymanders; there was some skirmishing in separate opinions by the justices about what avenues, if any, were left open for a future challenge. But

³ *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

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with Justice Kennedy's retirement, the likelihood that such a challenge will succeed in the future has certainly diminished, to say the least.

In other important cases last Term, the outcome was, unfortunately, predictable, and the Court continued on a regrettable path. *Janus v. American Federation of State, County and Municipal Employees Council 31*⁴ was probably the most high-profile example. Some of the justices seem openly hostile to public employee unions, and several years ago they had invited a challenge to agency fees—fees that public employees who are represented by a union pay to the union to defray the cost of the services the union provides. Unions have a duty to represent all employees in a bargaining unit, whether or not they are union members. As Catherine Fisk explains, if agency fees were not required, the union would face a potentially fatal collective action problem: each employee, acting out of self-interest, could free-ride by taking advantage of the union's duty of representation without paying.

The Court ruled that agency fees violated the First Amendment because employees were required to fund speech with which they disagreed. Some public employee unions do engage in political activity, but under a forty-year-old precedent, *Abood v. Detroit Board of Education*,⁵ employees had a right to decline to pay the portion of their fees that went to political activity; they could be required only to pay for the union's activity as collective bargaining representative. In *Janus* the Court overruled *Abood*, despite strong arguments against doing so: an extensive structure of labor relations had built up around *Abood*; *Abood* fit comfortably

⁴ *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

⁵ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

in the fabric of First Amendment law; and there were no severe problems in administering the regime that *Abood* established. In addition, as Professor Fisk shows, *Janus* interpreted the First Amendment in a way that is impossible to square with other well-established principles and that, if taken seriously, would undermine many long-standing institutions in which people indirectly support speech with which they disagree. More generally, as Professor Fisk also notes, *Janus* continued the trend, manifested in several cases in recent years, of using the First Amendment as a way to attack the regulatory state.

Epic Systems Corp. v. Lewis,⁶ like *Janus*, was another step in a series of decisions that undermined the ability of employees to protect their shared interests. As in *Janus*, the result was not a surprise. And while the result in *Epic Systems* was not as unprincipled as the result in *Janus*, it seems quite clearly wrong nonetheless. The question in *Epic Systems* was whether the National Labor Relations Act (NLRA), which guarantees employees the right to act collectively, meant that an arbitration clause could not prevent employees from bringing class action-type claims against employers. As Charlotte Garden notes, in a series of decisions the Court has ruled that the Federal Arbitration Act (FAA) makes arbitration clauses in employment contracts enforceable and held that state law may not limit their enforceability. As a result, employers increasingly include arbitration clauses in employment contracts, and those clauses often require employees to pursue arbitration as individuals, not as a class.

But a foundational provision of U.S. labor law, §7 of the NLRA, provides that employees have “the right to self-

⁶ Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

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organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁷ The National Labor Relations Board ruled that the right “to engage in . . . concerted activities for the purpose of . . . mutual aid and protection” meant that an arbitration clause could not bar employees from engaging in collective forms of litigation or arbitration.

The Court disagreed, reading §7 essentially to extend only to activity in the workplace. As Professor Garden explains, the Court’s decisions on arbitration have systematically limited the ability of employees to pursue collective relief, which—because an individual employee’s claim is often for a small amount, compared to the cost of litigation—is frequently the only effective remedy that an employee has. Professor Garden shows that it is far from clear that the Court was right in the first place to say that the FAA even applies to employment contracts. Even assuming the Court was right about that, it is not clear that the FAA preempts state laws to the extent the Court has said it does, or—the issue in *Epic Systems*—that it should prevail over the protection of “concerted activities” in §7 of the NLRA. At each step, the Court has chosen the course that insulates employers from being effectively challenged for breaching their contracts or violating the law. And Professor Garden identifies troubling language in the Court’s opinion in *Epic Systems* that suggests that some justices may be receptive to a *Lochner* era view of the employment relationship, in which employees are simply assumed to have enough bargaining power to protect their own interests.

⁷ 29 U.S.C. § 157.

*Jesner v. Arab Bank*⁸ continued yet another trend in the Court’s decisions—to limit the use of the Alien Torts Statute (ATS) against violations of human rights. The Alien Torts Statute, which was part of the Judiciary Act of 1789, provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁹ As Martin Flaherty explains, for almost 200 years the ATS was more or less ignored, but beginning in 1980 victims of human rights violations used U.S. courts at least to establish the truth of their claims (it was often impossible to recover damages).

In 2004, in *Sosa v. Alvarez-Machain*,¹⁰ the Supreme Court dealt with the ATS for the first time. The Court interpreted the statute somewhat narrowly, but it reaffirmed the basic point that it could be used against egregious violations of human rights. When plaintiffs sued corporations under the ATS, however, the Court took a different turn. First the Court held that the ATS did not extend outside the territory of the United States, and then it held, in *Jesner*, that the ATS applies only to natural persons, not to corporations. As Professor Flaherty says, ATS plaintiffs have alleged that corporations worked hand-in-glove with foreign individuals and nations that are among the worst human rights violators. While the ATS can still be used to sue for violations of human rights, even after *Jesner*, that case forecloses important avenues of accountability. And opinions of some of the justices call the ATS into question on even more fundamental grounds.

⁸ *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

⁹ 28 U.S.C. § 1330.

¹⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

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*Trump v. Hawaii*¹¹ was the most high-profile case of the last Term. The Court, of course, upheld the travel ban issued by President Trump. As Cristina Rodríguez shows, on one level, the decision was unsurprising. The travel ban was an action by the president, not just an administrative agency; it invoked an exceptionally broadly-worded statute; and it concerned both immigration and national security, areas in which the courts have been highly deferential to the executive. In a normal administration, the combination of those things would leave no doubt about the outcome of a challenge to the president's action.

We do not live in normal times, though, and the travel ban was accompanied by truly extraordinary evidence of President Trump's hostility to Muslims. In that way, the case involved one of the central commitments not just of progressives but of U.S. constitutionalism: the special responsibility of the courts to protect minority groups from unfair discrimination. So there was, maybe, some reason to hope that the Court would find a way to avoid endorsing the travel ban.

The Court, of course, did not. Professor Rodríguez concludes that the statutory challenges to the travel ban should not have succeeded, given the breadth of the provision on which they were based and the tradition of deference to the executive. But the Court's decision to "elide[] powerful evidence of discriminatory motive," she says, amounted to "an abdication of judicial responsibility." The Court treated the evidence of anti-Muslim animus in a way that is inconsistent with basic principles of antidiscrimination law and, for that matter, inconsistent with common sense. The Court concluded that the travel ban should survive because it contained no explicit reference to religion; it did

¹¹ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

not apply to all majority-Muslim countries; and it was justified, by the executive branch, by a plausible-sounding rationale.

Someone who wanted to engage in even the most malign form of discrimination—and who had a little bit of creativity—would be able to satisfy criteria like that.

Still, Professor Rodríguez shows *Trump v. Hawaii* was not as bad as it might have been. The Court did not endorse the position, suggested by language in some infamous cases decided in the wake of World War II, that the Constitution simply does not apply to a decision to exclude noncitizens from the United States. More specifically, she says, *Trump v. Hawaii* did nothing to undermine Due Process Clause challenges to coercive actions against noncitizens, and that allows lower courts to continue to protect noncitizens in important ways.

Two other important decisions from last Term, while relatively narrow, engaged with long-standing issues that are certain to recur. In *Carpenter v. United States*,¹² the Court held that the government must obtain a warrant before it acquires, from a telecommunications company, historical information about the location of a cell phone. It has been clear for a while that established Fourth Amendment doctrine is not well adapted to deal with technology that has developed in recent years. One example is the “third-party” doctrine, according to which the government does not “search” an individual within the meaning of the Fourth Amendment—and therefore does not have to conform to the amendment’s requirements, such as (in some circumstances) showing probable cause and getting a warrant—when it obtains information from a third party to whom the individual has voluntarily disclosed it. The principal application of that doctrine

¹² *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

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is the use of informants; the Court extended it, in the 1970s, to the use of a pen register (a device that records the numbers dialed from a phone; the idea was that the individual disclosed that information to the telephone company) and to the government’s seizure of an individual’s financial records from a bank.

As Marc Rotenberg explains, it is hard to see how *Carpenter* can be reconciled with the third-party doctrine. But the Court avoided overruling the key third-party doctrine cases, leaving the law in an uncertain state (although, to be fair, simply overruling some of the cases would still have left it unclear when the government can obtain information about a suspect from a third party). More generally, *Carpenter* is only the latest example of how the Court has struggled, understandably, to adapt doctrines developed decades ago to a world in which it is much easier for the government both to obtain and to retain information about individuals, and effectively impossible for individuals to live a normal life without disclosing vast amounts of sensitive personal information to third parties like telecommunications companies, internet service providers, credit card companies, and the like. As Professor Rotenberg says, *Carpenter* raises questions not just about the third-party doctrine but about the foundations of Fourth Amendment law. And he describes a path forward for both the courts and Congress.

Finally, *Lucia v. SEC*,¹³ another relatively narrow decision on its face, also may turn out to be part of a larger trend—in this instance, a more troubling trend. The Court in *Lucia* ruled that Securities and Exchange Commission Administrative Law Judges (ALJs) are “inferior officers” within the meaning of the Appointments Clause, so that they must be appointed

¹³ *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

by the president or Commission, not (as had been the case) by Commission staff. The decision itself does not have very significant consequences—it is an easy matter for the Commission to ratify the decisions of the staff—and the narrow terms in which it was cast do not by themselves suggest that the decision will have major doctrinal significance. But the narrow nature of the ruling may have been a form of damage control by justices who understood—what Steven Schwinn explains—that the challenge to the appointment of ALJs was part of an attack on the regulatory state that has been an agenda item for some of the justices for several years.

There were no real surprises in the 2017 Term, except, perhaps, for the Court’s failure, in *Masterpiece Cakeshop* and *Gill v. Whitford*, to decide important issues that were before it and that should have been decided. In those cases, and in the travel ban case, the Court passed up opportunities to develop the law in ways that the Constitution actually demanded and that would have struck a blow against discrimination and made the nation more democratic. In other cases, the Court continued on a course—often a very questionable course—that it had already set. The 2017 Term was consistent with what went before; it also may have given us an idea of what the future will look like.

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Masterpiece Cakeshop v. Colorado Civil Rights Commission: What Was and Wasn't Decided

Mary L. Bonauto and Jon W. Davidson*

After conferencing the petition more than a dozen times,¹ the U.S. Supreme Court granted a writ of certiorari in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* on June 26, 2017.² Some of us were surprised. A bakery and its owner had asked the high court to review a Colorado appellate ruling rejecting their claims that the First Amendment's free exercise and free speech guarantees entitled them to refuse to sell wedding cakes to same-sex couples that they sold to other couples, notwithstanding the state's public accommodations nondiscrimination law. That ruling was consistent with longstanding precedents regarding both freedom of expression and the free exercise of religion.³

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¹ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, SCOTUSblog (last visited Sept. 13, 2018), SCOTUSBLOG.com/case-Files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/.

² *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017).

³ See, e.g., Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990); Hishon v. King & Spalding, 467 U.S. 69 (1984); Newman v. Piggie Park Enters., Inc., 390 U.S. 400 (1968); see also Brief for Respondents Charlie Craig and David Mullins, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2016 U.S. S. Ct. Briefs LEXIS 4396.

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Lower courts had readily—and unanimously—rejected similar claims,⁴ and even the Supreme Court had denied certiorari in an analogous case just three years earlier.⁵ Given the Court’s more recent resetting of the boundaries in cases in which freedom of religion or expression had been raised to challenge government action, however,⁶ would this case become a vehicle for curtailing nondiscrimination protections or minimizing marriages of same-sex couples?⁷ While the Court’s decision does not answer those questions, it embraces long-standing rules in this area and provides important guidance for the road ahead.

I. Background

The facts of *Masterpiece Cakeshop* are relatively simple and largely undisputed. On July 19, 2012, Charlie Craig and David Mullins, accompanied by Craig’s mother, entered the doors of Masterpiece Cakeshop, a business that sells baked goods to the general public out of a Denver suburb storefront. Craig and Mullins had decided to get married, but Colorado at the time

⁴ See, e.g., Thomas v. Anchorage Equal Rights Comm’n, 102 P.3d 937 (Alaska 2004); North Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Superior Court, 189 P.3d 959 (Cal. 2008); Gifford v. McCarthy, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016); State v. Arlene’s Flowers, Inc., 389 P.3d 543 (Wash. 2017).

⁵ Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

⁶ See, e.g., Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Sorrell v. IMS Health Inc., 564 U.S. 552 (2011); Citizens United v. FEC, 558 U.S. 310 (2010).

⁷ See, e.g., Rev. Irene Monroe, *Will the Supreme Court Allow Businesses to Discriminate Against LGBT People?*, BILERICO REPORT (June 28, 2017), <https://www.lgbtqnation.com/2017/06/will-supreme-court-allow-businesses-discriminate-lgbt-people/>. Also of concern, Petitioners’ counsel, the Alliance Defending Freedom, took a leading role in opposing marriages of same-sex couples. Some of Petitioners’ amici also called out *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), as wrongly decided in their view. See, e.g., Brief for Christian Bus. Owners Supporting Religious Freedom as Amicus Curiae Supporting Petitioners at 23 n. 6, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005666.

banned marriage by same-sex couples,⁸ and *U.S. v. Windsor* and *Obergefell v. Hodges* were not yet the law of the land.⁹ The couple accordingly planned to travel to Massachusetts, where they would marry, and have a reception for friends and family back home afterwards.

Like most engaged couples, Craig and Mullins wanted a cake for their reception. They chose to go to Masterpiece Cakeshop on the recommendation of their reception planner. Upon entering the store, they sat down with Jack Phillips, the bakery's owner, and explained that they wanted to buy a cake for a wedding reception. When Phillips asked them whom the cake was for, Craig and Mullins told him it was for them. Phillips responded that, while his bakery would sell baked goods to lesbian and gay customers for other purposes, it would not sell them baked goods for weddings.

A horrible silence followed. Mullins recalls that they felt dehumanized, mortified, and embarrassed, and they quickly left the store. As they later explained to NBC News, for Craig,

the interaction was devastating. He remembered how bullies had taunted him for being gay in the small Wyoming town where he grew up. He later attended the University of

⁸ Colorado's state constitutional provision that "Only a union of one man and one woman shall be valid or recognized as a marriage in this state," Colo. Const. art. II, § 31, was struck down as violative of the U.S. Constitution by a state district court on July 9, 2014, and by the U.S. District Court for the District of Colorado on July 23, 2014. *See Brinkman v. Long* (Denver District Ct. Case No. 14-CV-30731), available at https://www.courts.state.co.us/userfiles/file/Court_Probation/17th_Judicial_District/Adams/brinkman%20sj%20order%20july%209%20final%2007%2014.pdf; *Burns v. Hickerlooper*, Civil Action No. 14-cv-01817-RM-KLM (D. Colo.), available at <https://www.scribd.com/document/234913376/14-14-cv-01817-45>. Colorado's Attorney General dismissed appeals in these cases and ordered all counties in the state to allow same-sex couples to marry after the U.S. Supreme Court on October 6, 2014, refused to hear appeals from Fourth, Seventh, and Tenth Circuit rulings favoring marriage equality. Deb Stanley, *Colorado Attorney General Orders All County Clerks to Issue Marriage Licenses to Same-sex Couples*, DENVER CHANNEL (last updated Oct. 7, 2014, 6:24 PM), <https://www.thedenverchannel.com/news/local-news/colorado-supreme-court-lifts-injunctions-against-3-clerks-involving-same-sex-marriage-licenses>.

⁹ *See United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell*, 135 S. Ct. 2584.

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Wyoming, around the same time gay student Matthew Shepard was murdered. He moved to Denver after he graduated, hoping to find sanctuary in the liberal city encircled by mountains and high plains.¹⁰

Craig never expected to be shunned there because of his sexual orientation.

The next morning, Craig's mother called the bakery to ask Phillips why he had refused to sell her son a cake. Phillips said that the bakery had a policy of refusing to provide baked goods for weddings of same-sex couples, based on his personal religious beliefs. Craig and Mullins later learned that Masterpiece Cakeshop had turned away at least five other same-sex couples who had sought to buy baked goods for their wedding receptions or for commitment ceremonies, including one couple who simply wanted to order cupcakes.

Because the bakery refused to provide any kind of cake for the couple's reception, there was no discussion of what the couple wanted the cake to look like or how it might be decorated. Nonetheless, as the Supreme Court stated, the parties disagreed about the extent of the baker's refusal to provide service, that is, whether it was limited to putting particular words or symbols on a cake, or "a refusal to sell any cake at all."¹¹

II. The Colorado Legal Proceedings

Longstanding Colorado state law prohibits public accommodations—including businesses that open their doors to

¹⁰ Julie Compton, *Meet the Couple Behind the Masterpiece Cakeshop Supreme Court Case*, NBC News (Dec. 6, 2017, 1:28 PM), <https://www.nbcnews.com/feature/nbc-out/meet-couple-behind-masterpiece-cakeshop-supreme-court-case-n826976>.

¹¹ *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719, 1723 (2018).

the public such as Masterpiece Cakeshop—from refusing service to individuals based on personal characteristics like race, religion, or sexual orientation.¹² Craig and Mullins filed a complaint with the state. Following an investigation and hearings, the Colorado Civil Rights Commission determined that the bakery and Phillips violated Colorado law when they refused to sell Craig and Mullins a product that the bakery regularly sold to other couples.¹³

The Commission rejected the bakery’s and Phillips’s defense that they did not discriminate because they were willing to sell goods other than wedding cakes to lesbian and gay customers, ruling that Colorado law required that lesbian and gay customers be offered any goods and services that the bakery “otherwise offers to the general public.”¹⁴ In other words, a business can decide *what* goods or services it will create or sell—and here, the bakery refused “to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween,”¹⁵—but the state’s public accommodations anti-discrimination law means that businesses cannot limit *to whom* they will provide those goods or services based on a customer’s sexual orientation or other protected characteristic.

¹² The Colorado Anti-Discrimination Act (CADA) has origins dating back in the state to 1885. The ban on sexual orientation discrimination by public accommodations, Colo. Rev. Stat. § 24-34-601(2), was added to CADA in 2008. The legislature explicitly excluded “a church, synagogue, mosque, or other place that is principally used for religious purposes” from its definition of public accommodations. *See Masterpiece Cakeshop*, 137 S. Ct. at 1725 (citing Colo. Rev. Stat. § 24-34-601(1) (effective Aug. 6, 2014)).

¹³ The initial decision of the state administrative law judge, dated December 6, 2013, which granted summary judgment in favor of the complainants and denied Masterpiece Cakeshop’s and Jack Phillips’s cross-motion, is available at <https://www.aclu.org/legal-document/craig-and-mullins-v-masterpiece-cakeshop-decision>. The final agency order of the Colorado Civil Rights Commission, dated May 30, 2015, which adopted the administrative law judge’s initial decision in full, is available at <https://www.aclu.org/legal-document/craig-and-mullins-v-masterpiece-cakeshop-commissions-final-order>.

¹⁴ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 (Colo. App. 2015).

¹⁵ *Masterpiece Cakeshop*, 138 S. Ct. at 1745 (Thomas, J., concurring).

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The bakery challenged the Commission's decision by appealing to the Colorado Court of Appeals (the state's intermediate appellate court), which unanimously affirmed the Commission's decision.¹⁶ The Court of Appeals rejected the bakery's argument that it and Phillips had not discriminated, in the words of the Colorado Anti-Discrimination Act (CADA), ““because of’ [Mullins’ and Craig’s] sexual orientation” but instead because of the couple’s intended conduct of “entering into a marriage with a same-sex partner” and a message of personal approval of the marriage that baking the cake would allegedly convey.¹⁷ The court pointed out that the U.S. Supreme Court had previously rejected such a distinction between the status of being gay and conduct closely associated with that status.¹⁸ It reasoned that, “[b]ut for their sexual orientation, [the couple] would not have sought to enter into a same-sex marriage, and but for their intent to do so, Masterpiece would not have denied them its services.”¹⁹

The Colorado Court of Appeals also rejected the bakery’s argument that application of CADA in this situation infringed its and Phillips’s federal and state constitutional rights of freedom of speech by compelling them to convey a celebratory message about same-sex couples marrying, in conflict with Phillips’s beliefs. The court concluded that the bakery and Phillips would not be conveying a message supporting marriage equality merely

¹⁶ *Craig*, 370 P.3d at 272.

¹⁷ *Id.* at 280.

¹⁸ Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 689 (2010) (stating “[o]ur decisions have declined to distinguish between status and conduct” in the context of sexual orientation); *see also Obergefell*, 135 S. Ct. at 2604 (noting that the “denial to same-sex couples of the right to marry” is a “disability on gays and lesbians” which “serves to disrespect and subordinate them”); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (targeting “homosexual conduct” in criminal law is “an invitation to subject homosexual persons to discrimination”) (emphasis added); *id.* at 583 (O’Connor, J., concurring) (noting where the law applies to conduct “closely correlated with being homosexual” then the law is about “more than conduct” and is “instead directed toward gay persons as a class”).

¹⁹ *Craig*, 370 P.3d at 281.

by abiding by state law and serving all customers equally. It held that, to the extent any message at all is sent by a wedding cake, it is more likely to be perceived as the message of the couple whose wedding it is, not the bakery that provided it.²⁰ The court additionally stated the bakery could post a disclaimer in the store or on the internet indicating that the provision of its services does not constitute an endorsement or approval of its customers or their celebrations, and further emphasizing that its baked goods do not express a message of approval by the company or its owner of any particular customer or event.²¹

Masterpiece Cakeshop further argued that application of Colorado's anti-discrimination law violated its and Phillips's federal and state constitutional rights of free exercise of religion. The Colorado Court of Appeals rejected this claim as well. First, it found that Colorado's anti-discrimination law is a permissible, neutral law that applies equally to all businesses, and that, in accord with prevailing law, an incidental burden on religion does not support a free exercise claim.²² Second, it held that freedom of religion does not provide a right to discriminate against or otherwise harm others. The court further held that application of Colorado's law reasonably furthers a compelling interest in ending discrimination, which causes economic and dignitary harms to the state and its residents.²³

After the Colorado Supreme Court refused to hear the bakery's further appeal,²⁴ Masterpiece Cakeshop petitioned the U.S. Supreme Court for certiorari. The Court agreed to review the case and heard argument on December 5, 2017.

²⁰ *Id.* at 286-87.

²¹ *Id.* at 288.

²² Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

²³ *Craig*, 370 P.3d at 290-94.

²⁴ Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, 2016 Colo. LEXIS 429, 2016 WL 1645027 (Apr. 25, 2016).

III. The Supreme Court Decision

The Supreme Court issued its decision on June 4, 2018.²⁵ By a 7-2 vote, it reversed the judgment below, but it did so based not on the compelled speech and free exercise grounds that had been the focus of the parties' briefing and the 95 amicus briefs submitted to the Supreme Court after certiorari was granted. Instead, Justice Kennedy, in one of his final opinions for the Court, reversed based on the conclusion that Masterpiece Cakeshop and Phillips had been denied "neutral and respectful consideration" of their claims in the Colorado proceedings,²⁶ and that the Colorado Civil Rights Commission's treatment of their claims thereby "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."²⁷

A. What the Court Said About Governing Principles and the Legal Arguments

Before considering that holding, it is important to appreciate how the Court conceptualized the case and what it said about the principal issues that were on appeal. First, the Court described the case as involving "reconciliation" of two principles: state authority "to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services," and the "right of all persons to exercise fundamental freedoms under the First Amendment."²⁸

As to the first principle, the decision vindicates lesbian, gay, and bisexual (and presumably transgender) people's right to equal treatment, stating:

²⁵ Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

²⁶ *Id.* at 1729.

²⁷ *Id.* at 1731.

²⁸ *Id.* at 1723.

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight by the courts.²⁹

Taking the equal treatment principle to a concrete level, the Court approvingly cited the bakery’s statement at oral argument that a baker’s refusal to “sell any goods or any cakes for gay weddings” would be a denial of goods and services beyond any protected rights of the baker subject to an anti-discrimination law.³⁰

As to the second principle, the Court stated that “religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.”³¹ Yet, these controversies should be rare, the Court suggests, as “there are no doubt innumerable goods and services that no one could argue implicate the First Amendment.”³²

All told, however, the Court did not reconcile those principles because it ruled on the narrower grounds that the state civil rights

²⁹ *Id.* at 1727.

³⁰ *Id.* at 1728. Some may say that all these statements rejecting broad religious exemptions and reaffirming the Constitution’s protection of the equal dignity of lesbian, gay, and bisexual people are dicta (statements not necessary to the decision that do not create binding precedent), but lower courts rarely view considered statements of the Supreme Court that way. *See McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) (concluding that “federal appellate courts are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings, particularly when . . . a dictum is of recent vintage and not enfeebled by any subsequent statement” and collecting cases to like effect from other circuits); *see also Galli v. N.J. Meadowlands Comm’n*, 490 F.3d 265, 274 (3d Cir. 2007) (“Because the ‘Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket,’ failing to follow those statements could ‘frustrate the evenhanded administration of justice by giving litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there.’”) (citations omitted); *Laub v. U.S. Dep’t of Interior*, 342 F.3d 1080, 1090 n.8 (9th Cir. 2003) (“Supreme Court dicta is not to be lightly disregarded.”).

³¹ *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

³² *Id.* at 1728.

commission had not acted with religious neutrality in adjudicating the case.³³ It left for another day questions of “the confluence of speech and free exercise principles” and the “delicate question” of when “free exercise of religion must yield to a valid exercise of state power.”³⁴

B. Free Exercise of Religion

Although the Court found no need to reconcile the principles in this case, it set forth generally applicable parameters for future disputes. Crucially, the Court reaffirmed its 50-year old precedent in the historically unique context of race as embracing discrimination against LGBT people as well: “It is a general rule that [religious] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”³⁵

Alongside *Newman v. Piggie Park Enterprises, Inc.*, the Court cited *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*,³⁶ a case relied on by the bakery and its supporters to cram cake-baking in the commercial marketplace into the speech paradigm of the privately organized and inherently expressive parade at issue in *Hurley*. But the Court used *Hurley* for a different point: that there is nothing *per se* problematic about sexual orientation anti-discrimination laws, which are “well within the State’s usual power to enact” and “do not, as a general matter, violate the First or Fourteenth Amendment.”³⁷ The Court repeated that point, characterizing as “unexceptional” the government’s

³³ *Id.* at 1724.

³⁴ *Id.* at 1723-1724.

³⁵ *Id.* at 1727 (citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. at 400, 402, n.5 (1968)).

³⁶ *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557 (1995).

³⁷ *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (citing *Hurley*, 515 U.S. at 572 (1995)).

power to enact anti-discrimination laws and their scope in “protect[ing] gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.”³⁸

Specifically as to the claim that the First Amendment’s Free Exercise Clause provides a constitutional right for those seeking exemptions from public accommodation anti-discrimination laws, the majority opinion reiterated that “[t]he Court’s precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws.”³⁹ No justice dissented from the majority opinion’s reaffirmation of this longstanding precedent.⁴⁰

The majority opinion built on the Court’s landmark gay-rights opinions in *Romer v. Evans*,⁴¹ *Lawrence v. Texas*,⁴² *United States v. Windsor*,⁴³ and *Obergefell v. Hodges*,⁴⁴ to signal that “gay persons and couples cannot be treated as social outcasts or as inferior in dignity and worth,” and must be allowed to “exercise . . . their civil rights,” and “freedom on terms equal to others.”⁴⁵ Accordingly, lower courts should analyze these claims by according “great weight and respect” to claims by LGBT people seeking to

³⁸ *Id.* at 1728.

³⁹ *Id.* at 1723-24; *see also id.* at 1728 (“Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, . . . the State would have a strong case under this Court’s precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations laws.”).

⁴⁰ *See id.* at 1732 (Kagan, J., concurring); *id.* at 1734 (Gorsuch, J., concurring); *id.* at 1740 (Thomas, J., concurring); *id.* at 1748 (Ginsburg, J., dissenting).

⁴¹ *Romer v. Evans*, 517 U.S. 620 (1996).

⁴² *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴³ *United States v. Windsor*, 570 U.S. 744 (2013).

⁴⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁴⁵ *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

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“exercise . . . their freedom on terms equal to others.”⁴⁶ In so ruling, the Court effectively rejected the arguments advanced in support of the bakery that trivialized the stigma and dignitary harm from being refused service or urged that no harm occurs at all when alternative service providers are available.⁴⁷

The Court set a high bar for free exercise claims that might even be considered constitutionally protected in part because of the community-wide harms that accepting such claims could cause—harms that anti-discrimination laws exist to guard against. The Court first posited that clergy members who object to marriages of same-sex couples cannot be compelled to perform a ceremony because of free exercise of religion guarantees.⁴⁸ (Of course, clergy members are not public accommodations under Colorado’s law or the similar laws of other states.) The Court’s real point was to state why any “exception” must be “confined,” or else “a long list of persons” who provide goods and services for weddings could refuse to do so for gay persons, “resulting in a community-wide stigma” of gay people “inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.”⁴⁹ Likewise, the Court rejected as “impos[ing] a serious stigma” signage that would refuse services for “gay

⁴⁶ *Id.*

⁴⁷ Some amici briefs supporting the Petitioners argued there was no harm when an alternate service provider is available, e.g. Brief for The Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners at 34-35, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4004526; Brief for The Cato Institute and Individual Rights Found. as Amici Curiae Supporting Petitioners at 17, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4004528. Others argued that the dignitary harm experienced by Craig and Mullins is insufficient harm for a discrimination claim, particularly where the service provider or vendor also experiences dignitary harm. Brief for the Petitioners at 50-52, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913762; Brief for The Christian Legal Soc’y et al. as Amici Curiae Supporting Petitioners at 5, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005662.

⁴⁸ *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

⁴⁹ *Id.*

marriages.”⁵⁰ The Court not only recognized the possibility of widespread service denials if religiously-based service refusals were permissible, but that such refusals would effectively subordinate LGBT people and undermine the core purpose of anti-discrimination laws in ensuring equal access to and participation in places of public accommodation.

What is not obvious from the majority opinion but matters to future cases is the Court’s adherence to the status quo in the face of an intense assault on anti-discrimination laws. For example, by aligning this case with *Piggie Park*, the Court implicitly rebuffed arguments that the bakery discriminated based on the conduct of the customers—that is, Craig and Mullins’s celebration of their wedding, rather than on their sexual orientation or “status.”⁵¹ The majority opinion also did not embrace several direct attacks on anti-discrimination laws, such as challenges to the conventional

⁵⁰ See also *id.* at 1728-29 (“[A]ny decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying ‘no goods or services will be sold if they will be used for gay marriages,’ something that would impose a serious stigma on gay persons.”).

⁵¹ This argument has been rejected by the Court previously. See discussion *supra* note 18. But see Brief for Petitioners, at 52-53, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913762 (arguing that the couple had no compelling dignitary interest, because Phillips would sell them other products, but not “a custom wedding cake that would celebrate their marriage”); Brief of The Becket Fund for Religious Liberty, as Amici Curiae Supporting Petitioners at 25, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4004526 (arguing that the baker objected to baking this wedding cake because of opposition to this marriage of a same-sex couple (conduct) and not opposition to the respondents’ sexual orientation (status)); Brief of Council of Christian Colleges and Universities, et al. as Amici Supporting Neither Party at 34, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4023116 (arguing that the baker did not discriminate based on status, but declined to “participate (directly or indirectly) in their same-sex wedding because . . . for religious reasons he viewed that ceremony as reflecting a moral choice.”).

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rationales and compelling interests served by anti-discrimination laws⁵² and to the scope of such laws.⁵³

Still, there remains at least a theoretical possibility of a future “constrained” religious exemption to anti-discrimination laws. Crafting such an exemption would be onerous, given the “all but endless” factual complications involved in determining whether a free exercise claim might exist, including whether a baker refused to attend the wedding and cut the cake in a particular way, or refused to put “certain religious words or decorations on the cake.”⁵⁴ Also potentially looming over all of this is the future of the holding laid down in *Employment Divison, Dept. of Human Resources of Oregon v. Smith*, that “a neutral and generally applicable law will usually survive a constitutional free exercise challenge.”⁵⁵ The bakery, in a footnote, argued that *Smith* should be “reevaluated” if that case did not protect Phillips,⁵⁶ and others openly criticized *Smith* or urged its abandonment.⁵⁷ Only Justice Gorsuch explicitly referred to *Smith* as purportedly “remain[ing] controversial in many quarters.”⁵⁸

⁵² See, e.g., Brief for Petitioners, at 34, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913762 (arguing that the state’s asserted compelling interest in eradicating discrimination was too broad and that the justification must be assessed with reference to facts of case); Brief for Law and Economics Scholars as Amicus Curiae Supporting Petitioners at 11-16, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4118065 (arguing that there were no monopoly concerns and that same-sex couples may seek alternate vendors).

⁵³ See, e.g., Brief for Liberty Counsel as Amicus Curiae Supporting Petitioners at 17, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005663 (arguing that laws should be limited to addressing racial discrimination only).

⁵⁴ *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

⁵⁵ Emp’t Div., Dep’t of Human Res. v. Smith, 494 U.S. 872, 878-79 (1990).

⁵⁶ Brief for Petitioners at 48 n.8, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913762.

⁵⁷ See, e.g., Brief for The Christian Legal Soc’y et al. as Amici Curiae Supporting Petitioners at 6, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4005662.

⁵⁸ *Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J., dissenting).

C. Free Speech

With respect to the argument that the First Amendment’s Free Speech Clause can provide a defense to those who object to complying with public accommodations anti-discrimination laws, the Court did not hold that wedding cakes are speech or expression entitled to First Amendment protection.⁵⁹ In a terse discussion, Justice Kennedy called the free-speech aspects of the case “difficult.”⁶⁰ He noted that “few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech,” and yet “the application of constitutional freedoms in new contexts can deepen our understanding of their meaning,”⁶¹ a point he also made in his LGBT-rights cases.⁶² He also mused that, “[i]f a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all.”⁶³

Justice Kennedy further wrote, as noted above, that “the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression,”⁶⁴ and quoted from his opinion for the Court in *Obergefell* that “[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.”⁶⁵ By basing the decision in *Masterpiece Cakeshop* on the Court’s perception of the Colorado Civil Rights

⁵⁹ *Id.* at 1748, n.1 (Ginsburg, J., dissenting).

⁶⁰ *Id.* at 1723.

⁶¹ *Id.*

⁶² See, e.g. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015); *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

⁶³ *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

⁶⁴ *Id.* at 1727.

⁶⁵ *Id.* (quoting *Obergefell*, 135 S. Ct. at 2607).

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Commission’s hostility toward religion, however, the Court did not further specify whether, or in what circumstances, these objections to the marriage of same-sex couples might justify violating public accommodations laws. Instead, the majority opinion ends as it began, with a call for “tolerance, without undue disrespect for religious sincere beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.”⁶⁶

While there was little appetite overall for the speech arguments, Justice Thomas’s concurrence in the judgment, joined by Justice Gorsuch, took issue with the Colorado Court of Appeals’s conclusion that Phillips’s conduct was neither expressive nor protected speech.⁶⁷ As the bakery argued, Justice Thomas asserted that the “creation of custom wedding cakes is expressive;” that Phillips’s message communicated through the cake is that a wedding has occurred, a marriage has begun, and the couple should be celebrated; and that, by discussing the engaged couple’s desires and delivering the cake to the reception, “Phillips is an active participant in the wedding celebration.”⁶⁸ Justice Thomas concluded that strict scrutiny should be applied because, in his view, Colorado was punishing Phillips because of the content of his speech, which Justice Thomas described as “refus[ing] to create custom wedding cakes that express approval of same-sex marriage.”⁶⁹ Because the Colorado Court of Appeals did not address whether strict scrutiny could be satisfied, Justice Thomas stated that he “will not do so in the first instance,” but nonetheless asserted that protecting dignitary harms is not sufficient to overcome free speech, which he claimed

⁶⁶ *Id.* at 1732.

⁶⁷ *Id.* at 1740.

⁶⁸ *Id.* at 1742-43.

⁶⁹ *Id.* at 1746.

cannot be suppressed due to audience reaction or offense.⁷⁰

Justice Gorsuch's concurrence (joined by Justice Alito) likewise found that provision of a wedding cake conveys a message, because no one can "reasonably doubt that a wedding cake without words conveys a message."⁷¹ In Justice Gorsuch's view, whether there are "[w]ords or not and whatever the exact design," a "wedding cake [that] is made for a same-sex couple . . . celebrates a same-sex wedding" and Phillips should be able to withhold that approval both as a matter of his religious faith, and as a matter of protected speech.⁷² Accordingly, Justice Gorsuch contended, Phillips was justified in refusing to engage in the act of making the wedding cake based on his religious views of approval or disapproval of the wedding at hand—regardless of what the cake looks like. This assertion rests on the supposition that a wedding cake made for a same-sex couple's reception is somehow different from the exact same wedding cake made for a different-sex couple's reception. Whether in a future case Justices Gorsuch, Alito, and Thomas can convince Chief Justice Roberts and Justice Kennedy's successor of this framing remains to be seen.

D. The Religious Non-Neutrality Aspect of the Case

Returning to the opinion's actual grounds for reversal of the decision below, Justice Kennedy found that three aspects of the Colorado Civil Rights Commission's treatment of the bakery's claims had "elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated [the bakery's] objection."⁷³

⁷⁰ *Id.* The U.S. Department of Justice made comparable arguments about speech, but contended that application of public accommodations law to protected expression "may" not violate the Constitution in the case of laws targeting race-based discrimination. Brief for United States as Amicus Curiae Supporting Petitioner at 32, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4004530.

⁷¹ *Masterpiece Cakeshop*, 138 S. Ct. at 1738.

⁷² *Id.* at 1737-39.

⁷³ *Id.* at 1729.

1. Timing

The first concern was the context of the times when the dispute arose. The dispute arose in 2012, and the Court says that Phillips's "dilemma was particularly understandable" given that Colorado barred marriages of same-sex couples in 2012, and the *Windsor* and *Obergefell* decisions governing access to marriage and respect for existing marriages had not yet been decided.⁷⁴

2. Commissioners' Comments

The timing observation feeds into the second point, namely the comments of two Commissioners before and after ruling on the merits, that the Court understood as expressing "hostility toward the sincere religious beliefs that motivated [Phillips's] objection."⁷⁵ One Commissioner had stated that the baker could "believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state,'" and also that "he needs to look at being able to compromise."⁷⁶ A second commissioner (months later) stated that

Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.⁷⁷

⁷⁴ *Id.* at 1728.

⁷⁵ *Id.* at 1729.

⁷⁶ *Id.*

⁷⁷ *Id.*

Justice Kennedy acknowledged the first Commissioner's comments were ambiguous in that they might simply mean "that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views."⁷⁸ But the Court found it "more likely," that these comments "might be seen as inappropriate and dismissive . . . [and] showing lack of due consideration for [the baker's] free exercise rights and the dilemma he faced," particularly in light of the second Commissioner's comments.⁷⁹ Justice Kennedy stated that describing Phillips's faith as "despicable . . . rhetoric" disparages his faith both by "describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. . . . This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law."⁸⁰ Justices Kagan and Breyer were also troubled by these comments, because "state actors cannot show hostility to religious views."⁸¹

Whatever one may think of the comments, and distinctions can certainly be made, there is no basis from the *Masterpiece Cakeshop* ruling for arguing that mere enforcement of anti-discrimination laws amounts to religious hostility. As to the comments, it is worth noting that the second Commissioner's comment came two months after substantive decisionmaking

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 1729.

⁸¹ *Id.* at 1732 (Kagan, J., concurring). Others have also observed the tension between Justice Kennedy's reliance on these statements of two of seven commissioners given his joinder in the Supreme Court's the majority opinion in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), less than three weeks later. As Justice Sotomayor objected in her dissent in that case,

Unlike in *Masterpiece*, where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President's charged statements about Muslims as irrelevant.

Id. at 2447.

concluded. Based on precedent about religious prejudice, the four independent layers of decisionmaking in the state proceedings, and the lack of evidence that “prejudice infected the determinations of the adjudicators in the case before and after the Commission,” the dissent argues that the few comments should not “overcome Phillips’ refusal to sell a wedding cake to Craig and Mullins.”⁸² Moreover, the comments about “rhetoric” can be understood more about seeking to use beliefs as a defense to conduct that harms others than a direct attack on Phillips’s belief system itself.

3. (Claimed) Disparate Treatment of Phillips and Other Bakers

a) Majority Opinion

Justice Kennedy also relied on what he said “could reasonably be interpreted” as inconsistencies between how the Colorado Civil Rights Commission addressed “whether speech was involved” in the case involving Masterpiece Cakeshop and the three other cases of an individual—William Jack—who was a potential bakery customer but was denied cakes with anti-gay messages by other businesses. In the so-called “Jack cases,” Jack entered bakeries and requested two cakes,

made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red ‘X’ over the image. On one cake, he requested [on] one side[,] . . . “God hates sin. Psalm 45:7” and on the opposite side of the cake “Homosexuality is a detestable sin. Leviticus 18:2.” On the second cake, [the one] with the

⁸² *Masterpiece Cakeshop*, 138 S. Ct. at 1751 (Ginsburg, J., dissenting).

image of the two groomsmen covered by a red ‘X’ [Jack] requested [these words]: “God loves sinners” and on the other side “While we were yet sinners Christ died for us. Romans 5:8.”⁸³

Justice Kennedy questioned why, in each of the Jack cases, the Commission ruled in favor of the bakeries that had rejected the cake order, whereas the Commission ruled against Masterpiece Cakeshop.⁸⁴ First, he pointed to the fact that the Commission ruled against Phillips on the ground that any message that might be expressed by the wedding cake would be attributed to the customer rather than the baker, thereby eviscerating his speech claim, whereas in the Jack cases, the Commission did not address that issue.

Second, Justice Kennedy noted that, at the Colorado Court of Appeals, Phillips had “protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs,” and Justice Kennedy’s majority opinion concluded that “the Commission had treated the other bakers’ conscience-based objections as legitimate,” while treating Phillips’s objections as illegitimate, thus sitting “in judgment of his religious beliefs themselves.”⁸⁵

Finally, the Court of Appeals had rejected the assertion of double standards because “[the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed” when they refused to create the requested cakes, but because “the Division found that the bakeries . . . refuse[d] the patron’s request

⁸³ *Id.* at 1749 (Ginsburg, J., dissenting).

⁸⁴ *Id.* at 1730-31.

⁸⁵ *Id.* at 1730.

. . . because of the offensive nature of the requested message.”⁸⁶ Justice Kennedy seized upon the characterization of the messages on the cakes as “offensive” to complain that “[t]he Colorado court’s attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips’ religious beliefs.”⁸⁷

Looking to the future, the Court set forth factors drawn directly from *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,⁸⁸ that are relevant to the assessment of government neutrality. These include the historical background of the decision as well as the immediate steps leading to it, and the legislative or administrative history of the policy, including contemporaneous statements of the decision-making body.⁸⁹

All of this said, it is crucial to note that the majority opinion does not go so far as to say that the Phillips and Jack cases are subject to the same rules. Instead, it says Colorado was “inconsistent as to whether speech was involved,” which is “quite apart from whether the cases should ultimately be distinguished.”⁹⁰ And to be sure, there are forceful distinctions aplenty to be made, as addressed in the concurring opinion of Justice Kagan and the dissent, discussed below.

b) Concurring and Dissenting Opinions

It is because the majority suggests that the Phillips and Jack cases might be distinguished in a regime which, in its view, fairly applies the law, that the concurring and dissenting opinions

⁸⁶ *Id.* at 1730-31.

⁸⁷ *Id.*

⁸⁸ *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540 (1993).

⁸⁹ *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

⁹⁰ *Id.* at 1730; see also *id.* at 1728 (noting “[t]here were, to be sure, responses to these arguments that the State could make” in contending for a different rule in the two sets of cases).

spar over the mode of analysis to be applied in future cases. Justice Gorsuch (joined by Justice Alito) found the two cases indistinguishable, sharing both “all legally salient features”—such as refusing the service of producing a cake they would not sell to anyone based on personal conviction, and having the same effect of denying service to a person with a protected trait.⁹¹

Justice Kagan’s concurrence (joined by Justice Breyer) as well as Justice Ginsburg’s dissent (joined by Justice Sotomayor) demonstrate the appropriate legal analysis for distinguishing the Phillips and Jack cases, something the Court found lacking in the Colorado adjudications.⁹² For one, the Phillips and Jack cases can be distinguished by “a plain reading and neutral application of Colorado law.”⁹³ Phillips rejected Craig and Mullins’s request for a wedding cake because of their sexual orientation, while he regularly sold wedding cakes to other customers. By contrast, Jack requested cakes “denigrating gay people and same-sex marriage” that the bakers would not make for any customer, regardless of the customer’s religion. The difference in result was therefore warranted as well: there was no discrimination when the bakers treated Jack “the same way they would have treated anyone else” but Phillips denied the “‘full and equal enjoyment’ of public accommodations irrespective of their sexual orientation” by refusing wedding cakes he would otherwise produce only to same-sex couples.⁹⁴

As to the issue of “offensiveness” of the message, Justice Ginsburg distinguishes between the “offense” Phillips experienced “where the offensiveness of the product was determined solely

⁹¹ *Id.* at 1735-36 (Gorsuch, J., concurring).

⁹² *Id.* at 1729-31.

⁹³ *Id.* at 1733 (Kagan, J., concurring).

⁹⁴ *Id.*

by the identity of the customer requesting it,” and the offense of the three bakeries in the Jack cases who “object[ed] to the product . . . due to the demeaning message the requested product would literally display.”⁹⁵ Since Craig and Mullins “mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold,”⁹⁶ the,

Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division’s finding that messages in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distinguished the cases on the ground that Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination.⁹⁷

Essentially for the same reasons, both Justice Kagan’s concurrence and the Justice Ginsburg’s dissent also reject the position of Justice Gorsuch’s concurrence that Phillips would not sell a “cake celebrating a same-sex marriage” to anyone, just as the Jack bakers would not sell the requested cakes to any customer.⁹⁸ But the cake requested of Phillips was “simply a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike.”⁹⁹ Although Justice Gorsuch would allow the wedding cake to become something different—*i.e.*, a same-sex wedding cake¹⁰⁰—because

⁹⁵ *Id.* at 1750-51.

⁹⁶ *Id.* at 1749.

⁹⁷ *Id.* at 1751 (Ginsburg, J., dissenting).

⁹⁸ *Id.* at 1733, n.* (Kagan, J. concurring).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1738 (Gorsuch, J., concurring).

the vendor “invests its sale to particular customers with ‘religious significance,’” that position cannot be squared with governing law.¹⁰¹ For one, public accommodations laws apply even when a vendor’s “religion disapproves of selling a product to a group of customers.”¹⁰² And the rule flowing from *Piggie Park* is that “[a] vendor can choose the products he sells, but not the customers he serves—no matter the reason.”¹⁰³

Justice Gorsuch makes the further argument that the Commission erred in presuming intent to discriminate on the basis of sexual orientation in the case of Phillips and not making the same presumption of intent to discriminate based on religion in the Jack cases, since the person most likely to ask for a cake with those particular religious messages is a person with a particular set of religious beliefs.¹⁰⁴ This obscures the fundamental point, however, that there is nothing discriminatory about refusing to sell a particular product that a vendor would sell to no one. There was no evidence that Jack was being singled out for his religious beliefs when he was denied cakes that disparaged other people, and that disparagement constitutes a legitimate nondiscriminatory reason.¹⁰⁵ To illustrate the point, “Change Craig and Mullins’ sexual orientation (or sex), and Phillips would have provided the

¹⁰¹ *Id.* at 1733, n.* (Kagan, J., concurring) (internal citation omitted).

¹⁰² *Id.* (citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5 (1968) (*per curiam*)).

¹⁰³ *Masterpiece Cakeshop*, 138 S. Ct. at 1733, n.* (Kagan, J. concurring). Justice Gorsuch’s view that the cake is different if it is for a same-sex couple’s wedding than if it is for a different-sex couple’s wedding is at odds with the rulings in *Windsor* and *Obergefell* that rejected the notion that when same-sex couples marry they are doing something fundamentally different than when different-sex couples marry, *i.e.*, they are entering a “gay marriage” rather than a “marriage.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (ruling that “same-sex couples may exercise the right to marry” and the reasons marriage is fundamental “apply with equal force to same sex couples”); *United States v. Windsor*, 570 U.S. 744, 769 (2013) (holding that married same-sex couples have a lawful status “worthy of dignity and equal with all other marriages”); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (holding that same-sex couples have the same right as opposite sex couples of to enjoy intimate association).

¹⁰⁴ *Masterpiece Cakeshop*, 138 S. Ct. at 1736-37.

¹⁰⁵ See *id.* at 1733-34, (Kagan, J., concurring); *id.* at 1751 (Ginsburg, J., dissenting).

cake. Change Jack’s religion, and the bakers would have been no more willing to comply with his request. . . . [T]he bakers simply refused to make cakes bearing statements demeaning to people protected by CADA.”¹⁰⁶ Finally, as Jim Oleske rightly observes, no presumption is warranted, because sexual orientation is “inextricably tied” to the conduct of marrying a partner of the same sex whereas opposition to gay people and marriage of same-sex couples is not inextricably tied to any particular creed, or any creed at all.¹⁰⁷ In sum, there is a world of difference in “the role the customer’s ‘statutorily protected trait’” in the two examples.¹⁰⁸

Last, Justice Gorsuch suggests that Justice Kagan’s concurrence and Justice Ginsburg’s dissent manipulate “the level of generality” as to the messages of the Jack and Phillips cakes: both “convey a message regarding same-sex marriage,” and both should be subject to the same rule.¹⁰⁹ This is certainly a high level of abstraction, particularly where the Jack cakes literally contained words and symbols expressing a point of view about gay people and their marriages, and where the majority recognized that a refusal “to design a special cake with words or images . . . might be different from a refusal to sell any cake at all.”¹¹⁰ While Justice Gorsuch’s concurrence contends that any wedding cake made by

¹⁰⁶ *Id.* at 1750, n.3 (Ginsburg, J., dissenting).

¹⁰⁷ Jim Oleske, *Justice Gorsuch, Kippahs, and False Analogies in Masterpiece Cakeshop*, TAKE CARE BLOG (June 19, 2018), <https://takecareblog.com/blog/justice-gorsuch-kippahs-and-false-analogies-in-masterpiece-cakeshop> (citing Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661 (2010)).

¹⁰⁸ *Masterpiece Cakeshop*, 138 S. Ct. at 1750 n.3 (Ginsburg, J., dissenting) (internal citation omitted). In addition, Justice Gorsuch’s concurrence claims that both the Jack baker and Phillips agreed they would sell other products to people of faith (Jack) and gay people (Phillips), thus negating any intent to discriminate. The majority opinion lacked the assurance that this was so. *Id.* at 1723 (“One of the difficulties of this case is that the parties disagree as to the extent of the baker’s refusal to provide service.”); *id.* at 1726 (noting Phillips’s refusal to sell cupcakes to a lesbian couple for their commitment celebration and the affidavits submitted asserting the cakeshop’s policy of “not selling baked goods to same-sex couples for this type of event”).

¹⁰⁹ *Id.* at 1739.

¹¹⁰ *Id.* at 1723.

Phillips conveys his approval of the customer’s wedding, much like “‘an emblem or flag,’ a cake for a same-sex wedding is a symbol . . . [and] signif[es] approval,”¹¹¹ no Supreme Court case has “suggested the provision of a baked good might be expressive conduct.”¹¹² Moreover, while Phillips has expressed his “own views on the messages he believes his cakes convey,” the legal test requires conduct to be reasonably understood to an observer to be expression, and to be the expression of the vendor rather than the couple marrying.¹¹³

All told, it may be that Justice Kennedy chose to read the record below as permeated with hostility toward religion in order to find grounds for deciding the case that could command a majority without reaching the substantive issues raised in the appeal. Along with pressing for resolution of the substantive issues in future cases, some see new opportunities for challenging the enforcement of anti-discrimination laws. As Professors Douglas Laycock and Thomas Berg have suggested, “testers” may be closely reviewing all judicial and administrative litigation for “double standards” in how laws are applied.¹¹⁴

¹¹¹ *Id.* at 1738.

¹¹² *Id.* at 1748, n.1 (Ginsburg, J., dissenting). While this discussion in Justice Ginsburg’s dissent is directed at Justice Thomas’s concurrence on free speech grounds, the same points can be made as to the speech-infused elements of the Gorsuch concurrence. *Id.* at 1748, n.5.

¹¹³ *Id.* (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984)). Two blog posts concisely explain the question of whether a vendor speaks at all. See Tobias Wolff, *Symposium: Anti-Discrimination Laws Do Not Compel Commercial-Merchant Speech*, SCOTUSBLOG (Sep. 14, 2017, 10:25 AM), <http://www.scotusblog.com/2017/09/Symposium/anti-discrimination-laws-do-not-compel-commercial-merchant-speech/>; Robert Post, *An Analysis of DOJ’s Brief in Masterpiece Cakeshop*, TAKE CARE BLOG (Oct. 18, 2017), <https://takecareblog.com/blog/an-analysis-of-doj-s-brief-in-masterpiece-cakeshop>.

¹¹⁴ Douglas Laycock and Thomas Berg, *Symposium: Masterpiece Cakeshop – Not as Narrow as May First Appear*, SCOTUSBLOG (June 5, 2018, 3:48 PM), <http://www.scotusblog.com/2018/06/symposium-masterpiece-cakeshop-not-as-narrow-as-may-first-appear/>.

IV. Supreme Court Action After the *Masterpiece Cakeshop* Ruling

After the Supreme Court decided *Masterpiece Cakeshop*, it issued an order in another case in which certiorari had been sought contesting a lower court's rejection of religious and expressive defenses to the enforcement of a sexual orientation anti-discrimination law in the context of wedding goods and services.¹¹⁵ The Court granted certiorari, vacated the decision below, and remanded it to the Washington Supreme Court for reconsideration in light of *Masterpiece Cakeshop*.¹¹⁶ Presumably, the only question for consideration on remand is whether anywhere in the record there is a demonstrated and relevant lack of neutral and respectful consideration of the floral shop owner's religious beliefs.

The Alliance Defending Freedom (ADF)—counsel for the businesses in both *Masterpiece Cakeshop* and *Arlene's Flowers*—is already claiming that the Washington Attorney General's simple act of enforcing the state's anti-discrimination law against someone asserting that they were following their religious beliefs is evidence of impermissible religious hostility.¹¹⁷ That approach seems doomed where the Court just reaffirmed its *Piggie Park* precedent, which involved enforcement of an anti-discrimination law to an individual who claimed a religious justification.

This new attempt to craft a “religious hostility” defense, its contours and what it may mean, will likely come to the Court in due course, although one would hope that comments about a party's defenses, including religious defenses, would not

¹¹⁵ *Arlene's Flowers v. Washington*, 86 U.S.L.W. 3640 (June 25, 2018).

¹¹⁶ *Id.*

¹¹⁷ Supplemental Brief of Petitioner, *Arlene's Flowers*, 138 S. Ct. 2671 (mem.) (No. 17-108), 2018 WL 3019588, available at https://www.supremecourt.gov/DocketPDF/17/17-108/49474/20180606162140535_17-108%20Supplemental%20Brief%20of%20Petitioners.pdf.

ordinarily elicit comment from enforcement and adjudicatory officials. In addition to the likelihood that the *Arlene's Flowers* case will generate another petition for a writ of certiorari once the Washington Supreme Court rules upon the remand, there are numerous other cases that may provide additional opportunities for U.S. Supreme Court review. For example, the Oregon Supreme Court declined review in another ADF case in which a baker was found to have violated state law by refusing to sell a wedding cake to a same-sex couple,¹¹⁸ and the Hawaii Supreme Court declined review in a further ADF case in which the owner of a bed-and-breakfast was found to have violated a state law by refusing to rent a room to a same-sex couple.¹¹⁹

In addition, within days after the Supreme Court decided *Masterpiece Cakeshop*, the Arizona intermediate Court of Appeals relied on *Masterpiece Cakeshop* to reject religious and expressive objections to hypothetical enforcement of a sexual orientation nondiscrimination law in a wedding services context,¹²⁰ and ADF has already sought review by the state supreme court.¹²¹ Along with the Arizona case, ADF has advanced several pre-enforcement challenges to anti-discrimination laws, such as *Telescope Media Grp. v. Lindsey*,¹²² and *303 Creative LLC v. Elenis*.¹²³ These are

¹¹⁸ Klein v. Or. Bureau of Labor & Indus., 410 P.3d 1051 (Or. Ct. App. 2017); see Aimee Green, *Oregon Supreme Court Won't Hear Sweet Cakes by Melissa's Appeal*, OREGONIAN/OREGON LIVE (June 22, 2018), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2018/06/oregon_supreme_court_wont_hear.html.

¹¹⁹ Cervelli v. Aloha Bed & Breakfast, SCWC-13-0000806, 2018 WL 3358586, (Haw. July 10, 2018). ADF is advancing numerous additional similar cases forward as well. See Brennan Suen, *Masterpiece Cakeshop Was Just the Beginning*, MEDIA MATTERS (June 5, 2018, 1:32PM), <https://www.mediamatters.org/blog/2018/06/05/Masterpiece-Cakeshop-was-just-the-beginning-ADF-is-pushing-several-other-license-to-discri/220381>.

¹²⁰ Brush & Nib Studio v. Phoenix, 418 P.3d 426 (Ariz. Ct. App. 2018).

¹²¹ *Arizona Supreme Court Gets Appeal on Discrimination Issue*, AP (July 10, 2018), <https://www.apnews.com/71683eb6dbd24bde9c029b75daa8ca64>.

¹²² *Telescope Media Grp. v. Linsey*, 271 F. Supp. 3d 1090 (D. Minn. 2017), *appeal pending*, No. 17-3352 (8th Cir.).

¹²³ *303 Creative LLC v. Elenis*, 2017 U.S. Dist. LEXIS 203423 (D. Colo. Sept. 1, 2017), *appeal dismissed*, 2018 U.S. App. LEXIS 22516 (10th Cir. Aug. 14, 2018).

certainly inauspicious settings for identifying religious hostility, given that enforcement proceedings had not even commenced.

V. Conclusion

We are not alone in discerning a message of pluralism in the majority opinion, particularly where it concludes by noting that future cases “must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.”¹²⁴

A crucial way of managing that pluralism, as the Supreme Court ruled decades ago in *Piggie Park*, is to ensure an open marketplace without a vendor’s right to refuse goods and services based on religious belief. As the NAACP LDF argued in its amicus brief, “the journey out of Jim Crow” has shown that free exercise and equal protection principles “can live in harmony when neutral laws of general applicability, such as public accommodations statutes, are uniformly enforced and reasonably applied.”¹²⁵ Specifically, while our nation “rightly cherish[es] religious liberty and go[es] to great lengths to accommodate individuals in their beliefs and practices,” those liberties “must yield to such neutral laws, especially when they are supported by the compelling interest in eliminating discrimination.”¹²⁶ Changing that rule threatens to change much more than same-sex couples’ access to wedding cakes.¹²⁷

¹²⁴ Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 138 S. Ct. 1719, 1732 (2018).

¹²⁵ Brief for NAACP Legal Defense Fund as Amici Curiae Supporting Respondents at 20, Masterpiece Cakeshop, Ltd., v. Colo. Civil Rights Comm’n, 138 S.Ct. 1719 (2018) (No. 16-111), 2017 WL 5127302.

¹²⁶ *Id.*

¹²⁷ Paul M. Smith, *The Real Cost of Masterpiece; It’s Personal*, BALKINIZATION, (Apr. 7, 2018), <https://balkin.blogspot.com/2018/04/the-real-cost-of-masterpiece-its.html>.

Others are already advancing proposals to provide certain accommodations to vendors or service providers with a sincere religious objection so long as doing so would not impair that pluralism by exposing LGBT customers to harm. For example, Chai Feldblum argues for greater latitude for religious organizations:

When dealing with individuals, the government should respect a statement by a religious person that complying with a non-discrimination law or some other law will place a burden on that person's religious beliefs, unless there is a good reason to believe that statement is false. If there is a way to accommodate the person and still achieve the compelling purpose of the law, the government should do that. If there is no way to accommodate the person, and still ensure that the compelling purpose of the law is achieved, then the accommodation should not be made.¹²⁸

No doubt other proposals will surface as well.

Whatever lies on the road ahead, we hope people will heed both the Court's admonitions that government hostility to religious belief is off limits and that gay people, and all people, are entitled to enjoy "freedom on terms equal to others."¹²⁹

¹²⁸ See, e.g., Chai Feldblum, *What I Really Believe About Religious Liberty and LGBT Rights*, MEDIUM (Aug. 1, 2018), <https://medium.com/@chaifeldblum/what-i-really-believe-about-religious-liberty-and-lgbt-rights-2cc64ade95a2>.

¹²⁹ *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

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Husted v. A. Philip Randolph Institute — To Vote, or Not to Vote: That is the Question.

Gilda R. Daniels*

In William Shakespeare's most famous soliloquy, Hamlet ponders whether it is better to live or to die.¹ He wonders if death would ease the pressures of the present day, which he describes as a type of sleep. He asserts that the only power one has over the tumultuous battle of life is to sleep. He argues that the only reason we endure the pains of life is the fear of death. He asks the question of whether it is better to live or to die. While rather dramatic, the juxtaposition of life and death seems appropriate in analyzing the Supreme Court's decision in *Husted v. A. Philip*

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¹ WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.

*To be, or not to be: that is the question:
Whether 'tis nobler in the mind to suffer
The slings and arrows of outrageous fortune,
Or to take arms against a sea of troubles,
And by opposing end them? To die: to sleep;
No more; and by a sleep to say we end
The heart-ache and the thousand natural shocks
That flesh is heir to, 'tis a consummation
Devoutly to be wish'd. To die, to sleep...*

Id.

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*Randolph Institute.*² In this case, the Court analyzed whether the National Voter Registration Act prohibited Ohio's process of using the practice of not voting as a death knell to the right to vote. The state administered what it called the Supplemental Process to clean up its voter rolls. In this process, if you failed to vote in a two-year period, or the equivalent of missing a mid-term election—as a large swath of American citizens choose to do—you would face the distinct possibility of losing the right to vote because you made the choice not to vote.

Husted posits a number of interesting questions and contradictions, including how legislation with a stated purpose of increasing participation can actually punish those who choose not to vote and remove them for inactivity. It also is important to consider the impact and import of the case in the context of recent attempts to place the right to vote in a dream state, where it is not accessible but available to those who may awaken and endure the “sea of troubles” and obstacles to regain the right to vote.

Shortly after the election of the nation’s first African American President, Barack Hussein Obama, the fight to vote began anew. Since the election of President Obama, forces have been laser-focused on eliminating the large-scale impact of voters of color through new laws that diminish the right to vote through restrictive voter-identification requirements, laws and practices that permit and encourage voter challenges, laws and practices that promote voter deception, and overly punitive felon disenfranchisement laws. Between 2010 and 2018, Republican legislatures have attempted slowly but surely to pass legislation that restricts access to the ballot box. All are important pieces in the disenfranchisement puzzle. The effort to displace and

² *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

disenfranchise voters of color was not as obvious as the Southern Strategy employed during a different time in our history. Nonetheless, the impact continues to be just as effective.

In Part I of this essay, we will wade through some of the historical hurdles to obtain the right to vote. In Part II, we will review the National Voter Registration Act and challenges to the enforcement of this legislation. In Part III, we will discuss the Supreme Court's decision in *Husted*. Finally, we will consider *Husted*'s impact and how to mitigate its effects for those who may or may not choose to vote.

I. The Fight to Vote

The right to vote is the lynchpin of our democratic process; without it, our democracy dies. It is the right to vote that separate us from other forms of governance. Due to its import, our Constitution has more amendments that address the fundamental right to vote than any other right³--more than speech or assembly,⁴ and more than the ability to own a gun.⁵ In fact, the ability to vote is also one of the most regulated rights in this democracy.⁶ So much so, that age, economic circumstances, and ability to read and to understand English can in many ways determine whether you have an effective right to vote.⁷ Throughout our history, we have seen forces deliberately disenfranchise groups of citizens--e.g., voters of color, women, and persons who do not speak English--in

³ U.S. CONST. amends. XV, XIX, XXIV, XXVI.

⁴ U.S. CONST. amend. I.

⁵ U.S. CONST. amend. II.

⁶ See, e.g., Voting Rights Act of 1965, 52 U.S.C. § 10101 *et seq.* (2016).

⁷ See Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57 (2008); Joshua A. Douglass, *Is the Right to Vote Really Fundamental?*?, 18 CORNELL J.L. & PUB. POL'Y 143 (2008); see also Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611 (2004); Royster v. Rizzo, 326 S.W.3d 104, 110 (Mo. Ct. App. 2010).

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an effort to predetermine electoral outcomes. This type of political gamesmanship tears the democratic fabric of our country. Courts have both prevented and permitted these efforts. From its founding, our country has considered the ideal of who should vote and who should not vote.

The Founding Fathers realized the significance of the right to vote and the ability to elect representatives—so much so, that one of the country’s first compromises involved limiting the right to vote and representation in states that had large numbers of persons who were enslaved and could not enjoy the benefits of citizenship. The three-fifths compromise was one of the first constitutional actions that recognized the less-than-human, less-than-equal-status of the slave and canonized it for perpetuity. The founders recognized that question could someday lead to the demise of the country. Yet, they found the compromise necessary to ensure the continued progress of the new republic. Consequently, their decision to provide less-than-equal representation was the price paid to ensure that the new country could continue.

As a few of the Founders feared, the question of slavery would tear the country apart. The Civil War took a toll on this country’s soul. Those who fought to continue to treat and mistreat those of a darker hue as less than human, thankfully, lost the war. Out of the ashes of the war rose the Civil War Amendments that provided certain freedoms for the formerly enslaved population. The Civil War Amendments prohibited enslavement, provided equal protection under the law, and prohibited discrimination in the right to vote.⁸

⁸ The Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution are commonly referred to as the Civil War Amendments. The Thirteenth Amendment abolished slavery and involuntary servitude. U.S. CONST. amend. XIII, § 1. The Fourteenth Amendment prohibits states from denying “any person within [their] jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. The Fifteenth Amendment grants the right to vote to citizens of the United States regardless of “race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1.

The amendments and emancipation of the former slaves delivered a glimpse into a true democratic state. Indeed, during a short period in American history, after the passage of the Civil War Amendments, we witnessed newly enfranchised citizens voting and electing representatives to local, state, and federal offices.⁹ Voter participation, turnout, and involvement continued in glorious levels, until it stopped. The former slaves' newfound independence intimidated and threatened Southern whites.

Accordingly, they negotiated yet another compromise and removed the federal protections in the South that made new citizens able to participate in the franchise.¹⁰ Once the Southern states and the federal government negotiated a deal that removed military protection, whites began eliminating blacks from elected positions in legal and illegal ways.¹¹ During this period of "redemption,"¹² whites used violence as the primary means of ensuring that blacks did not participate in the voting process. The diminishing presence of black elected officials ensured that whites would return to the three-fifths compromise of sorts. New disenfranchisement methods—e.g., literacy tests, poll taxes, felon disenfranchisement, and grandfather clauses—began stripping the right to vote from its new citizens.¹³ The Jim Crow laws and violence effectively killed the right to vote for the newly enfranchised citizen. The right to vote was no longer a reality; and democracy, a government for the people and by the people, ceased to exist. It would take almost a century before the descendants of the former slaves would

⁹ See Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860-70*, 17 CARDozo L. REV. 2153 (1996).

¹⁰ See *id.* at 2168–74.

¹¹ See generally James W. Fox Jr., *Imitations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 HOW. L.J. 113 (2006).

¹² See *id.* at 156–58.

¹³ See generally George Brooks, *Felon Disenfranchisement: Law, History, Policy and Politics*, 32 FORDHAM URB. L.J. 851 (2005).

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overcome the many obstacles set before them prohibiting access to the ballot in a meaningful way.

Interestingly, the period between the great equalizers—the Civil War Amendments and the Voting Rights Act (VRA)—took approximately one hundred years.¹⁴ America needed the VRA because of the anemic ability of the constitutional amendments to protect its citizens from nefarious voting regulations meant to disenfranchise, frustrate, and intimidate voters of color.

U.S. Attorney General Nicholas Katzenbach deemed the Act necessary to combat the many disenfranchising devices and methods that were prevalent throughout the South.¹⁵ President Lyndon B. Johnson considered the VRA a “monumental” piece of legislation.¹⁶ In a speech to Congress introducing the VRA, he stated:

Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to insure that right. Yet, the harsh fact is that in many

¹⁴ The Fifteenth Amendment was ratified in 1870, and the Voting Rights Act was passed into law in 1965.

¹⁵ In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the court noted the need for a national approach to end voter discrimination instead of the piecemeal approach that the Department of Justice was forced to employ.

Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination. The Civil Rights Act of 1957 authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds. . . . [T]he Civil Rights Act of 1960 permitted the joinder of States as defendants, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systematic discrimination. Title I of the Civil Rights Act of 1964 expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify Negroes from voting in federal elections.

Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination.

Katzenbach, 383 U.S. at 313.

¹⁶ See DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 132 (1978).

places in this country men and women are kept from voting simply because they are Negroes. . . . For the fact is that the only way to pass these barriers is to show a white skin. . . . We have all sworn an oath before God to support and to defend that Constitution. We must now act in obedience to that oath.¹⁷

The VRA provided the second entrée for African Americans to the ballot box in a century. The impact of the Act cannot be overstated. Black and white voters achieved parity in voter registration rates in less than twenty years in most Southern states after passage of the Act.¹⁸ The VRA woke the country from a dream state and into the continual and ongoing battle to ensure that all persons were free to engage in the electoral process.

After passage of the VRA, once again the country witnessed the truth of its promise, an inclusive government, by the people and for the people. The country imagined a new reality, where access to the ballot was not subject to racial or economic discrimination. Clearly, we endured countless stops and starts with litigation over the VRA's constitutionality¹⁹ and implementation, as well as the reach of the Civil War Amendments in securing the right to vote.²⁰ While this country has made great strides in the decades after passage of the VRA, Congress would once again seek to enlarge the franchise.

¹⁷ President Lyndon B. Johnson, *We Shall Overcome* (Mar. 15, 1965).

¹⁸ The VRA helped to close the voter registration disparities in the South. See BERNARD GROFMAN, LISA HANDLEY AND RICHARD G. NIEMI, *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* (Cambridge University Press 1992).

¹⁹ See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (holding that the VRA was a constitutionally sound exercise of Congress's grant to use "full remedial powers" of the Fifteenth Amendment to secure the franchise for Black citizens); *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 210-11 (2009) (holding that the district in question was eligible to "bail out" of Section 5 preclearance under the VRA, however the Court declined to rule on the merits of Section 5 itself).

²⁰ See generally Gilda R. Daniels, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century*, 81 GEO. WASH. L. REV. 1928 (2013).

II. The NVRA and the Right to Vote

In spite of the overwhelming success of the VRA, our democracy needed more legislation to elevate voter registration and participation. In 1993, Congress passed the National Voter Registration Act (NVRA), commonly referred to as the “Motor Voter Law.”²¹ The purpose of the NVRA is:

- (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
- (2) to make it possible for Federal, State, and local governments to implement [the NVRA] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
- (3) to protect the integrity of the electoral process; and
- (4) to ensure that accurate and current voter registration rolls are maintained.²²

In developing the law, Congress surveyed best practices across the country and surmised that implementing a few fundamental reforms could increase voter participation. Congress was deliberate and intentional in its decisions to require states to provide voter-registration opportunities at, *inter alia*, the Department of Motor Vehicles, public assistance agencies, and veterans’ facilities. Nonetheless, states argued that the NVRA was an unfunded mandate. In the NVRA, Congress used its authority provided in the Civil War Amendments and the Elections Clause to justify its imposition on the states. It provides uniform registration

²¹ 52 U.S.C. § 20501 *et seq.* (2016).

²² 52 U.S.C. § 20501.

procedures at federal agencies, a uniform mail-in voter-registration form, and standards for removal from the voter rolls. The NVRA explicitly refers to the right to vote as fundamental.²³ It also includes list-maintenance procedures that allow removal in limited circumstances, such as mental incompetency and felony conviction.²⁴ The NVRA was constitutional and its purposes clear: to increase registration and participation and to keep voters on the voter rolls, removing them for a small set of circumstances, but *never* for failing to vote. Additionally, it explicitly warned that persons should not get penalized for not voting, finding that citizens “have an equal right not to vote, for whatever reason.”²⁵ Significantly, in enacting the NVRA Congress recognized that states utilized purges disproportionately against minority voters.²⁶

In 2002, after the *Bush v. Gore*²⁷ debacle, Congress once again attempted to provide guidance and assistance to the states to improve voter participation and confidence. It passed the Help America Vote Act (HAVA)²⁸ to provide resources for antiquated election systems and established the Election Assistance Commission as the clearinghouse for information on election systems. As mentioned, the NVRA’s purpose was to simplify voter registration and to increase voter participation. The NVRA also included a list-maintenance requirement to allow election officials the ability to remove certain voters, but explicitly forbade removal for not voting. Ten years after the NVRA’s passage, Congress enacted the HAVA as a means to provide clarity on list

²³ “[T]he right of citizens of the United States to vote is a fundamental right.” See 52 U.S.C. § 20501(a)(1).

²⁴ See 39 U.S.C. § 3629; 52 U.S.C. §§ 20501 - 20511.

²⁵ S. REP. No. 103-6, at 17 (1993).

²⁶ See *id.* at 18.

²⁷ *Bush v. Gore*, 531 U.S. 98 (2000).

²⁸ Help America Vote Act of 2002, 52 U.S.C. 20901 *et seq.* (2018) (providing robust federal investments into local voting infrastructure to facilitate access to the franchise and set basic standards for election administration).

maintenance. It is the combination of list-maintenance functions in the NVRA and the HAVA that stands at the pinnacle of yet another attempt to reduce the voter rolls and, in particular, the number of voters of color. While these were laws meant to encourage citizens to vote, the Supreme Court and legislatures across the country are using them to make it easier for people to lose the right to vote.

III. The Making of Husted

I earned the right to vote . . . Whether I use it or not is up to my personal discretion. They don't take away my right to buy a gun if I don't buy a gun.²⁹

When I joined the Department of Justice (DOJ) as a staff attorney after the passage of the NVRA, I had the assignment to defend it against claims that it was an unconstitutional unfunded mandate.³⁰ States across the country argued that the NVRA required them to spend funds they did not have, and that it was an unconstitutional congressional act. DOJ attorneys in the Civil Rights Division, Voting Section, argued that Congress had the authority under the Civil War Amendments and the Elections Clause to enact the NVRA. This litigation was consistent with the first wave of cases challenging the VRA's constitutionality, followed with attempts to strip away protections contained within the Act.

Years later, as I served in the George W. Bush administration as a Deputy Chief in the Voting Section, the narrative of bloated voter rolls and the propensity for widespread voter fraud was presented as an Orwellian fact that supported plans for voter suppression. We

²⁹ Nina Totenberg, *Supreme Court Upholds Controversial Ohio Voter Purge Law*, NPR (June 11, 2018, 10:30 AM), <https://www.npr.org/2018/06/11/618870982/supreme-court-upholds-controversial-ohio-voter-purge-law>.

³⁰ See, e.g., Condon v. Reno, 913 F. Supp. 946, 949 (D.S.C. 1995).

have, unfortunately, watched this narrative grow exponentially in its reach across the country. Moreover, jurisdictions have utilized these unsupported charges to advocate for stricter voter-ID and proof-of-citizenship laws, among others. Accordingly, we have seen an extensive increase in the number of election-related cases. Prior to 2000, election-related cases averaged less than 100 per year. In the period from 2000 to 2016, the average number of cases has increased to more than 250 each year.³¹

The politicization that began in a previous administration has exponentially advanced in this present age. The Attorney General of the United States serves as a chief enforcer of these and other federal voting-rights statutes. For more than two decades, the Department of Justice consistently interpreted the “Failure to Vote Clause” in the NVRA as explicitly prohibited using the failure to vote as a rationale for removal from the voter rolls.³² In the lower courts’ decisions in the *Husted* litigation, the Department of Justice consistently argued that Ohio violated the NVRA by removing voters from the rolls because they did not vote in three consecutive federal elections and failed to return a state mailer.

After the 2016 election, the DOJ, led by Attorney General Jeff Sessions, switched its position in the case and urged the Supreme Court to reverse the Sixth Circuit Court of Appeals’ decision that Ohio’s voter-removal scheme violated the NVRA and allow Ohio to remove voters from the rolls.³³ This change was consistent with other positions the DOJ took under Attorney

³¹ See, Richard L. Hasen, *The 2016 Voting Wars: From Bad to Worse*, 26 WM. & MARY BILL RTS. J. 629, 630 (2018) (Figure 6.2 “Election Challenge” Cases Per Year: 1996-2016).

³² I served as amici in Brief for Eric H. Holder, et al., filed September 22, 2017 (arguing that for almost three decades, through Republican and Democratic administrations, the Department of Justice had maintained the position that the NVRA prohibited removal for not voting). *See* Brief for Eric H. Holder, Jr. et al. as Amici Curiae Supporting Respondents at 8-9, *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 4483918.

³³ Brief for the United States as Amicus Curiae Supporting Petitioner at 10, *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 3485554.

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General Session against increasing voter access and championing various voter-removal strategies. Former DOJ managers filed an amicus brief that explained to the court the longstanding position that the NVRA not only protected the fundamental right to vote, but also the right not to vote.³⁴ The Trump administration did a complete reversal on the meaning of the clause. Astonishingly, the Department cited only “the change in administration” as the impetus for the shift.³⁵

With this newfound advocate of voter removal, the state of Ohio sharpened its scheme that allowed it to remove voters for inactivity.³⁶ In continuance of this effort to make voting less accessible and in the name of voter integrity, Ohio election officials interpreted the NVRA in conjunction with the HAVA to allow the removal of voters for the failure to vote. Ohio’s decision, however, affects real voters. For example, Ohio resident and Navy veteran Larry Harmon decided not to vote in the 2012 presidential election. He regularly voted in presidential elections. However, when he decided not to vote in 2012, after voting in 2008, the state of Ohio initiated the removal process. As part of its Supplemental Process, Ohio sends notifications to those persons who choose not to vote within a two-year period. Ohio uses the notification to determine if persons have moved from their previous place of residence. Mr. Harmon had not moved. Actually, he had maintained the same residence for more than sixteen years. He does not recall receiving

³⁴ Brief for Eric H. Holder, Jr. et al. as Amici Curiae Supporting Respondents at 8-9, *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 4483918.

³⁵ See, Brief for the United States as Amici Curiae Supporting Petitioner at 14, *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 3485554.

³⁶ Ohio has a sordid history in the area of voting rights. It has attempted to employ a number of disenfranchising methods through the years. See, e.g., *Stewart v. Blackwell*, 356 F.Supp.2d 791 (N.D. Ohio 2004); *Ne. Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016), cert. denied, 137 S. Ct. 2265 (2017); see also James Dao, Ford Fessenden, and Tom Zeller Jr., *Voting Problems in Ohio Spur Call for Overhaul*, N.Y. TIMES (Dec. 24, 2004), <https://www.nytimes.com/2004/12/24/us/voting-problems-in-ohio-spur-call-for-overhaul.html>.

a notice, nor did he return a notice. When he decided to vote against a ballot initiative seeking to legalize marijuana, he learned that the state of Ohio had removed him from the voter rolls for inactivity. He maintained, “I earned the right to vote Whether I use it or not is up to my personal discretion. They don’t take away my right to buy a gun if I don’t buy a gun.”³⁷ Notwithstanding his declaration, the Supreme Court of the United States decided to examine the process.

A. Supreme Court Review

The Supreme Court granted certiorari in *Husted* to decide whether Ohio’s Supplemental Process violated federal voting statutes.³⁸ Specifically, the Court considered whether the NVRA allowed Ohio’s list-maintenance process to remove voters from the state’s voter rolls for not voting.³⁹ The Ohio Secretary of State argued that a combined reading of the NVRA and HAVA permitted the Ohio Supplemental Process.⁴⁰ The A. Philip Randolph Institute (APRI), however, maintained that the Supplemental Process violated both the NVRA and HAVA in that it used not voting as a trigger for removal. The Sixth Circuit agreed, holding that the Ohio Supplemental Process used HAVA to bypass the requirements of Section 8 of the NVRA.⁴¹ Conversely, the district court previously disagreed, reasoning that the federal statutes allowed Ohio’s process. Indeed, the district court accepted the argument that the failure to respond to the notice, not the failure to vote, served as the proximate cause for removal under the Ohio Supplemental Process.⁴²

³⁷ Totenberg, *supra* note 29.

³⁸ *Husted*, 138 S. Ct. 1833.

³⁹ *Id.* at 1833.

⁴⁰ *Id.* at 1841.

⁴¹ A. Philip Randolph Inst. v. Husted, 838 F.3d 699 (6th Cir. 2016).

⁴² Brief for Petitioner at 14, *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 3412011.

1. The Majority Rules

*It has been estimated that 24 million voter registrations in the United States—about one in eight—are either invalid or significantly inaccurate. And about 2.75 million people are said to be registered to vote in more than one State.*⁴³

Justice Alito’s opening lines for the majority of the Court set the stage for the demise of the NVRA. The tension between voter access and voter integrity was at the forefront of the *Husted* case and Ohio’s plan for removing voters for failure to vote. It is consistent with the political framework that was set decades ago in a previous administration.⁴⁴

The majority in *Husted* opined that the primary issue was whether the failure to vote served as the *sole* reason for removal. Justice Alito wrote, “When Congress clarified the meaning of the NVRA’s Failure-to-Vote Clause in HAVA, here is what it said: ‘[C]onsistent with the [NVRA] . . . no registrant may be removed *solely* by reason of a failure to vote.’”⁴⁵ The Court then engaged in a formalist jurisprudential exposition and referred to the plain meaning of the word “solely,” referring to several dictionaries.⁴⁶ It landed on the proposition that a jurisdiction violates the NVRA if not voting served as the *only* reason for removal: “[A] State violates the Failure-to-Vote Clause only if it removes registrants for no reason other than their failure to vote.”⁴⁷ The Court approached the case as merely one of statutory interpretation. As such, it spent a considerable amount of time determining the

⁴³ *Husted*, 138 S. Ct. at 1838.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1842 (citing 52 U.S.C. § 21083(a)(4)(A) (emphasis added)).

⁴⁶ *Id.* (“‘Solely’ means ‘alone.’ Webster’s Third New International Dictionary 2168 (2002); American Heritage Dictionary 1654 (4th ed. 2000). And ‘by reason of’ is a ‘quite formal’ way of saying ‘[b]ecause of.’ C. Ammer, American Heritage Dictionary of Idioms 67 (2d ed. 2013).”) (citations included).

⁴⁷ *Id.*

level of causation intended in the NVRA and HAVA regarding the Failure-to-Vote Clause. It finally landed on “sole causation,” finding that such a reading “harmonize[d] the Failure-to-Vote Clause and subsection (d), because the latter provision does not authorize removal solely by reason of a person’s failure to vote. Instead, subsection (d) authorizes removal only if a registrant also fails to mail back a return card.”⁴⁸ Accordingly, it found, as the district court before, that the failure to vote combined with the failure to return the notice card permitted the state to remove eligible voters from the voter rolls without violating the NVRA.

2. Dissenters Are Dismissed

[T]he majority does more than just misconstrue the statutory text. It entirely ignores the history of voter suppression against which the NVRA was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate.⁴⁹

Clearly, Justice Alito completely disregarded the historical and contemporaneous facts surrounding the implementation of Ohio’s removal process. In fact, he criticized Justice Sotomayor’s dissent as ignoring the language of the NVRA and focusing on the history of voter suppression. He further contended that her characterization of Ohio’s Supplemental Process as discriminatory was misplaced, because APRI did not assert a claim under the NVRA’s discrimination prohibition.⁵⁰ Justice Alito disregarded the need for protections to ensure the right to vote, in favor of a cramped, overly formalistic statutory interpretation, to the detriment of

⁴⁸ *Id.* at 1843.

⁴⁹ *Id.* at 1865.

⁵⁰ *Id.* at 1861 (“shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. § 1973 *et seq.*) [now 52 U.S.C. § 10301 *et seq.*].”).

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eligible, registered voters. Moreover, his comrade, Justice Thomas, took the opportunity to champion states' rights and his view that the United States Constitution provides a wide breadth of authority for states to freely determine the times, place, and manner for persons to exercise the right to vote.⁵¹ Essentially, he, too, overlooks how states have created laws that limit the fundamental right to vote and maintains that the Ohio Supplemental Process does not deviate from the state's right to disenfranchise voters in whatever manner it chooses.⁵²

Conversely, Justice Breyer's dissent found that Ohio's Supplemental Process violated the NVRA's prohibition against "removing registrants from the federal voter roll 'by reason of the person's failure to vote.'"⁵³ Justice Breyer stressed that Congress originally intended that the NVRA would "protect the integrity of the electoral process," "increase the number of eligible citizens who register to vote in elections for Federal office," and "ensure that accurate and current voter registration rolls are maintained."⁵⁴ Importantly, Justice Breyer argued that Congress forbade removal for failure to vote, because it was "mindful that 'the purpose of our election process is not to test the fortitude and determination of the voter, but to discern the will of the majority.'"⁵⁵ Further, he

⁵¹ *Husted*, 138 S. Ct. at 1848-50 (Thomas, J., concurring).

But, as originally understood, the Times, Places and Manner Clause grants Congress power "only over the 'when, where, and how' of holding congressional elections," not over the question of who can vote. The "'Manner of holding Elections'" was understood to refer to "the circumstances under which elections were held and the mechanics of the actual election." It does not give Congress the authority to displace state voter qualifications or dictate what evidence a State may consider in deciding whether those qualifications have been met. The Clause thus does not change the fact that respondents' reading of the NVRA is constitutionally suspect.

Id. at 1850 (citations omitted).

⁵² *Id.* at 1849 ("As I have previously explained, constitutional text and history both 'confirm that States have the exclusive authority to set voter qualifications and to determine whether those qualifications are satisfied.'").

⁵³ *Id.* at 1850 (Breyer, J., dissenting).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1850-51.

recognized that the Court erred in its attempt to reconcile the NVRA and HAVA to justify the practice of removing eligible voters for spurious reasons.

Additionally, Justice Breyer considered the impact of Ohio's process on the removal of eligible citizens. He referred to amici arguments and statistics that demonstrated that the notification process was severely flawed. The data indicate that: when most registered voters move they remain in their county of registration; large numbers of registered voters choose not to vote in every election; most registered voters who fail to vote also do not respond to the state's "last chance" notice; and the number of registered voters who fail to vote *and* fail to respond to the "last chance" notice far exceeds the number of registered voters who move outside of their county each year. According to the state of Ohio, nationwide only four percent of Americans actually move outside of their county annually, and in 2014, around fifty-nine percent of Ohio's registered voters failed to vote.⁵⁶ Even more disturbing,

[i]n 2012 Ohio identified about 1.5 million registered voters—nearly 20% of its 8 million registered voters—as likely ineligible to remain on the federal voter roll because they changed their residences. Ohio then sent those 1.5 million registered voters subsection (d) "last chance" confirmation notices. In response to those 1.5 million notices, Ohio only received back about 60,000 return cards (or 4%) which said, in effect, "You are right, Ohio. I have, in fact, moved." In addition, Ohio received back about 235,000 return cards which said, in effect, "You are *wrong*,

⁵⁶ See Brief of the League of Women Voters et al. as Amici Curiae Supporting Respondents at 16, n.12, *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 6939164.

Ohio, I have *not* moved.” In the end, however, there were *more than 1,000,000 notices*—the vast majority of notices sent—to which Ohio received back *no* return card at all.⁵⁷

Under Ohio’s process, these 1,000,000 registrants could now find themselves removed from the voter rolls. Basically, despite many registrants failing to vote and only a small number actually moving, under Ohio’s Supplemental Process, using a registrant’s failure to vote to identify that registrant as a person whose address has been changed amounts to an unreasonable (and inaccurate) determination of registrants who have actually moved.

Likewise, in her dissent, Justice Sotomayor emphasized that the explicit purpose of the NVRA was to increase the registration and enhance the participation of eligible voters in federal elections.⁵⁸ She reminded the Court that the NVRA sought to correct against the substantial efforts by states to disenfranchise low-income and minority voters, including programs that purged eligible voters from registration lists because they failed to vote in prior elections. Justice Sotomayor pointed to the importance of this history when interpreting the text of the statute and the majority’s ultimate sanctioning of the very purging that Congress expressly sought to avoid. Justice Sotomayor highlighted a number of amici briefs that emphasized the inaccuracies and the impact of Ohio’s flawed process, including a brief that I helped draft on behalf of the National Association for the Advancement of Colored People

⁵⁷ *Husted*, 138 S. Ct. at 1856 (Breyer, J., dissenting) (citations omitted).

⁵⁸ *Id.* at 1863 (Sotomayor, J., dissenting).

(NAACP) and the Ohio NAACP discussing the disproportionate impact of purges on voters of color.⁵⁹

IV. Cases Have Consequences

In *Husted*, the Court discussed cause without considering the effects of the Ohio Supplemental Process. Irrefutably, the Court's fundamentalist approach to jurisprudence ignores the discriminatory impact and results of this law. Still, the NVRA is clear: states should not use the failure to vote as a reason to remove eligible persons from the voter rolls. Should a citizen choose to vote or not to vote, that is their prerogative. Moreover, choosing not to vote should not serve as a reason, proximate or otherwise, to remove an eligible citizen from the voter rolls. The Court ignored the question of whether the Supplemental Process served as an effective mechanism for determining how states should maintain their lists of eligible voters. The majority chose to advance a number of jurisprudential propositions while ignoring the accuracy of the state's actions and refusing to preserve and protect the fundamental right to vote.

⁵⁹ See Brief of the Nat'l Assoc. for the Advancement of Colored People and the Ohio State Conference of the NAACP as Amici Curiae Supporting Respondents, *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 4387145. As one example, *amici* point to an investigation that revealed that in Hamilton County, “African-American-majority neighborhoods in downtown Cincinnati had 10% of their voters removed due to inactivity” since 2012, as “compared to only 4% of voters in a suburban, majority-white neighborhood.” *Id.* at 18. *Amici* also explain at length how low voter turnout rates, language-access problems, mail delivery issues, inflexible work schedules, and transportation issues, among other obstacles, make it more difficult for many minority, low-income, disabled, homeless, and veteran voters to cast a ballot or return a notice, rendering them particularly vulnerable to unwarranted removal under the Supplemental Process. See Brief of Asian Americans Advancing Justice | AAJC et al. as Amici Curiae Supporting Respondents at 15–26, *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 4387148; Brief of National Disability Rights Network et al. as Amici Curiae Supporting Respondents at 17, 21–24, 29–31, *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 4483919; Brief for VoteVets Action Fund as Amicus Curiae Supporting Respondents at 23–30, *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 4386883. See also Brief for Libertarian National Committee as Amicus Curiae Supporting Respondents at 19–22, *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 4308366 (arguing that Ohio's rule places weighty burdens on principled nonvoters).

A. Impact on Voters

Unfortunately, the majority's decision gives a green light to states to purge a voter without confirmation that the person merits removal pursuant to the constraints of the NVRA. Justice Alito's dismissal of the dissenters' cautions against the shameful practice of unregistering lawful voters emboldens other jurisdictions anxious to rid their voter rolls of citizens who regularly opt-out of elections, which essentially purges voters for not voting. The Court is correct that the Ohio Supplemental Process does not solely remove voters for not voting. The process uses not voting as a trigger for sending a confirmation and then on a second swipe will remove a voter for not voting in additional years. Ohio's Supplemental Process and its implementation, however, are at odds with the primary purposes of the NVRA: the expansion and simplification of voter registration processes designed to increase registration and participation in federal elections.⁶⁰ Ohio's history of disenfranchising voters of color through purges, incomplete or inaccurate voter rolls, voter challenges, overuse of provisional ballots, poll-worker error, and long lines are only a few of the barriers that voters of color experience. The voter removal two-step permits yet another opportunity for the state to shrink not only the voter rolls but also the number of voters of color who enjoy the opportunity to vote or not vote.

1. Aggressive Purge Process

Husted invites states to engage in the risky and disenfranchising behavior present in Ohio's Supplemental Process. Recent experience is informative; after the *Shelby County v.*

⁶⁰ Common Cause of Colo. v. Buescher, 750 F. Supp. 2d 1259, 1274 (D. Colo. 2010).

Holder decision⁶¹ states almost immediately began implementing laws meant to disenfranchise certain voters. In fact, since *Shelby County*, the nation has seen an increase in the number of purges, particularly in jurisdictions once covered under Section 5 of the Voting Rights Act.⁶² According to a Brennan Center report, from 2014 to 2016, states removed nearly sixteen million voters from the voter rolls.⁶³ This represents a four-million-person increase, or thirty-three percent, when compared to 2006 to 2008. This increase exceeds the increase in registered voters and total population.⁶⁴

Similarly, in the wake of *Husted*, voting rights advocates are concerned that jurisdictions will increase the level of purges, resulting in a widespread discriminatory process divesting voters from registration. In Georgia, registrants are placed on the inactive list for “not vot[ing], updat[ing] their voter registration information, fil[ing] a change of name or address, sign[ing] a petition or respond[ing] to attempts to confirm their last known address for at least the past three years.”⁶⁵ In Georgia, approximately 750,000 additional names were removed from 2012 and 2016 than between 2008 and 2012. In Texas, more than 350,000 registrants were removed between 2012 and 2014, and in Virginia approximately 380,000 were removed from 2012 to

⁶¹ *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (holding that Section 4 of the Voting Rights Act of 1965 was unconstitutional, and effectively stripping federal protections found in Section 5 of the Act, using a states-rights rationale). See generally Gilda R. Daniels, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century*, 81 GEO. WASH. L. REV. 1928 (2013).

⁶² JONATHAN BRATER, KEVIN MORRIS, MYRNA PÉREZ, & CHRISTOPHER DELUZIO, BRENNAN CTR. FOR JUSTICE, PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 3-5 (2018), https://www.brennancenter.org/sites/default/files/publications/Purges_Growing_Threat_2018.pdf.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Kristina Torres, *Georgia Cancels Registration of More than 591,500 Voters*, ATLANTA JOURNAL-CONSTITUTION (July 31, 2017, 3:32 PM), <https://politics.myajc.com/news/state--regional-govt-politics/georgia-cancels-registration-more-than-591-500-voters/ozSuX227UpNe18YGQ0hYUJ/>.

2016.⁶⁶ The result of heeding Justice Thomas’s proclamation that states should be given the flexibility to implement any and all voting laws pursuant to the Elections Clause and without federal supervision is higher rates of purging voters in previously covered jurisdictions.

2. Inaccuracies and Burdens

Justice Alito’s lack of focus on the inaccuracy of voter rolls is consistent with the Republican mantra of undocumented and unproven voter fraud or bloated voter rolls from past eras. While proponents argue for accuracy in the voter rolls, they have little appetite to ensure that the removal lists are accurate. Removal devices like Crosscheck are riddled with errors.⁶⁷ Yet removed voters are given the burden of demonstrating that they should remain on the rolls, instead of states having the duty to ensure that the removal of any and every voter accurately captures those persons who have moved, died, are incompetent, or committed a disenfranchising felony. Battleground states like Wisconsin, Georgia, and Pennsylvania have similar removal processes and will remove hundreds of thousands of voters for not voting. Clearly, this was not the intent of the NVRA.

Moreover, Post-*Shelby*, voters do not have the protection of federal oversight, and the DOJ under the current administration has, in fact, aligned itself with those seeking to limit voter access. The DOJ has even sent letters to jurisdictions encouraging them to “clean up” their voter rolls, which will lead to more purges. Actions, such as those exhibited in Ohio and Georgia, do not

⁶⁶ Jacqueline Thomsen, *Study: States with Racial Discrimination History Purge Voter Rolls More Aggressively*, HILL (July 20, 2018, 10:40 AM), <http://thehill.com/homenews/campaign/398038-report-states-with-history-of-racial-discrimination-more-aggressively>.

⁶⁷ See, e.g., BRATER ET AL., *supra* note 62.

necessarily “clean” the registration lists. It usually strips large swaths of eligible voters from the voter lists, causes confusion, and encourages voter apathy. Purge proponents have wholeheartedly accepted the false notion that it is best to utilize a process that disenfranchises eligible voters instead of investing in an accurate removal system. Notwithstanding these obstacles, we have weapons to contest these formidable assaults on the right to vote.

B. Protection from Purges

1. Federal Protection in the NVRA

The NVRA provides uniform standards and protections for purged voters. However, *Husted* makes it easier for states to remove people without confirmation that they have moved or are otherwise ineligible. Additionally, more states will use a failure to vote as the trigger to place voters on an inactive list, which prematurely makes them susceptible to a purge. These voters are those who may only vote in presidential elections. If registrants continue the practice of only voting in presidential elections or in those elections where they feel compelled to vote, they run the risk of having to re-register every six years. For example, an Ohio voter who voted in the 2012 presidential election and did not vote in 2016 will find herself removed from the voter rolls if she attempts to vote in the 2018 midterms and did not return the notice. Likewise, voters who sit out the 2018 midterms and have a dislike for the 2020 crop of presidential candidates would also find themselves on the outside looking in to the electoral process. In both examples, these voters would find themselves, effectively, unable to cast a ballot without re-registering to vote.

Accordingly, voters could find themselves required to re-register simply for choosing not to vote in a midterm election. This creates a nightmare for election officials, who already have

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inaccuracies on the list of voters. The constant removal and updating of voters could lead to duplicate entries, removal of eligible voters, and voter apathy. We already know the harder states make it to vote, the lower the turnout. Additionally, if a voter does not know that she is on the voter rolls, she is less likely to participate or have confidence in the electoral process. A lack of voter confidence leads to voter apathy. Politicians would then get what many of them want, i.e., a select few voters determining the outcomes of important local, state, and federal elections.

The NVRA contains federal standards for the purge process and requires that states notify voters. Voter access advocates should petition election officials to ensure that removed persons are notified and instructed on how to regain the right to vote. Additionally, the NVRA includes a private right of action. Thus, private citizens can bring claims under the NVRA. While the Supreme Court has now authorized removal for reasons that the statute did not intend, because of the racial discriminatory impact of purges, advocacy groups should consider challenging voter purges that violate the anti-discrimination prohibition in the NVRA and Section 2 of the Voting Rights Act.⁶⁸

While the NVRA prescribes federal standards, states are encouraged to develop even more protections than the federal government provides. States that have constitutions with an affirmative right to vote may find it harder to remove citizens for not voting. Purges of the type in Ohio and Georgia could find states facing litigation for violation of their state constitutions.⁶⁹

⁶⁸ 42 U.S.C. § 1973 (2016). Section 2 of the VRA prohibits voting practices and procedures that discriminate on the basis of race or color. Traditionally, Section 2 cases have involved challenges to at-large methods of election. However, Section 2's nationwide prohibition against racial discrimination in voting applies to any voting standard, practice, or procedure, including redistricting plans.

⁶⁹ See generally Gilda R. Daniels, *Voting Realism*, 104 Ky. L. J. 583 (2016).

2. Compulsory Voting

With the decision in *Husted*, the Court has essentially developed a system of de facto compulsory voting in states that disenfranchise voters for not voting in short periods, i.e., every two years. Compulsory voting would make voting mandatory.⁷⁰ If a citizen chose not to vote in an election, he would receive a penalty. Australia has mandated voting for its citizens since 1924, and voter turnout has never fallen below ninety percent.⁷¹ The penalty for not voting in Australia is a monetary fine.⁷² After *Husted*, the penalty in places like Ohio for not voting is removal from the voter rolls. In this way, *Husted* could have the unintended consequence of increasing voter participation.

3. Same Day/Election Day Registration

An additional way to offset the impact of rabid purges is to allow same-day registration, which would permit citizens to register to vote on the same day that they cast a ballot. Same-day registration could eliminate the thirty-day preregistration requirement in most states and blunt the force of inaccurate purges. Approximately seventeen states and the District of Columbia allow same day registration, while two states permit Election Day registration.⁷³ If adopted, states increase the ability for citizens to participate in the electoral process. Conversely, we have seen states

⁷⁰ Waleed Aly, *Voting Should Be Mandatory*, N.Y. TIMES (Jan. 19, 2017), <https://www.nytimes.com/2017/01/19/opinion/voting-should-be-mandatory.html>.

⁷¹ *Compulsory Voting in Australia*, AUSTRALIAN ELECTION COMMISSION (Feb. 14, 2011), https://www.aec.gov.au/About_Aec/Publications/voting/index.htm.

⁷² If an Australian fails to vote, he would receive a \$20 fine for a first offense and \$50 fine for a subsequent offense. See, *Failure to Vote*, WESTERN AUSTRALIAN ELECTION COMMISSION, <https://www.elections.wa.gov.au/vote/failure-vote>.

⁷³ *Same Day Voter Registration*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 27, 2018), <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

reverse course in providing same day registration, resulting in lower turnout.⁷⁴

4. Remove Residency Requirements

The early voting process has demonstrated the antiquated nature of mandating that voters only cast ballots in their district of residence.⁷⁵ During primary and general elections, early voting allows voters to provide their current address and to cast ballots in a central location like a courthouse or community center. Ohio's out-of-district requirements result in more provisional ballots if a voter does not provide the appropriate documentation in the specified period. Consequently, during federal elections, the state discards the entire ballot, including ballots for those contests that do not require district residency, e.g., state-wide and federal elections. If residency requirements are removed, election officials should accept voters' ballots with an attestation or affirmation of residency, which will in turn increase the number of votes cast and counted.

V. Conclusion

Husted highlights the reality that the Supreme Court has been complicit in the disenfranchisement war. From *Crawford v. Marion County*⁷⁶ to *Husted v. A. Philip Randolph Institute*,⁷⁷ with *Shelby County v Holder*⁷⁸ in between, the right to vote is surely and

⁷⁴ See, e.g., *id.* (“There is strong evidence that same day and Election Day registration increases voter turnout.”).

⁷⁵ For example, Ohio requires voters to live in the district where they vote. See OHIO REV. CODE ANN. § 3503.01(A) (West Supp. 2017); see *Voting by Nonresidents*, NAT'L CONF. OF STATE LEGISLATURES (June 20, 2018), <http://www.ncsl.org/research/elections-and-campaigns/non-resident-and-non-citizen-voting.aspx>.

⁷⁶ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (upholding Indiana’s voter-ID requirement).

⁷⁷ *Husted*, 138 S. Ct. at 1833.

⁷⁸ *Shelby Cnty. v. Holder*, 570 U.S. at 529 (2013).

emphatically being compromised, and with it our democracy. Like Hamlet, the United States must confront the quandary: will we allow the vote to live, or will it slumber as “flights of angels sing [it] to [its] rest?”⁷⁹ The forces of voter access and voter integrity are in a battle to allow citizens to vote, a battle for the soul of our democracy. We fight against those who work to make it harder for certain demographics to cast a ballot. The battle between these two forces will either be or not be. These are cyclical battles that ebb and flow throughout our history. Dr. Martin Luther King advised, “*The [voting] rights issue is not an ephemeral, evanescent domestic issue that can be kicked about by reactionary guardians of the status quo; it is rather an eternal moral issue which may well determine the destiny of our nation.*”⁸⁰ The question is who will win the war? Onward.

⁷⁹ SHAKESPEARE, *supra* note 1, act 5, sc. 2.

⁸⁰ Dr. Martin Luther King, Jr., *Give Us the Ballot* (May 17, 1957).

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Janus and the Future of Unions

Catherine L. Fisk*

For nearly 100 years, union relationships with employers and with the workers whom the union represents have operated on the model of electoral democracy. A union, chosen by a majority in an election, represents all workers in the unit, just as a legislative or executive official represents everyone. But unlike a political leader, a union owes a duty of fair representation to *every* employee in the unit and cannot act arbitrarily or discriminatorily in deciding whose interests to prioritize. And in enforcing a contract, the union must treat all workers—union members and nonmembers alike—adequately and without discrimination. Democracy is foundational to everything unions do, from the way they govern their internal affairs to their efforts on behalf of workers to create workplace democracy to their role in civil society. Their responsibility to respect the interests and rights of minorities is what makes unions different from political leaders and what has made the contemporary fight over how unions fund their work so significant.

Like other large groups, union employees face a collective action problem; indeed, theirs is the paradigmatic collective action problem—the one used by economists to explain the theory of collective action. It is in the interest of every member of the large group to engage in collective action to improve wages and working conditions. It is equally in the interest of every member of the group to let others incur the costs of engaging in the collective

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action. But if every person acts rationally as an individual in free-riding on the efforts of other, *all* will be worse off because no one will get the benefit of collective action.¹ Union security provisions were the ingenious contractual solution to this collective action problem: requiring everyone to support the collective representative prevents the individually rational decision to free-ride, thus promoting the economically optimal collective action.

Courts long ago prevented unions from solving their collective action problem by requiring workers to actually join the union. Rather, the most that unions could do is to require represented workers to share in the cost through payment of what was known as an “agency” or “fair share” fee. In *Janus v. American Federation of State, County and Municipal Employees Council 31*, the Court declared unconstitutional fair-share fee provisions in the labor laws and union contracts of twenty-two states, the District of Columbia, and Puerto Rico.² The case is the latest, though probably not the last, in a series of cases in which the Roberts Court, always split on ideological 5-4 lines and always with the majority opinion written by Justice Alito, continued its attack on public employee unions. Finding the contractual solution to the collective action problem to violate the First Amendment, the Supreme Court continued its use of the First Amendment to invalidate well-established regulations of economic and social legislation.

Part I of this Article describes the legal background to *Janus*. Part II explores the reasoning of the majority and its possible implications for labor law. Part III explores the conceptualizations of complicity and compulsion embraced or at least hinted at in *Janus* and their troubling implications for an array of regulations.

¹ MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

² *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

Part IV describes the efforts of anti-union litigation and lobbying to extend their win to other areas of labor law. Part V describes legislative efforts to provide for union security after *Janus*.

I. Union Security Before *Janus*

Republican Bruce Rauner was elected governor of Illinois on a pledge to destroy public sector unions.³ Rather than negotiate with the state's public employee unions to address the state's budget issues, or work with the Illinois legislature to repeal laws he considered an obstacle to that goal, Governor Rauner filed a federal suit to get fair share fees declared unconstitutional.⁴ That says quite a bit about *Janus*—it was from the start an effort to use the federal courts in a political fight that Governor Rauner felt he could not win on his own.

The state laws and contracts that Governor Rauner asked the federal courts to invalidate were settled principles of federal, state, and local labor law. For well over a hundred years, labor unions have sought contract terms that require all employees represented by the union to either join the union or pay their fair share of the costs the union incurs in negotiating and enforcing a labor contract. Administering a fair personnel process is expensive. In a unionized workplace, employees have some say in the process, unlike nonunion employees. But if workers are partly responsible for HR, the union must raise the money to support it. Unions are,

³ See Monica Davey and Mitch Smith, *Illinois Governor Acts to Curb Power of Public Sector Unions*, N.Y. TIMES (Feb. 9, 2015), <https://www.nytimes.com/2015/02/10/us/illinois-governor-bruce-rauner-acts-to-curb-power-of-public-sector-unions.html>; Lydia DePillis, *Why Public-Sector Unions Lost Big in Illinois*, WASH. POST (Nov. 14, 2014), https://www.washingtonpost.com/news/storyline/wp/2014/11/14/why-public-sector-unions-lost-big-in-illinois/?utm_term=.db4520a9b218; Steven Greenhouse, *Illinois Governor Bruce Rauner: Organized Labor's Public Enemy No. 1?*, GUARDIAN (Feb. 17, 2015, 7:00 AM), <https://www.theguardian.com/us-news/2015/feb/17/illinois-governor-bruce-rauner-unions-labor>.

⁴ Rauner v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, AFL-CIO, 2015 WL 2385698 (N.D. Ill. May 19, 2015).

in this respect, just like governments. A city or state requires every resident to pay taxes to support schools, parks, police, firefighters, and prisons. Some people deeply oppose policing and prisons, or don't use schools or parks, but they pay taxes to support them. These are what economists call common goods, and an elementary principle of economics is that no economically rational person will voluntarily choose to pay for them so long as others pay to support them.⁵

Before 1947, federal law allowed unions and employers to require employees to pay dues or fees to a union, as well as contractual terms requiring employees to be union members at the time of hire, not merely to pay fees to it.⁶ These were known as closed shops. An organization was founded by business groups to combat these closed shops, arguing that they violated employees' "right to work."⁷ In 1947, the right to work group scored a big legislative win, as Congress amended § 8(a)(3) of the National Labor Relations Act (NLRA) to prohibit these "closed shop" agreements, instead allowing employers and unions to agree only that employees must become union members within thirty days of hire (a "union shop" agreement). In addition, Congress added a new § 14(b) to the statute, which allowed states to choose whether to allow contracts with fair share fees, though it's ultimately up to

⁵ See OLSON, *supra* note 1.

⁶ Section 8(3) of the National Labor Relations Act, as originally written, provided "[t]hat nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein." 49 Stat. 499 (1935), as codified at 29 U.S.C. § 158(3).

⁷ SOPHIA LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 59 (2014) ("deep-pocketed executives like the du Ponts, anti-New Deal activist groups like [the National Association of Manufacturers], and populist mobilizers ... formed a loose and hazily defined movement in the early 1940s. 'Right to work' was its emerging slogan.").

each union and agency to decide whether to require them.⁸

When the Supreme Court in the 1960s expanded individual freedoms of speech and association through new interpretations of the First Amendment, the Court further restricted the ability of unions and employers to require employees to join unions. It did so both as a matter of interpretation of the NLRA and under the First Amendment.

As to the NLRA, it adopted a broad reading of what was prohibited by § 8(a)(3)'s and § 14(b)'s restrictions on compulsory union "membership." A strictly literal reading of these two sections would allow employers and unions to negotiate contracts (under § 8(a)(3)), or states to forbid such contracts (under § 14(b)), that require a worker actually to become a *member* of the union, but would not prohibit anything else. But in a pair of cases from 1963, the Supreme Court held that the sections' definition of "membership" is broader. In *NLRB v. General Motors*, the union had proposed a contract provision that did not require workers to join the union but only to pay a fee for the union's representation services (an "agency fee").⁹ The employer insisted that the only form of union security device permissible under the NLRA was one requiring workers actually to join the union; it was all or nothing. The Court rejected the employer's argument and held that the Taft-Hartley Act changed the "meaning of 'membership' for the purposes of union security contracts" so that § 8(a)(3)

⁸ As amended in 1947, § 14(b) of the NLRA provided: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164(b) (2018). Section 8(a)(3) as amended in 1947 prohibited agreements requiring membership at the time of hire, but authorized agreements requiring employees to become members within 30 days after hire. However, it also stated that employees cannot be disciplined if they did not become members if denial of membership was for reasons other than failure to pay dues. 29 U.S.C. § 158(a)(3) (2018).

⁹ NLRB v. Gen. Motors Co., 373 U.S. 734 (1963).

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“membership” as a condition of employment is whittled down to its financial core.”¹⁰ That is, workers could be required to pay full dues, but they could not be required to join. In the same year, in *Retail Clerks v. Schermerhorn*, the Court extended the *General Motors* narrowing of “membership” to the preemptive scope of § 14(b).¹¹

But *Schermerhorn* did not hold that states may forbid contract provisions that require less than full membership. In fact, it suggested that states could not forbid such provisions. The union in *Schermerhorn* had argued that its agreement was distinguishable from the agreement in *General Motors* because it confined the use of nonmember dues to collective bargaining, rather than other union institutional goals (such as political activity).¹² But the Court explained that the union’s contract did not limit how nonmember payments could be used. And, the Court pointed out, the union charged nonmembers *the same as members*, which suggested that the union would use nonmember fees to fund union activities other than contract negotiation and enforcement.¹³ This matters, because if states could ban *any* compulsory nonmember fees, it would have been unnecessary for the Court to emphasize that the contract at issue in the case didn’t restrict the use of nonmember fees and charged nonmembers the same as members.¹⁴

But that is not how lower courts and litigants have read *Schermerhorn*. Rather, it has been read to allow states to prohibit *any* payments from nonmembers. Now, twenty-eight states prohibit unions and employers from agreeing to require employees

¹⁰ *Id.* at 742.

¹¹ *Retail Clerks Int’l Ass’n, Local 1625, AFL-CIO v. Schermerhorn*, 373 U.S. 746 (1963).

¹² *Id.* at 752.

¹³ *Id.* at 753-54.

¹⁴ This analysis is developed at further length in Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857 (2014).

to pay any fees or dues to the union. In those states, the union is obligated to provide contract negotiation and administration services to nonmembers for free. The union is required to represent all workers in the bargaining unit equally, and may not discriminate between those who become union members and those who do not.¹⁵ The duty extends not just to collective bargaining—where the union cannot bargain terms that favor members over nonmembers—but to disciplinary matters as well.¹⁶ The union must grieve and arbitrate on behalf of nonmembers just as zealously (and, more to the point, as expensively) as they do on behalf of members. In *non-right-to-work* states, federal law enables unions to require that nonmembers pay for the services they receive. In *right-to-work* states, on the other hand, the union still bears the same federal duty to represent nonmembers, but state law precludes a requirement that the nonmembers pay for that representation.

Having held in *General Motors* that private sector employees cannot be required to join a union, for twenty-five years the law was settled that private sector employees could not be required to join a union. But they could be required to pay full dues, even if the union spent some portion of the revenue from dues on political activity, unless the employee worked in a state that had enacted a so-called right-to-work law prohibiting any payment of fees. But in *Communications Workers v. Beck*, the Supreme Court held that § 8(a)(3) permits a collective bargaining agreement to require nonmembers to pay fees only to support the union's contract negotiation and enforcement functions, and not to support

¹⁵ Furniture Workers Div., 291 N.L.R.B. 182, 183 (1988); Columbus Area Local, Am. Postal Workers Union, 277 N.L.R.B. 541, 543 (1985); Int'l Ass'n of Machinists & Aerospace Workers, Local Union No. 697, 223 N.L.R.B. 832, 835 (1976).

¹⁶ Vaca v. Sipes, 386 U.S. 171 (1967).

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the union's political operations.¹⁷ Thus, the most that a union and employer can require of an objecting employee is to pay an "agency" or "fair share" fee representing the employee's fair share of the union's costs of services "germane" to the union's role as bargaining agent. The employee cannot be required to subsidize "political" expenditures. This "fair share" fee arrangement had its origin in two strands of cases involving railway and then public sector unions.

The first strand began with *Railway Department Employees v. Hanson*.¹⁸ In *Hanson*, the National Right to Work Committee argued that the Railway Labor Act (RLA) was unconstitutional because it preempted a Nebraska right-to-work law and therefore compelled employees to support unions. The Supreme Court made two significant holdings. First, the Court agreed with the plaintiffs that the RLA's preemption of state right-to-work laws was sufficient state action to subject the union security agreement between the private union and the private railroad to constitutional scrutiny. Second, the Court held that the compelled subsidization of the employee's exclusive bargaining representative did not violate the employees' First Amendment rights. But the Court reserved the lower-court ruling that the expenditure of those employees' dues or fees over their objection on political candidates violated their First Amendment rights.¹⁹

The Court reached the issue it reserved in *Hanson* in *International Association of Machinists v. Street*.²⁰ To avoid the question whether compulsory dues violated the First Amendment, the Court interpreted the RLA not to require dissenting employees

¹⁷ Comm'n Workers of Am. v. Beck, 487 U.S. 735 (1988).

¹⁸ Ry. Emps. Dep't v. Hanson, 351 U.S. 225 (1956).

¹⁹ *Id.* at 238.

²⁰ Int'l Ass'n of Machinists v. S.B. Street, 367 U.S. 740 (1961).

to provide financial support for union political speech. Noting the importance of allowing self-governance of work on the railroads, the Court deemed it important to avoid a situation in which nonunion members “share in the benefits”²¹ derived from collective agreements negotiated by the railway labor unions but bear no share of the cost of obtaining such benefits.” Moreover, the Court recognized the right of the majority of workers and their union to engage in political activity, “without being silenced by the dissenters.”²² The Court thought a sensible compromise was to prohibit the expenditure of agency fees on political expression not germane to the union’s role as bargaining agent.²³

The second strand of cases began with *Abood v. Detroit Board of Education*, the Court’s first case about the constitutionality of public sector unions.²⁴ The Court held that government employees have First Amendment rights to refuse to join the unions that represent them and to refuse to provide financial support to their unions’ political activities unrelated to the union’s duties in negotiating and enforcing the collective bargaining agreement.

The notion embraced in both *Street* and *Abood* that contractually required union membership involved compelled speech in violation of the First Amendment produced sharp dissent from some justices. As Justice Frankfurter (joined by Justice Harlan) stated in dissent in *Street*, “what is loosely called political activity of American trade unions . . . indissolubly relat[es] to the immediate economic and social concerns that are the *raison d’être* of unions.”²⁵ The dissent went on to note the many examples throughout the nineteenth and twentieth centuries through which

²¹ *Id.* at 762.

²² *Id.* at 773.

²³ *Id.* at 768.

²⁴ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

²⁵ *S.B. Street*, 367 U.S. at 780 (Frankfurter, J., dissenting).

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labor unions achieved improved working conditions through “an extensive program of political demands calling for compulsory education, an eight-hour day, employer tort liability, and other social reforms.”²⁶ Justices Frankfurter and Harlan insisted that the use of union dues to support political activity did not constitute compelled speech.

Plaintiffs here are in no way subjected to such suppression of their true beliefs or sponsorship of views they do not hold. Nor are they forced to join a sham organization which does not participate in collective bargaining functions, but only serves as a conduit of funds for ideological propaganda. No one’s desire or power to speak his mind is checked or curbed. The individual member may express his views in any public or private forum as freely as he could before the union collected his dues.²⁷

The dissent also pointed out that payment of taxes, like payment of union dues, supports political speech “to propagandize ideas which many taxpayers oppose. . . . It is a commonplace of all organizations that a minority of a legally recognized group may at times see an organization’s funds used for promotion of ideas opposed by the minority.”²⁸

But that point of view was a dissent. Since 2012, the conservative majority of the Supreme Court twice expanded the protections for union dissenters,²⁹ culminating in 2018 with overruling *Abood*.

²⁶ *Id.*

²⁷ *Id.* at 806.

²⁸ *Id.* at 808.

²⁹ *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298 (2012); *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

II. The *Janus* Decision

The *Janus* majority, in an opinion by Justice Alito (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Gorsuch), held that the payments for representation services are speech protected by the First Amendment because the union uses the money to engage in speech (negotiating and administering a contract), and payment cannot be compelled.³⁰ The case produced a stinging dissent by Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor. Each step of the Court’s reasoning has significant implications not only for the future labor law, but for the First Amendment more generally.

A. When Are Fees Compelled Speech?

The first step in the *Janus* reasoning is to equate paying a fee to compelling a statement of belief. The majority began with the proposition that “compelling individuals to mouth support for views they find objectionable violates [the] cardinal constitutional command” that (quoting the compulsory flag salute case) “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”³¹ Equating payment of a fee to forced confession of a belief is a bold and controversial move. All of us are compelled by law to pay money to entities that use it to engage in speech activities: taxes, homeowners association dues, health insurance premiums, pension plan contributions, licensing fees, public school and university student fees. The majority in *Janus* did not say anything about these other fees.

³⁰ *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018).

³¹ *Id.* at 2463 (quoting *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis in *Janus*)).

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The implications of *Janus* will depend on how the Supreme Court and lower courts expand on the idea that compulsory payments are tantamount to compulsory professions of belief. Although *Janus* said nothing about other fees, in *Harris v. Quinn*, the same five-justice majority (who held unconstitutional fair share fees for unionized home health aides paid by Medicaid) said they thought that the government has a more compelling interest in requiring attorneys to pay state bar dues and public university students to pay activity fees. But it did not say why, which makes it hard to discern how the Court expects other fees to be analyzed. *Harris* said that bar dues “served the State’s interest in regulating the legal profession and improving the quality of legal services” and “[s]tates also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices.”³² It did not say why the state’s interest in requiring lawyers to pay the cost of regulation is greater than its interest in requiring public employees to pay the cost regulation. As to university fees, *Harris* said that universities “have a compelling interest in promoting student expression in a manner that is viewpoint neutral.”³³ That is not a principle that could explain other forms of compulsory fees, because there is no requirement that health insurers spend employee contributions in a viewpoint neutral manner. *Harris* also said that creating an opt-out regime for public-university student fees would create “administrative problems [that] would likely be insuperable.”³⁴ It is unclear what principle is used to decide when administrative problems are “insuperable” or when that becomes the basis for upholding a compulsory fee system.

³² *Harris*, 134 S. Ct. at 2644.

³³ *Id.*

³⁴ *Id.*

The failure to distinguish contrary authority is, of course, common in constitutional and common law adjudication. What's troubling about this line of cases, though, is the fact that the only thing that distinguishes one case from another is whether the Court believes the government's interest is compelling. If every regulation is subject to strict scrutiny, constitutional analysis in the end will turn on whether the Court's majority thinks the government's interest is compelling.

B. Misunderstanding the Collective Action and Free Rider Problem

The next step in the majority's reasoning addressed the collective-action problem, which the majority incorrectly reduced simply to a free-rider problem involving fees for representational services. The collective-action problem is not simply whether an employee must pay for the cost of contract enforcement once a contract is negotiated. Rather, it is that without being able to make a credible commitment to stick with the group, a large group will be unable to engage in economically optimal collective action (such as achieving a union contract) in the first place.

The difference is simple to illustrate. When I first took a job at the University of California in 2008, I agreed to work in a non-union position for a salary. When the state's budget crashed in 2009, the university unilaterally reduced my salary by ten percent, though none of my responsibilities changed. (To be clear, I'm not complaining about my salary: I was well paid and I loved my job.) It could do so because faculty had never joined together to negotiate collectively for enforceable contracts. Unionized employees, by contrast, had enforceable contracts, so the state

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could not unilaterally reduce their pay.³⁵ The significance of unionization is not just that employees shouldn't free ride on the union dues paid by their co-workers so that when bad things happen they have the union to handle their grievance. Rather, it's that without unionizing, they never get the contractual protection in the first place. The *Janus* majority assumed that, even without union security, public employees would still have labor contracts and the only question is whether employees should have to pay to get union representation in enforcing the contract. It's like health insurance: the majority assumed that the problem is whether an employee will get his medical bills paid by the insurance company after he gets sick. But without the union to bring everyone together, or without the ability to require employees to join a large group to form a risk pool, there would be no contract, no insurance policy, in the first place. So when the majority said that unions could solve the free rider problem by declining to represent nonpayers or by charging them for handling grievances, it misunderstood that, without the union's ability to require *everyone* to support the union, nobody gets the contractual protections.

The benefits of collective action accrue to the employer, too. California teachers before 1976 did not have a majority representative system. Rather, teachers could choose the union they wanted, or no union at all, and school districts had limited bargaining obligations with each different union, depending on the size of the membership. School districts had multiple different contracts with different groups of teachers. And, not surprisingly, they hated it. The system was cumbersome, confusing, and expensive to administer. It generated enmity among teachers at the

³⁵ Actually, it did. But at least it was compelled to give them a corresponding ten percent reduction in work hours.

same school. The Court recognized all this in *Abood* in explaining why union security is constitutionally required:

designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.³⁶

Union critics seem to assume that the alternative to majority unions is either no union or a plethora of weaker unions and that will strengthen the ability of employers to set policy, to fire poor workers, to lower salaries and benefits costs, and to avoid periodic strikes. That is true only in times of labor shortage. As everyone witnessed in the spring of 2018, weak unions did not lead to better schools, better teachers, or better educational outcomes in West Virginia, Oklahoma, and the four other states that experienced massive strikes.

C. The First Amendment and Public Employee Speech

The third fundamental point in the *Janus* opinion concerns the speech rights of public employees. Under 50-year-old Supreme Court precedent, public employees have relatively few First Amendment rights. In particular, they have no First Amendment

³⁶ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220-21 (1977).

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right to speak to their supervisor about their working conditions. In *Garcetti v. Ceballos*, the Court upheld the discipline of an assistant district attorney who raised concerns with his supervisor about false police testimony that could lead to a wrongful conviction.³⁷ That speech, the Court held, is not protected by the First Amendment no matter how important the issue, because it was speech about the DA's work. On matters outside of their job duties and in forums outside the workplace, the Court held in *Pickering v. Board of Education* that public employees have a right to speak out as citizens, but only on matters of public concern, and only if their speech does not disrupt the government's interests as employer.³⁸

Janus dismisses this area of law. First, explained the majority, *Pickering* and *Garcetti* are a different strand of First Amendment doctrine, and “[w]e see no good reason, at this late date, to try to shoehorn *Abood* into the *Pickering* framework.”³⁹ The notion seems to be that one strand of cases holding that employees have few speech rights need not be consistent with another. That is not convincing; there aren’t multiple First Amendments. All of these cases concern public employees’ free speech rights, and the Court needs to explain *why* employees can get fired for complaining about their work, but not for refusing to pay fair share fees.

The second reason for dismissing *Pickering* and *Garcetti* was that they concern the rights of individual employees, whereas fair share fees are “a blanket requirement,” and a “speech-restrictive law with widespread impact . . . gives rise to far more serious concerns than could any single supervisory decision.”⁴⁰ That is not the law and never has been. Nor was it the facts of *Pickering*,

³⁷ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

³⁸ *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

³⁹ *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018).

⁴⁰ *Id.*

Garcetti, or *Janus*. In *Garcetti*, for example, the Los Angeles County District Attorney justified the discipline of Richard Ceballos in terms of policy: his supervisors had decided not to dismiss the case that Garcetti thought should be dismissed, and his defiance of their judgment was the basis for discipline.⁴¹ Similarly, when the Court rejected a First Amendment challenge to the abortion counseling gag rule in *Rust v. Sullivan*, it upheld a blanket policy (prohibiting any recipient of Title X family planning funds from providing information about abortion).⁴²

Moreover, finding greater First Amendment protection for speech compelled by a blanket policy than for the speech of an individual isn't even the law that the Court itself applied in a First Amendment case handed down the day before *Janus*. In *National Institute of Family and Life Advocates v. Becerra*, the same conservative five justices held that the First Amendment invalidated California laws requiring women's health clinics to give accurate information.⁴³ This involved a blanket policy (a California state law) regulating the speech of all health providers, not individual restrictions. Similarly, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, a bakery argued that a state law prohibiting discrimination in places of public accommodation violated its alleged free-speech right to refuse to serve gay couples.⁴⁴ The Court did not decide the First Amendment issue, sending the case back to the lower court to reconsider, but the Court never suggested that the First Amendment wouldn't

⁴¹ Brief for the Petitioners, *Garcetti*, 547 U.S. at 410 (No. 04-473).

⁴² *Rust v. Sullivan*, 500 U.S. 173 (1991).

⁴³ Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA), 138 S. Ct. 2361, 2378 (2018); see CAL. HEALTH & SAFETY CODE § 123472(a)(1) (requiring certain primary care clinics to post a notice stating: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [telephone number]").

⁴⁴ *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018).

apply because the law affects all businesses rather than just Masterpiece. First Amendment rights don't get stronger when it is one person rather than many whose speech is restricted.

The *Janus* majority also distinguished *Pickering* and *Garcetti* on the ground that they were cases in which employees were prevented from speaking, not compelled to speak. Outside a situation involving speech as part of an employee's official duties, the majority said, "it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree."⁴⁵ Leaving aside the fact that nobody was forced to "recite words," the First Amendment generally has not distinguished between compulsion and restriction of speech. Take the Court's original compelled speech case, *West Virginia Board of Education v. Barnette*, which struck down discipline of students with a religious objection to reciting the Pledge of Allegiance:⁴⁶ would it matter if a student were disciplined for refusing to recite the Pledge, or for reciting it but changing the words to avoid offending the student's beliefs? Of course not. Moreover, the Court has upheld laws requiring speakers to "recite words." As Justice Breyer pointed out in his dissent in *NIFLA*, in *Planned Parenthood v. Casey* the Court upheld a law requiring medical personnel providing abortions to inform patients about the nature of the procedure, the health risks of abortion and childbirth, and the "probable gestational age of the unborn child," and to inform the patients of printed materials "describing the fetus, medical assistance for childbirth, potential child support,

⁴⁵ *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2473 (2018).

⁴⁶ *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

and the agencies that would provide adoption services (or other alternatives to abortion)."⁴⁷

This aspect of the Court's reasoning in *NIFLA* raises a point the *Janus* Court never considered. It has never before held that there is a constitutional right to refuse to subsidize speech where the underlying speech is not protected by the First Amendment. The only basis on which *Janus* could resist paying fees to subsidize collective bargaining would be if the collective bargaining is speech that is protected by the constitution. One doubts that the Court would hold that a group of employees who demanded collective bargaining over terms of employment would be protected by the First Amendment. But why not? If subsidies for collective bargaining are protected, why on earth not the bargaining itself? Many states do have a right to bargain collectively in their state constitutions.⁴⁸

Perhaps the argument would be that compelled subsidies for collective bargaining are unconstitutional even though collective bargaining is not constitutionally protected speech, because public sector bargaining is bad. The attack on union security, both in *Janus* and in political critiques of unions and collective bargaining, is fueled, in part, by the sense that unions in both the public and private sectors are political organizations that should not be able to intervene in the policy-making process through collective bargaining. The critique is that union security gives unions too much power over the workers they represent and too much power over employers. Much of the *Janus* critique of union political activity focuses on the notion that unions do not reflect the

⁴⁷ *NIFLA*, 138 S. Ct. at 2384 (Breyer, J., dissenting) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 881 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (quoting 18 Pa. Cons. Stat. § 3205 (1990)).

⁴⁸ See, e.g., NY CONST. art. I § 17 ("Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.").

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interests of the employees they represent. Union supporters believe union security arrangements are democratically devised solutions to collective-action problems facing democratic organizations. Union critics see union security provisions, including fair-share fees, as perpetuating the power of more-or-less corrupt and oligarchic special interest groups that use money coerced from dissenting employees and taxpayers to pursue a political agenda closely tied to the values of the Democratic party and the unions' leadership. The legitimacy of union security thus turns, in part, on whether laws and union rules effectively promote democratic self-governance within labor unions.

Justice Alito's third way of reconciling the Court's newly-invented First Amendment right with precedent was that some forms of political-patronage hiring are unconstitutional and, therefore, union fees should be unconstitutional too.⁴⁹ Apart from the false syllogism, the reasoning falls apart because the Court has upheld many laws prohibiting political activity of government employees. It upheld the federal Hatch Act (which prohibits certain partisan political activity on federal government employees' free time).⁵⁰ It upheld state laws that prohibit patronage appointments in low-level jobs.⁵¹ The only anti-patronage law the Court has declared unconstitutional is a restriction on awarding policymaking jobs based on political affiliation.⁵² (There might be many reasons why Democrats wish Jeff Sessions were not the Attorney General, but one cannot argue that his early political support for Donald Trump makes it unconstitutional for Trump to choose him.)

⁴⁹ *Janus*, 138 S. Ct. at 2470.

⁵⁰ *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947); *U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973).

⁵¹ *Elrod v. Burns*, 427 U.S. 347 (1976).

⁵² *Rutan v. Republican Party*, 497 U.S. 62 (1990).

III. Complicity, Compulsion, and Democracy

Although, as will be explained below, the impact of *Janus* is enormous for governments and their employees, those outside the labor field may think it will have little impact on other areas of free-speech law. But there are disturbing aspects to the Court's reasoning in *Janus* and in its other compelled speech case, handed down the day before, *NIFLA*. Those may portend much more radical changes in how the Court considers the constitutionality of the what Justice Kagan in her *Janus* dissent: "Speech is everywhere – a part of every human activity (employment, health care, securities trading, you name it)."⁵³

First, the Court appears to have launched itself on its own form of viewpoint discrimination in how it handles speech restrictions. The day before the Court handed down its decision in *Janus*, the same five conservative justices decided that California lacks a compelling interest in requiring so-called crisis pregnancy centers to inform pregnant women that low-cost abortions are one available alternative.⁵⁴ Yet, the Court did hold several years ago that states do have a compelling interest in requiring health care providers to inform patients seeking abortions about certain facts about fetuses and about certain debatable propositions about abortion. As Justice Breyer remarked in dissent, the Court essentially believes that the government has a compelling interest in forcing health care providers to try to talk women out of having abortions but no compelling interest in forcing them to identify abortion as one way of dealing with an unwanted pregnancy.⁵⁵

It upheld compelled speech warnings attempting to dissuade women from having abortions (including compelling health

⁵³ *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

⁵⁴ Nat'l Inst. of Family Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2379 (2018).

⁵⁵ *Id.* at 2384 (Breyer, J., dissenting).

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care providers to tell patients information that science considers misleading or wrong).⁵⁶ But it struck down notices alerting women to the availability of abortions in *NIFLA*.⁵⁷ If a legislature were to adopt the rule the Court has created, under the Court's own precedents condemning viewpoint discrimination in law, the rule would be unconstitutional. Moreover, the Court has compelled speech in the labor area too. In *Hudson*, the Court invented a constitutional rule compelling unions to notify workers they represent of their right to free-ride on the fees paid by their co-workers. It's worse than ironic that the Court engages in viewpoint discrimination while invalidating laws on the grounds of viewpoint discrimination.

The tension between *Janus* and *NIFLA* is troubling. Compelling a private organization to give a message to its members that is antithetical to the organization's own deeply held values is precisely what Justice Thomas found objectionable in *NIFLA*. Yet, *Janus* dramatically expands public sector unions' obligation to undermine their own mission by doing exactly that. If it is unconstitutional to require a pregnancy service provider "to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option" it should be equally unconstitutional to require unions to notify their members of their right to quit the union "at the same time [unions] try to dissuade [workers] from choosing that option."⁵⁸

More generally, as many have observed, the Court has suddenly cast into constitutional doubt an enormous array of regulations of lawyers and a host of other service providers. Laws

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *id.* at 2371.

require sellers of goods and services routinely to warn prospective consumers about their goods and services because the government, sometimes controversially, deems certain uses of a product or service to be objectionable. Purveyors of alcoholic beverages are required to warn pregnant women of the dangers of drinking because the government condemns drinking while pregnant, even though some research suggests that modest consumption is not hazardous. Most of the law regulating lawyers operates as restrictions and compulsions on speech. When the majority in *NIFLA* explained that most professional speech is protected by the First Amendment, and the Court's decision upholding certain restrictions on lawyer solicitation and advertising in *Zauderer* does not apply because “[t]he notice in no way relates to the services that licensed clinics provide,” it was ignoring most of the law of professional responsibility.⁵⁹

The tension between how *Janus* treats unions and how state rules of professional conduct treat lawyers extends beyond the bar-dues issue noted above. Lawyers are required to counsel clients about the wisdom of hiring another lawyer to give a second opinion on a business transaction between lawyer and client and on a retainer agreement that limits malpractice liability. Lawyers must make elaborate disclosures about contingency fees. Organizations receiving funding from the Legal Services Corporation must warn prospective clients that the lawyers will have to terminate the representation if the client loses her lawful immigration status or starts to reside with someone who has ever been convicted of certain crimes, even if the representation is not funded by the LSC. While the Court in *NIFLA* suggested that compulsory disclosure is acceptable when it takes the form of an informed consent law,

⁵⁹ *Id.* at 2372.

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these are not informed consent laws, they are disclosure laws. Some lawyers feel these warnings are irrelevant or inimical to their effective representation, just as NIFLA objects to the disclosure laws, but that has never made them unconstitutional. Justice Thomas's notion that abortion is different because it is controversial (unlike, presumably, restrictions on lawyer speech) ignores the controversy surrounding many rules prohibiting or compelling lawyer speech. In some states, lawyers *cannot* report a client's likely harmful conduct toward a third party; in some states lawyers *may* report; but in most states psychotherapists *must* report. These are highly controversial rules and they do not fit within the categories of informed consent and professional conduct that the *NIFLA* majority suggests are the only exceptions to First Amendment protection for professional speech.

The justices have snuck two especially baffling statements about general free speech rules into its compelled speech cases from June 2018. First, in *Janus*, the Court created confusion about the degree of constitutional scrutiny for compelled speech in the commercial area. The *Janus* Court said that *Knox*, a prior fair-share fee case, held that “exacting scrutiny” should be applied to such restrictions, even if they are commercial speech and not subject to strict scrutiny. The *Janus* majority continued:

Even though commercial speech has been thought to enjoy a lesser degree of protection, see, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-563 (1980), prior precedent in that area . . . had applied what we characterized as “exacting” scrutiny, *Knox*, 567 U.S. at 310, a less demanding test than the “strict” scrutiny that might be thought to apply outside the commercial sphere. Under “exacting” scrutiny, we noted, a compelled subsidy must “serve

a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.” *Ibid.* (internal quotation marks and alterations omitted).⁶⁰

That passage makes no sense. *Central Hudson* applies intermediate scrutiny to commercial speech.⁶¹ But the “exacting scrutiny” standard that the Court articulates here is identical to strict scrutiny. The majority in *Janus* then continued:

[P]etitioner in the present case contends that the Illinois law at issue should be subjected to “strict scrutiny.” The dissent, on the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests. This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here. At the same time, we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*.⁶²

The “more permissive standard” appears to be the same as strict scrutiny, and it is indeed fatal in the union dues cases. Is that something that the Court will pick up on next year or thereafter to say that it has already decided that regulation of commercial speech is no longer subject to intermediate scrutiny?

⁶⁰ *Janus v. Am. Fed.’n of State, Cnty., & Mun. Emps. Council 31*, 138 S. Ct. 2448, 2464-65 (2018).

⁶¹ “For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

⁶² *Id.* at 2465 (citations omitted).

The second disturbing aspect of the holdings in *Janus* and *NIFLA* is the statement in *NIFLA* that the disclosure requirements are content regulation subject to strict scrutiny and invalid if they are under- or over-inclusive or if the interests they serve are not compelling or not real or if compliance with the disclosure rule is “unduly burdensome” or if the government could convey the required information itself.⁶³ All disclosure rules are, by definition, content regulation. Most disclosure rules are under- or over-inclusive because some people will not need or want the disclosure, and some will require more disclosure. Compelled disclosure in English will not help those who do not understand English. And the government can *always* convey the message itself rather than require the private entity to convey it.

Moreover, compelled subsidies of others’ speech are ubiquitous. Drivers and employees are compelled to purchase liability and health insurance, and insurers use some part of that money for speech. Employees covered by pension plans subsidize speech of the financial-services companies that collect pension contributions. The *Janus* majority suggested that union fair-share fees become unconstitutional because, in the aggregate, the effects of public-sector bargaining are substantial for public policy. But of course the effect of insurance and financial-services industry lobbying (using the insureds’ compulsory payments) is equally substantial and equally controversial.

The conservative majority’s answer to all of these examples is that the government has a compelling or substantial interest in some restrictions but not in the ones it struck down. Justice Alito said exactly this in *Harris v. Quinn* in explaining why requiring lawyers to pay bar dues and public university students

⁶³ *NIFLA*, 138 S. Ct. 2361, 2377 (2018).

to pay activity fees serves an overriding government interest, while fair-share fees do not.⁶⁴ But it is not enough simply to posit that states need the bar to charge dues to fund bar admission and discipline more than they need to maintain public-employee personnel systems. That is like saying chocolate ice cream is better than vanilla. It's self-evident only to those who share the justices' values. And even if it were true, can it really be said that the Federal Aviation Administration has a substantial interest in requiring airlines to tell passengers how to fasten a seatbelt? Is there anyone on a plane who has never seen or used one? And how many people who can afford to buy a plane ticket are unaware of questions about alcohol consumption during pregnancy?

It might be that the Court will not follow the broadest implications of its compelled-speech reasoning to all forms of compulsory disclosure or compulsory subsidies, and will instead limit these cases to speech or subsidies that it thinks requires speakers to be complicit in speech they abhor. What underlies the Court's hostility to speech in *NIFLA* and *Janus* is the notion that the anti-abortion "crisis pregnancy centers" and Mark Janus were philosophically opposed to giving the notice or paying fees and that the speech made them complicit in conduct they abhor. In other words, *Janus* and *NIFLA* are not necessarily broad pronouncements on compelled speech but, rather, are narrower condemnations of speech or subsidies that require complicity. Even if the opinions are thus narrowed, one may be troubled by the Court's approach to complicity.

Justice Kennedy said in his concurring opinion in *NIFLA*: "Governments must not be allowed to force persons to express

⁶⁴ *Harris v. Quinn*, 134 S. Ct. 2618, 2643 (2014).

a message contrary to their deepest convictions.”⁶⁵ He found the claim of complicity so weighty in *Masterpiece Cakeshop* that a baker who refused to bake a cake for the wedding reception of a gay couple was entitled to have his claim judged by a state agency that hadn’t had a member say that atrocities have been committed in the name of religion.⁶⁶ The *NIFLA* and *Janus* majority’s approach to the complicity theory of compelled speech, like the *Masterpiece* approach to free speech and free exercise claims, pick up the idea that the Court rejected in *Employment Division v. Smith*⁶⁷ but revived in *Hobby Lobby*, when it found a statutory right to freedom of religion violated by requiring employers to provide contraceptive coverage in their employee benefit plans.⁶⁸ These are extravagantly broad claims about what makes one complicit in the actions of another. This isn’t requiring people to have an abortion or use contraception or marry someone of the same sex, and it’s not even asking someone to officiate at a marriage or attend or help someone get an abortion or contraception. Rather, it is simply having to make a statement of fact or decorate a cake or include coverage in a benefits plan. To turn disclosure, nondiscrimination laws, and employee benefits into complicity is to render religion or conscience a basis for opting out of life in a diverse community.

IV. Implications of *Janus* on the Ground and in the Courts

Janus poses four very significant problems for labor. First, and most obvious, is the question whether it will lead to a dramatic drop in membership. Anti-union groups have already hired canvassers to go door to door in blue states encouraging employees

⁶⁵ *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring).

⁶⁶ *Masterpiece Cakeshop v. Col. Civ. Rights Comm.*, 138 S. Ct. 1719 (2018).

⁶⁷ *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990).

⁶⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

to quit their union and quit paying dues by convincing them that they can get the benefits of the union contract without paying for it.⁶⁹ Their goal is to get so many teachers, home health aides, and others to leave the unions that the unions lack the money to provide services to all the workers they represent. As the quality of services falls, more will leave the union, until ultimately the union will wither away. Unions have anticipated this and have been vigorously signing up fee-payers as full members.

Second, dozens of suits have been filed seeking repayment of fees paid going back for as many years as the statute of limitations will allow. The potential liabilities are staggering if courts conclude that *Janus* applies retroactively and requires refund of fees paid for many years past.

Third, litigation has been filed seeking to build on the *Janus* ruling to extend the prohibition on agency fees to the private sector. Some cases focus on the Railway Labor Act, and some on the National Labor Relations Act.

Fourth, litigation has also been filed to build on *Janus* to extend the prohibition on agency fees to a prohibition on union representation based on majority rule. The plaintiffs in these cases argue that, if paying fees to support bargaining is unconstitutional, it should be unconstitutional for a union to negotiate a contract on behalf of those who do not want union representation at all. Anti-

⁶⁹ See, e.g., Dirk Vanderhart, *Following Decision On Union, Canvassers Target Public Workers in Oregon*, NW NEWS NETWORK (July 2, 2018), <http://nwnewsnetwork.org/post/following-decision-union-canvassers-target-public-workers-oregon>; Bloomberg, *Group Funded by Conservative Billionaires Launches Anti-Union Campaign Following Supreme Court Ruling*, L.A. TIMES (June 28, 2018, 12:10 PM), <http://www.latimes.com/business/la-fi-freedom-foundation-20180628-story.html>.

union advocates have lost those cases before.⁷⁰ The majority stated that it was not calling majority-rule representation into doubt.

Whether *Janus* will change that ultimately depends on how the Supreme Court chooses to build on a few passages in *Janus*. Justice Alito said Mark Janus was not free-riding “on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage.”⁷¹ Elsewhere, the majority said that majority rule representation is “a significant impairment on associational freedoms that would not be tolerated in other contexts”⁷² and “[d]esignating a union as the employees’ exclusive representative substantially restricts the rights of individual employees.”⁷³ In a footnote, the majority noted that “under common law, collective bargaining was unlawful, and into the twentieth century, every individual employee had the liberty of contract to sell his labor upon such terms as he deemed proper,” but then said “[w]e note this only to show the problems inherent in the Union respondent’s argument; we are not in any way questioning the foundations of modern labor law.”⁷⁴

V. Unions Security for the Twenty-First Century

The outcome in *Janus* was anticipated from November 2016, when it became apparent that Donald Trump would fill the Scalia seat rather than Hillary Clinton. Unions and worker advocates

⁷⁰ See J.I. Case Co. v. NLRB, 321 U.S. 332 (1944); Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 346 (1944) (reasoning that if individual agreements could supersede collective bargaining agreements, “statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually”); NLRB v. Crompton-Highland Mills, 337 U.S. 217 (1949) (holding that, when an employer excluded the majority elected representative by increasing wages outside of the negotiation, the side agreement constituted unfair labor practices).

⁷¹ *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2466 (2018).

⁷² *Id.* at 2478.

⁷³ *Id.* at 2460.

⁷⁴ *Id.* at 2471 n.7.

have had time to think about union security in a world in which all forms of union security as it has been known for a century have been declared unconstitutional (in the public sector) and are in the sights of the five conservative justices (in the private sector).

The most important and most promising set of ideas are going by the name “Together We Rise.” They focus on legislation and executive action to facilitate communications among workers about unions, to ease membership sign-up, to promote stability of bargaining units, and to create alternative dues-payment systems. Some of these provisions have been enacted into law in California, New York, and New Jersey.⁷⁵ As for membership, unions insist that their best protection is to enable them to recruit and retain members. Unions seek, and in California and other states have obtained, mandatory access to new employee orientations.⁷⁶ Under these rules, unions have a right to receive notice of when all public-sector employers conduct all new employee orientations and have a right to meet with new employees at the orientations without the presence of supervisors or other entities (such as anti-union organizations).⁷⁷ Unions also seek legislation and contract terms requiring delivery of new hire and bargaining unit lists to the exclusive representative and also protections against disclosure of such lists to other organizations.⁷⁸ To enable unions to keep their members engaged and to ensure effective communications, unions seek opportunities to communicate with workers at employer

⁷⁵ See CAL. GOV’T CODE §§ 3555-3559 (effective Jun. 27, 2018) (requiring California public employers to provide unions mandatory access to new bargaining unit employees at orientation); 2018 Sess. Law News of N.Y. Ch. 51 (S. 7501) (requiring public sector employers to furnish labor organizations with employee contact information and permitting union representatives to meet with new public sector employees within thirty days); A. 3686, 218th Gen. Assem., Reg. Sess. (N.J. 2018) (allowing labor representatives to meet with members during work hours and requiring public employers to furnish labor organizations with contact information of covered employees).

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See, e.g., Assem. Bill 119, 2017-2018 Reg. Sess. (Cal. 2017).

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trainings or other in-service meetings and to be allowed to use the email system or website of the employer to communicate with workers. Finally, unions seek to ensure the employer remains neutral about unionization by restricting the ability, especially the differential ability, of employers to use supervisors to dissuade employees from joining the union.⁷⁹

Even with rights to communicate with the employees, still unions must have the ability to collect member dues in order to have a stable source of funding to support the union's role as representative. To that end, unions seek to ensure, through statute or contract, that the employer remains required to deduct dues from the employees' paycheck if the employee allows it and to allow employees to authorize payroll deduction through electronic signatures. To some extent, the loss of agency fees could be partially offset by allowing union representatives to adjust grievances or engage in other contract enforcement tasks on paid time. (This is the system that is used in the federal service.)⁸⁰ But many unions are attentive to the need to ensure that this "official time" does not become the union's only source of support, because it may have the unintended consequence of making union representatives less responsive to their membership and more responsive to the employer to continue the union representative in his or her job.

These proposals also insist that unions should remain democratically chosen organizations that are member-driven and

⁷⁹ See 29 U.S.C. § 158(a)(3) (2018) ("It shall be an unfair labor practice for any employer to . . . encourage or discourage membership in any labor organization."); 29 U.S.C. § 152(2) (2018) ("The term 'employer' includes any person acting as an agent of an employer, directly or indirectly . . ."); but see NLRB v. CNN America, Inc., 865 F.3d 740, 762 (D.C. Cir. 2017) (finding that although supervisors' statements reflected an anti-union animus, the "employer's hiring process must be either upcoming or ongoing" because if hiring were completed a "no-union statement could not generally suggest coercion.").

⁸⁰ 5 U.S.C. § 7131 (2018).

member-governed. They reject ideas that unions should disclaim their obligation to represent all workers in a bargaining unit; in other words, they reject members-only bargaining.

The most controversial set of proposals to protect union finances without agency fees are proposals to require government employers to pay money directly to the union for representational services.⁸¹ If governments fund unions directly, the money never comes out of the employees' paycheck, and this would avoid the First Amendment problem the Court perceived in *Janus*. But this kind of system has serious problems.

When the union receives money directly from the government, it is at risk of becoming less responsive and accountable to its members and more responsive to its funder. Moreover, turning the union into a line item in the government's budget risks catastrophic cuts to the union's budget whenever a new government is elected or whenever the public-sector agency budget is cut, and these are the times when government employees may most need the union to advocate for the interests of government workers.

The four major public-sector unions (not including those representing public safety workers)—American Federation of State, County and Municipal Employees (AFSCME), American Federation of Teachers (AFT), National Education Association (NEA), and Service Employees International Union (SEIU)—have all endorsed policies that encourage and enable unions to be responsive to and to represent all workers in the bargaining unit. They unite in opposing members-only bargaining or any

⁸¹ See Daniel Hemel and David Louk, *Is Abood Irrelevant?*, 82 U. CHI. L. REV. DIALOGUE 227, 229 (2015) ("If a public sector employer wants to make sure that a labor union is compensated for the cost of representing nonmembers, the employer could just as easily reimburse the union for those expenses directly.").

other incursion on the principles of majority-rule representation in both contract negotiation and contract enforcement. They unite in opposing authorization of representation of bargaining unit employees by attorneys or other representatives not appointed by the union. They also unanimously oppose creating fee-for-service arrangements for non-members, including the system of per-capita payment by the government to the union.

Conclusion

Janus was one of fourteen 5-4 decisions this Term in which Justice Anthony Kennedy joined with Justices Roberts, Alito, Thomas and Gorsuch in reaching a conservative result. In no case did Justice *Kennedy* join with the liberals against the conservatives. Therefore, one may say that October Term 2017 marks the beginning of what will surely be a more conservative Supreme Court era. If Brett Kavanaugh is confirmed, he is unlikely to adopt a more tolerant or egalitarian interpretation of the Constitution. Those concerned about the growing divide between rich and poor and who support workplace democracy on the principle of majority rule are, to paraphrase *Janus*, on an unwanted voyage to a destination they would rather not reach. And the Republican-appointed justices are the captains of the ship, navigating with only their own personal policy preferences as a guide.

Jesner and the Supreme Court's Ongoing Assault on International Human Rights

Martin S. Flaherty*

For a time, the federal judiciary was a scourge of some of the most evil people, who committed some of the most heinous crimes in the world. Almost uniquely, U.S. courts for over a generation oversaw civil suits against dictators, despots, and their authoritarian henchmen involved in prolonged arbitrary detention, torture, crimes against humanity, extrajudicial murder, and genocide regardless of where it occurred. Even a partial list of those called to answer for their misdeeds reads like a Who's Who of the most despicable figures to appear on the world stage in recent times: Radovan Karadžić, Ferdinand Marcos, the leaders of South Africa's apartheid regime, Muammar Gaddafi and associated terrorist groups, not to mention a host of lesser accomplices like Americo Pena-Irala, effectively the head of a Uruguayan death squad under the regime of strongman Alfredo Stroessner. Add to this various multinational corporations that credible press reports indicated were complicit in such activities as the clearing of indigenous peoples and murder of environmental activists who stood in their way. As journalist and author Cam Simpson recently

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stated, “American courts were the centerpiece for people to bring international human rights cases.”¹ In this role they served as a rare bastion of accountability in a world of impunity.

Simpson knows whereof he speaks. Consider the harrowing case he recounts in his recent book, *The Girl From Kathmandu: Twelve Dead Men and a Woman’s Quest for Justice*.² The twelve dead men were Nepali workers who were brutally killed by insurgents at the outset of the second Gulf War in Iraq. The video of their execution was the first of its kind to go viral on the Internet. The victims did not wind up in a warzone out of free choice. The Nepalis had travelled to Jordan in the belief that they would have jobs waiting there. Instead they were trafficked with the knowledge of the American contractor, KBR Haliburton, for whom they were sent to work at a U.S. military base in Iraq under a U.S. government contract. Back in Nepal, the devastated young widow of one of the men who was killed, Kamala Magar, put her life back together against daunting odds. With the help of American human rights lawyers, including a former Peace Corps volunteer in Nepal, Magar decided to become a plaintiff in a suit against KBR, among others, for the kidnapping and trafficking of the twelve men.³ At the end of the proceedings, the District Judge stated that what had occurred was “more vile than anything that this court has previously confronted.”⁴

By hearing such cases, “the least dangerous branch” enhanced American foreign policy in innumerable ways. For a start it showed that the U.S. government, or part of it, could side with

¹ *Author Discussion on War*, C-SPAN (June 10, 2018), <https://www.c-span.org/video/?446055-9/author-discussion-war>.

² CAM SIMPSON, THE GIRL FROM KATHMANDU: TWELVE DEAD MEN AND A WOMAN’S QUEST FOR JUSTICE (2018).

³ Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674 (S.D. Tex. 2009).

⁴ SIMPSON, *supra* note 2, at 366 (quoting Adhikari v. Daoud & Partners, 95 F. Supp. 3d 1013, 1024 (S.D. Tex. 2015)).

the vast majority of the voiceless and oppressed against powerful authoritarian governments and interests, even when these were associated with other U.S. agencies. Such willingness helped offset the many blunders of the political branches—that seeking short-term strategic gain with an authoritarian ruler alienated the many whom they ruled in the long run. No less importantly, American judges helped render credible the nation’s until-recently perennial claims to global leadership in human rights. Most fundamentally, U.S. courts demonstrated that the nation’s commitment to the rule of law, domestic and international, was not empty diplomatic rhetoric.

The judiciary could play this underappreciated role in American foreign policy not through indifference to the law, but precisely through fidelity to it. The international human rights litigation that the courts shepherded was and remains faithful to history, both to the dictates of the First Congress of the United States, and more generally to the founding generation’s commitment to separation of powers in foreign and domestic matters alike. Subsequent precedent and custom have yet to overturn these foundational commitments, and in certain respects have strengthened them. In this light, the workings of modern international relations have only made the need for the judiciary to apply the law, especially in foreign affairs, all the more urgent. Modern international relations have proven to be yet one more (and underappreciated) factor in the inexorable rise of executive power in particular. The need for the courts to preserve their historic role of maintaining a balance among the three branches has grown, not diminished. For all these reasons, the legacy the courts had established in international human rights litigation

remained singularly faithful to the Constitution, domestic law, and international obligations.

And then the Supreme Court got involved.

I. Glory Days

The vehicle for most, though not all, international human rights litigation in the U.S. is, of course, the Alien Tort Statute (ATS). The ATS in its totality states that: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁵ Once upon a time, almost every account of the ATS began with Judge Henry Friendly’s observation that it “is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came.”⁶ Scholarship has since shed light on the statute’s origins, in no small part to meet the demands of modern opponents and proponents. Yet it was true enough that for nearly 200 years the ATS lay unknown and unused.

Then came *Filartiga v. Pena-Irala*.⁷ In 1979, Dr. Joel Filartiga and his daughter, Dolly, both citizens of Paraguay, filed the first modern ATS suit in U.S. Federal District Court in Brooklyn against Americo Norberto Pena-Irala, also a Paraguayan citizen, for the kidnapping, torture, and murder of Filartiga’s 17 year old son, Joelite. They alleged that Pena, who had been the inspector-general of the local police, had orchestrated the crimes. Dolly asserted that later on the day of the abduction, the police brought her to Pena’s home, “where she was confronted with the body of her brother, which evidenced marks of severe torture. As she fled,

⁵ 28 U.S.C. § 1330 (2016).

⁶ ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

⁷ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

horrified, from the house, Pena followed after her shouting, ‘Here you have what you have been looking for for so long and what you deserve. Now shut up.’”⁸ The Filartigas claimed that Joelito had been targeted because of his father’s opposition to Paraguay’s then-dictator, Alfredo Stroessner. Dolly had ultimately fled to the U.S. and settled in Washington, D.C. Not long thereafter, she discovered that Pena-Irala had moved to Brooklyn. After consulting with the Center for Constitutional Rights, she decided to attempt a civil action under the ATS.

Their case fell literally within the terms of the statute. They were aliens. They sought to bring an action for a tort only. The violations they asserted, torture and extrajudicial murder, were well established under customary international law as it had developed since World War II. The District Court nonetheless dismissed the complaint. The Second Circuit reversed and let the suit go forward. The opinion could not have come from a more improbably source. Judge Irving Kaufman had come to national prominence as the district judge who presided over the trial of Ethel and Julius Rosenberg, whom he sentenced to death after their convictions for passing nuclear secrets to the Soviets. Worse, in considering the sentence, he had allegedly engaged in impermissible *ex parte* contacts with the federal prosecutors on the case, including the notorious Roy Cohn.⁹ Kaufman nonetheless effectively wrote a manifesto for the domestic enforcement of international human rights. The main issue centered on whether customary international law addressed how nations treated persons within their own borders and jurisdiction. Kaufman and the court answered yes, drawing upon numerous sources to satisfy the first main

⁸ *Id.* at 878.

⁹ *An Open Letter to Judge Irving Kaufman*, N.Y. TIMES (June 19, 1977), <https://www.nytimes.com/1977/06/19/archives/an-open-letter-to-judge-irving-r-kaufman.html>.

requirement of international custom—that a principle command a near consensus of the world’s nations. Typical of American courts, the Second Circuit did not address the other main requirement that international lawyers consider—whether nations have acted out of a sense of legal obligation. That did not prevent the court from rightly concluding that torture in particular was a core violation of international law.¹⁰

Filartiga ushered in over thirty years of often high profile, international human rights litigation in U.S. courts. The cases roughly came in two waves. The first fifteen years or so witnessed something of a golden age. On the *Filartiga* model, foreign victims of authoritarian regimes used the federal judiciary as a kind of “truth commission” to establish that they or their loved ones had been arbitrarily detained, disappeared, or killed, whether or not they could actually obtain damages. Representative successes, often default judgments, included the following: a suit against an Indonesian general for a summary execution of a New Zealand national in East Timor;¹¹ an action brought by Kanjobol Indians against a former Guatemalan defense minister for torture, disappearance, and extrajudicial killing;¹² and a suit against Radovan Karadžić, the leader of the Republika Srpska, for, among other things, genocide.¹³ Successes in this vein continued in cases such as *Yousuf v. Samantar*, in which the courts denied a former prime minister of Somalia immunity from suit for torture, arbitrary detention, and extrajudicial killing.¹⁴

Every circuit court to consider the new spate of ATS cases approved. Outside the courtroom, Congress lent tacit approval, as

¹⁰ *Filartiga*, 630 F.2d at 878.

¹¹ *Todd v. Panjaitan*, No. 92-12255-PBS, 1994 WL 827111 (D. Mass. Oct. 26, 1994).

¹² *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. Apr. 12, 1995).

¹³ *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

¹⁴ *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012).

well, in passing the Torture Victim Protection Act of 1991, which opened ATS-type suits to U.S. citizens for torture and extrajudicial killing.¹⁵ Likewise supportive was the executive, Republican and Democratic, in numerous amicus briefs. Among the few prominent dissenting voices was Judge Robert Bork, who argued that the law-of-nations violations on which the ATS permitted suit were frozen to those that existed when the act was passed in 1789.¹⁶ That would have meant that not even torture, much less much else in modern human rights law, would have been covered. Bork, however, was all but a lone voice.

Then human rights victims started suing corporations. And the pushback began. This second wave of ATS suits reflected a simple reality. Multi-national corporations, often more powerful than most states, not infrequently work hand-in-hand with authoritarian regimes on mutually beneficial projects. And sometimes pursuing such joint projects involves horrific human rights violations. An early case, *Doe v. UNOCOL*,¹⁷ illustrates the dynamic. In 1996 a group of Burmese villages brought suit against UNOCOL, a multi-national oil company, for aiding and abetting the Myanmar military dictatorship in committing human rights violations to, in turn, assist UNOCOL to put an oil pipeline in their region. Among the alleged violations were forced labor, torture, rape, and extrajudicial killing. The parties ultimately settled.¹⁸ Cases such as *UNOCOL* multiplied. Yet as anyone might have predicted, suing major corporations meant more formidable opposition than suing former Paraguayan police officials. For one thing, the position of the executive branch at the highest levels switched from support

¹⁵ 28 U.S.C. § 1330 (2016).

¹⁶ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812-16 (D.C. Cir. 1984) (Bork, J., concurring).

¹⁷ *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

¹⁸ *Unocal Lawsuit (re Myamar)*, Bus. & Hum. Rts. RESOURCE CTR., <https://www.business-humanrights.org/en/unocal-lawsuit-re-myanmar>.

to opposition. More importantly, corporate defendants could hire the nation's most prestigious law firms. Such firms came complete with, among other assets, former Supreme Court clerks and Justice Department officials more than willing to use their legal talents and creativity to make sure that human rights victims would come nowhere near having their day in court.¹⁹

II. No Steps Forward, No Steps Back

The counterattack ultimately reached the Supreme Court. The first ATS case the justices would hear in fact would decide the fate of all litigation under the statute. For proponents of human rights, *Sosa v. Alvarez-Machain*²⁰ could scarcely have presented either a bolder challenge or worse facts. Dr. Humberto Alvarez-Machain allegedly had kept alive Enrique Camarena-Salazar, a U.S. Drug Enforcement Administration agent, so he could be tortured longer before being executed by a Mexican drug cartel that discovered he was an undercover agent.²¹ Alvarez had already had a case go to the Supreme Court when he challenged his abduction by U.S. officials, who had spirited him out of Mexico to stand trial in the U.S. rather than obtain custody under a U.S./Mexican extradition treaty. The doctor did stand trial and was acquitted. Turning the tables, he then brought suit against his abductors. In the case of the Mexican authorities who aided and abetted their U.S. counterparts, Alvarez brought a claim under the ATS, alleging arbitrary detention in violation of customary international law.²² His acquittal notwithstanding, his case did not exactly conjure the

¹⁹ For a prescient analysis, see Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645, 1665-67 (2014).

²⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

²¹ *Id.* at 697-99.

²² *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

sympathetic story of a noble dissident crushed and tortured by an authoritarian regime.

Conversely, the challenge to the ATS put forward on behalf of Sosa, the lead Mexican defendant, was far-reaching. Not coincidentally, they reflected the views of the solicitor general as well as an array of corporate associations. The argument was simple and fatal. The only thing that the text of the ATS did was to confer jurisdiction on federal district courts. It did not provide for a cause of action—in essence a license to sue—a necessary requirement for any civil action to go forward. The modern legal axiom held that a statute granting jurisdiction without another creating a cause of action meant that the courts could hear a given claim, but no one could bring it.²³ Had the justices accepted this argument, the results would have been momentous. Such a conclusion would have meant that the ATS cases of the previous quarter-century had been illegitimate. Prospectively, it would also have meant that no more ATS suits could have gone forward, whether against corporations or the official henchmen of authoritarian regimes.

A majority decided otherwise.²⁴ In an especially rigorous and nuanced opinion, Justice Souter preserved what had been the first wave of ATS suits, and partially left the door open for the second. The *Sosa* Court conceded that had the ATS been enacted today, a jurisdictional grant without an express cause of action would indeed have put an end to the matter. The ATS was, however, passed by the First Congress in the late eighteenth century. Here Justice Souter rightly argued that in that period, a grant of jurisdiction brought with it an expectation that courts

²³ *Sosa*, 542 U.S. at 712-24.

²⁴ *Id.* at 696-738.

would use their common-law-making power to fashion a cause of action. He further followed the dominant view of recent historical scholarship on the ATS to conclude that the First Congress would have specifically expected the federal courts to fashion three causes of action based on the contemporary law of nations: claims by ambassadors who had suffered assault; suits for violation of “safe conduct” (basically a guarantee by a national government that specified individuals could travel unmolested through its territory); and actions against pirates. Justice Souter then distilled two features common to these examples that would serve as the requisites for new causes of action as customary international law evolved. Any new such judge-made causes would have to command a “consensus of civilized nations.” They would also have had to develop with a degree of specificity.

The Court’s formulation preserved reliance on international law, yet did not get it exactly right. Modern customary international law—effectively the successor to “the law of nations”—conventionally must also meet two requirements. The first is “general practice,” which might better be conceived as general public commitment. To meet this condition, an overwhelming majority of the world’s states must consistently, and for some sustained period, act or pledge to prohibit or require some action. Next, it must be determined that states behaved as they did out of a sense of legal obligation, somewhat pretentiously known as *opinio juris (sive necessitatus)*. *Sosa* adopts half this formulation, but substitutes for the other. The Court’s slightly off-putting requirement of a “consensus of civilized nations” accords with the idea of general practice closely enough. Justice Souter, however, overlooked *opinio juris* and instead insisted that a proposed norm be specific.

All that said, the distinction did not make much of a difference. For many commentators, the *opinion juris* hurdle is all but circular—establish a legal obligation by showing that states acted out of a sense that they were subject to the obligation sought to be established—and does little work. Generally, *opinio juris* is inferred from the existence of general practice. For its part, specificity could lead to the rejection of certain claims. The Convention Against Torture, for example, gives a detailed definition of the practice. It does not, however, define “cruel, inhuman and degrading treatment.” An especially lazy American judge might throw up his or her hands as to the meaning of “cruel, inhuman and degrading treatment,” rather than look to comparative and international decisions, much less to the general comments of the Convention’s implementation committee defining the concept. For the most part, however, the important test remained, establishing a general practice that amounted to a consensus.

Whatever else, the *Sosa* formula meant that at the very least the “classic” *Filartiga*-type ATS suits were safe. Torture, extrajudicial killing, slavery, genocide, and prolonged arbitrary detention all easily meet both prerequisites. Also clear was that Alvarez might have won the war for the statute, but would lose the battle himself. The Court correctly observed that prolonged arbitrary detention was an established violation of international custom, but no less correctly held that the doctor’s 24-hour detention in no way was “prolonged.” Less clear would be the idea that private corporations could “aid and abet” such state-sanctioned human rights violations.²⁵

²⁵ *Id.* at 725-38.

III. Retreat, Baby, and Surrender

For this reason, the opponents of the ATS were far from done. Success came out of the blue from the same Court of Appeals that handed down *Filartiga*. In fact, as recently as 2007, the Second Circuit had endorsed the idea that a human rights victim could allege that a corporation had aided and abetted state human rights violations.²⁶ Then, just three years later, came *Kiobel v. Royal Dutch Petroleum Co.*²⁷ This case involved a group of Nigerian nationals suing Dutch, British, and Nigerian oil companies for, among other things, torture and extrajudicial killing in connection with the running of a pipeline. In a stunning exercise of judicial activism, the majority baldly declared that corporations could not be sued under the statute. It reached this conclusion notwithstanding the absence of supporting statutory text and the usual presumption that tort liability runs to both natural and corporate persons under domestic law. As Judge Leval's masterful separate opinion makes clear, the majority mainly relied on the irrelevant determination that customary international law does not impose criminal, as opposed to civil, liability on corporations for human rights violations.²⁸

The Supreme Court took the case, but not ultimately the issue it originally presented. It did grant certiorari, accept briefs, and hear oral argument on corporate liability. But in a rare move, it ordered the case be held over and reargued on a different issue—whether and to what extent the ATS applied extraterritorially. In a greater blow to human rights accountability, the Court answered with a qualified no.²⁹

²⁶ *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007).

²⁷ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

²⁸ *Id.* at 149 (Leval, J., concurring).

²⁹ *Kiobel v. Royal Dutch Petroleum Co. (Kiobel II)*, 569 U.S. 108 (2013).

Writing for the majority, Chief Justice Roberts began his analysis with the presumption against applying federal statutes abroad. Curiously, he noted that this rule “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”³⁰ He further suggested that this concern weighed even more heavily when, as *Sosa* concluded, Congress left it to the courts to craft the cause of action. Why any of this mattered when the only causes of action the courts could create were, by definition, universal, the opinion did not address. The Chief Justice stumbled even more badly over the statute’s history. Among other things, he ran into obvious difficulties arguing that piracy, one of the three law-of-nations violations that the First Congress had in mind when enacting the ATS, was not extraterritorial. Likewise, he could not fully reconcile the 1795 statement of Attorney General Edmund Bradford that suggested that causes of action under the ATS applied to conduct in Africa. Despite all these difficulties, the presumption carried the day. According to the Court, future claims would have to “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application.”³¹ On this view, *Filartiga* itself arguably should have been dismissed.

Justice Breyer, joined by three others, concurred with an alternative approach.³² He rejected outright applying the presumption against extraterritoriality for the obvious reasons. It does not square either with Attorney General Bradford’s opinion or the contemporary concern about piracy. More obviously, judicial authorization of a suit for the violation of a universal norm by

³⁰ *Id.* at 115 (2013) (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

³¹ *Kiobel II*, 569 U.S. at 124-25.

³² *Id.* at 127 (Breyer, J., concurring).

definition cannot create clashes between U.S. law and the laws of other nations. Instead, Justice Breyer argued that any limits on applying the ATS abroad should come from international law. On this basis, he suggested that he would find jurisdiction under the statutes where: “(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest,” including the interest of insuring that the U.S. does not become a safe harbor for torturers and other violators of fundamental international human rights.³³ In this instance, Kiobel’s claim did not fit into any of the three categories. Nonetheless, on *this* view, *Filartiga* and many of the cases in its wake could have gone forward.

Justice Breyer’s approach is at once more faithful to the ATS and, no less importantly, to the separation of powers. First consider the relevant history. As Justice Breyer points out, the presumption cannot be easily reconciled with the role of piracy or the views of Attorney General Bradford. Nor can it be easily reconciled with scholars who stress the founding generation’s desire for the U.S. to be seen as fully committed to the law of nations. Beyond this, Justice Breyer might also have pointed out that the First Congress’s expectation that the judiciary fashion a cause of action based on international law in no way cuts against judges limiting these to a U.S. territory. The founding generation, to the contrary, expressed confidence in the ability of the judiciary to say what the law is, including international law, as a further power for it to maintain balance among all three branches. Second, nothing in intervening constitutional custom undercuts this role. If anything, two generations of current ATS jurisprudence point the other

³³ *Id.*

way. Finally, modern international relations have only made the need for judicial accountability that much greater. The mutual empowerment of executives worldwide, especially in ways that put pressure on fundamental rights and evade domestic checks, makes those domestic checks even more essential. For that reason, a more expansive reading of Justice Breyer's third category would ideally include *Kiobel*'s claim as well.

IV. Bring on Your Wrecking Ball: *Jesner*

Much the same critique applies to the Court's most recent blow to the ATS, which adds insult to *Kiobel II*'s injury. For the opponents of human rights litigation, even *Kiobel II* left untied one substantial loose end—whether corporations could be sued when a claim touched and concerned the territory of the United States. The Court finally decided the issue this past term in *Jesner v. Arab Bank*.³⁴ As before, its decision accepted the invitation of the corporate bar not merely to limit ATS litigation, but to eviscerate it. In this instance, the judicial overreaction took the form of adopting the Second Circuit's activist reading of the statute to confine liability to natural persons rather than the multinational corporations that aid and abet, employ, or otherwise encourage them. In short, no matter how heinous the human rights violation, a corporation cannot be sued.

The case itself involved mainly foreign nationals alleging that a New York branch of a Jordanian bank aided and abetted multiple acts of terrorism over the course of a decade in the Middle East. The underlying human rights violations at issue, had they been more thoroughly considered, would easily have met the *Sosa* test. These centered on a series of suicide bombings against civilians

³⁴ *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

conducted by such groups as Hamas. Such acts could qualify as extrajudicial killing and violations of the customary international humanitarian law of armed conflict, among others. These violations, in turn, command both an international consensus and are defined with reasonable specificity.

The suit, however, focused not on the terrorist groups that committed these heinous acts, but one of the institutions that financed them. The defendant, Arab Bank, is a major financial organization based in Jordan with branches around the world, including New York. According to the victims and their families, Arab Bank maintained bank accounts for the terrorists and their front groups and allowed the accounts to be used to pay the families of suicide bombers. On this basis, the complaint claimed that the bank had aided and abetted the underlying human rights violations. In contrast to extrajudicial killing, the “aiding and abetting” in ATS litigation is less clear-cut. On one theory, it meets the *Sosa* test as a matter of customary international law. On another view, federal courts can recognize the claim as filling interstices in the statute as a matter of federal common law. Perhaps ironically, the Second Circuit itself had upheld an ATS claim against a corporation for aiding and abetting, with different members of the panel endorsing each approach. They did so prior to Judge Cabranes endorsing a very different and novel approach that eliminated the possibility of suing corporations under any theory.

With *Jesner*, the Court adopted this corporate version of a nuclear option. Yet apart from this core conclusion, the justices for the most part went their separate ways. The main opinion came from Justice Kennedy, only slivers of which commanded a majority.³⁵ Most of that consisted of a more-or-less anodyne

³⁵ *Id.* at 1388.

recounting of the history of the ATS and its reception by the Supreme Court. The only operative portion of his analysis that commanded a majority was a fairly pedestrian and muddled excursion speculating on international relations. Here the Court notes that the ATS was intended to promote harmony “by ensuring foreign plaintiffs a remedy for international-law violations.”³⁶ Countering a number of scholars, the opinion narrows this commitment to “circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable,”³⁷ rather than a more positive vision of U.S. promotion of international law and human rights. From here, the opinion does not ask whether corporate liability per se accords with its narrower conception of international harmony. Rather, it focuses on a narrow subset of cases in which suits against a *foreign* corporation might lead to tension between the U.S. and a foreign state. At no point does the Court consider the foreign policy implications of an American multinational aiding and abetting human rights violations. Or of a foreign corporation aiding and abetting in which concerned states, including the state in which the violations may have occurred, applaud the effort at accountability. Or of suits in which the objections come from authoritarian states with the result that such suits promote harmony and goodwill toward the U.S. with both a majority of that state’s population and democratic states that themselves promote international law and fundamental rights—arguably the chief effect of the previous four decades of ATS litigation.

No more compelling is the main part of Justice Kennedy’s opinion, endorsed by only Chief Justice Roberts and Justice

³⁶ *Id.* at 1406.

³⁷ *Id.*

Thomas. For the most part, this reads more-or-less like a cover version of the Second Circuit’s original *Kiobel* decision. First, it recycles the mistaken proposition that international law controls the issue of corporate liability. As in *Kiobel*, the plurality does not engage in extensive independent analysis. Instead, the opinion mainly relies on a footnote in *Sosa* that noted that a “related consideration” in ATS claims “is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation.”³⁸ Having posed the wrong question, the plurality offers a more plausible answer. As Justice Kennedy happily notes, even Judge Leval conceded that corporate liability for international human rights violations had not achieved the type of consensus among states that *Sosa* envisioned , and that there was no universal, specific, or obligatory norm that holds corporations directly accountable for human rights violations.³⁹

The opinion ends in the last refuge of a court seeking to avoid applying the law in foreign affairs. Specifically, Justice Kennedy sounds the historically recent yet already tired idea that “the political branches, moreover, *surely* are better positioned than the Judiciary to determine if corporate liability would, or would not, create special risks of disrupting good relations with foreign governments.”⁴⁰ Several passages along these lines, in fact, did command a majority. These similarly recycle a trope that arose with the nation’s rise as a global power and the corresponding ascent of the executive. The courts, for example, should hesitate to create new ATS causes of action because, “[t]he political branches, not the Judiciary, have the responsibility and institutional capacity

³⁸ *Id.* at 1399-1400.

³⁹ *Id.* at 1396.

⁴⁰ *Id.* at 1408.

to weigh foreign-policy concerns.”⁴¹ The courts should hesitate and not allow suits against corporations because they “are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one.”⁴² Foregoing international relations analysis, however, apparently applies only when it supports the Court’s conclusion. Earlier, not just the plurality, but the actual majority concluded that one reason to reject corporate human rights liability was precisely because their take on international relations suggested that U.S. foreign policy would be better off if U.S. courts could not entertain suits against foreign corporations, whether engaged in trafficking, torture, extrajudicial killing, crimes against humanity, or genocide.⁴³

Not even this conclusion sufficed for the Court’s newest justice. In a lone, partial concurrence, Justice Gorsuch would have dispensed with the ATS nearly root and branch.⁴⁴ His opinion first attacks *Sosa*’s conclusion that the ATS contemplates that the federal courts would fashion new causes of action based upon customary international law. On this point he notably bypasses *Sosa*’s careful historical analysis that the First Congress, in the pre-positivist context of the late-eighteenth century, expected that courts would fashion causes of action once granted jurisdiction. Next, the concurrence argues that the only constitutional basis for the ATS is diversity jurisdiction, which in turn means that the only suits that can be brought must have a U.S. party as the defendant. Finally, Justice Gorsuch argues that the ATS nonetheless did serve an important purpose in its day. Specifically, the provision addressed violations of safe-conduct—the law-of-nations

⁴¹ *Id.* at 1403.

⁴² *Id.* at 1407.

⁴³ *Id.* at 1407-08.

⁴⁴ *Id.* at 1412 (Gorsuch, J., concurring in part).

protection accorded to designated foreigners passing through a state—by U.S. citizens. This conclusion does cite certain respected scholars. It fails to point out, however, that it interprets their work as narrowly as possible. More importantly, the opinion fails to mention that *Sosa* relied on the prevailing scholarly opinion that the ATS also sought redress for violations against ambassadors and for piracy. Justice Gorsuch does admit that his historical conclusions are open to dispute. At this point, he justifies erring on the side of judicial self-abnegation with the same tropes against judicial involvement in foreign affairs that the plurality rehearsed.

Justice Sotomayor, in a four-justice dissent, offered a corrective based upon international law, statutory text, history, and purpose, and, finally, foreign policy concerns.⁴⁵ First, the dissent at great length plausibly argues that international law focuses on conduct, such as extrajudicial killing, not on the mechanisms for penalizing such conduct, such as tort liability against corporate persons who facilitate such conduct. Next, the dissent pointedly notes that the text of the ATS places no limits on possible defendants, that tort suits against corporate persons have a long history under federal common law, and that allowing suits against corporations who assist in wanton violations of international law surely furthers the statute’s express purpose. Laudably, the dissent also directly ventures into foreign affairs. Among other points, Justice Sotomayor asserts that there is no “reason to believe that the corporate form in itself raises serious foreign policy concerns” any more than does suits against natural persons.⁴⁶ In all, the only significant specific argument that the dissent overlooks goes back to the statute’s immediate history. At the time the First Congress

⁴⁵ *Id.* at 1419 (Sotomayor, J., dissenting).

⁴⁶ *Id.* at 1436.

convened, English common law already had numerous precedents of early corporations, such as the British East India Company, being sued for violations of the law of nations.⁴⁷ Otherwise, Justice Sotomayor's opinion is as rigorous as it is forceful in concluding:

[W]e permit a civil suit to proceed against a paint company that long knew its product contained lead yet continued to sell it to families, or against an oil company that failed to undertake requisite safety checks on a pipeline that subsequently burst. There is no reason why a different approach should obtain in the human rights context.⁴⁸

The saga of the Alien Tort Statute once more shows a conflicted Court threatening to more and more cede its proper role. Whatever else, the statute demonstrates that the founding generation had some concern about judicial enforcement of individual rights guaranteed under international law. Since its rediscovery in *Filtartiga*, much has been written about its specific legislative history. While not the only plausible reading, Justice Souter's take in *Sosa*, as noted, reflects what fairly represents the majority view among scholars. Likewise, there is every reason to believe that the First Congress would have expected suits against corporations. Yet more generally, and no less importantly, nothing in the founding's history justifies the current judicial timidity on display in the fragments that commanded a majority in *Jesner*. After a century-and-a-half hiatus, what custom had emerged in the lower courts consistently upheld a broad reading of the ATS, that both *Kiobel*

⁴⁷ Brief of Professors of Legal History Barbara Aronstein Black, William R. Casto, Martin S. Flaherty, Nasser Hussain, Stanley N. Katz, John V. Orth, and Anne-Marie Slaughter in Support of Plaintiffs-Appellants for Reversal at 12, *Jesner v. Arab Bank*. PLC, 808 F.3d 144 (2d Cir. 2015) (No. 13-3605), 2014 WL 1647606, at *11-*17.

⁴⁸ *Jesner*, 138 S. Ct. at 1436 (Sotomayor, J., dissenting).

II and *Jesner* effectively ignored. Finally, modern international relations further serve to confirm the need for precisely the type of international human rights litigation that the ATS represents. Executive officials worldwide increasingly interact to empower one another. This development has, among other things, increased their power compared to other domestic institutions, and accordingly made it easier for them to evade the constraints of those institutions, even when violating fundamental rights. This is all the more reason to maintain the ability of domestic checks in any given nation, including the United States, to hold violators and their accomplices accountable for flouting universal norms.

V. The Rising?

Between the Court and the corporate bar, the Alien Tort Statue today resembles the human rights victims that put it to such notable use. The ATS may be bruised and battered. Yet, like the Filartigas through Kamala Magar, it also may not pay to count it out too soon. Despite Justice Gorsuch's best efforts, the Court would clearly permit certain suits, and has arguably left room for still others. Beyond this, the Court's assault on international human rights litigation is not so well entrenched as to preclude a rollback. To the contrary, other justices have already provided reasoning based on text, history, structure, precedent, and even international relations, which offers greater fidelity to the founders and the First Congress, as well as a more enlightened understanding of American courts providing redress for modern international human rights atrocities. Whether by a change in the Court's composition or a change in the viewpoint of one of their colleagues, this group needs but one additional vote to prevail.

Even on the most hostile reading, the Court has not prohibited ATS suits altogether. Most obviously, after *Jesner* an alien may still

bring suit for an international human rights violation that occurred within U.S. territory so long as the defendant is not a corporation. Then again, various Catch-22's lurk. Most international human rights violations effectively require some underlying state action nexus. Assuming that any such violations occurring within U.S. territory would be committed by American officials, a host of immunity doctrines face potential litigants. That would leave open several less likely scenarios. Suit could be brought against a private (natural) person for a violation such as genocide on U.S. soil, an act that does not require state involvement. Or an official from a foreign state, perhaps aided and abetted by a private (natural) person, may travel to the U.S., commit torture or extrajudicial killing, and so be open to suit.

Still, nothing in the Court's current case law precludes much broader applications. Here Justice Breyer pointed the way. Chief Justice Roberts's majority opinion may have bequeathed the restriction that an ATS claim must "touch and concern the territory of the United States."⁴⁹ But it made no attempt to define it. To claims arising on U.S. territory, Justice Breyer's four-justice concurrence added the sensible suggestion that any case involving U.S. defendants would justify applying the ATS abroad. Immunity doctrines aside, this category would and should hold accountable U.S. officials involved in such practices as trafficking Nepali workers to U.S. bases. Justice Breyer's third category holds open the possibility of a broader application still. As noted, he suggested that "touch and concern" include cases in which "the defendant's conduct substantially and adversely affects an important American national interest."⁵⁰ For Justice Breyer, that idea at the very

⁴⁹ *Kiobel v. Royal Dutch Petroleum Co. (Kiobel II)*, 569 U.S. 108, 124-25 (2013).

⁵⁰ *Id.* at 133 (Breyer, J., concurring).

least meant that the U.S. should not be seen as a safe haven for human rights violators, such as Pena. Yet it could be applied even further. One possibility would be violations committed by foreign officials allied or trained by the U.S., as was too often the case with authoritarian regimes in Latin America in the 1980s. Still one more would simply be the idea that the violation of universal human rights norms always concerns the U.S., with the corollary that federal court redress for such violations on balance enhances the nation's standing around the world. None of this would get around *Jesner*'s carve out on behalf of multinational corporations. But such applications would help mitigate the damage that the Court has done both to human rights litigation and to a proper understanding of its statutory basis.

Pushing back from within the recent precedents may be fine so far as it goes. The true corrective, however, remains reconsidering those precedents as, if not unworkable in practice, then unsound in principle, textual interpretation, historical understanding, structural inference, decades of previous custom, and international relations analysis. *Jesner*'s missteps, not to mention those of *Kiobel*, have already been sketched. What remains is the necessity to keep pointing them out, even as litigants navigate within the many limitations these cases impose. That task will be none the easier if and when Judge Brett Kavanaugh takes his seat on the Court. He has already demonstrated that his views on the ATS, and international law in general, are downright antediluvian.⁵¹ Then again, the Kavanaugh appointment does not alter the current voting configuration, other than arguably adding a voice even more hostile to international human rights than Justice Gorsuch.

⁵¹ Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011); Doe v. Exxon Mobil Corp., 473 F.3d 345 (D.C. Cir. 2007) (Kavanaugh, J., dissenting). See Jamie Mayerfeld, *Brett Kavanaugh and the Risk of a Return to Torture*, JUST SECURITY (Aug. 10, 2018), <https://www.justsecurity.org/60238/brett-kavanaugh-risk-return-torture/>.

The good news is that any reconsideration of the Court’s recent missteps will be easier with regard to *Jesner*. Four justices stand united under Justice Sotomayor’s strong, cogent dissent. Their counterparts in the majority, by contrast, appear to share an antipathy to corporate liability, but not a coherent approach on which to base it. *Kiobel* presents a greater challenge. There, all nine members of the Court effectively endorsed a canon against extraterritorial application of a statute that addresses violations, which by definition are universal, therefore impose no distinctive American rule abroad, and so obviate the basis for the canon. Yet even here, four justices subscribing to Justice Breyer’s concurrence offer a way to mitigate much of the damage.

No doubt *Jesner*, as *Kiobel* before it, marks a giant leap backward from the most meager accountability for some of humanity’s most despicable acts. It reflects, among other things, the combined forces of wooden legal analysis and sustained corporate power. This is not a combination easily overcome, but neither are the human rights violations that the ATS addresses. To do so requires leveraging the last forty years of ATS litigation and scholarship, the better to resist, even to roll back, the new status quo that a bare majority of the Court offers. To the extent that effort succeeds, American courts may again become seen as the “centerpiece” of accountability in a world in which that value is in increasingly short supply.

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Epic Systems v. Lewis: The Return of Freedom of Contract in Work Law?

Charlotte Garden*

Of the U.S. Supreme Court’s most high-profile cases in the October Term 2017, *Epic Systems Corp. v. Lewis*¹ was also among the most predictable: much like with the Court’s other major labor case, *Janus v. AFSCME*,² court watchers could reliably anticipate the outcome as soon as it was apparent that a nine-member Court that included Justice Neil Gorsuch was going to hear the case. The Court did not surprise, splitting 5-4 to decide that pre-dispute individual arbitration clauses are enforceable, notwithstanding that the National Labor Relations Act (NLRA) protects employees’ “concerted activity,” and the Norris-LaGuardia Act (NLGA) renders unenforceable so-called “yellow dog contracts,” in which employees agree not to join a labor union as a condition of employment.³

Epic Systems will yield a range of consequences for workers—all of them negative. Justice Gorsuch’s majority opinion reads narrowly the NLRA’s protection for “other concerted activities,” planting the seeds for further retrenchment in the National Labor Relations Board (NLRB), which is now controlled by Trump

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¹ Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

² Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

³ Epic Sys. Corp., 138 S. Ct. at 1612.

appointees, and in the courts. In addition, Justice Gorsuch’s reliance on the rhetoric of “freedom of contract” signals that his approach to labor and employment law is likely to ignore the reality of workplace power dynamics, just as progressive court-watchers feared (and corporate lobbyists hoped) during his confirmation process. And most concretely, Justice Gorsuch’s opinion in *Epic Systems* will make it harder for employees to enforce their rights. This also means the decision will give a leg up to unscrupulous employers who either deliberately violate employment law or are indifferent to compliance, as compared to law-abiding employers.

This Essay has three parts. First, it describes how the NLRB’s rule on individual arbitration clauses came about, and analyzes how the *Epic Systems* majority opinion relied on an ahistorical, decontextualized understanding of both the Federal Arbitration Act (FAA) and labor law to reverse the Board’s rule. Second, it discusses *Epic System*’s likely consequences for workers who are compelled to bring their claims in individual arbitration or not at all. Finally, it discusses the threats to workers posed by the *Epic Systems* majority’s reading of the NLRA and reliance on “freedom of contract” rhetoric.

I. Individual Arbitration & Labor Law

To understand the ahistorical nature of the *Epic Systems* decision, it helps to trace key legal developments beginning in the early twentieth century. The purpose of this section is twofold: first, it sketches the legal background that led up to *Epic Systems*; and second, in the course of doing so, it offers an object lesson in the Court’s repeated interference with workers’ collective action.

A. Regulating Work in the New Deal

In the late 1800s and early 1900s, the American labor movement was gaining members and power, and strikes and boycotts aimed at improving working conditions were on the rise. In addition to “primary” strikes involving only the employer and employees locked in a labor dispute, unions increasingly relied on “secondary” or “sympathy” strikes, which greatly increased strikers’ leverage by expanding the scope of labor disputes to include the employees of “neutral” employers. But employers found a way to derail these efforts: some federal courts were willing to enjoin these strikes under a range of legal theories, including that they violated the Sherman Act. Congress attempted to end this practice in 1914, declaring in the Clayton Act that “[t]he labor of a human being is not a commodity or article of commerce,”⁴ and sharply limiting the authority of federal courts to issue injunctions in response to labor disputes.

The Supreme Court limited the Clayton Act’s effect by interpreting it narrowly in a pair of cases decided in 1921. In *Duplex Printing Press Co. v. Deering*, the Court declared that “Congress had in mind particular industrial controversies, not a general class war,” and held that federal courts could still enjoin secondary strikes and boycotts.⁵ And in *American Steel Foundries v. Tri-City Central Trades Council*, the Court approved an injunction against striking workers who were picketing in groups of four to twelve, limiting strikers to one picketer at each entrance to the employer’s plant. The effect of these cases was to increase the frequency with which federal courts issued (often *ex parte*) injunctions against labor unions and members engaged in

⁴ 15 U.S.C. § 17.

⁵ *Duplex Printing Co. v. Deering*, 254 U.S. 443, 472 (1921).

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secondary strikes, boycotts,⁶ or picketing—a practice now referred to “government by injunction.”⁷

Congress’s second effort to end government by injunction was more successful. In 1932, Congress passed the NLGA, which stripped federal courts of jurisdiction “to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute.”⁸ But that wasn’t all: the statute also declared “yellow dog contracts”—employment contracts that required employees to promise not to join a union on pain of job loss—to be contrary to public policy and unenforceable.

This time, government by injunction receded. Perhaps even more surprisingly, the Court did not review the constitutionality of the anti-yellow dog provision of the NLGA. This was significant because the Court had struck down legislative attempts to make it a crime for employers to impose yellow dog contracts on their employees in two previous *Lochner*-era cases.⁹

And finally, there was the NLRA itself, which was enacted in 1935 and upheld by the Supreme Court in 1937.¹⁰ The NLRA as originally enacted declared a preference for workers’ collective action:

[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . and the purchasing power of wage earners in industry.¹¹

⁶ Am. Steel Foundries v. Tricity Cent. Trade Council, 257 U.S. 184, 206 (1921).

⁷ See MELVYN DOBOFSKY, THE STATE AND LABOR IN MODERN AMERICA (1994); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991).

⁸ 29 U.S.C. § 101 *et seq.*

⁹ Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908). These cases, and their parallels to *Epic Systems* are discussed in Part III.

¹⁰ NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

¹¹ 29 U.S.C. § 151.

In other words, the NLRA was expressly premised on an understanding of workplace power dynamics: because workers were dependent on employers for their livelihoods, they often lacked the leverage to negotiate meaningfully with their employers, and the employment “agreements” they reached reflected the employer’s will rather than any sort of two-sided give-and-take. This insight would be obvious to anyone who has ever held a low-wage job—but it was also at odds with the Supreme Court’s *Lochner*-era caselaw, which was committed to preserving employers’ authority to set work rules without interference from the state under the guise of freedom of contract between workers and employers.

Section 7 of the NLRA, which contains the core substantive protection for workers’ rights to engage in collective action was drafted broadly: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”¹² That single sentence, with its list of protected activities, forms the backbone of workers’ labor rights. Moreover, while the Supreme Court has notoriously restricted workers’ NLRA rights where, for example, it perceived a conflict with employers’ property rights,¹³ it has also emphasized the capacious nature of the Act. For example, it has long been beyond doubt that the NLRA protects employees’ collective action whether or not they are unionized (or are looking to unionize), even when they will not personally benefit from their collective action, and when they are enforcing other statutory

¹² 29 U.S.C. § 157.

¹³ See, e.g., NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

rights, such as the right to be free from workplace sexual harassment.

B.The Federal Arbitration Act and Employment

In 1925, during the *Lochner* era and amidst turmoil regarding workers' collective action and the regulation of work, Congress enacted the Federal Arbitration Act (FAA).¹⁴ The statute was aimed at providing for "enforceability of arbitration agreements between merchants—parties presumed to be of approximately equal bargaining strength—who needed a way to resolve their disputes expeditiously and inexpensively."¹⁵ Accordingly, it contains an exemption: "nothing [in the Act] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."¹⁶ That language excluded from the FAA's purview the employment relationships that Congress was understood to be able to regulate in 1925, in light of the Court's narrow view of the Commerce Clause.¹⁷

For decades, arbitration was relatively rare in the employment context, in part because of doubts about whether arbitration clauses in employment contracts were enforceable under the FAA. Those doubts were ultimately resolved in favor of arbitration in a series of cases decided beginning in 1991. First, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court enforced an arbitration clause between an employee and employer that was imposed as a condition of registering as a securities representative with the

¹⁴ 9 U.S.C. § 1 *et seq.*

¹⁵ Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 106 (2006).

¹⁶ 9 U.S.C. § 1.

¹⁷ See, e.g., A.L.A. Schechter Poultry Corp. v. United States, 55 S. Ct. 837 (1935).

New York Stock Exchange.¹⁸ The *Gilmer* Court wrote that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context,” but left open the possibility of defenses such as fraud or coercion, and signaled that “claim[s] of unequal bargaining power” could be resolved “in specific cases.”¹⁹ However, because the arbitration clause in *Gilmer* was imposed by the NYSE rather than the employer, the Court chose not to address the scope of the FAA’s exemption of “workers engaged in foreign or interstate commerce.”²⁰

Then, in the 2001 case *Circuit City Stores, Inc. v. Adams*,²¹ the Court rejected the argument that Congress’s decision to exclude from the FAA all of the employment contracts over which it had jurisdiction in 1925 manifested an intent to exclude employment contracts from enforcement under the FAA more generally. The Court did not disagree about Congress’s likely intent, but it instead prioritized a plain-text approach to interpreting the FAA. Thus, since 2001, the Court’s view has been that the FAA’s exemption for employment contracts covers only workers engaged in interstate transportation. Finally, following *Gilmer* and *Circuit City*, the Court significantly limited states’ abilities to place limits on the use of arbitration clauses, and held that individual arbitration clauses were enforceable even when the costs of prosecuting a case on an individual basis exceed the possible recovery.²²

The result of these and other decisions has been steadily increasing numbers of employers that demand that employees

¹⁸ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

¹⁹ *Id.* at 33.

²⁰ *Id.* at 40 (Stevens, J., dissenting) (citing 9 U.S.C. § 1).

²¹ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

²² See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

agree to arbitrate their workplace disputes. Thus, one recent study found that whereas only about two percent of employees were covered by individual arbitration clauses in 1992 (the year after *Gilmer*), now more than half of employees are.²³ Moreover, these clauses often require workers to resolve their disputes on an *individual* basis, placing many low-dollar-value claims out of reach as a practical matter.

C. The *D.R. Horton/Murphy Oil* Rule at the Board and in the Courts

Against this backdrop of increasing reliance on individual arbitration by employers, it is hard to underestimate the importance of the NLRB's *D.R. Horton* decision. The decision held that employers could not require their employees to commit to resolve workplace disputes on an individual basis. Instead, the Board held that arbitration clauses in employment contracts were consistent with the NLRA only if they left employees with at least one forum—either judicial or arbitral—in which they could resolve disputes on an aggregated basis.²⁴ In other words, employers could still require employees to commit to resolve disputes in arbitration—but if they did that, they also had to agree to allow employees to band together to arbitrate their claims, including in class or collective actions. As a practical matter, the *D.R. Horton* rule likely would have limited the use of employment arbitration, because arbitration involves very limited appellate review, and employers would have chosen to litigate class or collective actions in court rather than risk large, unappealable losses.

²³ Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Sept. 27, 2017), available at <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/>.

²⁴ *In re D. R. Horton, Inc.*, 357 NLRB 2277 (2012).

The Board's reasoning in *D.R. Horton* was straightforward. First, it pointed to the long-accepted principle that Section 7 covers collective action that takes place outside of the workplace, including through litigation. As the Board put it, "employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA."²⁵ Indeed, the Supreme Court had already agreed, in *Eastex, Inc. v. NLRB*, that Section 7 protects "employees' efforts to 'improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.'"²⁶ In *Eastex*, the Court upheld the Board's view that Section 7 protects unions' and employees' rights to advocate for pro-worker public policy even when they might not benefit directly from the particular policy being advanced.²⁷ As far back as the 1940s, the NLRB had also held that Section 7 protects employees when they resort to court or agency enforcement processes, and courts of appeals, though not the Supreme Court, have repeatedly affirmed these decisions.²⁸

Relatedly, the Board noted that other caselaw prohibits employers from demanding that employees promise to resolve their disputes individually rather than through collective action—that is, employers cannot demand that employees individually waive their statutory rights.²⁹ That is true under the NLRA, but the Board wrote that the NLGA also has a role to play; if one accepts

²⁵ *Id.* at 2279.

²⁶ *Eastex, Inc. V. NLRB*, 437 U.S. 556 (1978)

²⁷ For example, workers who make \$20/hour are protected by the NLRA when they advocate raising the minimum wage to \$15/hour.

²⁸ *In re D. R. Horton, Inc.*, 357 NLRB at 2280

²⁹ *Id.* at 2281.

that class or collective litigation to improve working conditions is a form of collective action, then a pre-dispute individual arbitration clause is a form of yellow-dog contract.

Next, the Board considered whether the NLRA's protection for collective litigation was in conflict with the FAA. Concluding that the two statutes could be reconciled, the Board relied on the Supreme Court's statements in cases including *Gilmer* that the FAA does not require the waiver of substantive rights; moreover, the FAA contains a "savings clause" stating that arbitration agreements are "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*"³⁰ The Board reasoned that the substantive right protected by the NLRA was the right to act collectively—meaning that an order invalidating an individual arbitration clause "does not conflict with the FAA, because the waiver interferes with substantive statutory rights under the NLRA, and the intent of the FAA was to leave substantive rights undisturbed."³¹

Finally, the Board emphasized that it was not mandating class arbitration—to the contrary, it was holding "only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial."³² Instead, employers could choose between litigating their employees' collective claims, or arbitrating them. Thus, an employer could presumably require employers to sign, as a condition of employment, either an agreement committing employees to arbitrate their disputes, but allowing them to do so on a concerted basis; or an agreement committing employees to arbitrate their individual disputes, but permitting them to file cases seeking relief on behalf of multiple employees in court.

³⁰ 9 U.S.C. § 2 (emphasis added).

³¹ *In re D. R. Horton, Inc.*, 357 NLRB at 2286.

³² *Id.* at 2288.

The Board applied the *D.R. Horton* rule in dozens of cases, facially invalidating employer policies requiring employees to accept individual arbitration or lose their jobs. One of these cases, *Murphy Oil*,³³ re-affirmed *D.R. Horton* while also mooting questions about whether one of the Board members who decided *D.R. Horton* had been invalidly appointed to the Board without Senate consent.³⁴ In addition, numerous employees who sought to sue their employers under statutes such as the Fair Labor Standards Act (FLSA) invoked the *D.R. Horton* rule to oppose their employers' motions to compel (individual) arbitration.

Through both of these routes, cases testing the Board's *D.R. Horton* rule soon made their ways to the courts of appeals, where they met with initial rejection and ultimately a mixed reception. In the appeal from *D.R. Horton* itself, the Fifth Circuit seemed to credit the NLRB's reasoning that class or collective litigation or arbitration is protected by Section 7, but nonetheless held that the FAA required enforcement of individual arbitration agreements. In reaching that conclusion, the court first wrote that under Supreme Court precedent, "arbitration has been deemed not to deny a party any statutory right."³⁵ From there, the Fifth Circuit wrote that the "use of class action procedures . . . is not a substantive right," citing a number of cases rejecting arguments that different statutory schemes contained rights to class action procedures.³⁶ Turning to the Supreme Court's more recent arbitration decisions, the *D.R. Horton* court then concluded that "the Board's rule does not fit

³³ *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014).

³⁴ *Id.* at 775 n.16 (describing and rejecting arguments about validity of Member Becker's appointment and participation in *D.R. Horton*, but observing that "[i]n any case, the Respondent's arguments . . . are now moot, given our independent reexamination of D.R. Horton today").

³⁵ *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357 (5th Cir. 2013) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)). In fact, this reading was itself debatable; the case to which the *D.R. Horton* court cited disclaimed the proposition "that all controversies implicating statutory rights are suitable for arbitration." *Mitsubishi*, 473 U.S. at 627.

³⁶ *D.R. Horton, Inc.*, 737 F.3d at 359.

within the FAA’s saving clause,”³⁷ apparently because a prohibition on class action waivers in arbitration would make arbitration too unappealing to employers: “Requiring a class mechanism is an actual impediment to arbitration and violates the FAA.”³⁸ Finally, having set up a direct conflict between the NLRA (and the NLGA) and the FAA, the Fifth Circuit held that the NLRA’s guarantee of collective action was not specific enough to override the FAA’s policy favoring arbitration.³⁹

However, the *D.R. Horton* rule fared better in the Seventh and Ninth Circuits. First, in *Lewis v. Epic Systems Corp.*, the Seventh Circuit considered the Board’s rule in the context of a putative collective action filed under the FLSA. The employer, Epic, responded to Lewis’s complaint by seeking to enforce an individual arbitration clause that it had imposed by means of an email stating that any employee who “continue[d] to work at Epic” was deemed to have agreed to waive “the right to participate in or receive money or any other relief from any class, collective, or representative proceeding,” and instead to bring wage-and-hour claims in individual arbitration.⁴⁰ Unlike the Fifth Circuit, the Seventh Circuit agreed with the NLRB’s view of the interaction between the NLRA and the FAA, including that an individual arbitration clause was an illegal agreement under the NLRA—and therefore unenforceable according to the FAA’s savings clause. But the Seventh Circuit’s most important point of disagreement with the Fifth Circuit was its understanding of the substantive rights that the NLRA guaranteed: “While the FLSA and [the Age Discrimination in Employment Act] allow class or collective

³⁷ *Id.*

³⁸ *Id.* at 360.

³⁹ *Id.* at 362.

⁴⁰ *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151, 1154 (7th Cir. 2016).

actions, they do not guarantee collective process. The NLRA does. . . Just because the Section 7 right is associational does not mean that it is not substantive.”⁴¹

Following on the Seventh Circuit’s heels, the Ninth Circuit also affirmed the *D.R. Horton* rule in *Morris v. Ernst & Young, LLP*.⁴² *Ernst & Young* also involved employees who were required to sign individual arbitration clauses as a condition of employment, but who then sought to litigate an FLSA claim in court. As the Ninth Circuit saw it, the “NLRA obstacle is a ban on initiating, in any forum, concerted legal claims—not a ban on arbitration.”⁴³ Thus, the court reasoned, the *D.R. Horton* was not at odds with the FAA’s pro-arbitration policy: “The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims.”⁴⁴ Accordingly, the Ninth Circuit agreed with the NLRB and the Seventh Circuit that *Ernst & Young*’s individual arbitration clause fell under the FAA savings clause because it illegally waived a substantive federal right.

In September 2016, the United States solicitor general sought certiorari after the Fifth Circuit refused to enforce the NLRB’s decision in *Murphy Oil*, in a decision that largely tracked the analysis from its *D.R. Horton* decision.⁴⁵ (Needless to say, the solicitor general urged in the petition for certiorari that the Board’s rule was correct and should be upheld.) Likewise, the employers in *Epic Systems* and *Ernst & Young* also sought Supreme Court review. The Court consolidated the three cases and granted review in January 2017.

⁴¹ *Id.* at 1161.

⁴² *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016).

⁴³ *Id.* at 984.

⁴⁴ *Id.* at 985.

⁴⁵ Petition for Writ of Certiorari at 9-19, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (No. 16-307), (citing *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2013)).

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When it came time to file merits briefs, the (post-2016 election) solicitor general’s office did an about-face; it filed an amicus brief in support of the employers in the three cases, arguing that the NLRB should have given greater weight to the FAA’s pro-arbitration policy. This was one of a handful of cases in which the Trump administration reversed an Obama administration position—a list that notably included the other major labor case on the OT 2017 docket, *Janus v. AFSCME*.⁴⁶ At the same time, the solicitor general authorized the NLRB’s general counsel, Richard Griffin Jr., to litigate on the Board’s behalf in the Supreme Court. (Griffin was appointed by President Obama to a term that ended in October 2017, shortly after argument in *Epic Systems*.) In other words, the federal executive branch took two opposing positions in *Epic Systems*.

Paul Clement argued for the employers before the Supreme Court. His main argument was that Section 7 protects “collective action by the employees in the workplace,”⁴⁷ but not in courts or arbitrations. In response to questioning by Justice Breyer, Clement spelled out what he meant by this:

[F]rom the very beginning [of the NLRA], the most that has been protected is resort to the forum, and then, when you get there, you are subject to the rules of the forum. So, for example, if an atypical worker decides that he wants to bring a class action on behalf of a handful of fellow employees . . . the employer doesn’t commit an unfair labor practice by [arguing that the worker doesn’t satisfy the numerosity or typicality requirements of the class action rule, Fed. R. Civ. P. 23].⁴⁸

⁴⁶ *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps.*, Council 31, 138 S. Ct. 2448 (2018).

⁴⁷ Oral Argument at 10:06, *Epic Sys. Corp.*, 138 S.Ct. 1612 (No. 16-285), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-285_1qm2.pdf.

⁴⁸ *Id.*

In other words, Clement conflated two things: the right not to be subject to a pre-dispute waiver of the right to engage in collective action and the (mostly non-existent) right to preclude an employer from countering its employees' collective action, or even to compel some third party to accommodate workers' collective action. But the fact that workers' concerted activity can yield employer counter-moves is both well known to anyone with even minimal familiarity with labor law and distinct from the question of whether employees can execute advance waivers of their Section 7 rights. That is, an employer cannot ask employees to execute advance waivers of their Section 7 rights, but it is free to respond to employees' collective action once it begins, such as by permanently replacing economic strikers, or locking employees out of the workplace in order to secure a favorable collective bargaining agreement. And while the NLRA can limit the responses available to employers (for example, employers may temporarily, but not permanently, replace workers who go on strike in response to unfair labor practices), the NLRB has never suggested that the NLRA would preclude an employer from opposing a motion for class certification. Moreover, the NLRA does not constrain entities other than employers, unions, and employees, so the suggestion that the NLRB might deem it inconsistent with the NLRA for a district court to apply Rule 23's requirements had no basis in reality.

Arguing for the U.S. solicitor general, Jeffrey Wall made a similar argument to Clement, and also emphasized the FAA's "clear congressional command" to enforce arbitration agreements, which Wall argued meant that the NLRB could not "interpret the NLRA's ambiguity [as reflecting congressional intent to invalidate collective action waivers in employment arbitration agreements] .

. . . in the face of the FAA and federal rules like Rule 23.”⁴⁹ Finally, both Clement and Wall chided the NLRB for the newness of the *D.R. Horton* rule, with Clement suggesting that if the NLRA really precluded individual arbitration clauses, then the AFL-CIO should have argued as much in amicus briefs in previous employment arbitration cases.

During Griffin’s argument for the NLRB, several justices asked questions that suggested they accepted Clement’s premise about the scope and meaning of the *D.R. Horton* rule. For example, Justice Alito asked whether Rule 23 abrogated Section 7; later, Chief Justice Roberts asked whether an arbitral forum rule that imposed a 50-person numerosity requirement on putative class arbitrations meant that “you have a right to act collectively, but only if there are 51 or more of you.”⁵⁰ As a result, Griffin had to spend much of his time at the lectern explaining Labor Law 101, with occasional assists from Justices Kagan and Breyer. Likewise, Chief Justice Roberts asked Daniel Ortiz, counsel for the employees in *Epic Systems* and *Ernst & Young*, a variation on his 50-employee hypothetical. As with Griffin, the exchange seemed to yield more confusion than clarity, although Justice Sotomayor usefully observed that an employer’s intent in choosing an arbitral forum with particularly restrictive rules governing class or joint litigation was relevant to whether an arbitration agreement violated Section 7. Thus, an employer could violate the NLRA by intentionally restricting forum access to defeat collective litigation—but freestanding forum-imposed limits on collective litigation were entirely consistent with the Act.

While he asked no questions during oral argument, Justice Gorsuch wrote the majority opinion in *Epic Systems*.⁵¹ He first

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Epic Sys. Corp.*, 138 S.Ct. at 1619.

emphasized that the NLRA had existed for “77 years” before the NLRB adopted the *Epic Systems* rule, implying that the rule was therefore illegitimate—though without mentioning that individual arbitration of employment disputes was not prevalent until much more recently. Next, Justice Gorsuch reasoned that the FAA savings clause did not apply because it “recognizes only defenses that apply to ‘any’ contract,”⁵² and “courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties’ consent.”⁵³ Thus, the majority’s view was that even if individual arbitration clauses are illegal because they violate Section 7, the savings clause would not apply. Here, the majority analogized *Epic Systems* to *Concepcion*, which involved a state law that declared class action waivers to be unconscionable in either litigation or arbitration. But that analogy seems to fall short: whereas the law in *Concepcion* was aimed exclusively at preserving class actions, Section 7 applies equally to any employment contract that asks employees to waive their rights to engage in any activity that qualifies as protected concerted activity under the NLRA. Or, to put it another way, the *Concepcion* Court was dealing with a statute whose main function was to respond to class waivers in arbitration contracts. But—as the *Epic Systems* majority went on to argue at length—the NLRA was enacted to preserve a range of activities, of which the right to concerted litigation was at most one aspect.

Next, the majority turned to whether Section 7 encompassed the right to concerted litigation or arbitration at all, concluding that “[t]he notion that Section 7 confers a right to class or collective

⁵² *Id.* at 1622.

⁵³ *Id.* at 1623.

actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935.”⁵⁴ The Court majority used that argument about likely legislative intent (which did not discuss other procedures for concerted litigation, such as joinder) to frame its views on the core text of Section 7: “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁵⁵ According to the majority, the “catchall” term “other concerted activities for . . . mutual aid or protection” should be “understood to ‘embrace only objects similar in nature to those objects enumerated by the preceding specific words’” under the *ejusdem generis* canon.⁵⁶ And those specific words, the Court continued, “serve to protect things employees ‘just do’ for themselves in the course of exercising their right to free association in the workplace, rather than ‘the highly regulated, courtroom-bound “activities” of class and joint litigation.’”⁵⁷ That formulation—“things employees just do for themselves in the workplace”—came from Judge Sutton’s partial dissent in a Sixth Circuit case that affirmed the *D.R. Horton/Murphy Oil* rule.⁵⁸ There are many things that might be said about this reading of the scope of protected concerted activity, but one is that it is premised on a narrow reading of the remainder of Section 7 that assumes, for example, that the rights to “self-organization” and to “assist labor organizations” can be exercised only at work—and further, that

⁵⁴ *Id.* at 1624.

⁵⁵ *Id.* at 1635 (quoting 29 U.S.C. § 157).

⁵⁶ *Id.* at 1625 (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001)).

⁵⁷ *Id.* (quoting NLRB v. Alternative Entertainment, Inc., 858 F.3d 393, 415 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part)).

⁵⁸ *Id.*

it did so without delving into NLRB or case law about the actual scope of those rights.

After reading Section 7 narrowly, the Court turned to the inaccurate version of the *D.R. Horton/Murphy Oil* rule on which Clement and Wall partially premised their arguments: that Section 7 guaranteed access to class procedures, rather than simply banning waivers that cover access to available concerted litigation vehicles. Having set up that straw man, Justice Gorsuch proceeded to blow it down: “[w]ithout some . . . specific guidance, it’s not at all obvious what procedures Section 7 might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? . . . What standards would govern class certification?”⁵⁹ Then, characterizing as a “slight reply” the response that the foregoing did not correctly reflect the *D.R. Horton rule*, Justice Gorsuch added that “if the parties really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them.”⁶⁰ But this reasoning assumes its conclusion, and it is also inconsistent with the NLRA as it is understood in other contexts—for example, employees are subject to various restrictions on the right to strike, but that does not mean that employers may require individual employees to waive that right.

Given the majority’s reasoning thus far, it is unsurprising that it also rejected the argument that even if the NLRA’s text did not clearly encompass the right to engage in concerted litigation, the NLRB’s interpretation of Title VII was entitled to *Chevron* deference. Specifically, the Court wrote that the Board was not

⁵⁹ *Id.* at 1625.

⁶⁰ *Id.* at 1626.

entitled to *Chevron* deference for three reasons: first, it sought to reconcile the NLRA with a statute it did not administer; second, the executive branch was divided on the NLRA’s meaning; and third, the Court could resolve the potential statutory ambiguity using “traditional tools of statutory construction.”⁶¹

Justice Ginsburg dissented, joined by the three other liberal-leaning justices. She framed the ability of individual arbitration clauses—often imposed by adhesion contract as a condition of employment (or continued employment)—to make it practically impossible for employees to vindicate their rights as an example of the imbalance of power between workers and employers that led Congress to enact the NLRA. Thus, she identified individual arbitration clauses as simply another species of yellow-dog contract, illegal under the NLGA and the NLRA. Moreover, she wrote that the majority’s narrow reading of protected concerted activity was “conspicuously flawed” in light of the NLRA’s capacious language and NLRB and court decisions that interpret the statute’s protections broadly.⁶² After refuting this and other aspects of the majority’s opinion, Justice Ginsburg concluded that “[t]he inevitable result of today’s decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers.”⁶³

II. Consequences for Workplace Arbitration and Work Law

A recent Ninth Circuit decision illustrates *Epic System*’s consequences for workers, and shows why Justice Ginsburg’s

⁶¹ *Id.* at 1630 (internal quotation marks omitted).

⁶² *Id.* at 1639 (Ginsburg, J., dissenting).

⁶³ *Id.* at 1646

warning was prescient.⁶⁴ *O'Connor v. Uber* involved a class of more than 240,000 individuals who had driven for Uber in California or Massachusetts.⁶⁵ The drivers argued that they had been misclassified as independent contractors rather than employees, and that the company had therefore violated the law when it failed to pay benefits (such as mileage reimbursements and tips) required of employers under state law. These claims were unlikely to be worth more than a few thousand dollars per driver, but could have added up to massive liability for Uber.

In a series of orders, a district court had certified the large class over the objections of the company, which argued that nearly all of the drivers had accepted individual arbitration clauses when they signed up to drive for Uber. (A very small percentage of drivers had opted out of arbitration.) However, the Ninth Circuit rejected most of the district court's reasoning in a 2016 decision,⁶⁶ leaving the NLRB's *D.R. Horton/Murphy Oil* rule as a basis to keep the class intact.

The Supreme Court's *Epic Systems* decision deprived the *O'Connor* plaintiffs of their last serious argument in support of keeping the class together. Thus, it is unsurprising that the Ninth Circuit easily reversed the district court's class certification orders. On remand, it is possible that the district court will recertify a class of drivers who opted out of arbitration—but such a class would include a relatively small number of drivers. For example, in one

⁶⁴ I have previously written about the *O'Connor v. Uber* case and individual arbitration agreements in the gig economy more generally. See Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205 (2018). This and the next sections of this article draw on that piece, which was published before the Ninth Circuit's recent decision decertifying the *O'Connor* class based on *Epic Systems*.

⁶⁵ *O'Connor v. Uber*, No. 14-16078, 2018 WL 4568553, (9th Cir. Sept. 25, 2018).

⁶⁶ *Mohamed v. Uber Techs, Inc.*, 836 F.3d 1102 (9th Cir. 2016).

case involving California Uber drivers, the court found that only 270 drivers out of 160,000 had opted out.⁶⁷

What will happen to the drivers who did not opt out of Uber's individual arbitration clause? It is possible that they will decide to pursue individual arbitration. In fact, counsel for the *O'Connor* class has pledged to represent every former-class-member driver who wants to proceed to arbitration, and some drivers have already done just that. However, this promise of competent legal representation in low-value individual arbitrations is unusual—here, it is likely an artifact of the investment of time and money that class counsel has already made in the case, and maybe also the prospect that Uber will see a global settlement as a better outcome than litigating thousands of individual arbitrations, which would also involve fronting substantial arbitral forum costs. (These costs include the arbitrator's fee as well as the costs of conference room rentals and similar, and could easily exceed the value of many drivers' individual claims.) The more typical result in cases affected by *Epic Systems* will be that employees simply will not pursue low-value claims that would otherwise be candidates for concerted litigation if not for individual arbitration clauses. The result will be to virtually immunize from liability many employers who operate close to the legal line, and even some of those who willfully violate the law.

III. What's Next for Workplace Arbitration and Work Law?

Justice Gorsuch began his opinion with two rhetorical questions resting a premise that might best be described as a work of legal fiction: "Should employees and employers be allowed to

⁶⁷ Gillette v. Uber Techs., No. C-14-5241 EMC, 2015 WL 4481706, at *4 (N.D. Cal. July 22, 2015).

agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?”⁶⁸ The extent to which this question echoes the *Lochner*-era Court’s assumptions about individual workers’ supposed freedom of contract is breathtaking. It probably will not surprise many readers to hear that the current Court is skeptical of the very idea of the need for collective rights at work—and in light of the Court’s circumscribed description of the rights that Section 7 protects, there is a real risk that the Court will further cut back on the NLRA’s already-limited protections for workers’ concerted activity.

Despite these setbacks in labor rights, administrative agencies charged with enforcing work laws can still do their jobs even when employees are subject to individual arbitration clauses. This is an important route to both substantive enforcement of workers’ rights and the development of law despite the growing use of individual arbitration. But that rule was unsuccessfully challenged in an earlier case that resulted in a 6-3 decision in which the majority held—over the objections of Justices Thomas, Rehnquist, and Scalia—that agencies such as the EEOC could “obtain victim specific relief” in court for an employee who “waived his right to seek relief for himself in a judicial forum by signing an arbitration agreement.”⁶⁹ While the Court may ultimately lack the appetite to revisit this decision, it is conceivable that Chief Justice Roberts and Justices Alito and Kavanaugh would side with the dissenters in *Waffle House*, and vote to restrict the authority of administrative agencies to obtain relief that would benefit an employee on whom

⁶⁸ *Epic Sys. Corp.*, 138 S.Ct. at 1619.

⁶⁹ EEOC v. Waffle House, Inc., 534 U.S. 279, 305 (2002).

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an employer has imposed an arbitration agreement—a possibility that could dampen many employees’ willingness to file EEOC charges in the first place.

This possibility could also imperil one of the leading “blue state” responses to the rise of individual arbitration in employment: the authorization of representative actions, in which employees may step into the shoes of the state to enforce state work law on behalf of themselves and their coworkers. For example, California’s Private Attorney General Act (PAGA) authorizes statutory damages of \$100 per affected employee per pay period, with double damages available against employers who are repeat offenders.⁷⁰ Then, 75 percent of any amount collected goes to the state of California, to help fund the state’s own enforcement of work law. So far, the Supreme Court has denied certiorari in cases challenging aspects of PAGA, but of course it is impossible to predict what the Court will do in coming years.

As *Uber v. O’Connor* demonstrates, *Epic Systems* will do immediate, concrete harm to employees. Further, it likely signals further retrenchment of workplace rights at the Supreme Court. The one silver lining is that workers are rediscovering that they have collective power whether or not their concerted activity benefits from statutory protections. As this summer’s wave of teacher strikes showed, workers in a hostile legal and political environment can still move forward, together.

⁷⁰ CAL. LAB. CODE § 2698 *et seq.*

Trump v. Hawaii and the Future of Presidential Power over Immigration

Cristina M. Rodríguez*

Since his inauguration, President Donald Trump has been consistent in delivering on a core campaign promise. In the immigration arena, he has transformed vivid campaign statements into actual government policy. The Trump White House, along with the Departments of Justice and Homeland Security, have given political and bureaucratic expression to immigration restrictions. They have exploited the authorities delegated by the Immigration and Nationality Act (INA) to advance a maximalist enforcement agenda and reduce “undesirable” immigration. President Trump launched the most visible and brazen initiative within a week of taking the oath of office, signing the first in a series of executive actions designed to make his most incendiary campaign rhetoric a reality.

On January 27, 2017, Trump’s campaign promise of a “total and complete shutdown of Muslims entering the United States”¹ became a presidential executive order. The president prohibited the entry of all nationals from seven designated Muslim-majority countries and ordered the government to conduct a worldwide review of the information it received from those countries about their nationals who sought entry to the United States.² This first of what turned out

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¹ *Trump v. Hawaii*, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting).

² Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017).

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to be three “entry bans” swept the most broadly, covering all types of potential immigrants and visitors, including lawful permanent residents. It emerged without much by way of inter-agency deliberation. It sowed confusion and disarray at airports upon its release and sparked significant protests across the country.³

Instantly, private litigants and state attorneys general rushed to federal court to enjoin the unprecedented assertion of presidential power to exclude non-citizens from the United States. Courts in the Ninth Circuit quickly enjoined the first order.⁴ After its rebuke at the court of appeals,⁵ the administration issued a second order, again directing a worldwide review of foreign states’ security measures, while keeping a set of slightly narrower exclusions in place pending the review.⁶ In September 2017, with the worldwide review complete, the Trump administration issued its third

³ For a deconstruction of the Trump administration’s failures on this front, both with respect to the entry ban and in other contexts, see W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J.F. 825, 829-35 (2018), available at <http://www.yalelawjournal.org/forum/the-trump-administration-and-the-breakdown-of-intra-executive-legal-process>. As they describe, the executive order “plunged the country into temporary chaos while cabinet members reportedly learned through the media that the new policy had become effective.” *Id.* at 826.

⁴ Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (issuing preliminary injunction).

⁵ Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (denying government’s emergency motion for stay, leaving injunction in place).

⁶ Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). The second order was narrower in scope; it dropped Iraq from the list of countries to which it applied and excepted lawful permanent residents and diplomatic visas. *Id.* §§ 1(g), 3. The order made its reasoning explicit: “In light of the conditions in these six countries, until the assessment . . . is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high.” *Id.* § 1(f). Before the order could go into effect, district courts in Hawaii and Maryland enjoined it. *See* Hawai’i v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017); Int’l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017). On appeal, the Ninth and Fourth Circuits affirmed the injunctions. *See* Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017); Int’l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017). The Supreme Court issued a partial stay, allowing the Order to go into effect except for foreign nationals with “bona fide relationship[s] with a person or entity in the United States.” Trump v. Int’l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017). However, both cases were subsequently found to be moot after provisions of the order expired and the Supreme Court vacated and remanded the decisions. Trump v. Hawaii, 138 S. Ct. 377 (2017) (mem.); Trump v. Int’l Refugee Assistance Project, 138 S. Ct. 353 (2017) (mem.).

order: Presidential Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. In it, the president announced the results of the review and imposed a set of indefinite exclusions applicable to nationals from eight foreign states, six of which had overwhelmingly Muslim populations. The proffered justification was that the states' systems for sharing information about their nationals did not meet the government's security standards.⁷

All of the lower courts that considered each iteration of the entry ban concluded that it likely contained legal defects, either because aspects of the orders exceeded the statutory authority of the president or because they violated the Constitution.⁸ But in a 5-4 ruling announced at the end of October Term 2017, the Supreme Court of the United States turned this tide of litigation back, effectively upholding the proclamation.⁹ The Court concluded that the challengers' statutory claims were

⁷ Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017). The proclamation banned nationals of the listed states from entering the country on certain types of visas. Chad, Libya, and Yemen were labeled counterterrorism partners with inadequate information-sharing practices; for nationals from those countries, immigrant visas and nonimmigrant business or tourist visas were suspended. *Id.* §§ 2(a), (c), (g). Iran, North Korea, and Syria "regularly fail[ed] to cooperate" or "[did] not cooperate" in identifying security risks. All immigrant and nonimmigrant entry from these countries was suspended, except for Iranians entering on nonimmigrant student and exchange visas. *Id.* §§ 2(b), (d), (e). For Venezuela, the proclamation suspended entry of certain government officials and their immediate family members on nonimmigrant business or tourist visas. *Id.* § 2(f) (ii). And for Somalia, the proclamation suspended entry of nationals seeking immigrant visas and required additional scrutiny of nonimmigrant visas. *Id.* § 2(h)(ii). The order also contained a case-by-case waiver provision. *Id.* § 3(c)(i).

⁸ See, e.g., Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017) (enjoining the second executive order on Establishment Clause grounds); Hawai'i v. Trump, 265 F. Supp. 3d 1140 (D. Haw. 2017) (enjoining the presidential proclamation on statutory grounds, for exceeding authority under § 1182(f) and violating § 1152(a)). The district court in *Washington v. Trump* enjoined the section of the first executive order that halted refugee admissions, as did the Hawaii district court. *Washington*, 2017 WL 462040. In October 2017, as the third order was being litigated, the administration released an executive order resuming refugee admissions, thereby mooting the issue. Exec. Order No. 13,815, 82 Fed. Reg. 50,055 (Oct. 27, 2017). Ultimately, the INA delegates to the president the power to determine the number of refugees admitted each year, and a statutory challenge to a decision to eliminate admissions would have faced an uphill battle.

⁹ *Trump v. Hawaii*, 138 S. Ct. at 2392.

wrong and that they had failed to establish the likely success of their constitutional claims. In *Trump v. Hawaii*, the Court elided powerful evidence of discriminatory motive and proclaimed vast presidential powers at the intersection of two highly sensitive and contested realms of regulation—national security and the policing of entry to the nation.

In the immediate aftermath of the Supreme Court’s decision, commentators widely decried it as an abdication to the will of the president. A debate began in earnest over whether the decision would become the Roberts Court’s *Korematsu v. United States*—the reviled decision by a previous generation to accept the government’s national security justifications for interning Japanese Americans during World War II.¹⁰ President Trump, after all, had justified his call to shut down Muslim immigration to the United States by claiming that Franklin D. Roosevelt had done the “same thing.” Chief Justice Roberts forcefully resisted the analogy and condemned *Korematsu*. But whether the analogy was apt, Justice Sotomayor painstakingly laid out the evidence of the president’s anti-Muslim motive in her dissenting opinion, joined only by Justice Ginsburg. If we were to take the man who signed the presidential proclamation at his word, Sotomayor seemed to be saying, he was intent on curtailing Muslim immigration to the United States. And he came to this view, in no small part, through

¹⁰ *Korematsu v. United States*, 323 U.S. 214 (1944). For representative examples of the debate, see Joseph Fishkin, *Why Was Korematsu Wrong?*, BALKINIZATION (June 26, 2018), <https://balkin.blogspot.com/2018/06/why-was-korematsu-wrong.html>; Aziz Huq, *The Travel Ban Decision Echoes Some of the Worst Supreme Court Decisions in History*, Vox (June 26, 2018), <https://www.vox.com/the-big-idea/2018/6/26/17507014/travel-ban-interment-camp-supreme-court-korematsu-muslim-history>; Richard Primus, *The Travel Ban and Inter-Branch Conflict*, TAKE CARE (June 26, 2018), <https://takecareblog.com/blog/the-travel-ban-and-inter-branch-conflict>.

familiar stereotyping and by crediting anti-Muslim propaganda.¹¹

Chief Justice Roberts's opinion does indeed amount to an abdication of judicial responsibility—but not for all of the reasons bandied about in the aftermath of the opinion's release, and not necessarily with the far-ranging implications feared. The chief justice is on firm analytical and historical ground in rejecting the claim that the president had exceeded his statutory authority. But the Court's analysis goes awry in two ways. First, the Court treats the president's proclamation as the product of an ordinary presidency and a properly functioning executive branch; the Court refuses to see our particular president for who he actually revealed himself to be. Second, and more important, in considering whether the president's proclamation violated anti-discrimination norms embodied in the Establishment Clause, the Court applies a novel and toothless standard of review that prevents the courts from striking down discrimination on racial, religious, or other invidious grounds, in the selection of immigrants to the United States, as long as the government can also present a facially plausible reason for its actions. The Court does not go so far as to say the Constitution does not apply to the president's exclusion judgments, but in permitting discrimination that almost certainly would have been struck down in another regulatory context, it might as well have.

In reaching its breathtaking conclusion, however, the Court did not utterly compromise the power of judicial review over all matters immigration and presidential power. Herein lies a

¹¹ As Justice Sotomayor noted, on the campaign trail, President Trump called for “a total and complete shutdown of Muslims entering the United States” and stated that “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.” As he signed the first executive order, he read the title – Protecting the Nation from Foreign Terrorist Entry into the United States – and stated “We all know what that means.” *Trump v. Hawaii*, 138 S. Ct. at 2435-38. (Sotomayor, J., dissenting).

crucial coda to *Trump v. Hawaii*. The battle over the scope of the president's power to enforce the immigration laws has only just begun—in fact, it began in earnest in the Obama years. But there is no reason to treat the deference extended in *Trump v. Hawaii* in a totalizing fashion, even though Chief Justice Roberts invokes the sensitivity of immigration and national security each time the going gets rough in his analysis. For one thing, the weakness of the statutory arguments in this case notwithstanding, the intricacies of the INA do cabin the scope of the president's power. More important, lower courts and commentators can and should actively read *Trump v. Hawaii* as limited to its very particular context—to an anti-discrimination claim against the decision to exclude non-citizens on the precipice of entry and outside the custody and control of the United States.

With respect to immigration enforcement generally, including at the border, long-recognized constitutional constraints apply to the president's choices (and Congress's, for that matter), even when they can be cloaked with the veneer of national security. The courts have been especially crucial in their application of the Fifth Amendment's Due Process Clause to the federal government's enforcement policies. The Court in *Trump v. Hawaii* did not purport to overturn any of the precedents that rely on the clause to limit the government's power, nor would the mode of analysis in *Trump v. Hawaii* even make sense in a due process inquiry, which does not revolve around the decision-maker's motives. Serious questions about the actual depth or extent of the protections afforded under the clause remain unanswered and the subject of hot-button litigation. But nothing in *Trump v. Hawaii* prevents the ongoing and vigorous application of the clause to limit behavior that would be deemed abusive regardless of context. The lower courts, therefore, should continue to apply and even

extend the reach of the Due Process Clause, in all cases where the government exerts control or coercive authority over non-citizens, particularly through detention, deportation, and the abrogation of reliance interests.

I. Of Statutes and Constitutions

Though the import of *Trump v. Hawaii* rests mainly with its constitutional analysis, we should begin where is traditional, with the statute at issue. Statutory claims against government action are often safer than constitutional ones. In immigration law, in particular, where courts historically have extended great deference to the political branches, and the scope of the rights of immigrants is either limited, uncertain, or non-existent, litigants often turn to statutory strategies. Our recent jurisprudential past is filled with preemption rather than equal protection claims against state laws designed to crack down on illegal immigration,¹² and constitutional avoidance claims meant to produce narrow readings of statutes and enable courts to side-step profound questions about the reach of constitutional due process.¹³ In this vein, challengers of the entry-ban orders forcefully argued that President Trump's actions exceeded the president's statutory authority and therefore had no legal basis.

¹² See, e.g., Arizona v. United States, 567 U.S. 387 (2012); United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012); Georgia Latino Alliance for Human Rights v. Governor of Georgia, 691 F.3d 1250 (11th Cir. 2012).

¹³ See, e.g., Brief for Petitioner at 27-28, *Zadvydas v. Davis*, 533 U.S. 678 (2001) (No. 99-7791), 2000 WL 33709238 (arguing against statutory construction allowing indefinite detention as such a reading would "raise serious constitutional questions"). The Court ultimately accepted this argument, reading an implicit limitation to post-removal-period detention to avoid a due process problem. *Zadvydas*, 533 U.S. at 689-90. See also Brief for Respondents at 33, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (No. 15-1204), 2016 WL 6123731 ("The Court need not decide the constitutional issues, because a 'fairly possible' construction of the detention statutes is available that avoids these serious constitutional concerns.").

President Trump grounded each of his executive actions in a simple and breathtaking provision of the INA. Section 212(f) gives the president a mostly unqualified power to deny entry to “any aliens or class of aliens” whose entry would be “detrimental to the United States.”¹⁴ In *Trump v. Hawaii*, the Supreme Court rejected a central conclusion reached by the Ninth Circuit and pressed widely by the advocacy community—that the president’s use of section 212(f) was inconsistent with the complex statutory scheme Congress had elaborated over the years to screen potential immigrants, including for national security risks.¹⁵

Not too surprisingly, Chief Justice Roberts begins with straightforward textualism. The terms of section 212(f) itself are quite clear and broad. The power delegated contains no qualifications, except to establish that the power to deny entry kicks in when the president finds that entry would be detrimental to the nation’s interests. Indeed, the legislators who drafted section 212(f) in 1952 understood its breadth. Representative Emanuel Celler argued that it did too little to constrain the reasons the president might invoke to suspend immigration, permitting “the

¹⁴ 8 U.S.C. § 1182(f).

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Id.

¹⁵ Respondents made such an argument in briefing, echoing the Ninth Circuit decision the Court ultimately reversed and remanded. Brief for Respondents at 30-32, 36-37, 45-50, *Trump v. Hawaii*, 138 S.Ct. 2392 (2018) (No.17-965), 2018 WL 1468304; *Hawaii v. Trump*, 878 F.3d 662, 687 (9th Cir. 2017) (concluding that indefinite suspension of entry “nullifies . . . existing statutory scheme”). See also Peter Margulies, *Trump’s Travel Ban at the Supreme Court: Deference Joined by Nudges Toward Civility*, LAWFARE (June 26, 2018), <https://www.lawfareblog.com/trumps-travel-ban-supreme-court-deference-joined-nudges-toward-civility> (“Unfortunately, the majority’s broad view of 1182(f)’s delegation missed its more tailored role in the INA’s overall plan.”); Peter Margulies, *The New Travel Ban: Undermining the Immigration and Nationality Act*, LAWFARE (Sept. 25, 2017), <https://www.lawfareblog.com/new-travel-ban-undermining-immigration-and-nationality-act>.

President of the United States willy-nilly, on good grounds, or—if I may be facetious—on coffee grounds, to suspend totally any immigration into this country.”¹⁶ Others argued that such broad authority, while perhaps appropriate as a war-time emergency measure, should never be made a permanent fixture of immigration law. But that, by the statute’s terms, is what Congress did.

For the Court, the worldwide review of foreign governments’ cooperation in providing information about their nationals needed by the United States to assess security risks more than sufficed to meet the minimal national interest prerequisite of the statute. Moreover, the proclamation itself contained findings more extensive than any provided by any previous president invoking section 212(f)¹⁷—the sort of national security findings whose veracity or relevance courts rarely second guess. It didn’t matter that no previous presidential order swept quite as broadly, or that the worldwide review accompanying Proclamation 9645 only came after the botched roll out of an incompletely vetted initial order in the first week of Trump’s presidency.¹⁸

The Court then goes on to reject Hawaii’s claim that the structure of the INA precludes the president’s actions—that he can supplement but not supplant Congress’s work. The Court recognizes the president’s actions as complements to the security screenings laid out in meticulous detail in the immigration code. But, “in any event,” the Court writes, “no Congress that wanted

¹⁶ 98 Cong. Rec. 4304 (1952) (statement of Rep. Celler). When another congressman interrupted, to remind Celler that the provision permits exclusion only when entry would be “detrimental to the interest of the United States,” Celler responded that this language was no safeguard, since the decision of whether entry would be detrimental to the United States was left entirely to the president. *Id.* at 4305.

¹⁷ *Trump v. Hawaii*, 138 S. Ct. at 2409.

¹⁸ See Eggleston & Elbogen, *supra* note 3 at 830 (“Neither the White House nor the Department of Justice appears to have asked career lawyers within the Department of State, the Department of Defense, the Department of Homeland Security, or any other agency to review EO-1 before it was issued.”).

to confer on the President only a residual authority to address emergency situations would ever use language of the sort in [section 212(f)]—language that by its terms vests authority in the president to make exclusion beyond what the INA provides.¹⁹

We have seen the claim that the complexity of the INA limits presidential power before. Leading opponents of President Obama’s efforts to grant deferred action and work authorization to millions of unauthorized immigrants living in the United States—to the parents of U.S. citizens and lawful permanent residents—invoked the INA to claim that he acted unlawfully, usurping Congress’s comprehensive authority to control immigration policy. The statutory context for the debate over President Obama’s relief plans differed in important respects from section 212(f), not least because President Obama actually had far less of an explicitly textual basis for his actions than President Trump. But opponents of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) relied on the same structure of an argument and succeeded in convincing lower courts that President Obama’s proposal went beyond the reticulated statutory scheme

¹⁹ *Trump v. Hawaii*, 138 S. Ct. at 2412. The second statutory argument the Court rejects should give us more pause. In 1965, Congress amended the INA to provide that “no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.” 8 U.S.C. § 1152(a)(1). The Court is correct that this provision clearly applies only to noncitizens seeking visas for lawful permanent residency, because in immigration parlance, all other would-be immigrants (students, tourists, temporary workers) are “nonimmigrants.” *Trump v. Hawaii*, 138 S. Ct. at 2414–15. Even so, the Court’s broader rejection of the claim—that Hawaii confused visa issuance (which consular officials do) and admissibility determinations (what the president made under § 212(f))—is not obvious and reads like a legalistic attempt to draw a fine but not-so-meaningful distinction. On this question, compare Josh Blackman, *The Legality of the 3/6/17 Executive Order; Part I: The Statutory and Separation of Powers Analyses*, LAWFARE BLOG (Mar. 11, 2017, 9:47 PM), <https://www.lawfareblog.com/legality-3617-executive-order-part-i-statutory-and-separation-powers-analyses> (distinguishing between entry and visas), with Ian Samuel, “*See the Sights of Terminal 4!*” A Reply to Section 1182(f) Enthusiasts, 36 YALE J. ON REG.: NOTICE & COMMENT (Feb. 11, 2017), available at <http://yalejreg.com/nc/see-the-sights-of-terminal-4-a-reply-to-section-1182f-enthusiasts-by-ian-samuel/> (arguing that the distinction is illogical).

Congress had created to concretize the nation’s commitment to humanitarian relief and family unification.²⁰

If the Supreme Court had followed the Ninth Circuit and limited this “facially broad grant of power”²¹ with an appeal to the complex statutory regime that Congress subsequently erected for processing visas and screening for national security risks, it would not just have flouted the narrow textualist conventions beloved by conservative judges and lawyers.²² It would have cast legal uncertainty over numerous presidential policy initiatives across history, not just DACA and DAPA. Take, for example, the president’s invention of U.S. refugee policy. From the end of World War II until 1980, presidents used discrete powers delegated to them by Congress to admit hundreds of thousands of refugees to whom Congress had not otherwise opened avenues for entry. Even after Congress objected, presidents continued their actions, advancing a vision of the country as open to persons fleeing oppression.²³ Trump was arguably on firmer statutory

²⁰ Texas v. United States, 809 F.3d 134, 179 (5th Cir. 2015) (holding that the INA “expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present” which does not include those “who would be eligible for lawful presence under DAPA were it not enjoined”), *aff’d by an evenly divided court*, United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam). The Fifth Circuit’s ruling enjoined DAPA as well as the expansion of a 2012 program—Deferred Action for Childhood Arrivals (DACA). Several legal challenges to DACA during the Obama years failed. *See, e.g.*, Crane v. Johnson, 783 F.3d 244 (5th Cir. 2015) (holding that ICE employee must bring claim through processes for adjudicating civil service disputes); Arpaio v. Obama, 797 F.3d 11 (D.C. Cir. 2015) (finding that sheriff of Maricopa County lacked standing to challenge DACA), *cert. denied*, 136 S. Ct. 1250 (2016). President Trump has attempted to rescind the program, and though he has been stymied by the courts thus far, Texas, among others, has filed suit in the same district court that enjoined DAPA, arguing that DACA exceeded the president’s authority, thus setting up a clash for the Supreme Court to resolve eventually. *See* Texas v. United States, No. 18-00068 (S.D. Tex. May 1, 2018).

²¹ Trump v. Hawaii, 138 S. Ct. at 2410.

²² The Court does address Hawaii’s claims that the legislative history of § 212(f), coupled with past executive practice, which involved narrower applications of § 212(f), bolstered the state’s position, but it finds each of these reasons wanting. The Court’s exploration of past executive practice is particularly instructive, because it underscores how past uses of the suspension power have been largely without standards; presidents have invoked § 212(f) to serve not just national security goals, but also their own policy and diplomatic goals. *Trump v. Hawaii*, 138 S. Ct. at 2409-10.

²³ *See* ADAM B. COX & CRISTINA M. RODRIGUEZ, THE PRESIDENT AND IMMIGRATION LAW, Chapter 2 (forthcoming Oxford University Press 2019).

ground than his predecessors, because the delegation on which he relied was written in clear and broad terms, whereas the parole power employed by numerous twentieth-century presidents to admit refugees was drafted for individualized, not categorical, humanitarian relief.²⁴

Of course, each of these episodes of statutory creativity can be distinguished from one another with fact-based, lawyerly acumen, to achieve a desired result. But the mode of statutory analysis pressed by Hawaii is inconsistent with how presidents have acted under the INA for decades. We would be wise to think twice before limiting presidential authority over immigration by invoking an approach to statutory interpretation and a conception of congressional policy tailored to the outcomes we seek in an individual case. As Adam Cox and I have shown in our work together, the president has been a vital immigration policy maker throughout our history, complementing and challenging Congress where the legislature has otherwise been unable or unwilling to address genuine policy problems. That role has depended on making good use of statutes.

What is more, as Cox and I also have argued, the form of statutory analysis advanced in *Trump v. Hawaii* is indeterminate and gives far too much credence to the notion that the immigration code constitutes an internally consistent and comprehensive plan.²⁵

²⁴ 8 U.S.C. § 1182(d)(5)(A).

The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Id.

²⁵ Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 158-59 (2015).

Despite having enacted and repeatedly amended a sprawling immigration code, Congress has not erected a comprehensive plan for the implementation of the immigration laws. Initially adopted in 1952 and amended in significant fashion many times since, the INA consists of “a long series of legislative accretions.”²⁶ Each addition to the code embodies the weighing of different and even conflicting priorities by multiple Congresses across time. As we have written: “[t]he legislative ‘plan’ of the INA is so full of internal contradictions and complexities as to be nearly impossible to characterize as pursuing concrete ‘priorities’ at anything other than the highest level of generality.”²⁷ On the merits, and in the case of section 212(f), it does not seem inconsistent to have an elaborate screening process with detailed rules for consular and border officials to follow and to also give the president broad power to prevent the entry of aliens. The former establishes rules for the operation of the vast immigration bureaucracy, and the latter gives the president a power almost certain to be occasional and targeted, even if in particular instances it become a trump of the ordinary operation of immigration law.

The statutory problem with President Trump’s orders stemmed not from his interpretation of his authority, but from the breadth of the very authority Congress delegated. Only Congress (and in a less direct fashion the electorate) can do anything about the scope of the delegation. Indeed, in the hands of another president, a similarly broad and targeted executive order would have been legal because authorized under statute. But in light of what President Trump’s executive orders have revealed to us about the potential of section 212(f), Congress should scale back the power it once gave.

²⁶ *Id.* at 158-59.

²⁷ *Id.* at 159.

It could make explicit the numerous limitations advocates sought to pull from the interstices of the INA, including by requiring that the president present detailed factual findings to justify his exclusions, or that exclusions be limited to times of national emergency, or to particular human rights violators or bad actors (as past presidents have done).

Until Congress takes steps of this sort (a legislative fantasy in our current polarized world), section 212(f) is the most capacious single expression of our contemporary reality, in which the president stands at the center of American immigration policy. This is not to say that the INA does not constrain the president. Even though section 212(f) delegates broadly, the intricate statutory scheme does keep executive power within bounds. The president could not, for example, begin deporting noncitizens on grounds not specified by Congress. But the breadth of the president's power, as he sits atop the immigration enforcement machinery, makes it all the more important to be clear and determined about the constraints the Constitution places on his behavior. This realization is part of what makes *Trump v. Hawaii* so dispiriting, because the opinion profoundly limits the reach of constitutional review.

II. The President, the Presidency, and Discrimination

A. The Facial Presidency

In his opinion for the Court, Chief Justice Roberts reasons about the challenges the president faces and his national security decisionmaking in the abstract. He treats the executive branch as consisting of a national security bureaucracy under the direction of a chief executive, which together manages our perilous world by bringing expertise, gathered intelligence, and the nuances of

the foreign policy craft to bear.²⁸ The Court certainly expresses disappointment at the anti-Muslim statements made by the man who is actually president, comparing him unflatteringly to his predecessors who spoke about Muslims and minorities using words of inclusion. But the Court resists treating the decision-making process behind the proclamation as the product of that actual person. The opinion comes close to positing a world where the president is nothing more than a synecdoche, and where Donald Trump and his Twitter account do not exist. It treats the process that produced the final version of the entry ban as part of an ordinary presidency operating in our era of heightened national security deference, rather than as the culmination of a very particular and highly insidious political process. It therefore accepts the national security justification for the proclamation offered by the government in litigation at face value and dismisses the copious evidence of the president's anti-Muslim intent as legally beside the point.

In the aftermath of the opinion's release, a piece of conventional wisdom about this approach began to emerge among the decision's supporters. According to this view, Chief Justice Roberts acted to preserve the prerogatives of the presidency, ensuring that future leaders had the ambit to make tough national security choices without the Court looking over their shoulders to scrutinize their intentions. This observation is a distraction. The institutional prerogatives the Court supposedly preserved would not have been threatened by meaningful judicial consideration of a president's discriminatory motives.

²⁸ *Trump v. Hawaii*, 138 S. Ct. at 2421. (“But we cannot substitute our own assessment for the Executive’s predictive judgments on [national security] matters, all of which ‘are delicate, complex, and involve large elements of prophecy.’” (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948))).

To put it bluntly, no future president needs to feel free to indulge his prejudices in the making of national security or immigration policy. To strike down the proclamation based on the record of Donald Trump’s statements revealing his reasons for signing the proclamation would not have chilled decision-making genuinely designed to mitigate risks. Even in a future world in which the Court had struck down the proclamation issued by the current occupant of the office, policies that might require nationality classifications or have a disparate impact on certain groups would still have benefitted from the deferential review afforded national security-related immigration judgments, for reasons I explore in more detail in Part III of this essay.²⁹ Holding one president to account for blatantly discriminatory conduct would not have changed that.

In the course of turning *Trump v. Hawaii* into a separation of powers case, with an archetypal presidency in mind, the Court begins in a conventional place, but then takes the opinion in a radical direction. Chief Justice Roberts opens by articulating a standard of review that embodies the abstract concept of the presidency. In *Kleindienst v. Mandel*, the Court acknowledged the propriety of a “circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen.”³⁰ The Court in *Mandel* limited review of the attorney general’s decision in that case to deny a visa to a revolutionary Marxist, who had been invited to speak at Stanford University, to whether the executive had given a “facially legitimate and bona fide reason”

²⁹ A decision striking down the proclamation could have given future presidents and officials the incentive to “hide” any prejudicial or biased reasons for seeking particular immigration restrictions, but that is just a feature of intent analysis. This incentive is part of what makes it so hard today to prove that facially neutral laws have invidious intent. That clear statements of discriminatory intent are so rare is precisely what makes President Trump’s repeated utterances all the more extraordinary and worth calling out.

³⁰ *Trump v. Hawaii*, 138 S. Ct. at 2402.

for the decision.³¹ This standard means that the Court will neither look behind the exercise of discretion nor balance the government's interests against the interests of U.S. citizens, as long as a facially plausible, good faith reason for the immigration action at issue exists.³²

Chief Justice Roberts makes very clear that the *Mandel* standard alone would have been enough to decide the case. On its first requirement, he seems correct; the national security justifications for suspending the entry of the groups listed in the proclamation would seem to satisfy facial plausibility; to say otherwise really would substitute the Court's national security judgment for the president's and threaten the presidency's institutional prerogatives.³³ But in finding the worldwide review to be bona fide, Chief Justice Roberts doubles down on the formality

³¹ *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972) (limiting review of attorney general's denial of admission where a "facially legitimate and bona fide reason" for action existed). In *Kerry v. Din*, in which the Justices considered whether the Due Process Clause had been violated by the cursory denial of a visa to the spouse of a U.S. citizen on terrorism-related grounds, Justice Kennedy in concurrence deploys the standard similarly, emphasizing that it has special import in immigration cases that also implicate national security. He declined to decide whether a right to a protected liberty interest (in family unity across the border) existed in the case. Instead, he relied on *Mandel*'s "facially legitimate and bona fide" standard to find that any due process interests were met when the government provided notice of its denial of admission under the relevant INA provision, as the Court's inquiry into the attorney general's visa decision was limited. *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring). The plurality, by contrast, held that denying visa to the spouse of a U.S. citizen did not violate the Due Process Clause. *Id.* at 2138 (plurality opinion).

³² It can be unproductive, even pointless, to compare the ins and outs of different deferential standards of review, but it's ultimately not clear that the *Mandel* standard is meaningfully different from the rational basis review the courts apply when assessing classifications on the basis of nationality or alienage, except that one applies to exclusion and the other applies to the way the federal government discriminates against immigrants already present in the United States. The rhetoric about sovereign authority may be more muscular in *Mandel*-type cases, and the rational basis standard may purport to look beyond facial neutrality to weigh relative government and individual interests, but both standards embody considerable deference to the federal government's immigration judgments and presume good faith in the enactment of nationality classifications. It remains to be seen, however, how the federal courts would deal with policies targeting immigrants in the United States supported by the same considerable evidence of animus that existed in *Trump v. Hawaii*, i.e., whether the rational basis standard would permit recognition of discriminatory motive to override the immigration interest. For further discussion of this point, see Part III of this essay.

³³ *Trump v. Hawaii*, 138 S. Ct. at 2409.

of his analysis, in a way that is arguably inconsistent with the standard itself. He prioritizes the hypothetical president, for whom the worldwide review would have been a sincere exercise and whose conclusions drawn from the review would have been plausible. He does not engage with the possibility that this particular president's judgments—that the whole worldwide review process—were in bad faith, with a pre-determined outcome.

To even question the president's good faith in setting national security policy might seem in tension with the heavy dicta in numerous Court opinions calling for delicacy. But unless some inquiry into the integrity of the reason given by the executive is permitted under the *Mandel* standard of review, the concept of "bona fide" does no work. It could well have been that the worldwide review itself was conducted in good faith by the officials who performed it, and there may be no reason to doubt the conclusions drawn about the reliability of the information provided by the countries listed in the proclamation. But the Court does not even explore this question, preferring instead to emphasize facial plausibility.³⁴ The Court thus leaves it to Justices Breyer and Kagan in dissent to call for more of a probe into whether the national security claims were concocted to justify a pure political choice.³⁵

³⁴ *Id.* at 2418-20. (quoting *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976)) ("The upshot of our cases in this context is clear: 'Any rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of entry and national security is highly constrained.").

³⁵ Justice Breyer, joined by Justice Kagan, sought more evidence to help determine whether the president had bad motives, namely by probing whether the waivers included in the proclamation, which would enable case-by-case security assessments, were genuine limits on the order or just makeweights designed to give credence to the national security concerns. As Justice Breyer noted in his dissent, some evidence—including a sworn affidavit from a consular official and a report on the U.S. Embassy in Djibouti—suggested that the waiver process was "window dressing." *Trump v. Hawaii*, 138 S. Ct. at 2432-33 (Breyer, J., dissenting). On July 29, 2018, a class action complaint was filed against DHS and related agencies for "failure to provide a meaningful, orderly, and accessible [waiver] process," arguing violations of the APA, the INA, and due process rights. First Amended Complaint, *Emami v. Nielsen*, No. 3:18-cv-01587, Dckt. No. 34, at *4 (N.D. Cal. July 29, 2018).

Still and all, this application of the *Mandel* standard, though worthy of debate, is not what makes the decision so radical. Chief Justice Roberts could have left it there. The outcome would have been startling. But it would not have clearly licensed discrimination by the president, even though it would still have seemed willfully obtuse about the president’s motives. Instead, in accepting the federal government’s invitation to peer behind the order and apply rational basis to it, the chief justice’s opinion effectively grants that license.

B. Rational Basis Goes Awry

As Adam Cox, Ryan Goodman, and I observed in the immediate aftermath of the opinion’s release, the Court suggests that, at least in national security-tinged exclusion decisions, even an established discriminatory motive would not be enough to invalidate the government’s actions, as long as another, facially legitimate reason for the exclusion existed as well.³⁶ The Court thus gives the president, and Congress for that matter, a free pass to violate constitutional equality norms when deciding who may enter the country and who may not, as long as the political branches can ascribe another plausible motive to their actions—a feat that will not be difficult for the government to meet, given that the Court is usually loath to challenge assertions of national security needs.

³⁶ Adam Cox, Ryan Goodman, & Cristina Rodriguez, *The Radical Supreme Court Travel Ban Opinion – But Why It Might Not Apply to Other Immigrants’ Rights Cases*, JUST SECURITY (June 27, 2018), <https://www.justsecurity.org/58510/radical-supreme-court-travel-ban-opinion-but-apply-immigrants-rights-cases/> (describing the Court as “essentially admit[ting] that the policy could very well be based on unconstitutional grounds, but conclud[ing] that this fact is irrelevant so long as a separate and additional non-illicit reason for the policy is available.”). For an argument that takes this view even further, see Aziz Huq, *The Future of Constitutional Discrimination Law After Hawai’i v. Trump*, TAKE CARE (June 26, 2018), <https://takecareblog.com/blog/the-future-of-constitutional-discrimination-law-after-hawai-i-v-trump> (characterizing the opinion as affirming the view that “[s]o long as the government asserts some kind of public security justification when it wishes to coerce or confine, a litigant alleging bias must lose.”).

As we noted, this form of deference “marks a departure from the past, not continuity with it.”³⁷ The so-called plenary power—the specific name given to immigration deference—has never before been used to uphold an immigration policy that would have been unconstitutional under ordinary constitutional review at the time of the immigration decision. But Chief Justice Roberts articulates a standard of review that incorporates the very possibility of such a holding. Accordingly, for the first time since the era of Chinese exclusion in the late nineteenth century, the Court upholds an act that a reasonable observer could have concluded was intended to exclude people on the basis of characteristics—religion, in this case—usually deemed illegitimate grounds for state action.³⁸

Perhaps by going down the rational basis road, Chief Justice Roberts sought to assimilate the proclamation with ordinary constitutional law, to demonstrate that the Court was not just rubber stamping an action labeled national security. But his rational basis analysis goes off the rails in two ways and can only be explained by some sort of presidential, immigration, and national security exceptionalism. First, his legal analysis departs from the way courts typically address challenges to facially neutral laws that might be motivated by discriminatory intent. And second, the standard of review he applies is not warranted by the rational basis precedents he cites.³⁹

³⁷ Cox, Goodman, & Rodriguez, *supra* note 36.

³⁸ Cox, Goodman & Rodriguez, *supra* note 36; see also Adam Cox, *Why a Muslim Ban is Likely to Be Held Unconstitutional: The Myth of Unconstrained Immigration Power*, JUST SECURITY (Jan. 30, 2017), <https://www.justsecurity.org/36988/muslim-ban-held-unconstitutional-myth-unconstrained-immigration-power/> (“The Supreme Court has never upheld an immigration policy that openly discriminated on the basis of race or religion during a period of constitutional history when such a policy would have been clearly unconstitutional in the domestic context.”).

³⁹ Cf. *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005) (anti-discrimination component of Establishment Clause); *Larson v. Valente*, 456 U.S. 228 (1982) (same).

In grappling with the meaning of a facially neutral law, Chief Justice Roberts at least begins on firm ground. He says that rational basis requires considering whether the entry policy is plausibly related to the government's stated objective to protect the country and improve immigration vetting processes. He then turns to where he should—to the formal, facial reach of the proclamation—concluding correctly that the order is facially neutral as to religion. This feature is what allows him to say that the presidential proclamation is nothing like the order to intern Japanese Americans during World War II upheld by the Court in *Korematsu*—one of the deepest stains on the Court's reputation, which Chief Justice Roberts make a production of expressly overruling.⁴⁰

But of course, it's only his tendency toward formalism that allows him to reach his *Korematsu* conclusion with indignation. Even a facially neutral law can be motivated by intent to discriminate, making it no better or more constitutional than a law that classifies on its face. And a facially neutral government action that might otherwise survive rational basis scrutiny becomes a different constitutional animal altogether when there is evidence of intent to discriminate.⁴¹

Chief Justice Roberts's own opinion, not to mention Justice Sotomayor's incredulous dissent, lays out evidence of intent aplenty to grapple with. The record was replete with statements that reasonably could have been construed as evincing discriminatory intent, by no less than the chief decisionmaker—the actual signatory to the government orders—himself. Chief Justice Roberts might have concluded or intimated that President Trump's litany of proclamations concerning Muslim immigrants

⁴⁰ *Trump v. Hawaii*, 138 S. Ct. at 2423.

⁴¹ *Id.* at 2442 (Sotomayor, J., dissenting) ("Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis.").

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and Islam did not constitute sufficient evidence of intent. Chief Justice Roberts could have discounted campaign statements and dismissed political rhetoric as non-probative of executive branch motivation.⁴² But he did not take this tack. Perhaps the totality of the context, including the shoddy roll-out of the initial order, would have made such a conclusion unpersuasive. Indeed, evidence of intent to discriminate rarely gets much better than what the Court had in front of it.⁴³

Instead, Chief Justice Roberts makes the case that the president's statements were untoward but not legally relevant, because *even* if the president had a discriminatory intent, his actions should be upheld if supported by another, legitimate basis.⁴⁴ He says, “we may consider plaintiffs’ extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.”⁴⁵ And he concludes, “because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.”⁴⁶

⁴² See, e.g., Eugene Kontorovich, *The 9th Circuit’s Dangerous and Unprecedented Use of Campaign Statements to Block Presidential Policy*, WASH. POST (Feb. 9, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/09/the-9th-circuits-dangerous-and-unprecedented-use-of-campaign-statements-to-block-presidential-policy/> (“There is absolutely no precedent for courts looking to a politician’s statements from before he or she took office, let alone campaign promises, to establish any kind of impermissible motive.”); see also Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 129, 138 (2017) (detailing categories of presidential speech and arguing that courts generally should not rely on statements “offered in the spirit of advocacy, persuasion, or pure politics” except in a subcategory of cases where presidential speech provides evidence of a “constitutionally impermissible purpose”).

⁴³ *Trump v. Hawaii*, 138 S. Ct. at 2435 (Sotomayor, J., dissenting) (“The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.”).

⁴⁴ *Id.* at 2418 (“[T]he issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core executive responsibility.”).

⁴⁵ *Id.* at 2420.

⁴⁶ *Id.* at 2421.

Though the opinion doesn't quite say it in these terms, Chief Justice Roberts appears to be rejecting the possibility of mixed motives, or at least the possibility that a policy with a plausible legitimate motive might be struck down because an illicit motive also drove its promulgation. This is not the way the Court typically reviews facially neutral laws where allegations (and evidence) of discriminatory intent have been raised. Though Hawaii based its claims against the proclamation in the Establishment Clause, the Court's equal protection precedents are illuminating here in underscoring the implications of the standard of review that Chief Justice Roberts offers.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court makes clear that the intent standard announced in *Washington v. Davis* does not require a showing that the government action at issue rested only on discriminatory grounds.⁴⁷ Its rationale is worth quoting in full:

Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision solely motivated by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a

⁴⁷ Doctrinally, these cases apply to equal protection claims, not ones arising under the Establishment Clause. But there is no apparent reason why the logic of the former would not apply to the latter—why religious-based animus should require one test of causation, whereas race-based animus requires another.

motivating factor in the decision, this judicial deference is no longer justified.⁴⁸

In the face of such proof, the government can still defend its policy on the ground that it would have been enacted even absent the discriminatory motive.⁴⁹ The Court could have applied this standard, acknowledged the discriminatory motive, but then concluded that legitimate national security concerns were more proximate to the final decision than the bias reflected in the president's statements, or that national security concerns would have led the administration to pursue the course that it did, regardless of the president's malign motivations. It could even have concluded that the government's national security interests outweighed the costs of discrimination—the basic conclusion in *Korematsu*, where the Court purported to apply heightened scrutiny but was similarly unwilling to question the underlying national security rationale (and similarly misled about evidence relevant to the government's claims).⁵⁰

⁴⁸ Vill. of Arlington Heights v. Metropo. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).

⁴⁹ Hunter v. Underwood, 471 U.S. 222, 228 (1985) (striking down Alabama law disenfranchising felons and holding that “[o]nce racial discrimination is shown to have been a ‘substantial’ or ‘motivating’ factors behind enactment of the law, the burden shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor,” a standard Alabama could not meet); cf. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977) (“In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused.”).

⁵⁰ Jed Shugerman, *A New Korematsu: The Travel Ban Ruling Will be the Roberts Court’s Shameful Legacy*, SLATE (June 26, 2018, 3:42 PM), <https://slate.com/news-and-politics/2018/06/trump-v-hawaii-the-travel-ban-ruling-will-be-the-roberts-courts-shameful-legacy.html> (“The justices had asked in oral arguments whether the travel ban’s waiver program—the existence of which the DOJ relied on to argue that the ban was a fair and standard presidential directive—was merely ‘window dressing.’ Statistics and individual cases of denials had already suggested that the waiver process may be a sham. As Jeremy Stahl has reported, a former consular officer said in a sworn affidavit that he had no discretion to actually grant waivers. Another consular officer said ‘the waiver process is fraud’ and has ‘no rational basis.’ It’s fair to ask whether [Solicitor General Noel] Francisco misrepresented the waiver process.”).

Chief Justice Roberts instead assiduously avoids putting the government's national security rational to any kind of test. He doesn't try to answer the admittedly thorny questions of causation these precedents raise,⁵¹ nor does he send the case back to the lower courts to do so. Indeed, the standard of review on which he relies declares this whole anti-discrimination scaffolding irrelevant, because a facially plausible reason was enough to justify an immigration exclusion, even if the exclusion was also motivated by unconstitutional bias.

Interestingly, Chief Justice Roberts chooses to ground this conclusion not in standard rational basis cases reviewing social and economic legislation, but rather in the line of cases known for applying a heightened form of rational basis, in which the Court suspects animus against a group is involved. This turn signals that he understands animus to be part of the case before him, too, and possibly that he hoped to show that the Court's conclusion was not driven by a complete abdication to executive national security judgments. But the applications of these cases—*Moreno v. Department of Agriculture*,⁵² *City of Cleburne v. Cleburne Living Center*,⁵³ and *Romer v. Evans*⁵⁴—represent the second way in which his analysis goes awry.

⁵¹ Perhaps the Establishment Clause context accounts for this elision, though those precedents raise similar questions and put the government to similar proof requirements by looking at the actual context of the decision as opposed to any facially plausible explanation. See *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (“When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality.”); *Trump v. Hawaii*, 138 S. Ct. 2392, 2434 (2018) (Sotomayor, J., dissenting) (“[T]o determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion.”(quoting *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005))).

⁵² Dep’t of Agric. v. Moreno, 413 U.S. 528 (1973).

⁵³ *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

⁵⁴ *Romer v. Evans*, 517 U.S. 620 (1996).

Chief Justice Roberts interprets these rational basis with “bite” precedents as holding that laws otherwise subject to rational basis review will be struck down when *only* animus can explain them—another way of implying that mixed motives do not matter to the case before him. He writes that the cases have the “common thread” that the “laws at issue lack any purpose other than a ‘bare . . . desire to harm a politically unpopular group.’”⁵⁵ Again, because he found “persuasive evidence” that President Trump’s entry suspension had a “legitimate grounding in national security concerns, quite apart from any religious hostility,” he concluded that this line of cases required the Court to “accept that independent justification.”⁵⁶

In dissent, Justice Sotomayor seems to adopt this same approach to *Romer* and its predecessors. She simply concludes that the proclamation had no legitimate purpose. The extensive record of the president’s anti-Muslim utterances both before the proclamation and in relation to it effectively revealed the national security justifications to be a sham—the proclamation instead was issued to express hostility toward Muslims and then dressed up as security vetting. Citing *Romer*, she writes, “the Proclamation is ‘divorced from any factual context from which we could discern a relationship to legitimate state interests,’ and ‘its sheer breadth [is] so discontinuous with the reasons offered for it’ that the policy is ‘inexplicable by anything but animus.’”⁵⁷

⁵⁵ *Trump v. Hawaii*, 138 S. Ct. at 2420 (quoting *Moreno*, 413 U.S. at 534).

⁵⁶ *Id.* at 2421.

⁵⁷ *Id.* at 2441 (Sotomayor, J., dissenting) (quoting *Evans*, 517 U. S. at 632, 635); *see also Cleburne Living Center, Inc.*, 473 U. S. at 448 (recognizing that classifications predicated on discriminatory animus can never be legitimate because the government has no legitimate interest in exploiting “mere negative attitudes, or fear” toward a disfavored group).

While both approaches follow the language and mirror the analysis in *Romer*, it is by no means clear that it was doctrinally necessary in *Trump v. Hawaii* to “prove” that the proclamation had no legitimate purpose. The effort to do so opens the dissent to the critique that it refuses to accord any meaningful respect to the executive’s national security statements, because the dissent, like Roberts, rejects the possibility of mixed motives.⁵⁸ This implication of the dissent may well be driving those who defend the opinion on the ground that it prioritizes respect for the hypothetical presidency and therefore preserves future presidents’ room to maneuver.

But the circumstances surrounding *Romer* ultimately differed in crucial respects from those presented by *Trump v. Hawaii*, because of the very evidence the dissent in the latter uses to discount any legitimate motive on President Trump’s part. The Court in *Romer* had to infer animus from the overbreadth of the enactment before it, because it did not have the extensive direct evidence that the Court did in *Trump v. Hawaii*. The semantic formulation of the “test” in *Romer*—that the policy was inexplicable by anything other than animus against a particular group, which is constitutionally prohibited—was a product of those factual circumstances, not a holding that the presence of

⁵⁸ Perhaps this is the only way to address the causation questions raised by intent analysis. Admitting that a legitimate national security purpose exists is tantamount to concluding that the government action would have been adopted even absent the discriminatory motive. But a reasonable observer knows, according to Justice Sotomayor, that the administration issued its proclamation only because President Trump promised some sort of Muslim ban. Indeed, in any complex institution, it will be almost impossible to eliminate any plausible motive or prove the negative—that absent the malign motive, the government would have done the same thing.

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animus invalidates a government action only when there is no other discernable reason for the action.⁵⁹

In *United States v. Windsor*, Justice Kennedy seems to take this heightened rational basis standard toward the sort of mixed motive analysis that could have led to invalidation of the entry-ban proclamation without rejecting a facially plausible national security purpose. In *Windsor*, the federal government could claim a more plausible interest than the state of Colorado in *Romer* could. Though there is certainly ambiguity about the standard of review he was applying (Justice Kennedy's opinions increasingly eschewed intricate legalistic analysis over the years), he invalidated the Defense of Marriage Act after concluding that “no legitimate purpose *overcomes* the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”⁶⁰

In their dissent in *Trump v. Hawaii*, Justices Breyer and Kagan seem to be willing to take this kind of approach as a matter of law, though they do not frame it as an interpretation of *Romer* rational basis review. For them, the question was whether the proclamation’s “promulgation or content was significantly affected

⁵⁹ For the scholarly debate on the question of whether animus must constitute the sole reason, a primary reason, or simply one reason to justify striking down a law under rational basis, as applied in *Romer* and *Windsor*, see, for example, Susannah W. Pollvogt, *Windsor, Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. Sidebar 204, 213 (2013) (arguing that Justice Kennedy's opinion in *Windsor* treated animus as a silver bullet that “discredited any purported justifications” and that Chief Justice Roberts's dissent suggests that the presence of animus is not enough to invalidate a government action); Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 213, 232 (concluding that the Supreme Court left open in *Windsor* whether animus must be a but-for cause or only part of the purpose of the law, to justify invalidation and describing the “tainting” effect of animus); Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 62 (1996) (noting that there were “poorly fitting but probably rational justifications” in *Cleburne, Moreno*, and *Romer*, suggesting that the Court was engaged in more searching analysis); and Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1363 (2018) (reading *Romer* as not suggesting that the Court was required to find animus to conduct searching review).

⁶⁰ *United States v. Windsor*, 570 U.S. 744, 775 (2013) (emphasis added).

by religious animus.”⁶¹ They simply sought more evidence to prove that the national security justification was questionable, such that they could conclude that animus played a significant role in the proclamation’s issuance.⁶² To be sure, even this sort of standard would almost certainly not have satisfied Chief Justice Roberts, who probably would have recoiled at striking down a presidential order by questioning the centrality of the national security justification through a finding that its promulgation was significantly affected by religious animus. But Chief Justice Roberts works too hard to make his conclusion—that the Court must accept the presence of religious animus but declare it legally irrelevant—fit the Court’s equality jurisprudence.

The Court thus erects a standard of review alien to existing anti-discrimination doctrines, and it engages in a form of analysis that would not (or should not) succeed outside the immigration context. There may be some small significance to squeeze out of the Court’s turn to rational basis review; it could have declared that the Constitution did not apply at all. The best that can be said about this analysis is that it implicitly rejects the strong version of the so-called plenary power—that the Constitution does not apply

⁶¹ *Trump v. Hawaii*, 138 S. Ct. at 2429 (Breyer, J., dissenting).

⁶² *Id.* (“Members of the Court principally disagree about . . . whether or the extent to which religious animus played a significant role in the Proclamation’s promulgation or content. . . . [T]he Proclamation’s elaborate system of exemptions and waivers can and should help us answer this question.”); *id.* at 2430 (“[I]f the Government is not applying the Proclamation’s exemption and waiver system, the claim that the Proclamation is a ‘Muslim ban,’ rather than a ‘security-based’ ban, becomes much stronger.”). A potential virtue of this approach is that it doesn’t require second-guessing the executive’s national security judgments—the bogeyman of judicial review—at least not to the same extent as the Sotomayor approach. The inquiry into whether the waivers were a meaningful limitation on the order would be a factual one, and if they weren’t, that could constitute evidence of motivation to keep Muslims out of the country, regardless of whether the government discovered reason to question the reliability of immigration information coming from the targeted countries. Cf. Noah Feldman, *Take Trump’s Travel Ban Back to Court*, BLOOMBERG (June 29, 2018, 12:26 PM), <https://www.bloomberg.com/view/articles/2018-06-29/take-trump-s-travel-ban-back-to-court> (describing an exchange with Owen Fiss over whether, even under the *Trump v. Hawaii* opinion, plaintiffs “should go back to court and seek a trial on Trump’s bias” given a different standard of proof of bias and the opportunity to seek discovery).

to the political branches' immigration decisions. It re-enforces one longstanding interpretation of the plenary power—that it is a doctrine of judicial review.⁶³ In his concurrence, Justice Kennedy makes a perhaps misbegotten attempt to suggest that the proclamation may well have violated the Constitution, but that doctrines of judicial review simply precluded the Court from doing anything about it.⁶⁴ But whether we put any stock in the idea of the political branches engaging in self-binding to the requirements of the Constitution,⁶⁵ the way the Court employs rational basis review very clearly empowers the president, including a president who has little regard for the Constitution, much less the rights of foreigners.

III. The Future of Presidential Power and Immigrants' Rights

President Trump's Proclamation No. 9645 is unprecedented in the scope of its exclusions and in the clarity with which its author spoke about his desire to stop immigration by people of a particular faith.⁶⁶ The Court's opinion in *Trump v. Hawaii* purported to build on existing doctrines of deferential constitutional review, but it reached a watershed conclusion by declaring legally irrelevant a set of facts that would have doomed similarly drawn distinctions in most any other context not involving immigration and national

⁶³ GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 118-38 (2010).

⁶⁴ *Trump v. Hawaii*, 138 S. Ct. at 2424. (Kennedy, J., concurring) ("There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. . . . It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs.").

⁶⁵ Marty Lederman, *Contrary to Popular Belief, the Court Did Not Hold that the Travel Ban is Lawful—Anything But*, JUST SECURITY (July 2, 2018), <https://www.justsecurity.org/58807/contrary-popular-belief-court-hold-travel-ban-lawful-anything-but-which-ruling-justice-kennedys-deference-presidents-enforcement-ban-indefensible/>.

⁶⁶ For a discussion of the more limited ways in which presidents have used § 212(f) in the past, see Brief for Respondents at 40-41, *Trump v. Hawaii*, 138 S. Ct. 2392 (No. 17-965), 2018 WL 1468304, at *40-41.

security. The decision thus raises the obvious question of what's next for judicial review of immigration policy, particularly at a moment when the president and his administration have adopted a maximalist enforcement policy designed to deter and remove as many immigrants as possible.

The president and his administration have vast authority over immigration law and policy, particularly through the power to enforce the immigration laws. Deference to executive judgments has long played a role in a wide variety of cases implicating the immigration power. But has the Court now effectively authorized executive action that would otherwise be unconstitutional simply because immigration (and national security) are in play? Are all immigration judgments now suddenly insulated from anything but the most credulous judicial review? Not surprisingly, the government has quickly added citations to the rational basis deference provided in *Trump v. Hawaii* to its filings in other cases challenging executive immigration actions.⁶⁷

The import of *Trump v. Hawaii*—whether it will have significant repercussions or be folded into business as usual—will be determined in the coming years. But whereas the decision may serve to re-enforce and deepen already existing doctrines that permit the federal government to discriminate against non-citizens, it need not and should not disturb the application of the Due Process Clause and administrative law doctrines to curb

⁶⁷ See, e.g., Reply in Support of Defendants' Motion to Dismiss, *Centro Presente v. Dep't of Homeland Sec.*, No. CV 18-10340, at *5-6 (D. Mass. June 26, 2018), available at <https://static.reuters.com/resources/media/editorial/20180727/centrovtrump-mtdreply.pdf> (amending motion to dismiss challenge to decision to rescind Temporary Protected Status of noncitizens from Haiti, El Salvador, and Honduras).

arbitrary government power and the abuse of noncitizens under the government's jurisdiction and control.⁶⁸

A. The President and Discrimination

One very clear factual cum legal distinction that could be used to limit the reach of *Trump v. Hawaii* is between the government's authority at the precipice of entry and the government's power in relation to immigrants already present in the United States.⁶⁹ The highly deferential "facially legitimate and bona fide reason" standard from *Mandel* applies in cases where the executive has denied a visa to a foreign national in a way that might impinge on the constitutional rights of U.S. persons, not of the foreigner himself, because noncitizens outside the United States are not generally protected by the Constitution.⁷⁰ The *Mandel* standard is further justified because the decision whether to admit someone to the country reflects the ultimate expression of sovereign control. But much of the president's authority over immigration, and most of the controversies generated by the Trump administration, do not involve foreigners who remain outside the United States and have never stepped foot on U.S. soil.

⁶⁸ I discuss due process limits in greater detail below. For an example of the courts' turn to administrative law to restrain executive immigration policies, consider the litigation surrounding President Obama's deferred action policies and the Trump administration's thus far unsuccessful effort to rescind Deferred Action for Childhood Arrivals.

⁶⁹ One way of understanding the legal significance of this descriptive difference is with reference to the clear distinction courts make between the federal government's authority over immigration control and the general regulation of immigrants. The classic statement of this distinction comes from *DeCanas v. Bica*, where the distinction had federalism implications: the Court said that not every measure that touches on immigration is a regulation of immigrant movement and upheld a California law that regulated the employment of unauthorized immigrants. See *DeCanas v. Bica*, 424 U.S. 351, 355 (1976) ("But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised.").

⁷⁰ Cf. *Boumediene v. Bush*, 553 U.S. 723, 755 (2008) ("[W]e accept the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay. . . [H]owever, we take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory.").

Instead, they implicate noncitizens who have clear or colorable constitutional rights, or at least protected interests, by virtue of their ties to the United States—circumstances for which the *Mandel* standard is arguably inappropriate.⁷¹

But when it comes to claims that the government has *discriminated* against non-citizens in some way, it's not clear how much work this distinction between immigration control and immigrants rights will do. Long-standing doctrines governing whether and how the federal government can discriminate against non-citizens already significantly empower Congress and the president, without *Trump v. Hawaii* even in the picture. The political branches' authority to impose burdens and make judgments on the basis of nationality is well established.⁷²

Federal alienage classifications are thus only subject to rational basis review, because it is “a routine and normally legitimate part” of the business of the federal government to draw distinctions on the basis of alienage or citizenship.⁷³ Indeed, immigration law relies on nationality classifications; immigration policy is full of examples of nationals from certain countries receiving more or less favorable treatment than others because of particular circumstances tied to their country of origin.⁷⁴ Alienage law, or the jurisprudence through which courts have applied equal protection

⁷¹ The Ninth Circuit’s injunction of the first of the entry-bans was predicated in large part on the constitutional concerns it raised by virtue of seeming to apply to lawful permanent residents who were also nationals of the listed countries. *Washington v. Trump*, 847 F.3d 1151, 1164-66 (9th Cir. 2017) (per curiam), reconsideration en banc denied, 853 F.3d 933 (9th Cir. 2017).

⁷² See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 85 (1976).

⁷³ *Id.*

⁷⁴ For example, the Visa Waiver program extends more favorable treatment in immigration screening to nationals from certain (mostly advanced industrialized) countries than others. Temporary Protected Status (TPS), which gives a form of status to persons fleeing natural disaster or other calamities, is awarded based on nationality. See Designation of Nepal for Temporary Protected Status, 80 Fed. Reg. 36,346 (June 24, 2015); Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3,476 (Jan. 21, 2010); Designation of Rwanda Under Temporary Protected Status Program, 59 Fed. Reg. 29,440 (June 7, 1994).

scrutiny to discrimination against non-citizens, is first and foremost a federalism doctrine that limits states' authority to discriminate against non-citizens through the application of strict scrutiny, while acknowledging the ordinaryness of the federal government doing the same.

Sometimes nationality classifications can end up targeting particular groups that are also widely disfavored in society, raising the specter of prejudice or bias by the federal government. In the immediate aftermath of 9/11, for example, the Bush administration adopted a series of programs justified by national security concerns that targeted temporary immigrants from Muslim-majority countries. The National Security Entry-Exit Registration System (NSEERS) required so-called nonimmigrants from mostly Muslim countries to register with the INS when they arrived at the port of entry and even if they were already present in the country⁷⁵—regulatory requirements that were only rescinded in 2016 by the Obama administration.⁷⁶

No equal protection challenge to NSEERS ever succeeded. In part, the cases often came styled as selective prosecution claims, which are notoriously difficult to prove.⁷⁷ But courts also cited the facial neutrality of the NSEERS regulation,⁷⁸ alongside the federal government's broad authority to distinguish among foreign

⁷⁵ Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,583 (Aug. 12, 2002). Ultimately, nationals from 25 countries were required to register: Iraq, Iran, Libya, Sudan, Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan, and Kuwait.

⁷⁶ Removal of Regulations Relating to Special Registration Process for Certain Nonimmigrants, 81 Fed. Reg. 94,231 (Dec. 23, 2016).

⁷⁷ See, e.g., *Malik v. Gonzales*, 213 F. App'x. 173, 174 (4th Cir. 2007) (holding that court lacked jurisdiction to consider selective enforcement claims); *Daud v. Gonzales*, 207 F. App'x. 194, 202–03 (3d Cir. 2006) (same).

⁷⁸ *Roudnahal v. Ridge*, 310 F. Supp. 2d 884, 892 (N.D. Ohio 2003) (citing the Federal Register notice and noting that “the Executive is designed and entrusted to best shape our national security” and that the registration requirements were facially legitimate “[i]n light of current military operations in the Middle East, combined with a heightened terrorist threat-environment at home and abroad”).

nationals, to brush aside discrimination claims.⁷⁹ And even if we applied ordinary anti-discrimination law, the disparate impact alone that NSEERS had would not violate anti-discrimination protections.⁸⁰ So even if the framework for evaluating nationality classifications draws heavily from deference doctrines made for the immigration or national security contexts, it's not clear how much of a difference the deference ultimately makes.

But the question of discriminatory motive still lingers in these alienage cases. The presumption of good faith or legitimate motive that courts give to federal classifications on the basis of citizenship does not, in and of itself, require courts to accept those classifications that could be the product of illicit motives. As overbroad as NSEERS turned out to be⁸¹—it seemed to many, even at the time, a fear-inspired over-reaction to a very real national security threat—no material evidence of discriminatory motive ever appeared in the litigation surrounding it (or at least, the court opinions upholding it never adverted to any such possibility).⁸² But if strong evidence of discriminatory motives on the part of President Bush or other key decision-makers behind NSEERS had emerged in the litigation—particularly of the variety and volume that existed in *Trump v. Hawaii*—those cases could have come out differently. Alienage law would not have required otherwise.

⁷⁹ See *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008) (noting that an immigration law would “survive a constitutional challenge so long as there is a facially legitimate and bona fide reason for the law” (citing *Romero v. INS*, 399 F.3d 109, 111 (2d Cir. 2005))).

⁸⁰ See *Washington v. Davis*, 426 U.S. 229 (1976) (making it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact).

⁸¹ Muzaffar Chishti & Claire Bergeron, *DHS Announces End to Controversial Post-9/11 Immigrant Registration and Tracking Program*, MIGRATION POL’Y INST. (May 17, 2011), <https://www.migrationpolicy.org/article/dhs-announces-end-controversial-post-911-immigrant-registration-and-tracking-program>. See also Asli Ü. Bâli, *The U.S. Already Tried ‘Extreme Vetting’ for Muslims. It Didn’t Work.*, WASH. POST (Jan. 26, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/26/the-u-s-already-tried-extreme-vetting-it-doesnt-work/>.

⁸² *Rajah*, 544 F.3d at 439 (noting that there was no basis for the claim that NSEERS was “motivated by an improper animus toward Muslims” as it was “clearly tailored” to the fact that the attacks of September 11 “were facilitated by violations of immigration laws by aliens from predominantly Muslim nations”).

The recent decision of a federal judge in Massachusetts provides an example of how lower courts might still entertain discrimination claims against the federal government exercising its immigration power, by citing factual distinctions with *Trump v. Hawaii*. The judge in that case rejected the government's attempt to invoke *Trump v. Hawaii* to insulate the decision by the Department of Homeland Security (DHS) to rescind the Temporary Protected Status (TPS) of nationals of Honduras, El Salvador, and Haiti. The plaintiffs had alleged that the decision was motivated by racial discrimination, citing infamous statements by President Trump: "why are we having all these people from shithole countries come here?" and "why do we need more Haitians?" who "all have AIDS?"⁸³ The district court treated *Trump v. Hawaii* as inapposite, because the case before it involved noncitizens with substantial ties to the U.S. and did not implicate national security.⁸⁴ It declared *Arlington Heights* to provide the appropriate framework for analysis and observed that "applying review under *Arlington Heights* would not vitiate the deference that courts typically afford the other branches in immigration policy, but would only limit that deference upon a proper showing of unlawful animus on the basis of a protected category."⁸⁵

But even though this kind of analysis remains available, *Trump v. Hawaii* makes it questionable whether it will survive on appeal and through the percolation of these claims throughout the federal courts. *Trump v. Hawaii* did not just apply the *Mandel* standard

⁸³ Centro Presente v. United States Dep't of Homeland Sec., No. CV 18-10340, 2018 WL 3543535, at *5 (D. Mass. July 23, 2018).

⁸⁴ *Id.* at *12.

⁸⁵ *Id.* at *13; see also New York v. Dep't of Commerce, 1:18-CV-02921-JMF, at 67 (S.D.N.Y. July 26, 2018), available at <https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2018cv02921/491254/215/> (declaring that government's attempt to invoke *Trump v. Hawaii* to require deference to the Department of Commerce decision to include a question about citizenship in the 2020 Census as "somewhere between facile and frivolous").

to the president's proclamation. It applied its version of *Romer* rational basis, too. The outcome shows that the Court, as currently constituted, is willing to look away from discriminatory motives in the application of rational basis review to the federal government's regulation of immigration and national security.

If we remove the hypothetical case from the precipice of entry, from the border, and posit the interests of immigrants already present and with lawful status, will the Court entertain mixed motive analysis?⁸⁶ Will it step outside of the typical deference given to classifications based on nationality, and outside the parameters of *Trump v. Hawaii*, which calls for upholding policies even in the face of evidence of discriminatory motive? As a principled legal matter, it's hard to see how it could, unless the alienage classifications at issue have an attenuated connection to national security. TPS falls less clearly in the national security bucket than the Trump entry-ban, but some courts may begin to blend security with public order more generally.

B. The Due Process Clause and Government Coercion

The distinction between immigration control and the rights of immigrants also has limited value when the controversies involve border enforcement, where the government can claim heightened sovereignty and security concerns. Especially when it comes to those who have entered illegally, the imperatives of immigration

⁸⁶ See Gutierrez-Soto v. Sessions, 317 F. Supp. 3d 917, 930-931 (W.D. Tex. 2018) (observing that, "out of an abundance of caution, the Court will adopt the Supreme Court's approach from *Trump v. Hawaii*," and rejecting claim that revocation of humanitarian parole violated Equal Protection Clause because "it could be reasonably understood to result from a justification independent of unconstitutional grounds. This is because Petitioners' extrinsic evidence, President Trump's [discriminatory] statements, lack anything more than a tenuous connection to Respondents' actions").

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control could in theory and practice swallow immigrants' rights.⁸⁷ Indeed, government lawyers long before the Trump administration have urged the position that certain people who appear at the border—both asylum seekers and unlawful entrants, particularly those with no ties to the United States—are constructively outside the United States.

And so something more than a distinction between sovereign control and ordinary regulation is required to perpetuate meaningful judicial scrutiny of executive immigration actions. Fortunately, existing case law, including canonical dissents, point to a different factor that distinguishes immigration enforcement, including border enforcement, from exclusion decisions of the sort at issue in *Trump v. Hawaii*. Rather than think of the need for sovereign control as the trigger for the type of judicial review on offer in *Trump v. Hawaii*, the inquiry should turn on whether coercive authority has been exercised over the non-citizen. The distinction would be between the abstract decisions to exclude hypothetical future entrants in *Trump v. Hawaii* and concrete instances of the government's direct control or power over the person. The scrutiny of such control should extend regardless of

⁸⁷ See, e.g., Respondents' Response in Opposition to Motion for Preliminary Injunction at 21-22, Ms. L. v. U.S. Immigration and Customs Enforcement, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (No. 18cv0428 DMS), available at <https://www.documentcloud.org/documents/4550646-Defendants-Response-in-Opposition-Re-Motion-for.html> (“[I]t is essential for DHS to be able to make these discretionary decisions because DHS plays an important role in disrupting smuggling operations. . . . Both ICE and CBP frequently are faced with the need to determine, in a fast-moving and uncertain environment, the legitimacy of a purported family relationship, and to act accordingly. . . . Where concerns arise, CBP and ICE must have the ability to exercise their discretion as to the most appropriate immigration action.”); Respondents' Supplemental Response in Opposition to Motion for Preliminary Injunction at 13-14, Ms. L. v. U.S. Immigration and Customs Enforcement, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (No. 18cv0428 DMS), available at <https://www.documentcloud.org/documents/4560367-Respondents-Supplemental-Response-in-Opposition.html> (“[I]n determining what standard should be applied to a separation decision made by the Government, the Court should consider the immigration enforcement that occurs at the border. . . . [W]hen DHS encounters a purported family group, it . . . must consider the broader issues of safety related to the smuggling of children and the use of children to gain entry into the United States.”).

whether the person has been present in the U.S. for an extended period or is a recent (and unlawful) border crosser.⁸⁸ And it should encompass government actions such as rescission of status, arrest, deportation, and especially custody and detention.⁸⁹

Limits on the government's coercive power in immigration long have been understood to come from the Fifth Amendment's Due Process Clause, which the Court has held since the turn of the twentieth century applies to all persons, even recent clandestine entrants.⁹⁰ The Court does not address and certainly does not purport to disturb these precedents in *Trump v. Hawaii*. That case involved the rights of U.S. persons, not any cognizable rights of immigrants. More to the point, for cases grounded in the Due Process Clause, the form of rational basis review applied in *Trump v. Hawaii* simply is not apposite. The standard would make no sense analytically, because the government's motive has no bearing on whether the Due Process Clause has been violated.

Of course, the possibility of due process review does not mean

⁸⁸ This approach is in harmony with and could be supported by the Supreme Court's landmark decision in *Boumediene v. Bush*, holding that the right to petition for a writ of habeas corpus applied to detainees held at Guantanamo Bay, where the U.S. was not sovereign but had effective control. See *Boumediene*, 553 U.S. at 765 ("Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'") (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885))). For more on *Boumediene* and extra-territorial application of the Constitution, see Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973 (2009); Stephen I. Vladeck, *The Problem of Jurisdictional Non-Precedent*, 44 TULSA L. REV. 587 (2009).

⁸⁹ This line does not help the U.S. citizens and LPRs who have an interest in those hypothetical entrants. In *Trump v. Hawaii*, respondents emphasized the interests of U.S. citizens in "reuniting with close family who have applied for visas . . . welcom[ing] visitors to [a religious] community," and the university interest in recruiting and retaining individuals. Brief for Respondents at 19, *Trump v. Hawaii*, 138 S.Ct. 2392 (2018) (No. 17-965), 2018 WL 1468304. The Court found these interests were adequate to confer standing but not to prompt anything but the most cursory judicial review. And in *Kerry v. Din*, Justice Scalia wrote on behalf of a plurality that denial of a spouse's visa application does not deprive a citizen of a fundamental liberty interest. *Kerry v. Din*, 135 S. Ct. 2128, 2132-36 (2015) (plurality opinion). Importantly, Justice Kennedy in concurrence chose not to decide this question. *Id.* at 2139 (Kennedy, J., concurring).

⁹⁰ *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) ("[We have] never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law'.").

that the government's interests couldn't outweigh the constitutional violation, or that courts would not give great deference to the interests the government puts forward, refusing to scrutinize its claims of national security necessity. But the application of a form of rational basis that permits blatantly unconstitutional conduct because it was arguably well intentioned, or undertaken in pursuit of a plausible governmental objective that in and of itself would be legitimate, would reflect a significant stretch of *Trump v. Hawaii*. The lower courts certainly need not acquiesce in such an approach unless and until the Supreme Court has made it clear that the Due Process Clause really is that thin.

As a procedural doctrine, due process is, of course, a relative concept that calls for weighing the extent of a noncitizen's liberty interest against the government's needs.⁹¹ When it comes to the core enforcement question—whether someone is to be removed or excluded—both the liberty interest (in being in the United States) and the government interest (in removing non-citizens the law declares have no entitlement to be in the country) can be weighty, but variable. Both will depend to an extent on legal status, the extent of ties to the country, and the rationales in particular cases for removal.⁹²

The hallmarks of due process, namely notice and an opportunity to be heard before an adjudicator (if not a court), have long been recognized as attaching as a matter of constitutional law, as well as in statute and regulation, at least for long-term

⁹¹ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁹² Notably, constitutional challenges to the deportation power beyond the procedural have been unsuccessful, whether in the form of Ex Post Facto Clause challenges to the application of new deportation rules to immigrants after they have been admitted, or First Amendment challenges to the grounds of deportation, which historically have included engaging in speech and association that would otherwise be protected by the First Amendment.

residents.⁹³ The Supreme Court made clear in the 1980s, for example, that a returning lawful permanent resident was entitled to more than a cursory consideration of her claim against deportation. In fact, this basic principle led the Ninth Circuit panel that considered the first iteration of the Trump entry-ban to question its constitutionality, which in turn pushed the administration to make clear that its orders did not apply to this category of non-citizens.⁹⁴

But within the confines of ordinary procedural due process, even cursory removal processes may suffice. The government, for instance, has plenty of room to dispense quickly with the removal of non-citizens with no ties to the United States, whose liberty interests in remaining are thin to non-existent (except in the vital case of the refugee).⁹⁵ No legal challenge has succeeded against the expedited removal procedure that Congress authorized in 1996, to give immigration officers the power to order a non-citizen removed if the officer has determined the non-citizen is inadmissible, without further hearing or review, unless the person expresses an

⁹³ See 8 U.S.C. § 1229(a) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”); see generally 8 U.S.C. § 1129.

⁹⁴ *Landon v. Plasencia*, 459 U.S. 21 (1982); cf. *Washington v. Trump*, 847 F.3d 1151, 1165 (9th Cir. 2017) (“The Government has provided no affirmative argument showing that the States’ procedural due process claims fail as to [aliens attempting to reenter after travelling abroad]. For example, the Government has failed to establish that lawful permanent residents have no due process rights when seeking to re-enter the United States.”).

⁹⁵ For robust articulations of this idea, which have eroded over time, see *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (for “foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law . . . the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law”); and *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”). As the government showed in its position in *Jennings v. Rodriguez*, some interpret cases such as *Knauff v. Shaughnessy* to mean that non-citizens seeking an initial entry have no due process rights. But *Knauff* and cases like it do not so hold. Instead, they are best read as limiting the process owed in certain circumstances while giving significant deference to admission and exclusion judgments. For a full elaboration of this argument, see Brief of Scholars of Constitutional, Immigration, and Administrative Law in Support of Petitioners-Appellees/Cross Appellants, *Rodriguez v. Marin*, No. 13-56706 (9th Cir. July 27, 2018).

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intent to apply for asylum.⁹⁶ To be sure, challenges have foundered because Congress has made judicial review exceedingly difficult. But the bottom line is that the government's efforts over the last two decades to remove people apprehended at the border quickly and without access to courts only presents a problem under existing law (statutory, regulatory, and international) if such processes thwart the effort to claim asylum.

The extent of this last point may soon come in for further development, however. The executive has yet to make full use of the expedited removal power Congress delegated to it. Congress authorized expedited removal for those inadmissible aliens who could not prove that they had been continuously in the United States for two years, and so the government in theory could deploy the procedure across the United States. The Clinton, Bush, and Obama administrations applied expedited removal only to new arrivals or recent border crossers, either at the ports of entry or within 100 miles of the border.⁹⁷ The Trump administration, however, has promised to use its statutory authorities to their full effect, and the complete use of the power of expedited review could generate new questions under the Due Process Clause, provided litigants can navigate the limits on judicial review.⁹⁸

⁹⁶ 8 U.S.C. § 1252(e)(3)(B); 8 U.S.C. § 1225(b)(1)(A); *see also* American Immigration Lawyers Association v. Reno, 199 F.3d 1352 (D.C. Cir. 2000) (holding that particular challenges before it only gave rise to a challenge that the INS had not followed its own procedures, not a challenge to the legality of expedited removal, and holding that the requirement that challenges be brought within 60 days of implementation or issuance of a new regulation was jurisdictional).

⁹⁷ The Clinton administration applied expedited removal only to those who arrived at ports of entry with fraudulent documents and were not asylum claimants. The Bush administration extended the procedure to all noncitizens encountered within 14 days of entry and within 100 miles of the border. The Obama administration maintained this regulation. *See Designating Aliens for Expedited Removal*, 69 Fed. Reg. 48,878 (Aug. 11, 2004).

⁹⁸ Memorandum from Secretary of Homeland Security John F. Kelly to Kevin McAleenan, Acting Commissioner U.S. Customs and Border Protection, et al. (Feb. 20, 2017), available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

On the merits of the constitutional claim, a challenge to the expansion of the procedure might argue that, as expedited removal expands into the interior, the risk that the government might erroneously deprive a non-citizen of a weighty liberty interest—namely her right to live in the U.S.—will grow. As more settled immigrants enter the government’s purview, trial-type procedures become more necessary. The government’s interests in policing the border and expelling non-citizens before they develop ties also wane.⁹⁹ *Trump v. Hawaii* does not provide any reason for lower courts to apply anything other than this ordinary due process analysis to questions that might arise involving further contractions of procedural safeguards governing deportation.

More important, even if the Due Process Clause does not require extensive trial-type proceedings for all forms of removal, in its substantive form, the Clause can operate to prevent abusive treatment. As Justice Breyer put it in his dissent from *Jennings v. Rodriguez* this term, when addressing the Constitution’s application to recent border crossers: “No one can claim, nor since the time of slavery has anyone to my knowledge successfully claimed, that persons held within the United States are totally without constitutional protection. Whatever the fiction, would the Constitution leave the Government free to starve, beat, or lash those held within our boundaries?”¹⁰⁰ Here he echoes Justice Jackson’s canonical dissent in *Shaughnessy v. United States ex rel. Mezei*—a case that represented a highwater mark for national security deference to the government. Justice Jackson responded to

⁹⁹ In such circumstances, the legality of the INA’s limitations on judicial review of expedited removal would arguably demand a reconsideration as the result of the serious threat to due process posed. For a discussion of the constitutional questions raised by greatly restricting due process for those who have lived in the U.S. for an extended time, see Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 969 (1998).

¹⁰⁰ *Jennings v. Rodriguez*, 138 S. Ct. 830, 862 (Breyer, J., dissenting).

the majority's acquiescence in the government's decision to deny a non-citizen a hearing before ordering her exclusion at the border with a warning that the Due Process Clause should be understood as restraining the government from extreme proceedings, blending the procedural and substantive dimensions of the clause:

[Due process] is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice. . . . Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or to set him adrift in a rowboat.¹⁰¹

Though these powerful condemnations of cruelty are embodied in dissents, they do reflect deeply rooted constitutional expectations and values, as Justice Breyer lays out in his *Jennings* dissent.¹⁰² Before *Trump v. Hawaii*, and in response to the Trump administration's enforcement policies, the lower courts reflected these same intuitions—that the Due Process Clause stands as a bulwark against governmental abuse. District judges showed their willingness to label actions taken by the government in pursuit of tough enforcement as violations of substantive rights, even

¹⁰¹ Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206, 224, 226 (1953) (Jackson, J., dissenting).

¹⁰² Much remains open for debate around this question of what substantive liberty interests a non-citizen under government control would have. Freedom from torture and other similar forms of abuse seem the clearest. But the D.C. Circuit's profound disagreements over whether the Trump administration could slow down (and thwart) the ability of an unaccompanied, undocumented minor in the custody of the United States Department of Health and Human Services from acquiring an abortion underscores that legal status and the imperatives of immigration control can easily shape the way courts see unresolved questions about specific rights. The fact that Judge Kavanaugh dissented from the D.C. Circuit's en banc rebuke of the Trump administration, arguing that the court created a new right to abortion on demand for an unauthorized immigrant, makes this all the more pointed. See *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc) (per curiam).

going so far as to label some government policies—separating parents from children at the border, for example—as shocking the conscience.¹⁰³

Nothing in *Trump v. Hawaii* necessitates a recalibration or retreat from this form of review.¹⁰⁴ Even if courts in the aftermath of the decision choose to be credulous about the government’s reasons for its enforcement policies—e.g., if they choose to credit the administration’s view that separating families will deter asylum seekers, despite powerful evidence to the contrary¹⁰⁵—marginal deterrence benefits would hardly seem to justify strikingly abusive behavior. It’s hard to imagine the courts as a holistic institution concluding that treatment that shocks the conscience (or is just plain abusive) cannot be remedied by courts because the government also had a facially legitimate and bona fide reason for the conduct, namely deterring illegal immigration.¹⁰⁶ That intention could not, even in theory, erase the execrable treatment as it erased the discriminatory motive under the Court’s analytical

¹⁰³ See Ms. L. v. U.S. Immigration and Customs Enforcement, 302 F.Supp.3d 1149, 1165-66 (S.D. Cal. 2018) (citing cases describing practices “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience,” or that interfere with rights “implicit in the concept of ordered liberty,” and so “brutal’ and ‘offensive’ that it [does] not comport with traditional ideas of fair play and decency.”) (citations omitted).

¹⁰⁴ For other examples of district court pushback, see V.F.B. v. Sessions, No. 3:18-cv-01106-VAB, 2018 WL 3421321 (D. Conn. July 13, 2018) (finding that government likely violated substantive due process right to family integrity, as well as procedural due process, and granting writs for habeas corpus, and appearing to apply strict scrutiny); and Ms. L. v. U.S. Immigration and Customs Enforcement, 302 F.Supp.3d 1149 (S.D. Cal. 2018) (finding that family separation policy likely violated due process and granting classwide preliminary injunction). See also Flores v. Sessions, No. 85-4544-DMG, at *7 (C.D. Cal. July 9, 2018) (denying government’s *ex parte* application for exemption from or modification of *Flores* Agreement that requires noncitizen children in the immigration system to be detained in the least restrictive manner practicable, to permit children taken into custody at border to be detained together with their parents, as “wholly without merit”).

¹⁰⁵ Tom K. Wong, *Do Family Separation and Detention Deter Immigration?*, CENTER FOR AM. PROGRESS (July 24, 2018, 1:30 PM), <https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/> (showing that monthly U.S. Border Patrol apprehensions of families at the southwest border increased after “pseudo-interventions” like the zero tolerance pilot).

¹⁰⁶ A “shocks the conscience” standard is a high bar for relief, but it need not be understood as a threshold requirement.

framework in *Trump v. Hawaii*. Again, a court could prove Justice Jackson wrong. It could conclude that the government’s interest in deterrence justifies the constitutional violation, much as the Supreme Court concluded that national-security interests justified President Roosevelt’s facial race discrimination in *Korematsu*. But to do so would require a substantial step beyond *Trump v. Hawaii*.

We may be heading toward a high-level reckoning on the reach of the Due Process Clause in immigration enforcement. This term, in *Jennings*, the Supreme Court reversed a Ninth Circuit decision that had read a congressional statute authorizing mandatory detention for certain classes of non-citizens to require individualized bond hearings after six months of detention, in order to avoid constitutional concerns under the Due Process Clause. Detention implicates a core liberty interest that the courts, even in immigration, have been careful to protect. But they have done so largely by applying the canon of constitutional avoidance to questionable congressional statutes.¹⁰⁷ In *Jennings*, the Court rejected one such interpretation by the lower courts as “linguistic trauma,” squarely returning to litigate the constitutional question—of the extent to which the Constitution limits the detention of non-citizens.

Justice Breyer’s dissent in *Jennings*, quoted above, shows the way for the Court to limit mandatory detention and require individualized hearings to assess flight risk and dangerousness, grounded in deep constitutional history, complete with links to Blackstone as well as contemporary jurisprudence. But what

¹⁰⁷ *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (“The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious.”); *Jennings v. Rodriguez*, 138 S. Ct. 830, 846-47 (2018) (rejecting reading an implicit six-month limit on mandatory detention as “fall[ing] far short of a ‘plausible statutory construction’” and remanding the case to the lower courts to decide squarely whether mandatory detention, without individualized review of flight risk or dangerousness, pending removal is constitutional).

kind of weight will the Court as currently constituted give the government's interest in mandatory detention, and will its recommitment to national security deference in *Trump v. Hawaii* re-emerge when this constitutional challenge inevitably comes back to the Court? Will the Court go so far as to credit the government's claim that certain non-citizens, namely first-time entrants, in fact have no due process rights at all?

Justices skeptical of constitutional claims against detention statutes have not needed a holding as sweeping as *Trump v. Hawaii* to acquiesce in the decisions of the political branches to make detention mandatory for certain noncitizens facing deportation.¹⁰⁸ But in recent decades, the Court as a whole has at least thrown safety valves into its opinions that otherwise uphold detention policies, perhaps in order to leave room for invalidation of the truly terrible.¹⁰⁹ With the Court's composition and identity in flux, it is difficult to predict exactly how far respect for the government in immigration and national security will extend. But the operation of the Due Process Clause to prevent arbitrary government action has a long pedigree with many adherents across the ideological

¹⁰⁸ For example, in *Demore v. Kim*, Chief Justice Rehnquist held that "detention during removal proceedings is a constitutionally permissible part of that process," rejecting a due process challenge. *Demore v. Kim*, 538 U.S. 510, 531 (2003). The Court noted that "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal" and gave credence to "[t]he evidence Congress had before it" when enacting the mandatory detention provision. *Id.* at 528.

¹⁰⁹ As *Jennings* itself highlights, the lower courts have read the Rehnquist opinion in *Demore* as acceding to mandatory detention only for the short periods of time typically required to execute a removal order, and they have seized on language in Justice Kennedy's concurrence suggesting that detention could reach an extent that would make it constitutionally problematic. *Demore*, 538 U.S. at 532 (Kennedy, J., concurring) ("[S]ince the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien . . . could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.").

spectrum.¹¹⁰ At the very least, the lower courts can tee up the issue in a way that demonstrates the essentiality of this basic protection to our form of constitutional, limited government.

* * *

Like many of my colleagues in the legal academy, when I teach the *Chinese Exclusion* cases in my immigration law courses, I pose a hypothetical to the students. If Congress were to adopt a law that resembled the Chinese Exclusion Acts of the late nineteenth century—say a law that barred the entry of immigrants from Muslim-majority countries—would a majority of today’s justices follow their predecessors and decide that it was beyond the Court’s purview to second-guess the judgments of the political branches? To punctuate the discussion that ensues, I typically have made two observations. First, the political branches have internalized non-discrimination norms that would make blanket exclusions on the basis of race, religion, and even nationality unthinkable. Second, the modern court would be writing on a completely different slate than the justices of the late nineteenth century, when segregation was still constitutional. The result of the equal protection and civil rights revolutions of the twentieth century, and the concomitant demise of race-based immigration restrictions, would lead the justices to limit any exercise of the immigration power that embodied the sort of discriminatory state action that would be clearly unconstitutional in other contexts.

After *Trump v. Hawaii*, confidence in neither of these observations can be justified; they will seem highly debatable at best and laughable to many. In the face of a barrage of presidential

¹¹⁰ Cf. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring) (observing, in response to the government’s claim that, in the immigration context, the typical due process vagueness inquiry should be relaxed, that “[t]o acknowledge that the *President* has broad authority to act in this general area supplies no justification for allowing *judges* to give content to an impermissibly vague law”).

statements that a reasonable observer would have interpreted as reflecting anti-Muslim animus, the Supreme Court concluded that it could not stop the president's indefinite exclusion of most nationals from five Muslim-majority countries. Rather than dispute the evidence, or call for more robust fact-finding to get to the bottom of the motivation behind President Trump's entry-ban proclamation, the Court credited the facially legitimate justification proffered by the government, because the protection of our borders and the nation's security required its acceptance.

It is almost beside the point whether the world-wide review and its results were genuine national security exercises or after-the-fact veneers to make raw discrimination fit within the confines of accepted presidential behavior. Even if the former, the Court's decision is still best read as permitting state action motivated by animus to survive judicial review because of the delicacies of the presidential prerogatives at issue. Though the trappings of deference have been woven into the practices of constitutional review of the federal government's regulation of immigrants and immigration, the Court's willingness to legally erase discriminatory motives marks a new moment.

Whether this departure will infect judicial review of other sorts of immigration and national security policies remains to be seen. But the peculiarities of motive analysis that drive *Trump v. Hawaii* will be inapposite in other types of cases, most importantly in the application of the Due Process Clause to various forms of coercion over noncitizens within the jurisdiction and control of the U.S. government, especially border enforcement and detention policy. Because *Trump v. Hawaii* does not even purport to address the complex and still developing jurisprudence governing the laws that authorize coercion, as well as the executive practices that implement that authority on a day-to-day basis, the lower courts

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need not feel constrained by the Supreme Court's latest word on the immigration power. Of course, existing jurisprudence provides constraint enough over judicial review. More ominously, the Supreme Court's de facto willingness to tolerate constitutionally offensive conduct for fear of trenching upon presidential prerogatives may well re-emerge if and when the Court takes up the latest iteration of the *Jennings* detention case, or the litigation challenging the Trump family-separation policies. The legal and moral stakes could not be greater, but *Trump v. Hawaii* should be far from the final word.

Carpenter Fails to Cabin Katz as Miller Grinds to a Halt: Digital Privacy and the Roberts Court

Marc Rotenberg

When the U.S. Supreme Court agreed to hear the appeal of Timothy Carpenter, the excitement in the privacy world was widespread. Here was the case that would take the Fourth Amendment into the digital age, the opportunity to put constitutional limits on the collection of location information generated by cell phones, the chance to solidify two recent and favorable decisions by the Court. Perhaps the stakes were not quite as high as the battle between The Machine and Samaritan in the final season of *Person of Interest*,¹ but they were close.

The outcome did not disappoint. Chief Justice Roberts said “we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through”—wait for it—“CSLI [cell site location information.]”²

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¹ A popular CBS series that documented the dangers of location tracking in a world without constitutional constraints. In the final season, an evil AI “Samaritan” threatens to defeat a benevolent AI “The Machine.” The heroes must escape the location tracking capability of Samaritan to save humanity. *Person of Interest: return 0* (CBS television broadcast June 21, 2016).

² *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).

Rejecting the third-party doctrine, which provided that the Fourth Amendment ends where third parties begin, the chief justice wrote, “After all, when *[Smith v. Maryland]* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person’s movements.” He continued, “There is a world of difference between the limited types of personal information addressed in *Smith* and *[United States v. Miller]* and the exhaustive chronicle of location information casually collected by wireless carriers today.”³ The Court emphasized that “a person does not surrender all Fourth Amendment protection by venturing into the public sphere.”⁴ And therefore “when the Government accessed CSLI from the wireless carriers, it invaded Carpenter’s reasonable expectation of privacy in the whole of his physical movements.”⁵

Moreover, Chief Justice Roberts drew no distinction between whether the government deployed its own technology, such as a GPS tracking device, or sought to access that same information from a wireless carrier. “In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*,” the Court wrote.⁶ “A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor’s offices, political headquarters, and other potentially revealing locales. Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.”⁷

³ *Id.* at 2219.

⁴ *Id.* at 2217.

⁵ *Id.* at 2219.

⁶ *Id.* at 2218 (referencing *United States v. Jones*, 565 U.S. 400 (2012)).

⁷ *Id.* (citations omitted).

“Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data,” Chief Justice Roberts added.⁸ “In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection.”⁹ Dissenting opinions were filed by Justices Kennedy, Thomas, Alito, and Gorsuch.

Henceforth, law enforcement access to the location records will be subject to a Fourth Amendment standard that is higher than the standard established by Congress for the so-called “2703(d) orders” in the 1994 amendments to the federal Wiretap Act.¹⁰ For Mr. Carpenter and the owners of the 396 million cell phone accounts (in a nation of only 326 million people),¹¹ the outcome is good news. Everyone now has constitutional protections in location data that they did not have before *Carpenter* was decided. But as for the Fourth Amendment in the digital age and the famous *Katz* decision, with its “reasonable expectation of privacy” test, the fun has just begun. Four detailed dissenting opinions, 119 pages, 160 references to “privacy,” and a newly-confirmed justice guarantee that. So, too, does new technology.

⁸ *Id.* at 2220.

⁹ *Id.* at 2223.

¹⁰ A court may issue an order “if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.” See 18 U.S.C. § 2703(d) (2018).

¹¹ *Carpenter*, 138 S. Ct. at 2211.

Many looked to the *Carpenter* decision to revise the third-party doctrine. That has not happened. And the prospects are real that in future cases focused on police access to location data, those in possession of personal data will require a judicial warrant before disclosure may occur. But somewhat unexpectedly, the Court has also raised new questions about the future of *Katz*, the case that established the “reasonable expectation of privacy” test for Fourth Amendment searches. That suggests that even as the third-party doctrine is updated for the digital age it may be necessary also to reexamine the foundations of Fourth Amendment privacy.

This article outlines a post-*Carpenter* “Progressive Constitutional” approach to the Fourth Amendment that borrows from the seminal wire-tapping case *Olmstead v. U.S.*,¹² an important nineteenth century case *Boyd v. United States*,¹³ and the opinion of Justice Gorsuch in *Carpenter*. I suggest that Congress now has an opportunity to update federal privacy law, providing greater clarity for digital searches after the *Carpenter* decision. And following related developments with communications privacy law, I conclude that even the collection of location data should not be assumed. In some circumstances, the Court could one day hold, it may be impermissible.

I. The Fourth Amendment Collision with Technology

For almost a hundred years, the Court has struggled with the question of what to do when the text of the Fourth Amendment collides with new technology. The most famous and still the most important decision was also the first—*Olmstead v. U.S.*¹⁴ “Big Ray” Olmstead was before the Supreme Court because

¹² *Olmstead v. United States*, 277 U.S. 438 (1928).

¹³ *Boyd v. United States*, 116 U.S. 616 (1886).

¹⁴ *Olmstead*, 277 U.S. at 438.

federal agents tapped the phone lines of his illegal bootlegging operation without a search warrant.¹⁵ The Supreme Court held that the warrantless interception of telephone communications of Olmstead's operation was not a search and therefore permissible under the Fourth Amendment. Chief Justice Taft, relying heavily on a common-law trespass view, concluded that the Fourth Amendment did not protect one who "installs in his house a telephone instrument with connecting wires [because he] intends to project his voice to those quite outside, and [therefore] the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment."¹⁶

The *Olmstead* case had several interesting dissents. Justice Holmes famously opined "it is a less evil that some criminals should escape than that the Government should play an ignoble part."¹⁷ The reference was to the fact that the federal agents violated a Washington state law against wiretapping—"a dirty business," said Justice Holmes—when they gathered the evidence. Breaking the law to enforce the law, Justice Holmes explained, was not the way to go.

Justice Butler, in a dissent that may someday be cited by Justice Gorsuch, observed that the "contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass."¹⁸ We might describe the Butler view

¹⁵ Say what you will about enforcing the law, but Olmstead was a well-regarded citizen who imported safe liquor from Canada to the Pacific Northwest at a time when prohibition, and homemade moonshine, created a national health crisis in the United States. Not only a community leader, Olmstead also respected the hard work of law enforcement agents. He reportedly left bottles of his product for the federal agents who monitored his operations. See generally PHILIP METCALFE, WHISPERING WIRES: THE TRAGIC TALE OF AN AMERICAN BOOTLEGGER (2007).

¹⁶ *Olmstead*, 277 U.S. at 466.

¹⁷ *Id.* at 470.

¹⁸ *Id.* at 487 (Butler, J., dissenting).

as a defense of “bailment.” Or we could say he was describing an expectation of privacy. More on that later.

But the *Olmstead* dissent that provided the basis for the Supreme Court’s decision forty years later in *Katz v. United States* and ushered the text of the Fourth Amendment into the modern age was that of Justice Brandeis. Well before cloud-computing services, Justice Brandeis observed,

the progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.¹⁹

“What to do?” as Justice Gorsuch would ask ninety years later, when the Fourth Amendment confronts new technology. Justice Brandeis began at the beginning. Citing Chief Justice Marshall in *McCullough v. Maryland*, he explained, “We must never forget that it is a constitution we are expounding”²⁰ “Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.”²¹

Justice Brandeis turned next to *Boyd*, an important nineteenth century case that held that the compelled production of documents violated both the Fourth and Fifth Amendments. Justice Bradley explained in that case, in the passage quoted by Brandeis in *Olmstead* (and referenced later in *Carpenter*):

¹⁹ *Id.* at 474 (Brandeis, J., dissenting).

²⁰ *Id.* at 472 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)).

²¹ *Id.* at 473 (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense, it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.²²

Justice Brandeis also observed that if the government must obtain a warrant to open the postal mail to view a single letter, as in *Ex parte Jackson*,²³ then it must certainly require one for the far more intrusive act of intercepting and recording telephone communications.

The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and, although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him.²⁴

²² *Id.* at 474-75.

²³ *Ex parte Jackson*, 96 U.S. 727 (1877).

²⁴ *Olmstead*, 277 U.S. at 476 (Brandeis, J., dissenting).

Rejecting the property-based view of the Fourth Amendment and providing perhaps the first opinion in cyberlaw, Justice Brandeis concluded “Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants’ objections to the evidence obtained by wiretapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants’ premises was made.”²⁵

In the *Olmstead* dissent, Justice Brandeis accomplished two remarkable feats: he applied the Fourth Amendment to new technology, and he set the cornerstone of Progressive Constitutionalism, the view that the Constitution should adapt to the times. It took only forty years before the Supreme Court understood all of this.

But before we tell the story of *Olmstead*’s vindication, it is important to make two other points about the history leading up to *Carpenter*. First, the Taft majority and the Brandeis dissent introduced a sharp split in the application of the Fourth Amendment to new technologies. Chief Justice Taft had drawn a bright line at the home. Justice Brandeis viewed the home as largely irrelevant, at least as to the flow of electronic information containing personal data. Not only were the two doctrines difficult to reconcile, descriptively they imagined two different worlds, one of fences and property lines, the other of wires and messages racing through the ether. Chief Justice Taft’s view offered no obvious path for the Fourth Amendment to the modern age.

But that did not mean that one side necessarily favored privacy more than the other. Chief Justice Taft did not dismiss the privacy interest before him. His solution was to get Congress on the

²⁵ *Id.* at 479.

playing field. He wrote, “Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials by direct legislation, and thus depart from the common law of evidence.”²⁶ And in fact, Congress took up the invitation in 1934 and enacted § 605, a provision of the Communications Act intended to safeguard communications privacy.²⁷ That provision, now recast as § 222,²⁸ reappears in *Carpenter*, as does the *Boyd* opinion, the Brandeis dissent, and the recommendation that Congress take action. To understand *Carpenter*, we must understand *Katz*. And to understand *Katz* we must understand *Olmstead*.

II. A Reasonable Expectation of Privacy

It is conventional wisdom that the Supreme Court in *Katz* reversed *Olmstead* and adopted the Brandeis dissent when it held that a warrant was required to intercept a telephone communication that took place at a payphone in Los Angeles. But that reading to me has never seemed correct. The Brandeis dissent in *Olmstead* was never simply about the warrant requirement. Justice Brandeis also viewed the government conduct as an offense against the Fifth Amendment. His opinion is grounded in the famous 1890 case *Boyd v. United States*,²⁹ which makes several cameos in *Carpenter*, and raised the very real possibility that even with a warrant, the evidence would simply be beyond the reach of government. Indeed, under the “mere evidence” rule, only instrumentalities, fruits of the crime, and contraband could be searched and seized. Mere evidence, such as records of communications, could not

²⁶ *Id.* at 465–466.

²⁷ Communications Act of 1934, 47 U.S.C. § 151 (1934).

²⁸ 47 U.S.C. § 222 (2016).

²⁹ *Boyd v. United States*, 116 U.S. 616 (1886).

be seized. That was the significance of the *Boyd* reference in the Brandeis opinion. And it was not until 1967 that the Court formally abandoned the rule. But the textualists and the originalists should have objected, because the text is clear: no person “shall be compelled in any criminal case to be a witness against himself.”³⁰ The Brandeis dissent, like the Court’s opinion in *Boyd*, grounded what we now call Progressive Constitutionalism in sturdy originalism.

In the same year that the Court abandoned the mere evidence rule, the Court held that a warrant was required for the interception of telephone communications. And in a companion case, *Berger v. New York*,³¹ that has never received the love that *Katz* did, the Court also held that a New York state law that established some limitations on wiretapping did not go far enough.

But many of the key elements in the Brandeis *Olmstead* dissent did not survive *Katz*. There were no references to the scope of surveillance (there were lots of payphones in L.A. at the time), the *Boyd* decision (except for a contrary reference in Justice Black’s dissent), the significance of the Fifth Amendment, or even the need to limit search in space and time. The Court in *Katz* says it overturned *Olmstead*, but it nowhere actually discusses Justice Brandeis’s critical dissent explaining why the original case was wrongly decided. Instead we ended up with the holding “privacy protects people not places” and the famous Harlan concurrence setting out the two-factor test for the reasonable expectation of privacy.³²

³⁰ U.S. CONST. amend. V.

³¹ *Berger v. New York*, 388 U.S. 41 (1967).

³² *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

Before we join the *Carpenter* dissenters and pummel the logic in *Katz*, we need to review two recent decisions of the Roberts Court that underpin the majority opinion in *Carpenter*.

The Shadow Majority in *Jones*

In 2012, the Court held in a unanimous opinion that the warrantless surveillance of a car with a GPS-tracking device was unconstitutional.³³ The outcome was striking not so much for the tally but for the three distinct opinions that each conveyed a different theory of how best to decide the case. Justice Scalia, writing for a five-member majority, grounded his view in a common-law trespass notion of the Fourth Amendment, much like Chief Justice Taft had in *Olmstead*. The difference of course was that the police had placed the GPS tracking device on the vehicle of the target, and that constituted the violation of the eighteenth-century text of the Constitution. Justice Scalia, who was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor, did not exactly reject the *Katz* reasonable expectation of privacy formulation. He simply said that “18th-century guarantee against unreasonable searches . . . must provide at a *minimum* the degree of protection it afforded when it was adopted.”³⁴ Indeed, Justice Scalia went to some pains to leave *Katz* in place. “[U]nlike the concurrence, which would make *Katz* the exclusive test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis.”³⁵

But the concurrence in *Jones*, authored by Justice Alito, and joined by Justices Ginsburg, Breyer, and Kagan, did fully embrace *Katz*. As Justice Alito wrote at the time:

³³ United States v. Jones, 565 U.S. 400 (2012).

³⁴ *Id.* at 411 (emphasis in original).

³⁵ *Id.*

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This case requires us to apply the Fourth Amendment’s prohibition of unreasonable searches and seizures to a 21st-century surveillance technique, the use of a Global Positioning System (GPS) device to monitor a vehicle’s movements for an extended period of time. Ironically, the Court has chosen to decide this case based on 18th-century tort law. . . .

I would analyze the question presented in this case by asking whether respondent’s reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.³⁶

In other words, according to the concurrence, *Katz* should control the outcome.

For those who are keepings score, it would appear that we have unanimity on the outcome, with five votes in favor of a property-based view of the Fourth Amendment and four votes for the *Katz* reasonable-expectation-of-privacy view. But this is where *Jones* gets interesting, because Justice Sotomayor cast two votes. Justice Sotomayor did not simply sign-on to Justice Scalia’s opinion for the majority. She wrote a separate concurrence, in which she went further than team *Katz*. Siding with Justice Scalia, she explained, “*Katz*’s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it.”³⁷

Justice Sotomayor also set up the key question that would be before the Court in *Carpenter* when she wrote in concurrence that it “may be necessary to reconsider the premise that an individual

³⁶ *Id.* at 419 (Alito, J., concurring).

³⁷ *Id.* at 414 (Sotomayor, J., concurring).

has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”³⁸ As she explained, the “approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.”³⁹ Perhaps anticipating a case such as *Carpenter*, Justice Sotomayor warned in *Jones*, “GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”⁴⁰ Justice Sotomayor quoted Justice Marshall’s dissent in *Smith v. Maryland*: “Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes.”⁴¹

The four votes in the Alito concurrence and the Sotomayor concurrence together constituted five votes in favor of the view that *Katz* controlled the outcome in the GPS tracking case. But the majority opinion by Justice Scalia said otherwise. Hence the case resulted in a majority for the property-based view of the Fourth Amendment and a “shadow majority” for the *Katz* view.

III. The Cellphone as Extension of Human Anatomy

So, maybe it was an overstatement above to suggest that a 9-0 vote to grant a suppression motion by the Supreme Court in 2012 was not remarkable. But after a similar outcome in the 2014 case *Riley v. California*,⁴² unanimous verdicts by the Court in digital privacy cases were becoming commonplace. In *Riley* the Court

³⁸ *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring).

³⁹ *Id.*

⁴⁰ *Id.* at 415.

⁴¹ *Id.* at 418 (quoting *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting)).

⁴² *Riley v. California*, 134 S. Ct. 2473 (2014).

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considered whether the search of a cell phone incident to an arrest required a warrant. In previous search-incident-to-arrest cases involving wallets and cigarettes packs, the Court had rejected the warrant requirement. But as just about every amici in *Riley* contended, cell phones are “different.” Not only do they contain vast repositories of personal data, they also provide access to cloud-based service and even unlock homes and cars.⁴³ Can your cigarette pack do that?

The Court agreed that cell phones were different and also that they were everywhere. And to drive the point home, Chief Justice Roberts invoked the “proverbial visitor from Mars” to observe that cellphones could easily be viewed as an “important feature of human anatomy.”⁴⁴ Justice Roberts described the far-reaching capabilities of cell phones and noted that “[h]istoric location information is a standard feature on many smart phones and can reconstruct someone’s specific movements down to the minute, not only around town but also within a particular building.”⁴⁵ And there was a big shout-out for *Boyd* watchers. “Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans ‘the privacies of life.’”⁴⁶

Justice Alito joined the majority in *Riley*, stating:

we should not mechanically apply the rule used in the predigital era to the search of a cell phone. Many cell phones now in use are capable of storing and accessing a quantity of

⁴³ See, Brief of *Amicus Curiae* Electronic Privacy Information Center (EPIC) and Twenty-four Legal Scholars and Technical Experts in Support of Petitioner, *Riley v. California*, 134 S. Ct. 2473 (2014) (No. 13-132).

⁴⁴ *Riley*, 134 S. Ct. at 2484.

⁴⁵ *Id.* at 2490.

⁴⁶ *Id.* at 2495 (quoting *Boyd*, 116 U.S. at 625).

information, some highly personal, that no person would ever have had on his person in hard-copy form. This calls for a new balancing of law enforcement and privacy interests.⁴⁷

But Justice Alito, who had warned in *Jones* that Congress may be better equipped to address the challenges of the digital age, also wrote in concurrence that,

it would be very unfortunate if privacy protection in the 21st century was left primarily to the federal courts using the blunt instrument of the Fourth Amendment. Legislatures, elected by the people, are in a better position than we are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future.⁴⁸

Siding with the Court but also looking to Congress, Justice Alito set out the view in *Riley* that many anticipated he would follow in *Carpenter*.

IV. Back to Carpenter

And so when the Supreme Court granted certiorari in *Carpenter* in January 2018, following the two 9-0 outcomes in *Jones* and *Riley*, the privacy world was abuzz. Would the Court overturn the third-party doctrine as Justice Sotomayor suggested in *Jones*? Would the Court maintain its unanimous voting record on emerging privacy issues, a remarkable outcome made clear in *Jones* and *Riley*? And would anyone know what the acronym “CSLI” stood for?

⁴⁷ *Id.* at 2496 (Alito, J., concurring).

⁴⁸ *Id.* at 2497-98.

Perhaps we should begin by noting that binary star systems are stable over time because celestial objects exert constant gravitational forces that tend toward an equilibrium. And so, it is possible for planets to orbit a binary star system even though there are multiple gravitational forces. Unfortunately, Supreme Court doctrine, even with the twin forces of *Katz* and trespass law, is not prone to equilibrium. And so, the hope that *Carpenter* would provide either a stable outcome or a grand synthesis for digital privacy was not to be.⁴⁹ The fissures in *Jones* opened up with significant consequence in *Carpenter*, suggesting that the contours of future privacy cases are far from clear.

A. The Majority – Get a Warrant

In *Carpenter*, the Supreme Court holds that “an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.”⁵⁰ As applied to the facts before the Court, a request for seven or more days of cell-site records triggers constitutional scrutiny. The search pursuant to § 2703(d) is unlawful and the evidence must be excluded.

To reach the result, Chief Justice Roberts reconciles two lines of cases—the first concerns a person’s expectation of privacy in their physical location, the second concerns the records that are maintained by so-called third parties. From *Jones* we establish that a person does have an expectation of privacy in their location data, but from *Smith* and *Miller* we are told that the expectation of privacy is extinguished when the records are held by third parties.

⁴⁹ I have suggested that Justice Kagan’s concurrence in *Florida v. Jardines*, 569 U.S. 1 (2013), a case concerning the search of a home by a drug sniffing dog at the doorway, provided such a grand synthesis. Justice Kagan explained that the “Court treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to *Jardines*’ privacy interests.” *Id.* at 13 (Kagan, J., concurring). In other words, it is possible to view a search as simultaneously implicating both a property interest and a *Katz* expectation of privacy interest.

⁵⁰ *Carpenter v. United States*, 138 S. Ct. at 2206, 2217 (2018).

A simple way to understand the outcome in *Carpenter* is to say that there is now a location data exception to the third-party doctrine.

But much has also changed since *Smith* and *Miller* were decided. The Chief Justice, drawing on the *Jones* and *Riley* opinions, makes this clear:

The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS monitoring we considered in *Jones*. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled

. . . .

. . . [W]hen *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements.⁵¹

Chief Justice Roberts's opinion is remarkable not only for describing the vast change in scale and scope of data collection made possible by digital technology, but also recognizing the ability for law enforcement to "travel back in time to retrace a person's whereabouts," because time-stamped location records exist in multiple dimensions, placing people in particular places at particular times.⁵² The Brandeis dissent in *Olmstead*, which contrasted the search of communications channels with the

⁵¹ *Id.* at 2206, 2216-17.

⁵² *Id.* at 2218.

search of a single physical object, first identified the unbounded character of cyber searches. But it was Chief Justice Roberts in *Riley* who recognizes that in the digital age, stored data also moves time backward.⁵³

A second key insight is that a search through cell history data is boundless and requires no individual suspicion. As Chief Justice Roberts explains, “police need not even know in advance whether they want to follow a particular individual, or when. . . . Only the few without cell phones could escape this tireless and absolute surveillance.”⁵⁴ And so, we see the outcome: “The Government’s position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter’s location but also everyone else’s, not for a short period but for years and years.”⁵⁵

But Chief Justice Roberts stops short of overturning *Smith* and *Miller*, and it is not entirely clear why. Much of his opinion makes clear that in the digital world there is little sense in which individuals “voluntarily disclose” personal information to others in the way that Chief Justice Taft had described telephone calls as “broadcast” to the world. Many of these records are generated by the use of the service. Chief Justice Roberts also states that location data about where individuals travel “implicates basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers.”⁵⁶

B. The Dissents

There are four dissents in *Carpenter*, with several justices signing on to the dissents of others. Justice Kennedy expresses

⁵³ And with predictive analytics, this data may also move time forward.

⁵⁴ *Carpenter*, 138 S. Ct. at 2218.

⁵⁵ *Id.* at 2219.

⁵⁶ *Id.* at 2222.

concern about the impact of the Court’s decision on police practice and also suggests that the privacy interest in cell-site location information in *Carpenter* is simply less than the GPS data in *Jones*.⁵⁷ But on the technology the chief gets the better of the argument—the Kennedy opinion does not reflect the reality that cell phones are pinged, i.e., location is established, routinely without any action by the users, as Justice Sotomayor had also observed in her *Jones* concurrence. To add a layer to the creepy factor, the mics and cameras on cell phones can also be remotely activated. While such real-time investigative technique should certainly be subject to constitutional review, it is not science fiction to recognize that the cell phone is more than a tracking device. It is also a remote listening device.

Justice Thomas lets loose on *Katz* and frankly makes a good argument.⁵⁸ The problems of the *Katz* doctrine are well known, and Justice Thomas marshals the forces. He also places understandable weight on the language of the phrase in the Fourth Amendment regarding their “persons, papers, and effects.” For the textualist, the third-party doctrine is established long before *Miller*.

Justice Alito, who might have been expected to concur in the outcome but write separately, chose a different course.⁵⁹ In his view, the subpoena process is so well established that any effort to modify the third-party doctrine will lead to confusion and chaos. He writes, “We will be making repairs—or picking up the pieces—for a long time to come.”⁶⁰ But Alito, as he did in *Jones* and *Riley*, also looks to Congress to solve these challenges: “legislation is much preferable to the development of an entirely new body

⁵⁷ *Id.* at 2223-35 (Kennedy, J., dissenting).

⁵⁸ *Id.* at 2235-46 (Thomas, J., dissenting).

⁵⁹ *Id.* at 2246-61 (Alito, J., dissenting).

⁶⁰ *Id.* at 2247 (Alito, J., dissenting).

of Fourth Amendment caselaw for many reasons, including the enormous complexity of the subject, the need to respond to rapidly changing technology, and the Fourth Amendment’s limited scope.”⁶¹ And he rightly notes that Congress can also reach the challenges from the use of personal data by the commercial sector:

The Fourth Amendment restricts the conduct of the Federal Government and the States; it does not apply to private actors. But today, some of the greatest threats to individual privacy may come from powerful private companies that collect and sometimes misuse vast quantities of data about the lives of ordinary Americans.⁶²

And in fact, federal wiretap law has often regulated the conduct of both the government and private actors.

C. The Gorsuch Concurring Dissent

Among the dissents, the most interesting is from Justice Gorsuch.⁶³ It is a concurrence in every way but the title. Not only does Justice Gorsuch believe the search of cell-site records was unlawful, he would go further than the Court and overturn the third-party doctrine as many had urged. Justice Gorsuch justifies the designation “dissent” because *Carpenter* failed to raise these arguments on appeal, but the message is clear. If there was a “shadow majority” in *Jones*, there were six votes in *Carpenter* for the proposition that the search was unlawful.

More interesting is Justice Gorsuch’s efforts to imagine a world without *Smith* and *Miller*, cases that let “the government search

⁶¹ *Id.* at 2261 (Alito, J., dissenting).

⁶² *Id.* (Alito, J., dissenting).

⁶³ *Id.* at 2261-72 (Gorsuch, J., dissenting).

almost whatever it wants whenever it wants.”⁶⁴ Justice Gorsuch, like Justice Thomas, is also not happy with *Katz* as the remaining foundation, but he is also not willing to ignore the growing impact of digital surveillance technologies on the rights of Americans. The question is what to put in its place. Justice Gorsuch provides an answer.⁶⁵

First, the courts should recognize that when we turn over our personal possessions to others—the essence of the third-party doctrine—we do in fact have an interest in what happens next. Justice Gorsuch describes this as a bailment. In his *Olmstead* dissent, Justice Butler called it a contract. Others have called it a fiduciary obligation. Second, our interest in our personal data held by others need not be absolute to establish a legal interest. Third, we may be able to avoid the circularity of *Katz* by looking for concrete signs that society has in fact deemed certain activities as private. That is how a federal statute comes into play in this case about the scope of the Fourth Amendment. Section 222 establishes some control for the use of personal data held by the telephone company. For Justice Gorsuch that is enough to establish a privacy interest. Fourth, the inquiry into positive law is an upward ratchet. Just because the government engages in the conduct does not establish that the conduct is permissible. And this constitutional floor applies as well to subpoenas. And perhaps of greatest interest, Judge Gorsuch also signals an interest in a robust understanding of the Fifth Amendment as applied to digital data: “there is substantial evidence that the privilege against self-incrimination was also originally understood to protect a person from being forced to turn

⁶⁴ *Id.* at 2264.

⁶⁵ *Id.* at 2268-71.

over potentially incriminating evidence.”⁶⁶ That was key to the Brandeis dissent in *Olmstead*, but disappeared in *Katz*, and could now reemerge after *Carpenter*.

D. The *Smith* and *Miller* Incantations

Both the majority and dissents restate *Smith* and *Miller* as settled law, which at the time of the decision was true but also incomplete. First, it bears noting that both decisions of the Supreme Court were followed by acts of Congress that did indeed establish privacy safeguards for records held by third parties. The Right to Financial Privacy Act of 1978⁶⁷ was the response of Congress to the *Miller* decision. The Stored Communications Act of 1986⁶⁸ was the response to *Smith*.

Perhaps it would surprise the dissenters to learn that those in possession of records of others would want clarity as to the circumstances when it is appropriate to release personal information to the government. Whether understood as a fiduciary obligation, a bailment, or simply fair play, the Court’s conclusion that the Fourth Amendment does not extend to third parties has not, in practice, ended the discussion over the circumstances when third parties would disclose information in their possession to a government agent.⁶⁹ In fact, and remarkably, the American Telephone and Telegraph company filed an amicus brief in the *Olmstead* case, arguing for the warrant requirement. And many of the arguments put forward by AT&T back in the day were adopted by Justice Brandeis in his dissent.

⁶⁶ *Id.* at 2271.

⁶⁷ See 12 U.S.C. § 3401 (2018).

⁶⁸ See 18 U.S.C. §§ 2701 – 2712 (2018).

⁶⁹ Even after enactment of the comprehensive federal Wiretap Act of 1968 it was not obvious to the phone companies that they should turn over information about their customers to the government without a warrant. It took a subsequent amendment to the Act to compel compliance.

So, the dissenters' assumption that third-party doctrine provides a bright-line rule tells only part of the story. In practice, those third parties still need legal rules to guide their conduct. And the dissents in *Smith* and *Miller* deserved more attention in *Carpenter*. As noted above, Justice Sotomayor's concurrence in *Jones* draws heavily on Justice Marshall's assumption of risk analysis in *Smith*, a point that was essentially made also by both Justice Gorsuch and Justice Alito in their dissents in *Carpenter*. The idea that individuals "voluntarily" disclose their personal data to third parties so that it can be used by others for unrelated purposes is more fiction than fact.

But there was a second dissent in *Smith* that also deserved more attention in *Carpenter* than it received. In *Smith*, Justice Stewart said that the protection for the content of a communication should extend also to the records associated with the communications.

The numbers dialed from a private telephone—although certainly more prosaic than the conversation itself—are not without "content." Most private telephone subscribers may have their own numbers listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long-distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.⁷⁰

Justice Stewart's analysis of the challenge in the digital age is relevant for at least two reasons. First, he makes clear that data, as

⁷⁰ *Smith v. Maryland*, 442 U.S. 735, 748 (1979) (Stewart, J., dissenting).

much as content, is significant. Second, he charts a path from *Katz* that side steps the third-party doctrine. It is less significant where the records are stored than where they originate: “The information captured by such surveillance emanates from private conduct within a person’s home or office—locations that without question are entitled to Fourth and Fourteenth Amendment protection.”⁷¹

E. What Would Scalia Do?

Justice Scalia’s views of the Fourth Amendment loomed large in several of the dissents. Justice Thomas quoted Scalia opinions at length, as did Justice Gorsuch. But one has to ask: What would Justice Scalia do if he were still on the Court? It is not at all obvious he would have joined the dissenters. It was Justice Scalia writing for the Court in 2001 who held that thermal imaging devices required a warrant. “This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted,” he wrote in *Kyllo*.⁷² And it was Justice Scalia who famously dissented in *Maryland v. King*, the DNA search case, writing:

Today’s judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the “identity” of the flying public), applies for a driver’s license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.⁷³

⁷¹ *Id.* at 747.

⁷² *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

⁷³ *Maryland v. King*, 569 U.S. 435, 482 (2013).

And in *Jones*, Justice Scalia did not argue that *Katz* was not good law. His point was that the property-based view provided a “minimum” standard for the Fourth Amendment and helped ensure that the reasonable-expectation-of-privacy analysis did not dip below this baseline.

So, it may be worth pushing against the premise in several of the dissents that Justice Scalia would have joined them in rejecting *Katz*. And it is most certainly worth noting that Justice Alito mischaracterized Justice Brandeis when he wrote in his dissent that “even Justice Brandeis—a stalwart proponent of construing the Fourth Amendment liberally—acknowledged that ‘under any ordinary construction of language,’ ‘there is no “search” or “seizure” when a defendant is required to produce a document in the orderly process of a court’s procedure.’”⁷⁴ Justice Brandeis made the opposite point in *Olmstead*. “Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it,” Justice Brandeis explained. “No court which looked at the words of the Amendment, rather than at its underlying purpose, would hold, as this Court did in *Ex parte Jackson* . . . that its protection extended to letters in the mails.”⁷⁵

V. Next Steps

A. Congress

One immediate consequence of the Court’s decision in *Carpenter* is that the “2703(d) order,” the process for obtaining cell-site records from telephone companies, is no longer good law. That means that Congress will almost certainly be asked by the Department of Justice and the telephone companies to enact a new standard that follows

⁷⁴ *Carpenter v. United States*, 138 S. Ct. 2206, 2251 (2018) (Alito, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 458, 476 (1928)).

⁷⁵ *Olmstead*, 277 U.S. at 476 (Brandeis, J., dissenting).

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Carpenter. The interesting question is whether Congress will do more. It would be a mistake to assume that the “*Carpenter fix*” is simply an adjustment to the Fourth Amendment setting in the Stored Communications Act.

The Electronic Communications Privacy Act of 1986,⁷⁶ which established the 2703(d) order, is in need a major upgrade.⁷⁷ The commercial use of communications data has increased in ways that could not have been imagined when e-mail first arrived on the scene. Law enforcement has many more ways to access private communications than in the past. And the absence of robust encryption leaves communications in the United States subject to attack by foreign adversaries. *Carpenter* should lead to public hearings that include a broad examination of the full range of new threats to online privacy.

Congress should also recognize that effective privacy law typically establishes multiple firewalls to ensure accountability. The federal Wiretap Act of 1968, for example, established a Fourth Amendment standard for the interception of electronic communications. But it also put in place limits on the duration of surveillance, established procedures for minimization, designated predicate crimes, required judicial determinations for extensions and target notification, and imposed substantial public reporting requirements.⁷⁸ These are the elements of modern privacy law, available to Congress, as it undertakes its review post-*Carpenter*.

⁷⁶ See 18 U.S.C. § 2510 (2018).

⁷⁷ See, e.g., ELECTRONIC PRIVACY INFORMATION CENTER, EPIC Urges Congress to Reform ECPA, Safeguard Locational Data (June 23, 2010), <https://epic.org/2010/06/epic-urges-congress-to-reform.html>. See also “ECPA Reform and the Revolution in Location Based Technologies and Services” Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. (2010) (statement of the Electronic Privacy Information Center).

⁷⁸ See 18 U.S.C. § 2510 (2018).

B. The Courts

Justice Alito was almost certainly correct when he said that the decision will cause confusion among lower courts. The third-party doctrine, right or wrong, provided a bright line that made easy the application of Fourth Amendment challenges to records held by third parties. The Court has moved the line with *Carpenter*, and the settling point is not clear. Many records include location data of the type found in cell site records.⁷⁹ It appears likely that *Carpenter II* is in the Court's near future.

Justice Gorsuch has helpfully provided guideposts that may give more clarity for the *Katz* test when that case returns to the Court. I would not ignore his bailment theory that follows from the Butler dissent in *Olmstead*. And I would point to the interest in positive law—objective indicators that we as a society value privacy—to help clarify our contemporary understanding of privacy.⁸⁰ It is likely that we will uncover acts of Congress responding to invitations from the courts to establish new protections in the digital age that then help the courts see the objective expectation of privacy in our modern society.

But if the aim is to further the project of Progressive Constitutionalism, we should go back to *Olmstead* and imagine a doctrine that reflects less of the circularity of *Katz* and more of the interpretive guidance of Justice Brandeis, incorporating the opinions in *Boyd* and *Ex parte Jackson*. This is the recovered history now made relevant with *Katz* teetering on the brink.

⁷⁹ Consider for example the records of vessel location routinely recorded by the U.S. Coast Guard on behalf of the Department of Homeland Security. See Ralph Naranjo, *Is AIS Chipping Away at Our Freedoms?*, PRACTICAL SAILOR (Feb. 2011), https://www.practical-sailor.com/issues/37_2/features/Is_AIS_Chipping_Away_at_Our_Freedoms_10135-1.html.

⁸⁰ The discussion in Carpenter of § 222 of the Communications Act which provides some rights for consumer in the “Customer Proprietary Network Information” suggests how this might play out. Unfortunately, there was disagreement even among the dissenters of the significance of this instance of positive law.

Surveillance unbounded from space and time is different from a physical search that exists at a moment in time. But that does not diminish the constitutional claim. It amplifies it. And perhaps the right of the people should inhere in their persons. It has always seemed odd to me that the Fourth Amendment, alone among the amendments, ascribes personal rights to property interests. Perhaps this was the Framers' best understanding of one's persona in the eighteenth century. We are those things we keep in homes, those papers we choose to possess, the daily activities we record in our journals and our business records. And as against the government, to be secure in our private lives, we must ensure oversight. But in the twenty-first century, we are now also the places we visit, the texts we send, the people we are with, the things we seek—the ephemeral now made permanent in our digital age. Although it is correct that the cell-site location information concerning Mr. Carpenter resided with third parties, those records could not exist but for the activities of Mr. Carpenter that caused the records to be created. And that is true for all cell-phone users in the United States. Those records exist because of us; and if companies choose to retain them, we should have some say over how they are used and when they are disclosed to others.

I doubt the framers would disagree.

VI. Concluding Thought: Data Retention, Positive Law, and the Future of Privacy

Finally, there is no necessary reason for telephone companies to retain cell-site location information. For many years, including the year when *Smith v. Maryland* was decided, telephone services were billed as a flat-rate utility and call set-up information was not generated or retained. The cell tower location information generated by the network today is necessary in the moment to

connect the device to the cell network and to provide the user with information about location. The data may also be useful to evaluate a service's quality and decide where to place additional cell towers. But almost all other uses of the data, generated solely by the users' private activities, raise troubling privacy concerns. Should telephone companies make use of this data to target services at the consumers, making every act subject to scrutiny? When the telephone companies transfer aggregate phone data to retailers trying to measure population density, is the technique for deidentification robust? How secure are the detailed records of those 396 million cellphone account holders from criminal hackers and foreign governments? Under what circumstances may the telephone companies disclose this data to law enforcement? The Court answered that last question in *Carpenter*, but it is likely not the only constitutional concern present.

Digital technologies have created a vast data retention dynamic. This dynamic requires some legal scrutiny. In the European Union, an initial effort to harmonize the data-retention laws of member states eventually settled on two years for telephone record information. That conclusion was subject to fierce political opposition in the European Parliament and legal judgements by courts across Europe that found the routine retention of data about private life unnecessary and disproportionate. Eventually, the Court of Justice of the European Union took up the matter and concluded that the retention of phone records, of the type at issue in the *Carpenter* case, was a violation of fundamental rights.⁸¹ In other words, today telephone companies

⁸¹ COURT OF JUSTICE OF THE EUROPEAN UNION, *The Court of Justice Declares the Data Retention Directive to Be Invalid* (Apr. 8, 2014) (“Digital Rights Ireland”), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140054en.pdf>.

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in Europe are simply not permitted to keep five years of cell-site information because of constitutional limitations in EU law.

Data retention was not before the U.S. Supreme Court in *Carpenter*, but perhaps it should have been. There is an inversion taking place in the realm of law enforcement. Increasingly digital data is building new mountains of evidence that will provide the basis for millions of searches, arrests, and convictions of Americans. Chief Justice Roberts recognized that danger with cell-site information and concluded that a warrant should be required for location data. But the challenges ahead will be still more complex. The mere collection of data will implicate constitutional freedoms.

Justice O'Connor once wrote, "With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities."⁸² Or as Chief Justice Roberts recently remarked at a graduation speech for his daughter's high school, "What is very interesting can become very creepy, very fast."⁸³

⁸² Arizona v. Evans, 514 U.S. 1, 18 (1995) (O'Connor, J., concurring).

⁸³ Richard Wolf, *Chief Justice John Roberts to High School Graduates (and His Daughter): 'Beware the Robots'*, USA TODAY (June 7, 2018, 4:20 PM), <https://www.usatoday.com/story/news/politics/2018/06/07/beware-robots-chief-justice-john-roberts-commencement-warning/681626002/>.

***Lucia v. SEC* and the Attack on the Administrative State**

Steven D. Schwinn*

In a Term with so many blockbusters, it's easy to overlook a case like *Lucia v. SEC*.¹ In that case, the Court held that Securities and Exchange Commission (SEC) administrative law judges (ALJs) were "officers" under the U.S. Constitution's Appointments Clause, and therefore required appointment by the president or the SEC itself (and not, as they had been appointed, by SEC staff). The Court reversed the decision of an improperly-appointed ALJ and sent the case back to the SEC for a new hearing, with a different, properly-appointed ALJ.

On this level, *Lucia* is easy to overlook. For one thing, the case deals with only a technical and position-specific question under a relatively clear textual provision, the Appointments Clause.² For another, the Court could resolve the issue, and did resolve it, by applying a single, narrow precedent—and avoiding any grand statements about the Appointments Clause, presidential authority, or the separation of powers. And finally, the practical response to the ruling was straightforward and uncontroversial: the SEC simply reappointed its ALJs itself and thus solved the Appointments Clause problem. On its surface, then, *Lucia* appears unexceptional.

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¹ *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

² U.S. CONST. art. II, § 2, cl. 2.

But scratching just a little beneath the surface, we see that *Lucia* has significant implications for presidential authority and the separation of powers. It will likely lead to challenges to the appointments of ALJs across the executive branch, and to functional separation-of-powers challenges to ALJs within independent agencies. It will also likely lead to Appointments Clause challenges to a much broader range of positions within the executive branch. Most significantly, it has already led to a presidential order extinguishing merit-based selection for ALJs, with a line of reasoning that could curtail all statutory appointment restrictions within the executive branch.

Individually, each of these implications represents a significant attack on independent, expert actors within the executive branch. Each puts more control over previously independent and expert ALJs in the hands of the president and agency heads. And by extension, each threatens to put more control over *all* independent and expert executive actors in those same hands. These mark a substantial attack on independent and expert positions within the agencies, and, at the extreme, threaten to turn them into mere political pawns.

But there's more. *Lucia* comes amid a much broader, coordinated movement against the administrative state. This movement includes challenges to judicial deference to agency rulemaking under the *Chevron* doctrine.³ It also includes increasingly viable separation-of-powers challenges to statutory removal protections for executive positions. And it even includes a current challenge to the nondelegation doctrine. Taken together, these could substantially upend our constitutional understanding

³ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (noting that “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency”).

of the administrative state. It's important to see *Lucia* as part of this movement.

So while *Lucia* appears unremarkable, especially among this Term's bigger cases, we ought to pay careful attention. This sleeper-of-a-case is in fact a key part of a larger, coordinated effort to undermine and even dismantle the modern administrative state. This movement is afoot, and unless we heed cases like *Lucia*, it will succeed.

I start with the background of the case, then move to the decision, and finally discuss the implications.

I. Background

In 2012, the SEC charged Raymond J. Lucia with violating the antifraud provisions of the Investment Advisers Act⁴ and SEC rules. The SEC alleged that Lucia, an investment professional, misled potential investors in nearly forty free retirement-planning seminars by touting his “Buckets-of-Money” investment strategy. Under the strategy, investors would spread their investments across several types of assets, with different degrees of risk and liquidity. According to Lucia, the strategy would allow prospective clients to “live comfortably off of their investment income while also leaving a large inheritance.”⁵

In demonstrating the “Buckets-of-Money” strategy, Lucia used a slideshow to demonstrate how the strategy *would have* performed in the past (as opposed to how it *might perform* in the future). Using this “backtesting” analysis, Lucia compared how his strategy would have performed as compared to others for a fictional couple retiring in historical times of economic downturn. “Each example

⁴ 15 U.S.C. § 80b-1 *et seq.*

⁵ Raymond J. Lucia Cos., Inc. v. SEC, 832 F.3d 277, 290 (D.C. Cir. 2016).

showed that a couple using the ‘Buckets-of-Money’ strategy would have increased the value of their investments despite the market downturns and would have done much better than those utilizing other investment strategies.”⁶

There was just one problem: the SEC alleged that Lucia misled potential investors by misrepresenting key information in his analysis. In particular, the SEC claimed that Lucia made faulty and unstated assumptions about the economy and the way his strategy worked. The SEC charged Lucia under the Investment Advisors Act and assigned the case to ALJ Cameron Elliot.

ALJ Elliot was one of five ALJs at the SEC, all of whom were appointed by Commission staff (and not the Commission itself).⁷ SEC ALJs have authority to preside over administrative hearings and to make recommendations to the full SEC. In so doing, they also have “authority to do all things necessary and appropriate to discharge [these] duties” and to ensure a “fair and orderly” administrative proceeding.⁸ Their particular powers include supervising discovery, issuing subpoenas, ruling on motions, ruling on evidence, and examining witnesses, among others. SEC ALJs even have authority to issue sanctions for “[c]ontemptuous conduct” or violations of procedural requirements.⁹ In short, “an SEC ALJ exercises authority ‘comparable to’ that of a federal district judge conducting a bench trial.”¹⁰ After a hearing, SEC ALJs have authority to issue an “initial decision,” setting out findings of fact and conclusions of law and specifying an appropriate sanction or relief.¹¹ The full SEC can review an ALJ’s

⁶ *Id.*

⁷ Lucia v. SEC, 138 S. Ct. 2044, 2049-50 (2018). The following discussion of the ALJs’ powers comes from the Court’s ruling, which, in turn cites the relevant regulations. *Id.*

⁸ *Id.* at 2046 (citation omitted).

⁹ *Id.* at 2049 (citation omitted).

¹⁰ *Id.* (quoting *Butz v. Economou*, 438 U.S. 478, 513 (1978)).

¹¹ *Id.* at 2046 (citation omitted).

decision on its own or upon request; or, if it declines to review the decision, it can “issue[] an order that the decision has become final,” and thus becomes the final “action of the Commission.”¹²

ALJ Elliot heard nine days of testimony and argument in the *Lucia* matter. He issued an initial decision concluding that Lucia had violated the Act and recommending \$300,000 in civil penalties and a lifetime bar from the investment industry. After remand from the SEC, ALJ Elliot later made additional findings and issued a revised initial decision but imposed the same sanctions.¹³

Lucia appealed to the SEC, arguing that ALJ Elliot’s decision was wrong on the merits, and that in any event the proceeding was invalid, because ALJ Elliott was appointed in violation of the Appointments Clause. As to the latter claim, Lucia contended that SEC ALJs are “Officers of the United States” under the Appointments Clause, and that they can only be appointed by the president, “Courts of Law,” or “Heads of Departments.”¹⁴ Lucia argued that SEC ALJs, including ALJ Elliot, were appointed merely by SEC staff, and not the actors specified in the Appointments Clause. As a result, Lucia contended that ALJ Elliot was invalidly appointed and lacked authority to convene a hearing, much less to issue a decision, in his case.

The SEC rejected this argument. It held that its ALJs were not “Officers of the United States,” but instead were “mere employees,” not subject to the Appointments Clause. According

¹² *Id.*

¹³ *Id.* at 2050.

¹⁴ U.S. CONST. art. II, § 2, cl. 2. Under the Appointments Clause, the President, shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.

Id.

to the Commission, that was because its ALJs do not “exercise significant authority independent of [its own] supervision.”¹⁵

A three-judge panel of the United States Court of Appeals for the D.C. Circuit affirmed,¹⁶ and an equally divided (5-5) *en banc* court denied Lucia’s claim.¹⁷ The ruling created a split with the United States Court of Appeals for the Tenth Circuit,¹⁸ and the Supreme Court granted certiorari.¹⁹ The government switched its previous position (supporting the ALJs’ appointments) and argued in favor of Lucia. The Court appointed an amicus to defend ALJ Elliot’s appointment.

II. The Case

The parties and amici framed their arguments around two principal issues. First, the parties and amici took up the formal Question Presented—whether SEC ALJs are officers of the United States within the meaning of the Appointments Clause—and wrangled over what it means to be an “officer” (as opposed to a mere “employee,” which is not subject to the Appointments Clause).²⁰ This is a significant and largely unresolved question. Up to now, the Court has defined these categories in only the vaguest of terms. Thus, in one early case, the Court held that doctors hired to perform various physical exams were mere employees, because their duties were “occasional or temporary,” not “continuing and permanent.”²¹ In another, more recent case, the Court held that members of the Federal Elections Commission were officers,

¹⁵ *Lucia*, 138 S. Ct. at 2050 (citation omitted).

¹⁶ *Lucia v. SEC*, 832 F.3d 277 (2016).

¹⁷ *Lucia v. SEC*, 868 F.3d 1021 (2017).

¹⁸ *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016).

¹⁹ *Lucia v. SEC*, 138 S. Ct. 736 (2018) (mem.).

²⁰ Importantly, the case did not involve the difference between a principal “Officer” and an “inferior Officer.”

²¹ *United States v. Germaine*, 99 U.S. 508, 511-12 (1879).

because they “exercis[ed] significant authority pursuant to the laws of the United States.”²² But the Court never defined the phrases “occasional or temporary,” “continuing and permanent,” or “significant authority” with any determinacy. As a result, these rulings left Congress and the president partially in the dark about which executive branch positions were “officers” that are subject to Appointments Clause requirements and which are “employees” that are not.

Next, the government and some amici argued that the Court should limit or strike the SEC ALJs’ statutory removal protection as a violation of the separation of powers. SEC ALJs can only be removed from office by the SEC “for good cause established and determined by the Merit Systems Protection Board.”²³ Members of the SEC, in turn, can only be removed from office by the president for “inefficiency, neglect of duty, or malfeasance in office.”²⁴ The government argued that the Court should narrowly construe the ALJs’ removal protection and the role of the MSPB in order to avoid the “serious constitutional concern[]” that the protection would impermissibly restrict the president’s authority to supervise officials in the executive branch.²⁵

²² Buckley v. Valeo, 424 U.S. 1, 126 (1976).

²³ 5 U.S.C. § 7521(a).

²⁴ Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 487 (2010) (citing Humphrey’s Ex’r v. United States, 295 U.S. 602, 620 (1935)).

²⁵ Brief for Respondent Supporting Petitioners at 45-55, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130), 2018 WL 1251862. The government argued that statutory removal protections categorically raise serious constitutional concerns, and that “[t]hese constitutional concerns are heightened in the context of independent agencies whose heads are themselves protected from removal by the President.” *Id.* at 48. The former argument challenged the Court’s consistent and long-running line of cases upholding similar removal protections against separation-of-powers challenges. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 693-96 (1988) (holding that the statutory for-cause removal protection for the independent counsel did not violate the separation of powers). The latter argument challenged the double-for cause protection under *Free Enterprise Fund*, 561 U.S. at 495-98 (holding that the PCAOB’s double for-cause protection violates the separation of powers).

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While the parties and amici framed their entire arguments around these issues, the Court managed to dodge them entirely. Instead, the Court ruled narrowly, based on a single precedent, that SEC ALJs were “officers” and that therefore their appointment by SEC staff was invalid.

Justice Kagan wrote the majority opinion, joined by Chief Justice Roberts and Justices Kennedy, Thomas, Alito, and Gorsuch. The Court held that the outcome was dictated by *Freytag v. Commissioner*.²⁶ In that case, the Court held that Tax Court special trial judges (STJs), which had authority to conduct a trial and draft a proposed decision for a regular Tax Court judge, were “officers” under the Appointments Clause.²⁷ The *Freytag* Court noted that STJs held a continuing office and that they had authority and “significant discretion” to conduct a full adversarial hearing.²⁸ In particular, the Court noted that STJs had the powers to administer oaths, to take testimony, to rule on motions and the admissibility of evidence, and even to punish all “[c]ontemptuous conduct,” including violations of orders. The Court applied the continuing-office standard and “the unadorned ‘significant authority’ test” and ruled that STJs were “officers.”²⁹

Justice Kagan wrote simply that *Freytag* “necessarily decides this case.”³⁰ As an initial matter, she wrote that SEC ALJs, like Tax Court STJs “hold a continuing office established by law.”³¹ “Far from serving temporarily or episodically, SEC ALJs ‘receive[] a career appointment.’ And that appointment is to a position created by statute, down to its ‘duties, salary, and means of appointment.’”³²

²⁶ *Lucia*, 138 S. Ct. at 2052 (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 2052.

³⁰ *Id.*

³¹ *Id.* at 2053.

³² *Id.* (quoting 5 C.F.R. § 930.204(a) (2018) and *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991)).

Moreover, Justice Kagan wrote that “the Commission’s ALJs exercise the same ‘significant discretion’ when carrying out the same ‘important functions’ as STJs do.”³³ She noted that SEC ALJs have all the powers (described above) that STJs have.³⁴ Indeed, she wrote that SEC ALJs have potentially *even more* autonomous authority after a hearing:

As the *Freytag* Court recounted, STJs “prepare proposed findings and an opinion” adjudicating charges and assessing tax liabilities. Similarly, the Commission’s ALJs issue decisions containing factual findings, legal conclusions, and appropriate remedies. And what happens next reveals that the ALJ can play the more autonomous role. In a major case like *Freytag*, a regular Tax Court judge must always review an STJ’s opinion. And that opinion counts for nothing unless the regular judge adopts it as his own. By contrast, the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ’s decision itself “becomes final” and is “deemed the action of the Commission.”³⁵

This made the case *a fortiori*: “If the Tax Court’s STJs are officers, as *Freytag* held, then the Commission’s ALJs must be too.”³⁶ And because ALJ Elliot was appointed by an SEC employee (and not the president, the courts, or the SEC itself), his appointment violated the Appointments Clause, and his decision in the *Lucia* case was invalid.

³³ *Id.* (quoting *Freytag*, 501 U.S. at 878).

³⁴ *Id.*

³⁵ *Id.* at 2053-54 (citations omitted).

³⁶ *Id.* at 2054.

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Justice Kagan concluded with the remedy. She wrote that Lucia was entitled to a new hearing before a different, and constitutionally appointed, ALJ:

That official cannot be Judge Elliot, even if he has received (or receives sometime in the future) a constitutional appointment. Judge Elliot has already both heard Lucia’s case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.³⁷

Justice Thomas, joined by Justice Gorsuch, concurred. He argued that the “original public meaning” of “Officers of the United States” swept much more broadly than the Court acknowledged. He wrote that “[t]he Founders likely understood the term ‘Officers of the United States’ to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty.”³⁸ According to Justice Thomas, that means that “officers” includes all executive actors whose duty is established by statute, “even if they perform[] only ministerial statutory duties.”³⁹ These could even include “recordkeepers, clerks, and tidewaiters (individuals who watched goods land at a customhouse).”⁴⁰ Justice Thomas argued that this sweep accorded with “early congressional practice . . . Congress required all federal officials with ongoing statutory duties to be appointed in compliance with the Appointments Clause.”⁴¹

³⁷ *Id.* at 2055.

³⁸ *Id.* at 2056 (Thomas, J., concurring).

³⁹ *Id.* at 2057.

⁴⁰ *Id.*

⁴¹ *Id.*

Justice Breyer, writing only for himself, concurred in part.

Justice Breyer argued that the Court should have resolved the case under the Administrative Procedure Act (APA).⁴² He noted that the APA provides for the appointment of ALJs across the executive branch, and that it authorizes “[e]ach agency” to appoint “as many administrative law judges as are necessary for” hearings under the APA.⁴³ He argued that the APA does not authorize the SEC to delegate appointment of its ALJs to SEC staff—that under the APA the SEC must appoint its ALJs itself.⁴⁴ He wrote that because the SEC delegated ALJ Elliot’s appointment to SEC staff, the appointment violated the APA.⁴⁵

Justice Breyer argued that his statutory approach to the case would allow the Court to avoid creating a larger constitutional problem, that is, that the SEC ALJ’s statutory double for-cause removal protection *might* impermissibly intrude on the president’s Article II powers and therefore violate the separation of powers under *Free Enterprise Fund*. Justice Breyer noted that the Court struck a double for-cause removal protection in *Free Enterprise Fund* because it impermissibly intruded on the president’s authority to supervise actors in the executive branch.⁴⁶ Even though he dissented in that ruling,⁴⁷ he argued that a faithful application of it *could* mean that the SEC ALJs’ double for-cause removal

⁴² *Id.* at 2057-59 (Breyer, J., concurring).

⁴³ *Id.* at 2058 (citing 5 U.S.C. § 3105).

⁴⁴ *Id.*

⁴⁵ *Id.* at 2058-59.

⁴⁶ *Id.* at 2059 (“The Court held in that case that the Executive Vesting Clause of the Constitution . . . forbade Congress from providing members of the Board with ‘multilevel protection from removal’ by the President.”)

⁴⁷ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 514-588 (2010) (Breyer, J., dissenting).

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protection similarly violates the separation of powers.⁴⁸ If so, the better course would be to hold that SEC ALJs are not “officers,” because such a holding would respect congressional intent under the APA to provide ALJs with removal protection while avoiding the constitutional problem. He explained:

I would not answer the question whether the Securities and Exchange Commission’s administrative law judges are constitutional “Officers” without first deciding the pre-existing *Free Enterprise Fund* question—namely, what effect that holding would have on the statutory “for cause” removal protections that Congress provided for administrative law judges. If, for example, *Free Enterprise Fund* means that saying administrative law judges are “inferior Officers” will cause them to lose their “for cause” removal protections, then I would likely hold that the administrative law judges are not “Officers,” for to say otherwise would be to contradict Congress’ enactment of those protections in the Administrative Procedure Act. In contrast, if *Free Enterprise Fund* does not mean that an administrative law judge (if an “Office[r] of the United States”) would lose “for cause” protections, then it is more likely that interpreting the Administrative Procedure Act as conferring such status would not run contrary to Congress’ intent. In such a case, I would more likely hold that, given the other features of the Administrative Procedure Act, Congress did not intend to make administrative law judges inferior “Officers of the United States.”⁴⁹

⁴⁸ *Lucia*, 138 S. Ct. at 2060 (Breyer, J., dissenting) (“If the *Free Enterprise Fund* Court’s holding applies equally to the administrative law judges—and I stress the ‘if’—then to hold that the administrative law judges are ‘Officers of the United States’ is, *perhaps*, to hold that their removal protections are unconstitutional.”).

⁴⁹ *Id.* at 2063-64.

For these reasons, Justice Breyer argued that the Court should have ruled ALJ Elliot’s appointment invalid under the APA alone.

Justice Breyer also dissented in part, joined by Justices Ginsburg and Sotomayor. He argued that the Court ought not to have required the SEC to grant Lucia a new hearing with a different ALJ.

The Securities and Exchange Commission has now itself appointed the Administrative Law Judge in question, and I see no reason why he could not rehear the case. After all, when a judge is reversed on appeal and a new trial ordered, typically the judge who rehears the case is the same judge who heard it the first time.⁵⁰

Finally, Justice Sotomayor, joined by Justice Ginsburg, dissented. Justice Sotomayor argued that SEC ALJs were not “officers,” because they lacked final agency decision-making authority. She noted that the ALJs issue only initial decisions, and that those decisions only become final upon the action of the SEC.⁵¹ She argued that because they cannot issue final and binding agency decisions, SEC ALJs do not exercise significant authority. Justice Sotomayor distinguished *Freytag* by arguing that the part of that decision relating to STJs’ authorities with regard to hearings “was unnecessary to the result” in that case.⁵²

⁵⁰ *Id.* at 2064.

⁵¹ *Id.* at 2066 (Sotomayor, J., dissenting) (“[T]he initial decision only becomes final when the Commission enters a finality order. And by operation of law, every action taken by an ALJ ‘shall, for all purposes . . . be deemed the action of the *Commission*.’”) (quoting 15 U.S.C. § 78d-1(c)).

⁵² *Id.* at 2067.

III. Implications

At first glance, *Lucia* appears to be a narrow ruling, with little, if any, application or relevance outside of like cases. That's because the holding hangs on just one precedent, *Freytag*, which itself is relatively narrow and particularized. By aligning *Lucia* with *Freytag*, the Court dodged the bigger issues in the case—a more precise definition of “officer,” and the separation-of-powers implications of the ALJs’ statutory for-cause removal protection. It’s also because the SEC and other agencies with ALJs can solve (and now have solved) the Appointments Clause problem in *Lucia* by simply reappointing ALJs by the agency head. After the agencies and the courts remand and rehear any remaining cases where a litigant argued that an improperly appointed ALJ rendered a decision, there should be no more *Lucia* problems, at least not with ALJs.

But at the same time, *Lucia* is fast becoming a much more important case—one with significant implications for the separation of powers, particularly given the increasingly aggressive attacks on the modern administrative state. In particular, *Lucia* will almost certainly inspire a flurry of separation-of-powers challenges to ALJs across the executive branch. It will also encourage a new round of Appointments Clause challenges to many executive positions, especially those in the grey area between “officer” and “employee.” Finally, *Lucia* gave President Trump constitutional window dressing for his executive order removing ALJs from the merit system service⁵³—a move that could politicize the ALJ corps and, by extension, other politically independent and expert executive positions that are subject to merit-based appointments.

⁵³ Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018).

All this comes against the backdrop of a larger assault on the administrative state. In addition to the *Lucia* fallout, other attacks include ongoing, and increasingly viable, challenges to the *Chevron* doctrine and judicial deference to agency rulemaking; ongoing and increasingly viable challenges to executive office independence through statutory for-cause removal protections; and even a current challenge to the nondelegation doctrine. Individually, each of these fronts is alarming to defenders of expert, independent agency decision-making in its own way. Taken together, and with the *Lucia* implications, these could lead to a hyper-politicization of the previously independent and expert bureaucracy, especially under a president that seems bent on politicizing nearly everything.

That said, let's take a look at what could happen—and what is happening—in the wake of *Lucia*.

First, the ruling will almost certainly draw a flurry of challenges to ALJs and their decisions across the executive branch. Most obviously, SEC ALJs' decisions will be subject to challenge, at least in those cases where a litigant raised an Appointments Clause claim when the case was pending. Although the SEC itself has now reappointed its ALJs in compliance with the Appointments Clause and *Lucia*, there may still be some decisions rendered by an invalidly appointed ALJ that are in the pipeline. When litigants challenge these decisions, the courts will apply the *Lucia* remedy: remand the case for a new hearing before a different ALJ.

ALJs' decisions outside of the SEC will be subject to challenge, too. There are currently nearly 1,900 ALJs in various federal agencies; most of these serve in the Social Security Administration. Depending on these ALJs' authorities—that is, if they have authority like the SEC ALJs and the Tax Court STJs—many of their decisions could be subject to an Appointments

Clause challenge under *Lucia*. Even if agencies reappoint their ALJs to comply with *Lucia*, there may be older cases still in the pipeline that are subject to remand and a new hearing.

These *Lucia*-type challenges to ALJs and their decisions could be more or less disruptive to the organization of federal agencies and the work and role of their ALJs. This will depend on how many viable challenges remain (given that agencies have now reappointed ALJs in light of *Lucia*) and how the courts rule in those cases (which depends, in turn, on the authorities of ALJs outside of the SEC). But the mere fact that *Lucia* required agencies to reappoint their ALJs means that the case had an impact on the way agencies operate.

More importantly, *Lucia* threatens the independence of any ALJ who serves in an independent agency, like the SEC, in which the agency head or heads themselves enjoy for-cause removal protection. As Justice Breyer reminded us in his concurrence in *Lucia*, ALJs enjoy statutory for-cause removal protection. If they serve in an independent agency, their two-tiered for-cause protection could violate the separation of powers under *Free Enterprise Fund*. As Justice Breyer argued, this two-tiered removal protection wouldn't necessarily violate *Free Enterprise Fund*; and in any event there may be a statutory way to preserve their removal protection. But Justice Breyer wrote only for himself on these points. And given the current make-up on the Court, it seems highly likely, or even certain, that *Lucia* teed up the Court's next separation-of-powers ruling—that independent ALJs within independent agencies violate the separation of powers. If so, *Lucia* is a key stepping-stone to a ruling that would eradicate the independence of ALJs.

Second, *Lucia* invites Appointments Clause challenges to many executive actors, especially those in the grey area between

“officer” and “employee,” and their actions. The Court in *Lucia* signaled its willingness to strike an appointment as violating the Appointments Clause when Congress misjudges the (employee) status of a position. Yet at the same time, the Court did nothing to clarify the murky distinction between “officer” and “employee.” Moreover, at least two justices, Justices Thomas and Gorsuch, opined that all, or nearly all, executive positions are “offices” under the Appointments Clause. (It’s not clear whether other justices hold this view, too. Remember that this argument was not a part of the case and was not necessary to the holding, so others may agree, even if they didn’t sign on.) Taken together, the Court’s ruling, the remaining ambiguity between “officer” and “employee,” and Justice Thomas’s concurrence encourage Appointments Clause challenges to many executive “employees” and to their actions. If the Court adopts a more expansive definition of “officer,” more executive actors would have to be appointed by the president or an agency head. This could strike a significant blow to the traditional political independence of line executive actors and the administrative agencies they serve.

Finally, *Lucia* gave President Trump a functional separation-of-powers excuse (independent of the Appointments Clause) to take aim at ALJ independence and expertise *from the appointment side*. This move opens up a new line of attack against executive independence—a separation-of-powers attack on executive office *appointment* restrictions (in addition to the more familiar attacks on *removal* restrictions)—so that opponents of executive independence and expertise can now attack executive positions from both the front end (against statutory *appointments* restrictions) and the more familiar back end (against statutory *removal* restrictions). This attack on the bureaucracy could easily

result in a hyper-politicization of previously independent and expert positions within the executive branch.

President Trump started down this road by enacting an executive order that exempted ALJs from the competitive service.⁵⁴ Before the order, ALJs were selected competitively, based on objective qualifications, and independent of politics. But after the order, agency heads (both independent and conventional) can now appoint anyone they like as an ALJ, not just those from a pre-screened and competitively selected pool. This means that agency heads must now appoint ALJs directly, without going through a competitive process. It thus gives agency heads (whether independent or politically appointed) exclusive power to appoint whomever they like.

President Trump justified his order based, in part, on his claim that “*Lucia* may also raise questions about the method of appointing ALJs.”⁵⁵ He didn’t further explain his constitutional reasoning, and nothing in *Lucia* or the Appointments Clause compels, or even suggests, his conclusion. But one reasonable inference may be that President Trump is reopening an old, but now settled, debate as to whether competitive appointment within the executive branch violates the president’s Article II authority to execute the law and the separation of powers. According to this argument, any statutory restriction on the president’s ability to *appoint* executive actors infringes on the president’s authority, much like any statutory restriction on the president’s ability to *remove* executive actors (or so the argument goes).

If President Trump’s order is based on this kind of constitutional reasoning, he has (re)opened a second line of

⁵⁴ *Id.*

⁵⁵ *Id.*

attack on politically independent and expert positions within the executive branch—a functional separation-of-powers attack on the *appointment* side, in addition to the more familiar attack on the *removal* side. This move has a direct impact on ALJs: it means that agency heads can now appoint whomever they like. Moreover, it also has that same potential impact on all executive actors who are subject to any kind of appointment qualification or restriction. In other words, this reasoning, if accepted, could wipe out the competitive service and any other statutory hiring restrictions of any executive actor. Taken to its extreme, it could mean the complete politicization of the executive branch.

* * *

Lucia is a case that's easy to overlook. On its surface, it appears to be a narrow ruling about a very specific position, with an easy administrative fix. But on a deeper level, the case opens up at least three lines of significant attack against independent and expert positions in the executive branch. And moreover, it's a key part of a larger, coordinated effort to undermine the bureaucracy.

Lucia is, indeed, easy to overlook. But if we're interested in preserving the modern administrative state, we ought to pay heed. This sleeper-of-a-case just might help dismantle it.



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PRECEDENTIAL

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 17-3113

JOEL DOE, A Minor, by and through his Guardians
John Doe and Jane Doe; MACY ROE; MARY SMITH;
JACK JONES, A minor, by and through his Parents
John Jones and Jane Jones, CHLOE JOHNSON, A minor
by and through her Parent Jane Johnson; JAMES JONES, A
Minor by and through his Parents John Jones and Jane Jones,
Appellants

v.

BOYERTOWN AREA SCHOOL DISTRICT;
DR. BRETT COOPER, In his official capacity as Principal;
DR. E. WAYNE FOLEY, In his official capacity as Assistant
Principal; DAVID KREM, Acting Superintendent

PENNSYLVANIA YOUTH CONGRESS FOUNDATION
(Intervenor in D.C.)

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. No. 5-17-cv-01249)
District Judge: Honorable Edward G. Smith

Argued May 24, 2018

Before: McKEE, SHWARTZ and NYGAARD,
Circuit Judges.

(Opinion Filed July 26, 2018)

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OPINION OF THE COURT

McKEE, *Circuit Judge.*

This appeal requires us to decide whether the District Court correctly refused to enjoin the defendant School District from allowing transgender students to use bathrooms and locker rooms that are consistent with the students' gender identities as opposed to the sex they were determined to have at birth. The plaintiffs—a group of high school students who identify as being the same sex they were determined to have at birth (cisgender)—believe the policy violated their constitutional rights of bodily privacy, as well as Title IX, and Pennsylvania tort law. As we shall explain, we conclude that, under the circumstances here, the presence of transgender students in the locker and restrooms is no more offensive to constitutional or Pennsylvania-law privacy interests than the presence of the other students who are not transgender. Nor does their presence infringe on the plaintiffs' rights under Title IX.

In an exceedingly thorough, thoughtful, and well-reasoned opinion, the District Court denied the requested injunction based upon its conclusion that the plaintiffs had not shown that they are likely to succeed on the merits and because they had not shown that they will be irreparably harmed absent the injunction. Although we amplify the District Court's reasoning because of the interest in this issue, we affirm

substantially for the reasons set forth in the District Court’s opinion.

I. BACKGROUND

A. The Setting.

Because such seemingly familiar terms as “sex” and “gender” can be misleading in the context of the issues raised by this litigation, we will begin by explaining and defining relevant terms. Our explanation is based on the District Court testimony of Dr. Scott Leibowitz, an expert in gender dysphoria and gender-identity issues in children and adolescents, and the findings that the District Court made based upon that expert’s testimony.

“Sex” is defined as the “anatomical and physiological processes that lead to or denote male or female.”¹ Typically, sex is determined at birth based on the appearance of external genitalia.²

“Gender” is a “broader societal construct” that encompasses how a “society defines what male or female is within a certain cultural context.”³ A person’s gender identity is their subjective, deep-core sense of self as being a particular gender.⁴ As suggested by the parenthetical in our opening paragraph, “cisgender” refers to a person who identifies with the sex that person was determined to have at birth.⁵ The term

¹ App. 500.

² App. 375.

³ App. 500.

⁴ App. 375.

⁵ App. 393, 550.

“transgender” refers to a person whose gender identity does not align with the sex that person was determined to have at birth.⁶ A transgender boy is therefore a person who has a lasting, persistent male gender identity, though that person’s sex was determined to be female at birth.⁷ A transgender girl is a person who has a lasting, persistent female gender identity though that person’s sex was determined to be male at birth.⁸

Approximately 1.4 million adults—or 0.6 percent of the adult population of the United States—identify as transgender.⁹ Transgender individuals may experience “gender dysphoria,” which is characterized by significant and substantial distress as a result of their birth-determined sex being different from their gender identity.¹⁰ Treatment for children and adolescents who experience gender dysphoria includes social gender transition and physical interventions such as puberty blockers, hormone therapy, and sometimes surgery.¹¹

“Social gender transition” refers to steps that transgender individuals take to present themselves as being the gender they most strongly identify with.¹² This typically includes adopting a different name that is consistent with that gender and using the corresponding pronoun set, wearing clothing and hairstyles typically associated with their gender

⁶ App. 375.

⁷ App. 2107.

⁸ App. 2107.

⁹ App. 376.

¹⁰ App. 376-77, 379.

¹¹ App. 2110.

¹² App. 2110.

identity rather than the sex they were determined to have at birth, and using sex-segregated spaces and engaging in sex-segregated activities that correspond to their gender identity rather than their birth-determined sex.¹³ For transgender individuals, an important part of social gender transition is having others perceive them as being the gender the transgender individual most strongly identifies with.¹⁴ Social gender transition can help alleviate gender dysphoria and is a useful and important tool for clinicians to ascertain whether living in the affirmed gender improves the psychological and emotional function of the individual.¹⁵

Policies that exclude transgender individuals from privacy facilities that are consistent with their gender identities “have detrimental effects on the physical and mental health, safety, and well-being of transgender individuals.”¹⁶ These exclusionary policies exacerbate the risk of “anxiety and depression, low self-esteem, engaging in self-injurious behaviors, suicide, substance use, homelessness, and eating disorders among other adverse outcomes.”¹⁷ The risk of succumbing to these conditions is already very high in individuals who are transgender. In a survey of 27,000 transgender individuals, 40% reported a suicide attempt (a rate

¹³ App. 2110.

¹⁴ App. 2110.

¹⁵ App. 2111.

¹⁶ Br. for Amici Curiae American Academy of Pediatrics, American Medical Association, et al., 17.

¹⁷ *Id.* at 18 (quoting Am. Psychol. Ass’n & Nat’l Ass’n of Sch. Psychologists, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* 4 (2015)).

nine times higher than the general population).¹⁸ Yet, when transgender students are addressed with gender appropriate pronouns and permitted to use facilities that conform to their gender identity, those students “reflect the same, healthy psychological profile as their peers.”¹⁹

Forcing transgender students to use bathrooms or locker rooms that do not match their gender identity is particularly harmful. It causes “severe psychological distress often leading to attempted suicide.”²⁰ The result is that those students “avoid going to the bathroom by fasting, dehydrating, or otherwise forcing themselves not to use the restroom throughout the

¹⁸ *Id.* at 18–19 (citing Sandy E. James et al., Nat’l Center for Transgender Equality, *Report of the 2015 U.S. Transgender Survey* 114 (2016)).

¹⁹ Br. for Amici Curiae of the National PTA, GLSEN, et al., 7 (citing Lily Durwood et al., *Mental Health and Self Worth in Socially Transitioned Transgender Youth*, 56 J. of the Am. Academy of Child & Adolescent Psychiatry 116, 116 (2017)).

²⁰ Br. for Amici Curiae of the National PTA, GLSEN, et al., 18 (citing Max Kutner, *Denying Transgender People Bathroom Access Is Linked to Suicide*, NEWSWEEK (Dec. 16, 2016); Kristen Clements-Nolle, et al., *Attempted Suicide Among Transgender Persons: The Influence of Gender-Based Discrimination and Victimization*, 51 Journal of Homosexuality 53, 63-65 (2006)).

day.”²¹ This behavior can lead to medical problems and decreases in academic learning.²²

We appreciate that there is testimony on this record that the cisgender plaintiffs have also reduced water intake, fasted, etc. in order to reduce the number of times they need to visit the bathroom so they can minimize or avoid encountering transgender students there. For reasons we discuss below, we do not view the level of stress that cisgender students may experience because of appellees’ bathroom and locker room policy as comparable to the plight of transgender students who are not allowed to use facilities consistent with their gender identity. Given the majority of the testimony here and the District Court’s well-supported findings, those situations are simply not analogous.

Dr. Leibowitz testified that forcing transgender students to use facilities that are not aligned with their gender identities “chips away and erodes at [the individual’s] psychological wellbeing and wholeness.”²³ It can exacerbate gender dysphoria symptoms by reinforcing that the “world does not

²¹ Br. for Amici Curiae of the National PTA, GLSEN, et al., 18 (citing Joseph Kosciw, et al., *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, & Queer Youth in Our Nation’s Schools* 12-13, GLSEN (2016)).

²² *Id.* at 18–19 (citing Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People’s Lives*, 19 J. of Pub. Mgmt. & Soc. Pol’y 65, 74–75 (2013)).

²³ App. 395.

appreciate or understand” transgender students.²⁴ In short, it is “society reducing them to their genitals.”²⁵ Dr. Leibowitz also noted that “hundreds of thousands of physicians in the United States . . . take the position that individuals with gender dysphoria should not be forced to use a restroom that is not in accordance with their gender identity.”²⁶ We have already noted the disparate suicide rates between transgender and cisgender students.

Prior to the 2016–17 school year, Boyertown Area School District required students at Boyertown Area Senior High School (“BASH”) to use locker rooms and bathrooms that aligned with their birth-determined sex.²⁷ BASH changed this policy in 2016 and for the first time permitted transgender students to use restrooms and locker rooms consistent with their gender identity. In initiating this policy, BASH adopted a very careful process that included student-specific analysis. Permission was granted on a case-by-case basis.²⁸

The District required the student claiming to be transgender to meet with counselors who were trained and licensed to address these issues and the counselors often consulted with additional counselors, principals, and school administrators.²⁹ Once a transgender student was approved to use the bathroom or locker room that aligned with his or her gender identity, the student was required to use only those

²⁴ App. 395.

²⁵ App. 396.

²⁶ App. 397.

²⁷ App. 625.

²⁸ App. 604.

²⁹ App. 638, 923–25.

facilities. The student could no longer use the facilities corresponding to that student's sex at birth.³⁰

BASH has several multi-user bathrooms.³¹ Each has individual toilet stalls.³² Additionally, BASH has between four and eight single-user restrooms that are available to all students, depending on the time of day.³³ Four of these restrooms are always available for student use.³⁴

The locker rooms at BASH consist of common areas, private "team rooms," and shower facilities.³⁵ Over the past (approximately) two years, BASH has renovated its locker rooms. The "gang showers" were replaced with single-user showers which have privacy curtains.³⁶ BASH does not require a student to change in the locker room prior to gym class, although the student must change into gym clothes.³⁷ A student who is uncomfortable changing in the locker room can change privately in one of the single-user facilities, the private shower stalls, or team rooms.³⁸

³⁰ App. 931–32.

³¹ App. 612.

³² App. 612–13.

³³ App. 613.

³⁴ App. 616.

³⁵ App. 617–19.

³⁶ App. 619–20.

³⁷ App. 618–19

³⁸ App. 618–19.

B. The Litigation.

Four plaintiffs—proceeding pseudonymously under the names Joel Doe, Jack Jones, Mary Smith, and Macy Roe—sued the District after it changed its bathroom and locker room policy to the policy we have described above.³⁹ Their claims were based on encounters between some of the plaintiffs and transgender students in locker rooms or multi-user bathrooms. The plaintiffs sought to enjoin BASH’s policy of permitting transgender students to use the bathrooms and locker rooms that aligned with their gender identities. They sought a preliminary injunction on three grounds. First, the plaintiffs alleged that the School District’s policy violated their constitutional right to bodily privacy. Next, they claimed that the School District’s policy violated Title IX of the Education Amendments of 1972 (Title IX).⁴⁰ Finally, they alleged that the policy was contrary to Pennsylvania tort law. After discovery and evidentiary hearings, the District Court filed the extensive and well-reasoned opinion we have already referred to, in which it explained that the plaintiffs had not demonstrated that they were likely to succeed on the merits of any of their claims and that plaintiffs had not shown that they would be irreparably harmed absent an injunction.

³⁹ The plaintiffs included parents and guardians of some of the anonymous students. The District Court provided a detailed recitation of the factual background of this suit, including the particular conduct each plaintiff alleges as the basis for the alleged violation of a privacy interest. *See Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 335–64 (E.D. Pa. 2017).

⁴⁰ 86 Stat. 373, as amended 20 U.S.C. § 1681 *et seq.*

For reasons the court identified, it concluded that even if the School District’s policy implicated the plaintiffs’ constitutional right to privacy, the state had a compelling interest in not discriminating against transgender students. The court also determined that the School District’s policy was narrowly tailored to serve that interest. Accordingly, the District Court ruled that even if a cisgender plaintiff had been viewed by a transgender student, it would not have violated the cisgender student’s constitutional right to privacy. We agree.

The District Court rejected the plaintiffs’ Title IX claim for two reasons. First, it found that the School District’s policy did not discriminate on the basis of sex, because it applied equally to all students—cisgender male and cisgender female, as well as transgender male and transgender female students—alike. The court also concluded that the plaintiffs had not identified any conduct that was sufficiently serious to constitute Title IX harassment. The mere presence of a transgender student in a locker room should not be objectively offensive to a reasonable person given the safeguards of the school’s policy.

For essentially the reasons described above, the District Court also declined to issue an injunction based on the Pennsylvania tort of intrusion upon seclusion. It found that there was insufficient evidence in the record to demonstrate that a transgender student ever viewed a partially clothed plaintiff, and that the presence of a transgender student would not be highly offensive to a reasonable person.

The District Court rejected the plaintiffs’ theory of irreparable harm that posited that the plaintiffs were being forced to give up a constitutional right to use segregated locker

rooms and bathrooms. It noted that the School District permitted the students to use the locker room facilities “without limitation.”⁴¹ Any student who was uncomfortable being in a state of undress or going to the bathroom with transgender students could use the single-user bathrooms or team rooms that BASH has made available.

Having found that the plaintiffs had no likelihood of success on the merits and did not face irreparable harm, the District Court entered an order on August 25, 2017 denying the injunction. This appeal followed.⁴²

⁴¹ *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d at 410.

⁴² Numerous amici filed briefs on behalf of the appellees, and one group filed a brief on behalf of the appellants. At the conclusion of briefing we heard argument. Recognizing the time-sensitive nature of this appeal and the concerns of all of the parents and students in the School District, as well as the District itself, we adjourned to conference to determine if a ruling could be made from the bench. After conferencing, the panel voted to unanimously affirm the ruling of the District Court. We announced that decision and entered an accompanying order. We now supplement that order with this opinion.

II. DISCUSSION⁴³

Preliminary injunctive relief is an “extraordinary remedy.”⁴⁴ It may be granted only when the moving party shows “(1) a likelihood of success on the merits; (2) that [the movant] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.”⁴⁵ The movants must establish entitlement to relief by clear evidence.⁴⁶ We review the denial of a preliminary injunction for “an abuse of discretion, an error of law, or a clear mistake in the consideration of proof.”⁴⁷ We exercise plenary review of the lower court’s conclusions of law but review its findings of fact for clear error.⁴⁸

A. Likelihood of Success on the Merits

The District Court correctly concluded that the appellants were not entitled to an injunction because none of their claims are likely to succeed on the merits.

1. The District Court correctly concluded that

⁴³ The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1334. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

⁴⁴ *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004).

⁴⁵ *Id.*

⁴⁶ *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008).

⁴⁷ *Kos Pharm.*, 369 F.3d at 708 (citation omitted).

⁴⁸ *Id.* (citations omitted).

the appellants' constitutional right to privacy claim was unlikely to succeed on the merits.

The appellants contend that the District Court erroneously concluded they were unlikely to succeed on their claim that the School District's policy violated their constitutional right to privacy. They assert that the District Court (1) failed to recognize the "contours" of the right to privacy; (2) failed to recognize that a policy opening up facilities to persons of the opposite sex necessarily violates that right; (3) erroneously concluded that the School District's policy advanced a compelling interest; and (4) incorrectly found that the policy was narrowly tailored to serve that interest. We reject each of these arguments in turn.

The appellants' challenge to the School District's policy was brought as a civil rights claim pursuant to 42 U.S.C. § 1983. Section 1983 claims can succeed only if the underlying act—here, the alleged exposure of the appellants' partially clothed bodies to transgender students whose birth-determined sex differed from the appellants—violated a constitutional right.⁴⁹ When a plaintiff's § 1983 claim is premised on a violation of the constitutional right to privacy, it will succeed

⁴⁹ *Doe v. SEPTA*, 72 F.3d 1133, 1137 (3d Cir. 1995) ("A § 1983 action cannot be maintained unless the underlying act violates a plaintiff's [c]onstitutional rights.").

only if it is “limited to those rights of privacy which are fundamental or implicit in the concept of ordered liberty.”⁵⁰

The touchstone of constitutional privacy protection is whether the information at issue is “within an individual’s reasonable expectations of confidentiality.”⁵¹ The Supreme Court has acknowledged two types of constitutional privacy interests rooted in the Fourteenth Amendment—“the individual interest in avoiding disclosure of personal matters” and the “interest in independence in making certain kinds of important decisions.”⁵² Based on the first principal described above, we have held that a person has a constitutionally protected privacy interest in his or her partially clothed body.⁵³

⁵⁰ *Id.* (quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976) (alterations and internal quotation marks omitted)).

⁵¹ *Doe v. Luzerne County*, 660 F.3d 169, 175 (3d Cir. 2011) (quoting *Malleus v. George*, 641 F.3d 560, 564 (3d Cir. 2011)).

⁵² *Id.* (citations omitted).

⁵³ *Id.* at 177. Other Circuits have come to the same conclusion. *Brannum v. Overton Cty. School Bd.*, 516 F.3d 489, 494, 498 (6th Cir. 2008) (finding a violation of the Fourth Amendment right to privacy when a school surveilled partially clothed middle school students in their locker room, and further noting that this is the “same privacy right . . . located in the Due Process clause”); *Poe v. Leonard*, 282 F.3d 123, 136 (2d Cir. 2002) (“[T]here is a right to privacy in one’s unclothed or partially clothed body.”); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) (“We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one’s unclothed [figure] from view of strangers, and particularly strangers of the opposite sex, is impelled by

The appellants advance two main arguments in support of their contention that their right to privacy was violated by the School District's policy of permitting transgender students to use bathrooms and locker rooms that aligned with their gender identities. Neither is persuasive.

First, the appellants claim that their right to privacy was violated because the policy permitted them to be viewed by members of the opposite sex while partially clothed.⁵⁴ Regardless of the degree of the appellants' undress at the time of the encounters, the District Court correctly found that this would not give rise to a constitutional violation because the School District's policy served a compelling interest—preventing discrimination against transgender students—and was narrowly tailored to that interest.

elementary self-respect and personal dignity.”). The District Court noted that *Doe v. Luzerne County* did not explicitly hold there was a constitutional right to privacy in an individual’s unclothed or partially clothed body. However, by concluding that Doe had a reasonable expectation of privacy and remanding the case to determine the exact contours of that right, we implicitly recognized that such a privacy right exists. The District Court assumed the existence of the right, and the parties seemingly agreed that the right exists. If there were any doubt after *Doe v. Luzerne County* that the constitution recognizes a right to privacy in a person’s unclothed or partially clothed body, we hold today that such a right exists.

⁵⁴ See Br. for Appellants, 18 (“The privacy interest is vitiated when a member of one sex is viewed by a member of the opposite sex.” (citation omitted)).

The constitutional right to privacy is not absolute.⁵⁵ It must be weighed against important competing governmental interests.⁵⁶ Only unjustified invasions of privacy by the government are actionable in a § 1983 claim.⁵⁷ That is, the constitution forbids governmental infringement on certain fundamental interests unless that infringement is sufficiently tailored to serve a compelling state interest.⁵⁸ The District

⁵⁵ *Doe v. SEPTA*, 72 F.3d at 1138.

⁵⁶ *Doe v. Luzerne County*, 660 F.3d at 178; *Sterling v. Borough of Minersville*, 232 F.3d 190, 195 (3d Cir. 2000) (“In examining right to privacy claims, we, therefore, balance a possible and responsible government interest in disclosure against the individual’s policy interest.”).

⁵⁷ See *Doe v. SEPTA*, 72 F.3d at 1138 (citing *Whalen v. Roe*, 429 U.S. 589, 602 (1977)); see also *Olmstead v. United States*, 277 U.S. 438, 478–79 (1928) (Brandies, J., dissenting) (“every *unjustifiable* intrusion upon the privacy of an individual . . . must be deemed a [constitutional] violation” (emphasis added)).

⁵⁸ *Reno v. Flores*, 507 U.S. 292, 301–02 (1993). The District Court found that this “compelling interest” analysis was the appropriate level to review BASH’s policy. *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d at 390 (citing *Reno*, 507 U.S. at 302). The parties do not explicitly challenge this choice. Br. for Appellants, 27-33; Br. for Appellees, 30; Br. for Intervenor-Appellee, 36. In other privacy-rights contexts, we have found that an “intermediate standard of review” was appropriate, and that the “more stringent ‘compelling interest analysis’ would be used when the intrusion on an individual’s privacy was severe.” *Doe v. SEPTA*, 72 F.3d at 1139–40. Because we hold that BASH’s policy survives the more

Court found that the School District’s policy served “a compelling state interest in not discriminating against transgender students” and was narrowly tailored to that interest.⁵⁹ We agree.

As set forth in detail above, transgender students face extraordinary social, psychological, and medical risks and the School District clearly had a compelling state interest in shielding them from discrimination. There can be “no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.”⁶⁰ The risk of experiencing substantial clinical distress as a result of gender dysphoria is particularly high among children and may intensify during puberty.⁶¹ The Supreme Court has regularly held that the state has a compelling interest in protecting the physical and psychological well-being of minors.⁶² We have

stringent standard of review, we need not decide which standard of review is appropriate here.

⁵⁹ *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d at 390.

⁶⁰ *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017).

⁶¹ App. 2276–78.

⁶² See *Sable Commc’ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 125 (1989) (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.”); *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (a state “has an independent interest in the well-being of its youth”); *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (“It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical

similarly found that the government has a compelling interest in protecting and caring for children in various contexts.⁶³ Mistreatment of transgender students can exacerbate gender dysphoria, lead to negative educational outcomes, and precipitate self-injurious behavior. When transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening. This record clearly supports the District Court’s conclusion that the School District had a compelling state interest in protecting transgender students from discrimination.

Moreover, the School District’s policy fosters an environment of inclusivity, acceptance, and tolerance. As the appellees’ amicus brief from the National Education Association convincingly explains, these values serve an important educational function for both transgender and cisgender students.⁶⁴ When a school promotes diversity and inclusion, “classroom discussion is livelier, more spirited, and simply more enlightening and interesting [because] the students have the greatest possible variety of backgrounds.”⁶⁵ Students in diverse learning environments have higher academic achievement leading to better outcomes for all

and psychological well-being of a minor’ is ‘compelling.’” (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982))).

⁶³ See, e.g., *Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997) (noting that the government has a compelling interest in the “protection of children,” and in protecting children from abuse).

⁶⁴ Br. for Amicus Curiae National Education Association, 7–11.

⁶⁵ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

students.⁶⁶ Public education “must prepare pupils for citizenship in the Republic,”⁶⁷ and inclusive classrooms reduce prejudices and promote diverse relationships which later benefit students in the workplace and in their communities.⁶⁸ Accordingly, the School District’s policy not only serves the compelling interest of protecting transgender students, but it benefits all students by promoting acceptance.

As we have already noted, we do not intend to minimize or ignore testimony suggesting that some of the appellants now avoid using the restrooms and reduce their water intake in order to reduce the number of times they need to use restrooms under the new policy. Nor do we discount the surprise the appellants reported feeling when in an intimate space with a student they

⁶⁶ Br. for Amicus Curiae National Education Association, 9–10 (citing Stephen Brand et al., *Middle School Improvement and Reform: Development and Validation of a School- Level Assessment of Climate, Cultural Pluralism and School Safety*, 95 J. Educ. Psychol. 570, 571 (2003); John Rosales, *Positive School Cultures Thrive When Support Staff Included*, NEA Today (Jan. 10, 2017); N. Eugene Walls et al. *Gay-Straight Alliances and School Experiences of Sexual Minority Youth*, 41 Youth & Soc’y 307, 323-25 (2010); Stephen T. Russell, *Are School Policies Focused on Sexual Orientation and Gender Identity Associated with Less Bullying? Teachers’ Perspectives*, 54 J. Sch. Psychol. 29 (2016)).

⁶⁷ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (citation omitted).

⁶⁸ Br. for Amicus Curiae National Education Association, 10 (citing Jeanne L. Reid & Sharon Lynn Kagan, *A Better Start: Why Classroom Diversity Matters in Early Education* 9 (Apr. 2015)).

understood was of the opposite biological sex.⁶⁹ We cannot, however, equate the situation the appellants now face with the very drastic consequences that the transgender students must endure if the school were to ignore the latter's needs and concerns. Moreover, as we have mentioned, those cisgender students who feel that they must try to limit trips to the restroom to avoid contact with transgender students can use the single-user bathrooms in the school.

Assuming the policy is subject to strict scrutiny, it must advance a compelling state interest and the means of achieving that interest must be "specifically and narrowly framed to accomplish that purpose."⁷⁰ Having correctly identified a compelling state interest, the District Court correctly held that the School District's policy was narrowly tailored. The appellants contend that "a much more tailored solution is to provide single-user accommodations."⁷¹ They reason that "all students would be allowed to access the individual facilities,

⁶⁹ App. 276, 1943. To the extent that the appellants' claim for relief arises from the embarrassment and surprise they felt after seeing a transgender student in a particular space, they are actually complaining about the implementation of the policy and the lack of pre-implementation communication. That is an administrative issue, not a constitutional one. To the extent that the appellants are expressing discomfort being around students whom they define as different from themselves, that discomfort does not implicate a privacy interest, even when viewed through the lens of strict scrutiny.

⁷⁰ *Grutter*, 539 U.S. at 333 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)).

⁷¹ Br. for Appellants, 32.

[so] no stigma would attach to the professed transgender students' using them, and preserving the sex-specific communal facilities to single-sex use would resolve all privacy concerns.”⁷²

This argument is not only unpersuasive, it fails to comprehend the depths of the problems the School District's policy was trying to remedy or the steps taken to address them. The School District already provides single-user accommodations for all students. Any student who is uncomfortable changing around their peers in private spaces, whether transgender or cisgender, may change in a bathroom stall, single-user bathroom, or the private team rooms.⁷³ The appellants seemingly admit that these accommodations “resolve all privacy concerns.”⁷⁴ Yet they insist that the policy should be changed to require that transgender students use individual bathrooms if they do not wish to use the communal facilities that align with their birth-determined sex. Not only would forcing transgender students to use single-user facilities or those that correspond to their birth sex not serve the compelling interest that the School District has identified here, it would significantly undermine it.⁷⁵ As the Court of Appeals for the Seventh Circuit has recognized, a school district's policy that required a transgender student to use single-user

⁷² *Id.*

⁷³ App. 618–19.

⁷⁴ Br. for Appellants, 32.

⁷⁵ See Br. for Amici Curiae American Academy of Pediatrics et al., 17–18. (“[F]orcing transgender students to use separate facilities sends a stigmatizing message that can have a lasting and damaging impact on the health and well-being of the young person.”).

facilities “actually invited more scrutiny and attention from his peers.”⁷⁶ Adopting the appellants’ position would very publicly brand all transgender students with a scarlet “T,” and they should not have to endure that as the price of attending their public school.

Nothing in the record suggests that cisgender students who voluntarily elect to use single-user facilities to avoid transgender students face the same extraordinary consequences as transgender students would if they were forced to use them. As we explain more fully below, requiring transgender students to use single user or birth-sex-aligned facilities is its own form of discrimination.

It is therefore clear that the District Court was correct in concluding that the appellants are unlikely to succeed in establishing a violation of their right to privacy based on a transgender student potentially viewing them in a state of undress in a locker room or restroom. The challenged policy is narrowly tailored to serve a compelling governmental interest. There is no constitutional violation.

The appellants also urge us to recognize constitutional privacy protections for alleged violations that resulted from conduct other than being viewed by transgender students in a locker room or bathroom. They assert that “government actors cannot force minors to endure *the risk* of unconsented intimate exposure to the opposite sex as a condition for using the very facilities set aside to protect their privacy.”⁷⁷ They claim that their constitutional privacy rights were violated “when the

⁷⁶ *Whitaker*, 858 F.3d at 1045.

⁷⁷ Br. for Appellants, 18 (emphasis added).

sexes intermingle[d]" in the bathrooms and locker rooms.⁷⁸ They also argue that the female appellants' privacy rights are violated if they are forced to attend to their menstrual hygiene in a facility where members of the opposite sex may potentially be present.⁷⁹ In other words, they contend that their constitutional right to privacy is necessarily violated because they are forced to share bathrooms and locker rooms with transgender students whose gender identities correspond with the sex-segregated space, but do not align with their birth sex.

We reject the premise of this argument because BASH's policy does not force any cisgender student to disrobe in the presence of any student—cisgender or transgender. BASH has provided facilities for any student who does not feel comfortable being in the confines of a communal restroom or locker room. BASH has installed privacy stalls and set some bathrooms aside as single-user facilities so that any student who is uneasy undressing or using a restroom in the presence of others can take steps to avoid contact. BASH's policy does not compel a privacy violation for any student.

In any event, we decline to recognize such an expansive constitutional right to privacy—a right that would be violated by the presence of students who do not share the same birth sex. Moreover, no court has ever done so. As counsel for the School District noted during oral argument, the appellants are claiming a very broad right of personal privacy in a space that

⁷⁸ *Id.* at 27.

⁷⁹ *Id.* at 26. We note that the appellants do not allege that the female plaintiffs ever actually tended to their periods in the presence of a transgender female student.

is, by definition and common usage, just not that private. School locker rooms and restrooms are spaces where it is not only common to encounter others in various stages of undress, it is expected. The facilities exist so that students can attend to their personal biological and hygienic needs and change their clothing. As the Supreme Court has stated, “[p]ublic school locker rooms . . . are not notable for the privacy they afford.”⁸⁰

Thus, we are unpersuaded to the extent that the appellants’ asserted privacy interest requires protection from the risk of encountering students in a bathroom or locker room whom appellants identify as being members of the opposite sex. As the Seventh Circuit noted in *Whitaker* “[a] transgender student’s presence in the restroom provides no more of a risk to other students’ privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions.”⁸¹

None of the cases cited by the appellants is to the contrary.⁸² For example, in their brief and at argument, they placed substantial reliance on *Faulkner v. Jones*⁸³ for the proposition that “society [has] undisputed[ly] approv[ed] separate public restrooms for men and women based on privacy concerns. The need for privacy justifies separation . . .”⁸⁴ But that case did not recognize a constitutional mandate

⁸⁰ *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).

⁸¹ *Whitaker*, 858 F.3d at 1052.

⁸² Br. for Appellee, 15–31.

⁸³ 10 F.3d 226 (4th Cir. 1993).

⁸⁴ Br. for Appellants, 17 (alterations added) (quoting *Faulkner*, 10 F.3d at 232).

that bathrooms and locker rooms must be segregated by birth-determined sex. Although it acknowledged that privacy concerns *may* justify separate facilities for men and women in certain circumstances,⁸⁵ it did not hold that the Constitution *compels* separate bathroom facilities. Moreover, as we have explained and as the District Court more thoroughly described, BASH has carefully crafted a policy that attempts to address the concerns that some cisgender students may have. To its credit, it has done so in a way that recognizes those concerns as well as the needs, humanity, and decency of transgender students.

The appellants' reliance on *Chaney v. Plainfield Healthcare Center*⁸⁶ is similarly unconvincing. That was an appeal from a Title VII suit brought against a nursing home after a Black nursing assistant was fired for protesting a patient's demand that he receive care only from White nursing aids.⁸⁷ The court distinguished medical care based on race from medical care based on sex, noting that just as "the law tolerates same-sex restrooms or same-sex dressing rooms . . . to accommodate privacy needs, Title VII allows an employer to respect a preference for same-sex health providers, but not same-race providers."⁸⁸ Like *Faulkner*, *Chaney* held that the

⁸⁵ *Faulkner*, 10 F.3d at 232 ("In the end, distinctions in any separate facilities provided for males and females may be based on real differences between the sexes, both in quality and quantity, so long as the distinctions are not based on stereotyped or generalized perceptions of differences.").

⁸⁶ 612 F.3d 908, 913 (7th Cir. 2010).

⁸⁷ *Chaney*, 612 F.3d at 910–12.

⁸⁸ *Id.* at 913.

Constitution *tolerates* single-sex accommodations. It did not hold that the constitution *demands* it.

Equally unpersuasive is the appellants' reliance on cases discussing far more intrusive invasions of privacy than allowed by BASH's policy. Cases about strip searches⁸⁹ and a criminal conviction for voyeurism after a person repeatedly looked at women in the stalls of public restrooms⁹⁰ are wholly unhelpful to our analysis. Those cases involve inappropriate conduct as well as conduct that intruded into far more "intimate aspects of human affairs" than here.⁹¹ There is simply nothing inappropriate about transgender students using the restrooms or locker rooms that correspond to their gender identity under the policy BASH has initiated, and we reject appellants' attempt to argue that there is. Appellants do not contend that transgender Students A or B did anything remotely out of the ordinary while using BASH's facilities. Indeed, the appellants' privacy complaint is not with transgender students' conduct, but with their mere presence. We have already explained that the presence of transgender students in these spaces does not offend the constitutional right of privacy any more than the presence of cisgender students in those spaces.

In an argument that completely misses (or deliberately ignores) the reason for the disputed policy or the circumstances it addresses, the appellants insist that it is improper to consider a student's transgender status when conducting this privacy

⁸⁹ *Canedy v. Boardman*, 16 F.3d 183, 185–86, 188 (7th Cir. 1994).

⁹⁰ *State v. Lawson*, 340 P.3d 979 (Wash. App. 2014).

⁹¹ *Doe v. Luzerne County*, 660 F.3d at 176 (quoting *Nunez v. Pachman*, 578 F.3d 228, 232 (3d Cir. 2009)).

analysis and that we must only look at the student’s anatomy.⁹² We disagree. Constitutional right to privacy cases “necessarily require fact-intensive and context-specific analyses.”⁹³ Bright line rules cannot be drawn.⁹⁴ Put simply—the facts of a given case are critically important when assessing whether a constitutional right to privacy has been violated. A case involving transgender students using facilities aligned with their gender identities after seeking and receiving approval from trained school counselors and administrators implicates different privacy concerns than, for example, a case involving an adult stranger sneaking into a locker room to watch a fourteen year-old girl shower. The latter scenario—taken from a case the appellants rely upon⁹⁵—is simply not analogous to the circumstances here.

2. The District Court
correctly concluded that
the appellants’ Title IX
claim was unlikely to
succeed on the merits.

The District Court rejected the appellants’ Title IX claim because the School District’s policy treated all students equally and therefore did not discriminate on the basis of sex, and because the appellants had failed to meet the elements of a “hostile environment harassment” claim. We again agree. We also agree with the School District’s position that barring

⁹² Br. for Appellants, 10–12.

⁹³ *Doe v. Luzerne County*, 660 F.3d at 176.

⁹⁴ *Id.*

⁹⁵ *People v. Grunau*, No. H015871, 2009 WL 5149857 (Cal. Ct. App. Dec. 29, 2009) (unpublished memorandum opinion).

transgender students from restrooms that align with their gender identity would itself pose a potential Title IX violation.

Title IX prohibits discrimination based on sex in all educational programs that receive funds from the federal government.⁹⁶ However, discrimination with regard to privacy facilities is exempt from that blanket prohibition. An institution “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.”⁹⁷ This exception is permissive—Title IX does not require that an institution provide separate privacy facilities for the sexes.

Title IX also supports a cause of action for “hostile environment harassment.”⁹⁸ To recover on such a claim, a plaintiff must establish sexual harassment that is so severe, pervasive, or objectively offensive and that “so undermines and detracts from the victims’ educational experience that [he or she] is effectively denied equal access to an institution’s resources and opportunities.”⁹⁹ To support a claim of hostile

⁹⁶ 20 U.S.C. § 1681(a).

⁹⁷ 34 C.F.R. § 106.33.

⁹⁸ *DeJohn v. Temple Univ.*, 537 F.3d 301, 316 n.14 (3d Cir. 2008) (citation omitted).

⁹⁹ *Id.* (alterations in original) (citation omitted). We recently noted that we have not always been consistent in stating whether a plaintiff claiming sexual harassment must prove the harassment was “severe *or* pervasive” or “severe *and* pervasive.” *Castleberry v. STI Grp.*, 863 F.3d 259, 263–64 (3d Cir. 2017) (emphasis added). Much of the confusion stems from the fact that the Supreme Court has used both the

environment harassment, a plaintiff must demonstrate that the offensive conduct occurred because of his or her sex.¹⁰⁰

Title IX’s “hostile environment harassment” cause of action originated in a series of cases decided under Title VII of the Civil Rights Act of 1964 (“Title VII”).¹⁰¹ The Supreme Court has “extended an analogous cause of action to students under Title IX.”¹⁰² Title VII cases are therefore instructive.¹⁰³

conjunctive and the disjunctive to describe the plaintiff’s burden. *Compare Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (“For sexual harassment to be actionable, it must be sufficiently severe or pervasive . . .”), with *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (concluding that an action for Title IX harassment “will lie only for harassment that is so severe, pervasive and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit”). In *Castleberry*, we concluded that the “correct standard is severe or pervasive. *Castleberry*, 863 F.3d at 264. Accordingly, we will proceed using the disjunctive inquiry here.

¹⁰⁰ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (holding, in the Title VII context, that a plaintiff “must always prove that the conduct at issue . . . constituted discrimination because of . . . sex.” (internal quotations omitted)).

¹⁰¹ 42 U.S.C. § 2000e *et seq.*

¹⁰² *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 205 (3d Cir. 2001).

¹⁰³ *Id.* Courts have frequently looked to Title VII authority for guidance with Title IX cases. See, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (“This Court has

Title VII prohibits employers from discriminating based on sex.¹⁰⁴ In *Oncake*, the Supreme Court considered whether Title VII prohibited “discrimination because of sex” when the harasser and the harassed employee were the same sex.¹⁰⁵ In concluding that Title VII could support such a claim, the Court held that Title VII is concerned only with “discrimination because of sex.”¹⁰⁶ It noted that the Court had never held that “workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.”¹⁰⁷ Rather, “the critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”¹⁰⁸ The plaintiffs in a Title VII action must therefore always “prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex.”¹⁰⁹ The same requirement holds true for Title IX claims.

The appellants have not provided any authority—either in the District Court or on appeal—to suggest that a sex-neutral

also looked to its Title VII interpretations of discrimination in illuminating Title IX.” (collecting cases)).

¹⁰⁴ 42 U.S.C. § 2000e-2.

¹⁰⁵ *Oncake*, 523 U.S. at 76.

¹⁰⁶ *Id.* at 80.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

¹⁰⁹ *Id.* at 81 (internal alterations, emphasis, and quotation marks omitted).

policy can give rise to a Title IX claim. Instead, they simply hypothesize that “harassment” that targets both sexes equally would violate Title IX; that is simply not the law.¹¹⁰ The touchstone of both Title VII and Title IX claims is disparate treatment *based on sex*.¹¹¹ The School District’s policy allows all students to use bathrooms and locker rooms that align with their gender identity. It does not discriminate based on sex, and therefore does not offend Title IX.

The District Court also correctly found that the appellants had not met their burden of establishing that the mere presence of transgender students in bathrooms and locker rooms constitutes sexual harassment so severe, pervasive, or objectively offensive and “that so undermines and detracts from the victims’ educational experience that [the plaintiff] is effectively denied equal access to an institution’s resources and opportunities.”¹¹² That is particularly true given the many

¹¹⁰ See *Pasqual v. Metro. Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996) (“Harassment that is inflicted without regard to gender, that is, where males and females in the same setting do not receive disparate treatment, is not actionable because the harassment is not based on sex.”); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (“[T]here may be cases in which a supervisor makes sexual overtures of both sexes or where the conduct complained of is equally offensive to male and female workers. In such cases, [the] harassment would not be based on sex because men and women are accorded like treatment . . . and the plaintiff would have no remedy under Title VII.”).

¹¹¹ *Oncake*, 523 U.S. at 80.

¹¹² *DeJohn*, 537 F.3d at 316 n.14 (citations omitted).

safeguards the School District put in place as part of the challenged policy.

Rather than relying on relevant legal authority to establish that the mere presence of a transgender student in a locker room or bathroom rises to the level of harassment, the appellants again cite inapposite cases that involve egregious harassment. That is not surprising since we have found no authority that supports the appellants' claims. Two cases that the appellants attempt to analogize to their situation are particularly illustrative of the weakness of their position—*Lewis v. Triborough Bridge and Tunnel Authority*¹¹³ and *Schonauer v. DCR Entertainment Inc.*¹¹⁴ *Lewis* involved harassment that is worlds apart from anything in the present record. There, cisgender men not only entered a locker room while cisgender female employees were changing, they “leer[ed]” at them, “crowd[ed] the entrance to the locker room, forcing [them] to ‘run the gauntlet[,]’ and brush[ed] up against them.”¹¹⁵ When a supervisor was informed, he referred to the female employees as “cunts” and “the biggest bunch of fucking crybabies.”¹¹⁶ Any comparison to the circumstances the appellants face here is patently frivolous.

Schonauer is also distinguishable. There, the plaintiff was employed as a beverage server at a topless nightclub and alleged that she had been harassed by a manager.¹¹⁷ In addition to entering the women’s changing facility, the manager

¹¹³ 77 F. Supp. 2d 376, 377–78 (S.D.N.Y. 1999).

¹¹⁴ 905 P.2d 392, 396–97, 400–01 (Wash. Ct. App. 1995).

¹¹⁵ 77 F. Supp. 2d at 377.

¹¹⁶ *Id.* at 378.

¹¹⁷ *Schonauer*, 905 P.2d at 396.

repeatedly encouraged the plaintiff to enter nude dance contests, asked questions about her sexual fantasies, and probed her sexual history.¹¹⁸ When the plaintiff resisted these advances, she was fired.¹¹⁹ The Washington Court of Appeals found that this behavior could constitute harassment not simply because the manager entered the changing facility, but because he pressed the plaintiff to “provide sexually explicit information and to dance on stage in a sexually provocative way.”¹²⁰

The District Court no doubt realized that the appellants’ attempt to seize upon *Lewis* and *Schonauer* demonstrated the weakness of their arguments. Here, there are no allegations of harassment, let alone any that are even remotely as “severe, pervasive, [or] objectively offensive.”¹²¹ Still, the appellants unconvincingly try to equate mere presence in a space with harassing activity.

This case is far more analogous to *Cruzan v. Special School Dist., No. 1*,¹²² a Title VII case from the Court of Appeals for the Eighth Circuit. *Cruzan* held that a transgender individual in a bathroom did not create a hostile environment because there was no evidence that the individual “engaged in any inappropriate conduct other than merely being present in the women’s faculty restroom.”¹²³ That is, a transgender

¹¹⁸ *Id.* at 396–97.

¹¹⁹ *Id.* at 397.

¹²⁰ *Id.* at 400.

¹²¹ *DeJohn*, 537 F.3d at 316 n.14; *Castleberry*, 863 F.3d at 264.

¹²² 294 F.3d 981, 984 (8th Cir. 2002).

¹²³ *Id.*

person in a restroom did not create an environment that was “permeated with discriminatory intimidation, ridicule, and insult” as required to sustain a harassment claim under Title VII.¹²⁴ We agree with the Eighth Circuit’s conclusion. As we have emphasized, the appellants’ real objection is to the presence of transgender students, not to any “environment” their presence creates. Indeed, the allegations here include an assertion that a cisgender student was harassed merely by a transgender student washing that student’s own hands in a bathroom or changing in a locker room. That is not the type of conduct that supports a Title IX hostile environment claim.¹²⁵ The District Court recognized this and correctly ruled that this claim was unlikely to succeed.

The School District, on the other hand, contends that barring transgender students from using privacy facilities that align with their gender identity would, itself, constitute discrimination under a sex-stereotyping theory in violation of Title IX.¹²⁶ We need not decide that very different issue here. We note only that in 2017, the Seventh Circuit held that a school district’s policy of prohibiting transgender students from using bathrooms and locker rooms consistent with their gender identity violated Title IX because it discriminated against transgender students by subjecting them to “different rules, sanctions, and treatment than non-transgender

¹²⁴ *Id.* (citation omitted).

¹²⁵ This is not to say that the transgender students could not engage in conduct that would rise to the level of harassment. It would be the same conduct required for cisgender students to harass someone.

¹²⁶ Br. for Appellees, 38–40.

students.”¹²⁷ The injunction that the plaintiffs have requested here would essentially replicate the policy used by the school district in *Whitaker by Whitaker v. Kenosha Unified School District*. Hence, BASH can hardly be faulted for being proactive in adopting a policy that avoids the issues that may otherwise have occurred under Title IX.

We therefore hold that the District Court correctly declined to issue an injunction based on the appellants’ Title IX claim.

3. The District Court correctly concluded that the appellants’ state law tort claim was unlikely to succeed on the merits.

Finally, the appellants contend that the District Court erred in denying the injunction as to their Pennsylvania-law tort claim for intrusion upon seclusion. Pennsylvania has adopted the Second Restatement of Torts’ definition of intrusion upon seclusion:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to the other for invasion of his privacy, if the intrusion would

¹²⁷ *Whitaker*, 858 F.3d at 1050.

be highly offensive to a reasonable person.¹²⁸

In denying this claim, the District Court concluded that the mere presence of a transgender individual in a bathroom or locker room is not the type of conduct that would be highly offensive to a reasonable person. As we have noted, students in a locker room expect to see other students in varying stages of undress, and they expect that other students will see them in varying stages of undress. We will affirm the District Court's rejection of the appellants' tort claim.

B. Irreparable Harm

In addition to finding that the appellants were unlikely to succeed on the merits of their claims, the District Court denied injunctive relief because they had not demonstrated that the failure to issue an injunction would result in irreparable harm. The District Court found that:

On a practical level . . . the privacy protections that are in place at BASH, which include the bathroom stalls and shower stalls in the locker rooms, the bathroom stalls in the multi-user bathrooms, the availability of a number of single-user bathrooms (a few of which will have lockers for storing items), the [ability] of students to

¹²⁸ *Tagouma v. Investigative Consultant Servs, Inc.*, 4 A.3d 170, 174 (Pa. Super. Ct. 2010) (quoting Restatement (Second) of Torts § 652B (1965)).

store personal items in their locker or leave those items with the gym teacher, and the availability of the team rooms in the locker rooms (which would not involve students passing through the common area of the locker room), and the overall willingness of the [appellees] to work with the students and their families to assure that the students are comfortable at BASH, mitigates against a finding of irreparable harm. . . . The privacy protections available to students in 2017-18 are more than suitable to address any privacy concerns relating to the presence of transgender students in the locker rooms and bathrooms at BASH.¹²⁹

We agree that the appellants did not demonstrate irreparable harm would result from denying an injunction. The School District has provided adequate privacy facilities for the appellants to use during this litigation. Even if the appellants could otherwise succeed on one or more of their claims (and, as explained above, we do not suggest that they can), the single-user facilities ensure that no appellant faces irreparable harm in the meantime.

¹²⁹ *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp 3d at 410.

III. CONCLUSION

The Boyertown Area School District has adopted a very thoughtful and carefully tailored policy in an attempt to address some very real issues while faithfully discharging its obligation to maintain a safe and respectful environment in which everyone can both learn and thrive.

The District Court correctly concluded that the appellants' attempt to enjoin that policy based on an alleged violation of their privacy rights and their rights under Title IX and Pennsylvania tort law is not likely to succeed on the merits. The District Court was also correct in deciding that denying the injunction would not irreparably harm the appellants. For the reasons set forth above and in the well-reasoned District Court opinion, we will affirm the District Court's denial of the requested preliminary injunction.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0045p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,
AIMEE STEPHENS,
Intervenor,
v.
R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Defendant-Appellee.

No. 16-2424

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:14-cv-13710—Sean F. Cox, District Judge.

Argued: October 4, 2017

Decided and Filed: March 7, 2018

Before: MOORE, WHITE, and DONALD, Circuit Judges.

COUNSEL

ARGUED: Anne Noel Occhialino, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. John A. Knight, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Chicago, Illinois, for Intervenor. Douglas G. Wardlow, ALLIANCE DEFENDING FREEDOM, Scottsdale, Arizona, for Appellee. **ON BRIEF:** Anne Noel Occhialino, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. John A. Knight, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Chicago, Illinois, Jay D. Kaplan, Daniel S. Korobkin, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Detroit, Michigan, for Intervenor. Douglas G. Wardlow, Gary S. McCaleb, ALLIANCE DEFENDING FREEDOM, Scottsdale, Arizona, for Appellee. Jennifer C. Pizer, Nancy C. Marcus, LAMBDA LEGAL DEFENSE AND

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OPINION

KAREN NELSON MOORE, Circuit Judge. Aimee Stephens (formerly known as Anthony Stephens) was born biologically male.¹ While living and presenting as a man, she worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc. (“the Funeral Home”), a closely held for-profit corporation that operates three funeral homes in Michigan. Stephens was terminated from the Funeral Home by its owner and operator, Thomas Rost, shortly after Stephens informed Rost that she intended to transition from male to female and would represent herself and dress as a woman while at work. Stephens filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), which investigated Stephens’s allegations that she had been terminated as a result of unlawful sex discrimination. During the course of its investigation, the EEOC learned that the Funeral Home provided its male public-facing employees with clothing that complied with the company’s dress code while female public-facing employees received no such allowance. The EEOC subsequently brought suit against the Funeral Home in which the EEOC charged the Funeral Home with violating Title VII of the Civil Rights Act of 1964 (“Title VII”) by (1) terminating Stephens’s employment on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes; and (2) administering a discriminatory-clothing-allowance policy.

¹We refer to Stephens using female pronouns, in accordance with the preference she has expressed through her briefing to this court.

The parties submitted dueling motions for summary judgment. The EEOC argued that it was entitled to judgment as a matter of law on both of its claims. For its part, the Funeral Home argued that it did not violate Title VII by requiring Stephens to comply with a sex-specific dress code that it asserts equally burdens male and female employees, and, in the alternative, that Title VII should not be enforced against the Funeral Home because requiring the Funeral Home to employ Stephens while she dresses and represents herself as a woman would constitute an unjustified substantial burden upon Rost's (and thereby the Funeral Home's) sincerely held religious beliefs, in violation of the Religious Freedom Restoration Act ("RFRA"). As to the EEOC's discriminatory-clothing-allowance claim, the Funeral Home argued that Sixth Circuit case law precludes the EEOC from bringing this claim in a complaint that arose out of Stephens's original charge of discrimination because the Funeral Home could not reasonably expect a clothing-allowance claim to emerge from an investigation into Stephens's termination.

The district court granted summary judgment in favor of the Funeral Home on both claims. For the reasons set forth below, we hold that (1) the Funeral Home engaged in unlawful discrimination against Stephens on the basis of her sex; (2) the Funeral Home has not established that applying Title VII's proscriptions against sex discrimination to the Funeral Home would substantially burden Rost's religious exercise, and therefore the Funeral Home is not entitled to a defense under RFRA; (3) even if Rost's religious exercise were substantially burdened, the EEOC has established that enforcing Title VII is the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination against Stephens; and (4) the EEOC may bring a discriminatory-clothing-allowance claim in this case because such an investigation into the Funeral Home's clothing-allowance policy was reasonably expected to grow out of the original charge of sex discrimination that Stephens submitted to the EEOC. Accordingly, we **REVERSE** the district court's grant of summary judgment on both the unlawful-termination and discriminatory-clothing-allowance claims, **GRANT** summary judgment to the EEOC on its unlawful-termination claim, and **REMAND** the case to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

Aimee Stephens, a transgender woman who was “assigned male at birth,” joined the Funeral Home as an apprentice on October 1, 2007 and served as a Funeral Director/Embalmer at the Funeral Home from April 2008 until August 2013. R. 51-18 (Stephens Dep. at 49–51) (Page ID #817); R. 61 (Def.’s Counter Statement of Disputed Facts ¶ 10) (Page ID #1828). During the course of her employment at the Funeral Home, Stephens presented as a man and used her then-legal name, William Anthony Beasley Stephens. R. 51-18 (Stephens Dep. at 47) (Page ID #816); R. 61 (Def.’s Counter Statement of Disputed Facts ¶ 15) (Page ID #1829).

The Funeral Home is a closely held for-profit corporation. R. 55 (Def.’s Statement of Facts ¶ 1) (Page ID #1683).² Thomas Rost (“Rost”), who has been a Christian for over sixty-five years, owns 95.4% of the company and operates its three funeral home locations. *Id.* ¶¶ 4, 8, 17 (Page ID #1684–85); R. 54-2 (Rost Aff. ¶ 2) (Page ID #1326). Rost proclaims “that God has called him to serve grieving people” and “that his purpose in life is to minister to the grieving.” R. 55 (Def.’s Statement of Facts ¶ 31) (Page ID #1688). To that end, the Funeral Home’s website contains a mission statement that states that the Funeral Home’s “highest priority is to honor God in all that we do as a company and as individuals” and includes a verse of scripture on the bottom of the mission statement webpage. *Id.* ¶¶ 21–22 (Page ID #1686). The Funeral Home itself, however, is not affiliated with a church; it does not claim to have a religious purpose in its articles of incorporation; it is open every day, including Christian holidays; and it serves clients of all faiths. R. 61 (Def.’s Counter Statement of Facts ¶¶ 25–27; 29–30) (Page ID #1832–34). “Employees have worn Jewish head coverings when holding a Jewish funeral service.” *Id.* ¶ 31 (Page ID #1834). Although the Funeral Home places the Bible, “Daily Bread” devotionals, and “Jesus Cards” in public places within the funeral homes, the Funeral Home does not decorate its rooms with “visible religious figures . . . to avoid offending people of different religions.” *Id.* ¶¶ 33–34 (Page ID #1834). Rost hires employees belonging to any faith or no faith to work at the Funeral Home, and he “does not endorse or consider himself to endorse his employees’ beliefs or non-employment-related activities.” *Id.* ¶¶ 37–38 (Page ID #1835).

²All facts drawn from Def.’s Statement of Facts (R. 55) are undisputed. See R. 64 (Pl.’s Counter Statement of Disputed Facts) (Page ID #2066–88).

The Funeral Home requires its public-facing male employees to wear suits and ties and its public-facing female employees to wear skirts and business jackets. R. 55 (Def.’s Statement of Facts at ¶ 51) (Page ID #1691). The Funeral Home provides all male employees who interact with clients, including funeral directors, with free suits and ties, and the Funeral Home replaces suits as needed. R. 61 (Def.’s Counter Statement of Disputed Facts ¶¶ 42, 48) (Page ID #1836–37). All told, the Funeral Home spends approximately \$470 per full-time employee per year and \$235 per part-time employee per year on clothing for male employees. *Id.* ¶ 55 (Page ID #1839).

Until October 2014—after the EEOC filed this suit—the Funeral Home did not provide its female employees with any sort of clothing or clothing allowance. *Id.* ¶ 54 (Page ID #1838–39). Beginning in October 2014, the Funeral Home began providing its public-facing female employees with an annual clothing stipend ranging from \$75 for part-time employees to \$150 for full-time employees. *Id.* ¶ 54 (Page ID #1838–39). Rost contends that the Funeral Home would provide suits to all funeral directors, regardless of their sex, *id.*, but it has not employed a female funeral director since Rost’s grandmother ceased working for the organization around 1950, R. 54-2 (Rost Aff. ¶¶ 52, 54) (Page ID #1336–37). According to Rost, the Funeral Home has received only one application from a woman for a funeral director position in the thirty-five years that Rost has operated the Funeral Home, and the female applicant was deemed not qualified. *Id.* ¶¶ 2, 53 (Page ID #1326, 1336).

On July 31, 2013, Stephens provided Rost with a letter stating that she has struggled with “a gender identity disorder” her “entire life,” and informing Rost that she has “decided to become the person that [her] mind already is.” R. 51-2 (Stephens Letter at 1) (Page ID #643). The letter stated that Stephens “intend[ed] to have sex reassignment surgery,” and explained that “[t]he first step [she] must take is to live and work full-time as a woman for one year.” *Id.* To that end, Stephens stated that she would return from her vacation on August 26, 2013, “as [her] true self, Amiee [sic] Australia Stephens, in appropriate business attire.” *Id.* After presenting the letter to Rost, Stephens postponed her vacation and continued to work for the next two weeks. R. 68 (Reply to Def.’s Counter Statement of Material Facts Not in Dispute at 1) (Page ID #2122). Then, just before Stephens left for her intended vacation, Rost fired her. R. 61 (Def.’s Counter Statement of Disputed Facts ¶¶ 10–11) (Page ID #1828). Rost said, “this is not going to

work out,” and offered Stephens a severance agreement if she “agreed not to say anything or do anything.” R. 54-15 (Stephens Dep. at 75–76) Page ID #1455; R. 63-5 (Rost Dep. at 126–27) Page ID #1974. Stephens refused. *Id.* Rost testified that he fired Stephens because “he was no longer going to represent himself as a man. He wanted to dress as a woman.” R. 51-3 (Rost 30(b)(6) Dep. at 135–36) (Page ID #667).

Rost avers that he “sincerely believe[s] that the Bible teaches that a person’s sex is an immutable God-given gift,” and that he would be “violating God’s commands if [he] were to permit one of [the Funeral Home’s] funeral directors to deny their sex while acting as a representative of [the] organization” or if he were to “permit one of [the Funeral Home’s] male funeral directors to wear the uniform for female funeral directors while at work.” R. 54-2 (Rost Aff. ¶¶ 42–43, 45) (Page ID #1334–35). In particular, Rost believes that authorizing or paying for a male funeral director to wear the uniform for female funeral directors would render him complicit “in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift.” *Id.* ¶¶ 43, 45 (Page ID #1334–35).

After her employment was terminated, Stephens filed a sex-discrimination charge with the EEOC, alleging that “[t]he only explanation” she received from “management” for her termination was that “the public would [not] be accepting of [her] transition.” R. 63-2 (Charge of Discrimination at 1) (Page ID #1952). She further noted that throughout her “entire employment” at the Funeral Home, there were “no other female Funeral Director/Embalmers.” *Id.* During the course of investigating Stephens’s allegations, the EEOC learned from another employee that the Funeral Home did not provide its public-facing female employees with suits or a clothing stipend. R. 54-24 (Memo for File at 9) (Page ID #1513).

The EEOC issued a letter of determination on June 5, 2014, in which the EEOC stated that there was reasonable cause to believe that the Funeral Home “discharged [Stephens] due to her sex and gender identity, female, in violation of Title VII” and “discriminated against its female employees by providing male employees with a clothing benefit which was denied to females, in violation of Title VII.” R. 63-4 (Determination at 1) (Page ID #1968). The EEOC and the Funeral Home were unable to resolve this dispute through an informal conciliation

process, and the EEOC filed a complaint against the Funeral Home in the district court on September 25, 2014. R. 1 (Complaint) (Page ID #1–9).

The Funeral Home moved to dismiss the EEOC’s action for failure to state a claim. The district court denied the Funeral Home’s motion, but it narrowed the basis upon which the EEOC could pursue its unlawful-termination claim. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 599, 603 (E.D. Mich. 2015). In particular, the district court agreed with the Funeral Home that transgender status is not a protected trait under Title VII, and therefore held that the EEOC could not sue for alleged discrimination against Stephens based solely on her transgender and/or transitioning status. *See id.* at 598–99. Nevertheless, the district court determined that the EEOC had adequately stated a claim for discrimination against Stephens based on the claim that she was fired because of her failure to conform to the Funeral Home’s “sex- or gender-based preferences, expectations, or stereotypes.” *Id.* at 599 (quoting R. 1 (Compl. ¶ 15) (Page ID #4–5)).

The parties then cross-moved for summary judgment. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 840 (E.D. Mich. 2016). With regard to the Funeral Home’s decision to terminate Stephens’s employment, the district court determined that there was “direct evidence to support a claim of employment discrimination” against Stephens on the basis of her sex, in violation of Title VII. *Id.* at 850. However, the court nevertheless found in the Funeral Home’s favor because it concluded that the Religious Freedom Restoration Act (“RFRA”) precludes the EEOC from enforcing Title VII against the Funeral Home, as doing so would substantially burden Rost and the Funeral Home’s religious exercise and the EEOC had failed to demonstrate that enforcing Title VII was the least restrictive way to achieve its presumably compelling interest “in ensuring that Stephens is not subject to gender stereotypes in the workplace in terms of required clothing at the Funeral home.” *Id.* at 862–63. Based on its narrow conception of the EEOC’s compelling interest in bringing the claim, the district court concluded that the EEOC could have achieved its goals by proposing that the Funeral Home impose a gender-neutral dress code. *Id.* The EEOC’s failure to consider such an accommodation was, according to the district court, fatal to its case. *Id.* at 863. Separately, the district court held that it lacked jurisdiction to consider the EEOC’s discriminatory-clothing-

allowance claim because, under longstanding Sixth Circuit precedent, the EEOC may pursue in a Title VII lawsuit only claims that are reasonably expected to grow out of the complaining party’s—in this case, Stephens’s—original charge. *Id.* at 864–70. The district court entered final judgment on all counts in the Funeral Home’s favor on August 18, 2016, R. 77 (J.) (Page ID #2235), and the EEOC filed a timely notice of appeal shortly thereafter, *see* R. 78 (Notice of Appeal) (Page ID #2236–37).

Stephens moved to intervene in this appeal on January 26, 2017, after expressing concern that changes in policy priorities within the U.S. government might prevent the EEOC from fully representing Stephens’s interests in this case. *See* D.E. 19 (Mot. to Intervene as Plaintiff-Appellant at 5–7). The Funeral Home opposed Stephens’s motion on the grounds that the motion was untimely and Stephens had failed to show that the EEOC would not represent her interests adequately. D.E. 21 (Mem. in Opp’n at 2–11). We determined that Stephens’s request was timely given that she previously “had no reason to question whether the EEOC would continue to adequately represent her interests” and granted Stephens’s motion to intervene on March 27, 2017. D.E. 28-2 (Order at 2). We further determined that Stephens’s intervention would not prejudice the Funeral Home because Stephens stated in her briefing that she did not intend to raise new issues. *Id.* Six groups of amici curiae also submitted briefing in this case.

II. DISCUSSION

A. Standard of Review

“We review a district court’s grant of summary judgment *de novo*.” *Risch v. Royal Oak Police Dep’t*, 581 F.3d 383, 390 (6th Cir. 2009) (quoting *CenTra, Inc. v. Estrin*, 538 F.3d 402, 412 (6th Cir. 2008)). Summary judgment is warranted when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). In reviewing a grant of summary judgment, “we view all facts and any inferences in the light most favorable to the nonmoving party.” *Risch*, 581 F.3d at 390 (citation omitted). We also review all “legal conclusions supporting [the district court’s] grant of summary judgment *de novo*.” *Doe v. Salvation Army in U.S.*, 531 F.3d 355, 357 (6th Cir. 2008) (citation omitted).

B. Unlawful Termination Claim

Title VII prohibits employers from “discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). “[A] plaintiff can establish a *prima facie* case [of unlawful discrimination] by presenting direct evidence of discriminatory intent.” *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion)). “[A] facially discriminatory employment policy or a corporate decision maker’s express statement of a desire to remove employees in the protected group is direct evidence of discriminatory intent.” *Id.* (citation omitted). Once a plaintiff establishes that “the prohibited classification played a motivating part in the [adverse] employment decision,” the employer then bears the burden of proving that it would have terminated the plaintiff “even if it had not been motivated by impermissible discrimination.” *Id.* (citing, *inter alia*, *Price Waterhouse*, 490 U.S. at 244–45).

Here, the district court correctly determined that Stephens was fired because of her failure to conform to sex stereotypes, in violation of Title VII. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 850 (“[W]hile this Court does not often see cases where there is direct evidence to support a claim of employment discrimination, it appears to exist here.”). The district court erred, however, in finding that Stephens could not alternatively pursue a claim that she was discriminated against on the basis of her transgender and transitioning status. Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing Stephens because she is transgender and transitioning from male to female.

1. Discrimination on the Basis of Sex Stereotypes

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a plurality of the Supreme Court explained that Title VII’s proscription of discrimination “*because of . . . sex*’ . . . mean[s] that gender must be irrelevant to employment decisions.” *Id.* at 240 (emphasis in original).

In enacting Title VII, the plurality reasoned, “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Id.* at 251 (quoting *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). The *Price Waterhouse* plurality, along with two concurring Justices, therefore determined that a female employee who faced an adverse employment decision because she failed to “walk . . . femininely, talk . . . femininely, dress . . . femininely, wear make-up, have her hair styled, [or] wear jewelry,” could properly state a claim for sex discrimination under Title VII—even though she was not discriminated against for being a woman *per se*, but instead for failing to be womanly enough. *See id.* at 235 (plurality opinion) (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)); *id.* at 259 (White, J., concurring); *id.* at 272 (O’Connor, J., concurring).

Based on *Price Waterhouse*, we determined that “discrimination based on a failure to conform to stereotypical gender norms” was no less prohibited under Title VII than discrimination based on “the biological differences between men and women.” *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004). And we found no “reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual.” *Id.* at 575. Thus, in *Smith*, we held that a transgender plaintiff (born male) who suffered adverse employment consequences after “he began to express a more feminine appearance and manner on a regular basis” could file an employment discrimination suit under Title VII, *id.* at 572, because such “discrimination would not [have] occur[red] but for the victim’s sex,” *id.* at 574. As we reasoned in *Smith*, Title VII proscribes discrimination both against women who “do not wear dresses or makeup” and men who do. *Id.* Under any circumstances, “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination.” *Id.* at 575.

Here, Rost’s decision to fire Stephens because Stephens was “no longer going to represent himself as a man” and “wanted to dress as a woman,” *see R. 51-3 (Rost 30(b)(6) Dep. at 135–36) (Page ID #667)*, falls squarely within the ambit of sex-based discrimination that *Price Waterhouse* and *Smith* forbid. For its part, the Funeral Home has failed to establish a non-discriminatory basis for Stephens’s termination, and Rost admitted that he did not fire Stephens

for any performance-related issues. *See* R. 51-3 (Rost 30(b)(6) Dep. at 109, 136) (Page ID #663, 667). We therefore agree with the district court that the Funeral Home discriminated against Stephens on the basis of her sex, in violation of Title VII.

The Funeral Home nevertheless argues that it has not violated Title VII because sex stereotyping is barred only when “the employer’s reliance on stereotypes . . . result[s] in disparate treatment of employees because they are either male or female.” Appellee Br. at 31. According to the Funeral Home, an employer does not engage in impermissible sex stereotyping when it requires its employees to conform to a sex-specific dress code—as it purportedly did here by requiring Stephens to abide by the dress code designated for the Funeral Home’s male employees—because such a policy “impose[s] equal burdens on men and women,” and thus does not single out an employee for disparate treatment based on that employee’s sex. *Id.* at 12. In support of its position, the Funeral Home relies principally on *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc), and *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977). *Jespersen* held that a sex-specific grooming code that imposed different but equally burdensome requirements on male and female employees would not violate Title VII. *See* 444 F.3d at 1109–11 (holding that the plaintiff failed to demonstrate how a grooming code that required women to wear makeup and banned men from wearing makeup was a violation of Title VII because the plaintiff failed to produce evidence showing that this sex-specific makeup policy was “more burdensome for women than for men”). *Barker*, for its part, held that a sex-specific grooming code that was enforced equally as to male and female employees would not violate Title VII. *See* 549 F.2d at 401 (holding that a grooming code that established different hair-length limits for male and female employees did not violate Title VII because failure to comply with the code resulted in the same consequences for men and women). For three reasons, the Funeral Home’s reliance on these cases is misplaced.

First, the central issue in *Jespersen* and *Barker*—whether certain sex-specific appearance requirements violate Title VII—is not before this court. We are not considering, in this case, whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits. Our question is instead whether the Funeral Home could legally terminate Stephens, notwithstanding that she fully intended to comply with the company’s sex-specific

dress code, simply because she refused to conform to the Funeral Home’s notion of her sex. When the Funeral Home’s actions are viewed in the proper context, no reasonable jury could believe that Stephens was not “target[ed] . . . for disparate treatment” and that “no sex stereotype factored into [the Funeral Home’s] employment decision.” *See Appellee Br.* at 19–20.

Second, even if we would permit certain sex-specific dress codes in a case where the issue was properly raised, we would not rely on either *Jespersen* or *Barker* to do so. *Barker* was decided before *Price Waterhouse*, and it in no way anticipated the Court’s recognition that Title VII “strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Price Waterhouse*, 490 U.S. at 251 (plurality) (quoting *Manhart*, 435 U.S. at 707 n.13). Rather, according to *Barker*, “[w]hen Congress makes it unlawful for an employer to ‘discriminate . . . on the basis of . . . sex . . .’, without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant.” 549 F.2d at 401–02 (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145 (1976), superseded by statute, Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076, 52 U.S.C. § 2000e(k), as recognized in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 89 (1983)). Of course, this is precisely the sentiment that *Price Waterhouse* “eviscerated” when it recognized that “Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.” *Smith*, 378 F.3d at 573 (citing *Price Waterhouse*, 490 U.S. at 251). Indeed, *Barker*’s incompatibility with *Price Waterhouse* may explain why this court has not cited *Barker* since *Price Waterhouse* was decided.

As for *Jespersen*, that Ninth Circuit case is irreconcilable with our decision in *Smith*. Critical to *Jespersen*’s holding was the notion that the employer’s “grooming standards,” which required all female bartenders to wear makeup (and prohibited males from doing so), did not on their face violate Title VII because they did “not require [the plaintiff] to conform to a stereotypical image that would objectively impede her ability to perform her job.” 444 F.3d at 1113. We reached the exact opposite conclusion in *Smith*, as we explained that requiring women to wear makeup does, in fact, constitute improper sex stereotyping. 378 F.3d at 574 (“After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do

not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex.”). And more broadly, our decision in *Smith* forecloses the *Jespersen* court’s suggestion that sex stereotyping is permissible so long as the required conformity does not “impede [an employee’s] ability to perform her job,” *Jespersen*, 444 F.3d at 1113, as the *Smith* plaintiff did not and was not required to allege that being expected to adopt a more masculine appearance and manner interfered with his job performance. *Jespersen*’s incompatibility with *Smith* may explain why it has never been endorsed (or even cited) by this circuit—and why it should not be followed now.

Finally, the Funeral Home misreads binding precedent when it suggests that sex stereotyping violates Title VII *only* when “the employer’s sex stereotyping resulted in ‘disparate treatment of men and women.’” Appellee Br. at 18 (quoting *Price Waterhouse*, 490 U.S. at 251).³ This interpretation of Title VII cannot be squared with our holding in *Smith*. There, we did not ask whether transgender persons transitioning from male to female were treated differently than transgender persons transitioning from female to male. Rather, we considered whether a transgender person was being discriminated against based on “his failure to conform to sex stereotypes concerning how a man should look and behave.” *Smith*, 378 F.3d at 572. It is apparent from both *Price Waterhouse* and *Smith* that an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave. *See Zarda v. Altitude Express, Inc.*, — F.3d —, No. 15-3775, slip op. at 47 (2d Cir. Feb. 26, 2018) (en banc) (plurality) (“[T]he employer in *Price Waterhouse* could not have defended itself by claiming that it fired a gender-non-conforming man as well as a gender-non-conforming woman any more than it could persuasively argue that two wrongs make a right.”).

³*See also* Appellee Br. at 16 (“It is a helpful exercise to think about *Price Waterhouse* and imagine that there was a dress code imposed which obligated Ms. Hopkins to wear a skirt while her male colleagues were obliged to wear pants. Had she simply been fired for wearing pants rather than a skirt, the case would have ended there—both sexes would have been equally burdened by the requirement to comply with their respective sex-specific standard. But what the firm could not do was fire her for being aggressive or macho when it was tolerating or rewarding the behavior among men—and when it did, it relied on a stereotype to treat her disparately from the men in the firm.”).

In short, the Funeral Home’s sex-specific dress code does not preclude liability under Title VII. Even if the Funeral Home’s dress code does not itself violate Title VII—an issue that is not before this court—the Funeral Home may not rely on its policy to combat the charge that it engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the Funeral Home’s perception of how she should appear or behave based on her sex. Because the EEOC has presented unrefuted evidence that unlawful sex stereotyping was “at least a motivating factor in the [Funeral Home’s] actions,” *see White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232, 238 (6th Cir. 2005) (quoting *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)), and because we reject the Funeral Home’s affirmative defenses (*see* Section II.B.3, *infra*), we **GRANT** summary judgment to the EEOC on its sex discrimination claim.

2. Discrimination on the Basis of Transgender/Transitioning Status

We also hold that discrimination on the basis of transgender and transitioning status violates Title VII. The district court rejected this theory of liability at the motion-to-dismiss stage, holding that “transgender or transsexual status is currently not a protected class under Title VII.” *R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d at 598. The EEOC and Stephens argue that the district court’s determination was erroneous because Title VII protects against sex stereotyping and “transgender discrimination is based on the non-conformance of an individual’s gender identity and appearance with sex-based norms or expectations”; therefore, “discrimination because of an individual’s transgender status is *always* based on gender-stereotypes: the stereotype that individuals will conform their appearance and behavior—whether their dress, the name they use, or other ways they present themselves—to the sex assigned them at birth.” Appellant Br. at 24; *see also* Intervenor Br. at 10–15. The Funeral Home, in turn, argues that Title VII does not prohibit discrimination based on a person’s transgender or transitioning status because “sex,” for the purposes of Title VII, “refers to a binary characteristic for which there are only two classifications, male and female,” and “which classification arises in a person based on their chromosomally driven physiology and reproductive function.” Appellee Br. at 26. According to the Funeral Home, transgender status

refers to “a person’s self-assigned ‘gender identity’” rather than a person’s sex, and therefore such a status is not protected under Title VII. *Id.* at 26–27.

For two reasons, the EEOC and Stephens have the better argument. First, it is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex. The Seventh Circuit’s method of “isolat[ing] the significance of the plaintiff’s sex to the employer’s decision” to determine whether Title VII has been triggered illustrates this point. *See Hively v. Ivy Tech Cnty. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017). In *Hively*, the Seventh Circuit determined that Title VII prohibits discrimination on the basis of sexual orientation—a different question than the issue before this court—by asking whether the plaintiff, a self-described lesbian, would have been fired “if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same.” *Id.* If the answer to that question is no, then the plaintiff has stated a “paradigmatic sex discrimination” claim. *See id.* Here, we ask whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women’s dress code. The answer quite obviously is no. This, in and of itself, confirms that Stephens’s sex impermissibly affected Rost’s decision to fire Stephens.

The court’s analysis in *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), provides another useful way of framing the inquiry. There, the court noted that an employer who fires an employee because the employee converted from Christianity to Judaism has discriminated against the employee “because of religion,” regardless of whether the employer feels any animus against either Christianity or Judaism, because “[d]iscrimination ‘because of religion’ easily encompasses discrimination because of a *change of religion*.⁴” *Id.* at 306 (emphasis in original). By the same token, discrimination “because of sex” inherently includes discrimination against employees because of a change in their sex. *See id.* at 307–08.⁴

⁴ Moreover, discrimination because of a person’s transgender, intersex, or sexually indeterminate status is no less actionable than discrimination because of a person’s identification with two religions, an unorthodox religion, or no religion at all. And “religious identity” can be just as fluid, variable, and difficult to define as “gender identity”; after all, both have “a deeply personal, internal genesis that lacks a fixed external referent.” Sue Landsittel, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U. L. REV. 1147, 1172 (2010) (advocating for “[t]he application of tests for religious identity to the problem of gender identity [because it] produces a more realistic, and therefore more appropriate, authentication framework than the current reliance on medical diagnoses and conformity with the gender binary”).

Here, there is evidence that Rost at least partially based his employment decision on Stephens's desire to change her sex: Rost justified firing Stephens by explaining that Rost "sincerely believes that 'the Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex,'" and "'the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman.'"⁵ *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 848 (quoting R. 55 (Def.'s Statement of Facts ¶ 28) (Page ID #1687); R. 53-3 (Rost 30(b)(6) Dep. ¶ 44) (Page ID #936)). As amici point out in their briefing, such statements demonstrate that "Ms. Stephens's sex necessarily factored into the decision to fire her." Equality Ohio Br. at 12; cf. *Hively*, 853 F.3d at 359 (Flaum, J., concurring) (arguing discrimination against a female employee because she is a lesbian is necessarily "motivated, in part, by . . . the employee's sex" because the employer is discriminating against the employee "because she is (A) a woman who is (B) sexually attracted to women").

The Funeral Home argues that *Schroer*'s analogy is "structurally flawed" because, unlike religion, a person's sex cannot be changed; it is, instead, a biologically immutable trait. Appellee Br. at 30. We need not decide that issue; even if true, the Funeral Home's point is immaterial. As noted above, the Supreme Court made clear in *Price Waterhouse* that Title VII requires "gender [to] be irrelevant to employment decisions." 490 U.S. at 240. Gender (or sex) is not being treated as "irrelevant to employment decisions" if an employee's attempt or desire to change his or her sex leads to an adverse employment decision.

Second, discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping. As we recognized in *Smith*, a transgender person is someone who "fails to act and/or identify with his or her gender"—i.e., someone who is inherently "gender non-conforming." 378 F.3d at 575; *see also id.* at 568 (explaining that

⁵On the other hand, there is also evidence that Stephens was fired only because of her nonconforming appearance and behavior at work, and not because of her transgender identity. *See* R. 53-6 (Rost Dep. at 136–37) (Page ID #974) (At his deposition, when asked whether "the reason you fired [Stephens], was it because [Stephens] claimed that he was really a woman; is that why you fired [Stephens] or was it because he claimed – or that he would no longer dress as a man," Rost answered: "That he would no longer dress as a man," and when asked, "if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him," Rost answered: "No.").

transgender status is characterized by the American Psychiatric Association as “a disjunction between an individual’s sexual organs and sexual identity”). Thus, an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try.

We did not expressly hold in *Smith* that discrimination on the basis of transgender status is unlawful, though the opinion has been read to say as much—both by this circuit and others. In *G.G. v. Gloucester County School Board*, 654 F. App’x 606 (4th Cir. 2016), for instance, the Fourth Circuit described *Smith* as holding “that discrimination against a transgender individual based on that person’s transgender status is discrimination because of sex under federal civil rights statutes.” *Id.* at 607. And in *Dodds v. United States Department of Education*, 845 F.3d 217 (6th Cir. 2016), we refused to stay “a preliminary injunction ordering the school district to treat an eleven-year old transgender girl as a female and permit her to use the girls’ restroom” because, among other things, the school district failed to show that it would likely succeed on the merits. *Id.* at 220–21. In so holding, we cited *Smith* as evidence that this circuit’s “settled law” prohibits “[s]ex stereotyping based on a person’s gender non-conforming behavior,” *id.* at 221 (second quote quoting *Smith*, 378 F.3d at 575), and then pointed to out-of-circuit cases for the propositions that “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes,” *id.* (citing *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011)), and “[t]he weight of authority establishes that discrimination based on transgender status is already prohibited by the language of federal civil rights statutes,” *id.* (quoting *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 729 (4th Cir.) (Davis, J., concurring), cert. granted in part, 137 S. Ct. 369 (2016), and vacated and remanded, 137 S. Ct. 1239 (2017)).⁶ Such references support what we now directly hold: Title VII protects

⁶We acknowledge that *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005), read *Smith* as focusing on “look and behav[ior].” *Id.* at 737 (“By alleging that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant’s actions, Smith stated a claim for relief pursuant to Title VII’s prohibition of sex discrimination.”). That is not surprising, however, given that only “look and behavior,” not status, were at issue in *Barnes*.

transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.

The Funeral Home raises several arguments against this interpretation of Title VII, none of which we find persuasive. First, the Funeral Home contends that the Congress enacting Title VII understood “sex” to refer only to a person’s “physiology and reproductive role,” and not a person’s “self-assigned ‘gender identity.’” Appellee Br. at 25–26. But the drafters’ failure to anticipate that Title VII would cover transgender status is of little interpretive value, because “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); *see also Zarda*, slip op. at 24–29 (majority opinion) (rejecting the argument that Title VII was not originally intended to protect employees against discrimination on the basis of sexual orientation, in part because the same argument “could also be said of multiple forms of discrimination that are [now] indisputably prohibited by Title VII . . . [but] were initially believed to fall outside the scope of Title VII’s prohibition,” such as “sexual harassment and hostile work environment claims”). And in any event, *Smith* and *Price Waterhouse* preclude an interpretation of Title VII that reads “sex” to mean only individuals’ “chromosomally driven physiology and reproductive function.” *See* Appellee Br. at 26. Indeed, we criticized the district court in *Smith* for “relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because ‘Congress had a narrow view of sex in mind’ and ‘never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.’” 378 F.3d at 572 (quoting *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)) (alteration in original). According to *Smith*, such a limited view of Title VII’s protections had been “eviscerated by *Price Waterhouse*.” *Id.* at 573. The Funeral Home’s attempt to resurrect the reasoning of these earlier cases thus runs directly counter to *Smith*’s holding.

In a related argument, the Funeral Home notes that both biologically male and biologically female persons may consider themselves transgender, such that transgender status is not unique to one biological sex. Appellee Br. at 27–28. It is true, of course, that an individual’s

biological sex does not dictate her transgender status; the two traits are not coterminous. But a trait need not be exclusive to one sex to nevertheless be a function of sex. As the Second Circuit explained in *Zarda*,

Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular “*individual*” is discriminated against “because of such *individual’s . . . sex.*” Taking individuals as the unit of analysis, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex.

Slip op. at 46 n.23 (plurality opinion) (emphasis in original) (quoting 42 U.S.C. § 2000e-2(a)(1)). Because an employer cannot discriminate against an employee for being transgender without considering that employee’s biological sex, discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be. By the same token, an employer need not discriminate based on a trait common to all men or women to violate Title VII. After all, a subset of both women and men decline to wear dresses or makeup, but discrimination against any woman on this basis would constitute sex discrimination under *Price Waterhouse*. See *Hively*, 853 F.3d at 346 n.3 (“[T]he Supreme Court has made it clear that a policy need not affect *every* woman [or every man] to constitute sex discrimination. . . . A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex.”).

Nor can much be gleaned from the fact that later statutes, such as the Violence Against Women Act, expressly prohibit discrimination on the basis of “gender identity,” while Title VII does not, see Appellee Br. at 28, because “Congress may certainly choose to use both a belt and suspenders to achieve its objectives,” *Hively*, 853 F.3d at 344; see also *Yates v. United States*, 135 S. Ct. 1074, 1096 (2015) (Kagan, J., dissenting) (noting presence of two overlapping provisions in a statute “may have reflected belt-and-suspenders caution”). We have, in fact, already read Title VII to provide redundant statutory protections in a different context. In *In re Rodriguez*, 487 F.3d 1001 (6th Cir. 2007), for instance, we recognized that claims alleging discrimination on the basis of ethnicity may fall within Title VII’s prohibition on discrimination on the basis of national origin, see *id.* at 1006 n.1, even though at least one other federal statute treats “national origin” and “ethnicity” as separate traits, see 20 U.S.C. § 1092(f)(1)(F)(ii).

Moreover, Congress's failure to modify Title VII to include expressly gender identity "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)). In short, nothing precludes discrimination based on transgender status from being viewed both as discrimination based on "gender identity" for certain statutes and, for the purposes of Title VII, discrimination on the basis of sex.

The Funeral Home places great emphasis on the fact that our published decision in *Smith* superseded an earlier decision that stated explicitly, as opposed to obliquely, that a plaintiff who "alleges discrimination based solely on his identification as a transsexual . . . has alleged a claim of sex stereotyping pursuant to Title VII." *Smith v. City of Salem*, 369 F.3d 912, 922 (6th Cir.), *opinion amended and superseded*, 378 F.3d 566 (6th Cir. 2004). But such an amendment does not mean, as the Funeral Home contends, that the now-binding *Smith* opinion "directly rejected" the notion that Title VII prohibits discrimination on the basis of transgender status. *See* Appellee Br. at 31. The elimination of the language, which was not necessary to the decision, simply means that *Smith* did not expressly recognize Title VII protections for transgender persons based on identity. But *Smith*'s reasoning still leads us to the same conclusion.

We are also unpersuaded that our decision in *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), precludes the holding we issue today. We held in *Vickers* that a plaintiff cannot pursue a claim for impermissible sex stereotyping on the ground that his perceived sexual orientation fails to conform to gender norms unless he alleges that he was discriminated against for failing to "conform to traditional gender stereotypes in any observable way at work." *Id.* at 764. *Vickers* thus rejected the notion that "the act of identification with a particular group, in itself, is sufficiently gender non-conforming such that an employee who so identifies would, by this very identification, engage in conduct that would enable him to assert a successful sex stereotyping claim." *Id.* The *Vickers* court reasoned that recognizing such a claim would impermissibly "bootstrap protection for sexual orientation into Title VII." *Id.* (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)). The Funeral Home insists that, under *Vickers*, Stephens's sex-stereotyping claim survives only to the extent that it

concerns her “appearance or mannerisms on the job,” *see id.* at 763, but not as it pertains to her underlying status as a transgender person.

The Funeral Home is wrong. First, *Vickers* does not control this case because *Vickers* concerned a different legal question. As the EEOC and amici Equality Ohio note, *Vickers* “addressed only whether Title VII forbids sexual orientation discrimination, not discrimination against a transgender individual.” Appellant Br. at 30; *see also* Equality Ohio Br. at 16 n.7. While it is indisputable that “[a] panel of this Court cannot overrule the decision of another panel” when the “prior decision [constitutes] controlling authority,” *Darrah v. City of Oak Park*, 255 F.3d 301, 309 (6th Cir. 2001) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 744 F.2d 685, 689 (6th Cir. 1985)), one case is not “controlling authority” over another if the two address substantially different legal issues, *cf. Int'l Ins. Co. v. Stonewall Ins. Co.*, 86 F.3d 601, 608 (6th Cir. 1996) (noting two panel decisions that “on the surface may appear contradictory” were reconcilable because “the result [in both cases wa]s heavily fact driven”). After all, we do not overrule a case by distinguishing it.

Second, we are not bound by *Vickers* to the extent that it contravenes *Smith*. *See Darrah*, 255 F.3d at 310 (“[W]hen a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case.”). As noted above, *Vickers* indicated that a sex-stereotyping claim is viable under Title VII only if a plaintiff alleges that he was discriminated against for failing to “conform to traditional gender stereotypes *in any observable way at work*.” 453 F.3d at 764 (emphasis added). The *Vickers* court’s new “observable-at-work” requirement is at odds with the holding in *Smith*, which did not limit sex-stereotyping claims to traits that are observable in the workplace. The “observable-at-work” requirement also contravenes our reasoning in *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005)—a binding decision that predated *Vickers* by more than a year—in which we held that a reasonable jury could conclude that a transgender plaintiff was discriminated against on the basis of his sex when, among other factors, his “ambiguous sexuality and his practice of dressing as a woman *outside of work* were well-known within the [workplace].” *Id.* at 738 (emphasis

added).⁷ From *Smith* and *Barnes*, it is clear that a plaintiff may state a claim under Title VII for discrimination based on gender nonconformance that is expressed outside of work. The *Vickers* court’s efforts to develop a narrower rule are therefore not binding in this circuit.

Therefore, for the reasons set forth above, we hold that the EEOC could pursue a claim under Title VII on the ground that the Funeral Home discriminated against Stephens on the basis of her transgender status and transitioning identity. The EEOC should have had the opportunity, either through a motion for summary judgment or at trial, to establish that the Funeral Home violated Title VII’s prohibition on discrimination on the basis of sex by firing Stephens because she was transgender and transitioning from male to female.

3. Defenses to Title VII Liability

Having determined that the Funeral Home violated Title VII’s prohibition on sex discrimination, we must now consider whether any defenses preclude enforcement of Title VII in this case. As noted above, the district court held that the EEOC’s enforcement efforts must give way to the Religious Freedom Restoration Act (“RFRA”), which prohibits the government from enforcing a religiously neutral law against an individual if that law substantially burdens the individual’s religious exercise and is not the least restrictive way to further a compelling government interest. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 857–64. The EEOC seeks reversal of this decision; the Funeral Home urges affirmance. In addition, certain amici ask us to affirm the district court’s grant of summary judgment on different grounds—namely that Stephens falls within the “ministerial exception” to Title VII and is therefore not protected under the Act. *See* Public Advocate Br. at 20–24.

⁷Oddly, the *Vickers* court appears to have recognized that its new “observable-at-work” requirement cannot be squared with earlier precedent. Immediately after announcing this new requirement, the *Vickers* court cited *Smith* for the proposition that “a plaintiff hoping to succeed on a claim of sex stereotyping [must] show that he ‘fails to act and/or identify with his or her gender’”—a proposition that is necessarily broader than the narrow rule *Vickers* sought to announce. 453 F.3d at 764 (citing *Smith*, 378 F.3d at 575) (emphasis added). The *Vickers* court also seemingly recognized *Barnes* as binding authority, *see id.* (citing *Barnes*), but portrayed the decision as “affirming [the] district court’s denial of defendant’s motion for summary judgment as a matter of law on discrimination claim where pre-operative male-to-female transsexual was demoted based on his ‘ambiguous sexuality and his practice of dressing as a woman’ and his co-workers’ assertions that he was ‘not sufficiently masculine.’” *Id.* This summary is accurate as far as it goes, but it entirely omits the discussion in *Barnes* of discrimination against the plaintiff based on “his practice of dressing as a woman *outside of work*. ” 401 F.3d at 738 (emphasis added).

We hold that the Funeral Home does not qualify for the ministerial exception to Title VII; the Funeral Home’s religious exercise would not be substantially burdened by continuing to employ Stephens without discriminating against her on the basis of sex stereotypes; the EEOC has established that it has a compelling interest in ensuring the Funeral Home complies with Title VII; and enforcement of Title VII is necessarily the least restrictive way to achieve that compelling interest. We therefore **REVERSE** the district court’s grant of summary judgment in the Funeral Home’s favor and **GRANT** summary judgment to the EEOC on the unlawful-termination claim.

a. Ministerial Exception

We turn first to the “ministerial exception” to Title VII, which is rooted in the First Amendment’s religious protections, and which “preclude[s] application of [employment discrimination laws such as Title VII] to claims concerning the employment relationship between a religious institution and its ministers.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012). “[I]n order for the ministerial exception to bar an employment discrimination claim, the employer must be a religious institution and the employee must have been a ministerial employee.” *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 833 (6th Cir. 2015) (quoting *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007)). “The ministerial exception is a highly circumscribed doctrine. It grew out of the special considerations raised by the employment claims of clergy, which ‘concern[] internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law.’” *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 409 (6th Cir. 2010) (quoting *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986)) (alteration in original).

Public Advocate of the United States and its fellow amici argue that the ministerial exception applies in this case because (1) the exception applies both to religious and non-religious entities, and (2) Stephens is a ministerial employee. Public Advocate Br. at 20–24. Tellingly, however, the Funeral Home contends that the Funeral Home “is not a religious organization” and therefore, “the ministerial exception has no application” to this case. Appellee Br. at 35. Although the Funeral Home has not waived the ministerial-exception defense by failing to raise it, *see Conlon*, 777 F.3d at 836 (holding that private parties may not “waive

the First Amendment’s ministerial exception” because “[t]his constitutional protection is . . . structural”), we agree with the Funeral Home that the exception is inapplicable here.

As we made clear in *Conlon*, the ministerial exception applies only to “religious institution[s].” *Id.* at 833. While an institution need not be “a church, diocese, or synagogue, or an entity operated by a traditional religious organization,” *id.* at 834 (quoting *Hollins*, 474 F.3d at 225), to qualify for the exception, the institution must be “marked by clear or obvious religious characteristics,” *id.* at 834 (quoting *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004)). In accordance with these principles, we have previously determined that the InterVarsity Christian Fellowship/USA (“IVCF”), “an evangelical campus mission,” constituted a religious organization for the purposes of the ministerial exception. *See id.* at 831, 833. IVCF described itself on its website as “faith-based religious organization” whose “purpose ‘is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord.’” *Id.* at 831 (citation omitted). In addition, IVCF’s website notified potential employees that it has the right to “hir[e] staff based on their religious beliefs so that all staff share the same religious commitment.” *Id.* (citation omitted). Finally, IVCF required all employees “annually [to] reaffirm their agreement with IVCF’s Purpose Statement and Doctrinal Basis.” *Id.*

The Funeral Home, by comparison, has virtually no “religious characteristics.” Unlike the campus mission in *Conlon*, the Funeral Home does not purport or seek to “establish and advance” Christian values. *See id.* As the EEOC notes, the Funeral Home “is not affiliated with any church; its articles of incorporation do not avow any religious purpose; its employees are not required to hold any particular religious views; and it employs and serves individuals of all religions.” Appellant Reply Br. at 33–34 (citing R. 61 (Def.’s Counter Statement of Disputed Facts ¶¶ 25–27, 30, 37) (Page ID #1832–35)). Though the Funeral Home’s mission statement declares that “its highest priority is to honor God in all that we do as a company and as individuals,” R. 55 (Def.’s Statement of Facts ¶ 21) (Page ID #1686), the Funeral Home’s sole public displays of faith, according to Rost, amount to placing “Daily Bread” devotionals and “Jesus Cards” with scriptural references in public places in the funeral homes, which clients may pick up if they wish, *see* R. 51-3 (Rost 30(b)(6) Dep. at 39–40) (Page ID #652). The Funeral

Home does not decorate its rooms with “religious figures” because it does not want to “offend[] people of different religions.” R. 61 (Def.’s Counter Statement of Disputed Facts ¶ 33) (Page ID # 1834). The Funeral Home is open every day, including on Christian holidays. *Id.* at 88–89 (Page ID #659–60). And while the employees are paid for federally recognized holidays, Easter is not a paid holiday. *Id.* at 89 (Page ID #660).

Nor is Stephens a “ministerial employee” under *Hosanna-Tabor*. Following *Hosanna-Tabor*, we have identified four factors to assist courts in assessing whether an employee is a minister covered by the exception: (1) whether the employee’s title “conveys a religious—as opposed to secular—meaning”; (2) whether the title reflects “a significant degree of religious training” that sets the employee “apart from laypersons”; (3) whether the employee serves “as an ambassador of the faith” and serves a “leadership role within [the] church, school, and community”; and (4) whether the employee performs “important religious functions . . . for the religious organization.” *Conlon*, 777 F.3d at 834–35. Stephens’s title—“Funeral Director”—conveys a purely secular function. The record does not reflect that Stephens has any religious training. Though Stephens has a public-facing role within the funeral home, she was not an “ambassador of [any] faith,” and she did not perform “important religious functions,” *see id.* at 835; rather, Rost’s description of funeral directors’ work identifies mostly secular tasks—making initial contact with the deceased’s families, handling the removal of the remains to the funeral home, introducing other staff to the families, coaching the families through the first viewing, greeting the guests, and coordinating the families’ “final farewell,” R. 53-3 (Rost Aff. ¶¶ 14–33) (Page ID #930–35). The only responsibilities assigned to Stephens that could be construed as religious in nature were, “on limited occasions,” to “facilitate” a family’s clergy selection, “facilitate the first meeting of clergy and family members,” and “play a role in building the family’s confidence around the role the clergy will play, clarifying what type of religious message is desired, and integrating the clergy into the experience.” *Id.* ¶ 20 (Page ID #932–33). Such responsibilities are a far cry from the duties ascribed to the employee in *Conlon*, which “included assisting others to cultivate ‘intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines.’” 777 F.3d at 832. In short, Stephens was not a ministerial employee and the Funeral Home is not a religious institution, and therefore the ministerial exception plays no role in this case.

b. Religious Freedom Restoration Act

Congress enacted RFRA in 1993 to resurrect and broaden the Free Exercise Clause jurisprudence that existed before the Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which overruled the approach to analyzing Free Exercise Clause claims set forth by *Sherbert v. Verner*, 374 U.S. 398 (1963). See *City of Boerne v. Flores*, 521 U.S. 507, 511–15 (1997). To that end, RFRA precludes the government from “substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability,” unless the government “demonstrates 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.” 42 U.S.C. § 2000bb-1. RFRA thus contemplates a two-step burden-shifting analysis: First, a claimant must demonstrate that complying with a generally applicable law would substantially burden his religious exercise. Upon such a showing, the government must then establish that applying the law to the burdened individual is the least restrictive means of furthering a compelling government interest.

The questions now before us are whether (1) we ought to remand this case and preclude the Funeral Home from asserting a RFRA-based defense in the proceedings below because Stephens, a non-governmental party, joined this action as an intervenor on appeal; (2) if not, whether the Funeral Home adequately demonstrated that it would be substantially burdened by the application of Title VII in this case; (3) if so, whether the EEOC nevertheless demonstrated that application of a such a burden to the Funeral Home furthers a compelling governmental interest; and (4) if so, whether the application of such a burden constitutes the least restrictive means of furthering that compelling interest. We address each inquiry in turn.

i. Applicability of the Religious Freedom Restoration Act

We have previously made clear that “Congress intended RFRA to apply only to suits in which the government is a party.” *Seventh-Day Adventists*, 617 F.3d at 410. Thus, if Stephens had initiated a private lawsuit against the Funeral Home to vindicate her rights under Title VII, the Funeral Home would be unable to invoke RFRA as a defense because the government would not have been party to the suit. *See id.* Now that Stephens has intervened in this suit, she argues

that the case should be remanded to the district court with instructions barring the Funeral Home from asserting a RFRA defense to her individual claims. Intervenor Br. at 15. The EEOC supports Stephens's argument. EEOC Reply Br. at 31.

The Funeral Home, in turn, argues that the question of RFRA's applicability to Title VII suits between private parties "is a new and complicated issue that has never been a part of this case and has never been briefed by the parties." Appellee Br. at 34. Because Stephens's intervention on appeal was granted, in part, on her assurances that she "seeks only to raise arguments already within the scope of this appeal," D.E. 23 (Stephens Reply in Support of Mot. to Intervene at 8); *see also* D.E. 28-2 (March 27, 2017 Order at 2), the Funeral Home insists that permitting Stephens to argue now in favor of remand "would immensely prejudice the Funeral Home and undermine the Court's reasons for allowing Stephens's intervention in the first place," Appellee Br. at 34–35 (citing *Illinois Bell Tel. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990)).

The Funeral Home is correct. Stephens's reply brief in support of her motion to intervene insists that "no party to an appeal may broaden the scope of litigation beyond the issues raised before the district court." D.E. 23 (Stephens Reply in Support of Mot. to Intervene at 8) (citing *Thomas v. Arn*, 474 U.S. 140, 148 (1985)). Though the district court noted in a footnote that "the Funeral Home could not assert a RFRA defense if Stephens had filed a Title VII suit on Stephens's own behalf," *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 864 n.23, this argument was not briefed by the parties at the district-court level. Thus, in accordance with Stephens's own brief, she should not be permitted to argue for remand before this court.

Stephens nevertheless insists that "intervenors . . . are permitted to present different arguments related to the principal parties' claims." Intervenor Reply Br. at 14 (citing *Grutter v. Bollinger*, 188 F.3d 394, 400–01 (6th Cir. 1999)). But in *Grutter*, this court determined that proposed intervenors ought to be able to present particular "defenses of affirmative action" that the principal party to the case (a university) might be disinclined to raise because of "internal and external institutional pressures." 188 F.3d at 400. Allowing intervenors to present particular defenses on the merits to judiciable claims is different than allowing intervenors to change the procedural course of litigation by virtue of their intervention.

Moreover, we typically will not consider issues raised for the first time on appeal unless they are “presented with sufficient clarity and completeness and [their] resolution will materially advance the process of th[e] . . . litigation.” *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988) (citation omitted). The merits of a remand have been addressed only in passing by the parties, and thus have not been discussed with “sufficient clarity and completeness” to enable us to entertain Stephens’s claim.⁸

ii. Prima Facie Case Under RFRA

To assert a viable defense under RFRA, a religious claimant must demonstrate that the government action at issue “would (1) substantially burden (2) a sincere (3) religious exercise.” *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428 (2006). In reviewing such a claim, courts must not evaluate whether asserted “religious beliefs are mistaken or insubstantial.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014). Rather, courts must assess “whether the line drawn reflects ‘an honest conviction.’” *Id.* (quoting *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 716 (1981)). In addition, RFRA, as amended by the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), protects “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A).

The EEOC argues that the Funeral Home’s RFRA defense must fail because “RFRA protects religious exercise, not religious beliefs,” Appellant Br. at 41, and the Funeral Home has failed to “identif[y] how continuing to employ Stephens after, or during, her transition would interfere with any religious ‘action or practice,’” *id.* at 43 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008)). The Funeral Home, in turn, contends that the “very operation of [the Funeral Home] constitutes protected religious exercise” because Rost feels

⁸For a similar reason, we decline to consider the argument raised by several amici that reading RFRA to “permit a religious accommodation that imposes material costs on third parties or interferes with the exercise of rights held by others” would violate the Establishment Clause of the First Amendment. *See* Private Rights/Public Conscience Br. at 15; *see also id.* at 5–15; Americans United Br. at 6–15. Amici may not raise “issues or arguments [that] . . . exceed those properly raised by the parties.” *Shoemaker v. City of Howell*, 795 F.3d 553, 562 (6th Cir. 2015) (quoting *Cellnet Commc’ns, Inc. v. FCC*, 149 F.3d 429, 433 (6th Cir. 1998)). Although Stephens notes that the Establishment Clause “requires the government and courts to account for the harms a religious exemption to Title VII would impose on employees,” Intervenor Br. at 26, no party to this action presses the broad constitutional argument that amici seek to present. We therefore will not address the merits of amici’s position.

compelled by his faith to “serve grieving people” through the funeral home, and thus “[r]equiring [the Funeral Home] to authorize a male funeral director to wear the uniform for female funeral directors would directly interfere with—and thus impose a substantial burden on—[the Funeral Home’s] ability to carry out Rost’s religious exercise of caring for the grieving.” Appellee Br. at 38.

If we take Rost’s assertions regarding his religious beliefs as sincere, which all parties urge us to do, then we must treat Rost’s running of the funeral home as a religious exercise—even though Rost does not suggest that ministering to grieving mourners by operating a funeral home is a tenet of his religion, more broadly. *See United States v. Sterling*, 75 M.J. 407, 415 (C.A.A.F. 2016) (noting that conduct that “was claimed to be religiously motivated at least in part . . . falls within RFRA’s expansive definition of ‘religious exercise’”), *cert. denied*, 137 S. Ct. 2212 (2017). The question then becomes whether the Funeral Home has identified any way in which continuing to employ Stephens would substantially burden Rost’s ability to serve mourners. The Funeral Home purports to identify two burdens. “First, allowing a funeral director to wear the uniform for members of the opposite sex would often create distractions for the deceased’s loved ones and thereby hinder their healing process (and [the Funeral Home’s] ministry),” and second, “forcing [the Funeral Home] to violate Rost’s faith . . . would significantly pressure Rost to leave the funeral industry and end his ministry to grieving people.” Appellee Br. at 38. Neither alleged burden is “substantial” within the meaning of RFRA.

The Funeral Home’s first alleged burden—that Stephens will present a distraction that will obstruct Rost’s ability to serve grieving families—is premised on presumed biases. As the EEOC observes, the Funeral Home’s argument is based on “a view that Stephens is a ‘man’ and would be perceived as such even after her gender transition,” as well as on the “assumption that a transgender funeral director would so disturb clients as to ‘hinder healing.’” Appellant Reply Br. at 19. The factual premises underlying this purported burden are wholly unsupported in the record. Rost testified that he has never seen Stephens in anything other than a suit and tie and does not know how Stephens would have looked when presenting as a woman. R. 54-5 (Rost 30(b)(6) Dep. at 60–61) (Page ID #1362). Rost’s assertion that he believes his clients would be disturbed by Stephens’s appearance during and after her transition to the point that their healing

from their loved ones’ deaths would be hindered, *see* R. 55 (Def.’s Statement of Facts ¶ 78) (Page ID #1697), at the very least raises a material question of fact as to whether his clients would actually be distracted, which cannot be resolved in the Funeral Home’s favor at the summary-judgment stage. *See Tree of Life Christian Sch. v. City of Upper Arlington*, 823 F.3d 365, 371–72 (6th Cir. 2016) (holding that this court “cannot assume . . . a fact” at the summary judgment stage); *see also Guess? Inc. v. United States*, 944 F.2d 855, 858 (Fed. Cir. 1991) (in case where manufacturer’s eligibility for certain statutory refund on import tariffs turned on whether foreign customers preferred U.S.-made jeans more than foreign-made jeans, court held that the manufacturer’s averred *belief* regarding foreign customers’ preferences was not conclusive; instead, there remained a genuine dispute of material fact as to foreign customers’ *actual* preferences). Thus, even if we were to find the Funeral Home’s argument legally cognizable, we would not affirm a finding of substantial burden based on a contested and unsupported assertion of fact.

But more to the point, we hold as a matter of law that a religious claimant cannot rely on customers’ presumed biases to establish a substantial burden under RFRA. Though we have seemingly not had occasion to address the issue, other circuits have considered whether and when to account for customer biases in justifying discriminatory employment practices. In particular, courts asked to determine whether customers’ biases may render sex a “bona fide occupational qualification” under Title VII have held that “it would be totally anomalous . . . to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid.” *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971); *see also Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795, 799 (8th Cir. 1993) (holding grooming policy for pizza deliverymen that had disparate impact on African-American employees was not justified by customer preferences for clean-shaven deliverymen because “[t]he existence of a beard on the face of a delivery man does not affect in any manner Domino’s ability to make or deliver pizzas to their customers”); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting claim that promoting a female employee would “‘destroy the essence’ of [the defendant’s] business”—a theory based on the premise that South American clients would not want to work with a female vice-president—because biased customer preferences did not make being a man a “bona fide occupational qualification” for the position at

issue). District courts within this circuit have endorsed these out-of-circuit opinions. *See, e.g.*, *Local 567 Am. Fed'n of State, Cty., & Mun. Emps. v. Mich. Council 25, Am. Fed'n of State, Cty., & Mun. Emps.*, 635 F. Supp. 1010, 1012 (E.D. Mich. 1986) (citing *Diaz*, 442 F.2d 385, and *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969), for the proposition that “[a]ssertions of sex-based employee classification cannot be made on the basis of stereotypes or customer preferences”).

Of course, cases like *Diaz*, *Fernandez*, and *Bradley* concern a different situation than the one at hand. We could agree that courts should not credit customers’ prejudicial notions of what men and women can do when considering whether sex constitutes a “bona fide occupational qualification” for a given position while nonetheless recognizing that those same prejudices have practical effects that would substantially burden Rost’s religious practice (i.e., the operation of his business) in this case. But the Ninth Circuit rejected similar reasoning in *Fernandez*, and we reject it here. In *Fernandez*, the Ninth Circuit held that customer preferences could not transform a person’s gender into a relevant consideration for a particular position *even if* the record supported the idea that the employer’s business would suffer from promoting a woman because a large swath of clients would refuse to work with a female vice-president. *See* 653 F.2d at 1276–77. Just as the *Fernandez* court refused to treat discriminatory promotion practices as critical to an employer’s business, notwithstanding any evidence to that effect in the record, so too we refuse to treat discriminatory policies as essential to Rost’s business—or, by association, his religious exercise.

The Funeral Home’s second alleged burden also fails. Under *Holt v. Hobbs*, 135 S. Ct. 853 (2015), a government action that “puts [a religious practitioner] to th[e] choice” of “engag[ing] in conduct that seriously violates [his] religious beliefs’ [or] . . . fac[ing] serious” consequences constitutes a substantial burden for the purposes of RFRA. *See id.* at 862 (quoting *Hobby Lobby*, 134 S. Ct. at 2775). Here, Rost contends that he is being put to such a choice, as he either must “purchase female attire” for Stephens or authorize her “to dress in female attire *while representing* [the Funeral Home] and serving the bereaved,” which purportedly violates Rost’s religious beliefs, or else face “significant[] pressure . . . to leave the funeral industry and

end his ministry to grieving people.” Appellee Br. at 38–39 (emphasis in original). Neither of these purported choices can be considered a “substantial burden” under RFRA.

First, though Rost currently provides his male employees with suits and his female employees with stipends to pay for clothing, this benefit is not legally required and Rost does not suggest that the benefit is religiously compelled. *See* Appellant Br. at 49 (“[T]he EEOC’s suit would require only that if Rost provides a clothing benefit to his male employees, he provide a comparable benefit (which could be in-kind, or in cash) to his female employees.”); R. 54-2 (Rost Aff.) (Page ID 1326–37) (no suggestion that clothing benefit is religiously motivated). In this regard, Rost is unlike the employers in *Hobby Lobby*, who rejected the idea that they could simply refuse to provide health care altogether and pay the associated penalty (which would allow them to avoid providing access to contraceptives in violation of their beliefs) because they felt religiously compelled to provide their employees with health insurance. *See* 134 S. Ct. at 2776. And while “it is predictable that the companies [in *Hobby Lobby*] would face a competitive disadvantage in retaining and attracting skilled workers” if they failed to provide health insurance, *id.* at 2777, the record here does not indicate that the Funeral Home’s clothing benefit is necessary to attract workers; in fact, until the EEOC commenced the present action, the Funeral Home did not provide any sort of clothing benefit to its female employees. Thus, Rost is not being forced to choose between providing Stephens with clothing or else leaving the business; this is a predicament of Rost’s own making.

Second, simply permitting Stephens to wear attire that reflects a conception of gender that is at odds with Rost’s religious beliefs is not a substantial burden under RFRA. We presume that the “line [Rost] draw[s]”—namely, that permitting Stephens to represent herself as a woman would cause him to “violate God’s commands” because it would make him “directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift,” R. 54-2 (Rost Aff. ¶¶ 43, 45) (Page ID #1334–35)—constitutes “an honest conviction.” *See Hobby Lobby*, 134 S. Ct. at 2779 (quoting *Thomas*, 450 U.S. at 716). But we hold that, as a matter of law, tolerating Stephens’s understanding of her sex and gender identity is not tantamount to supporting it.

Most circuits, including this one, have recognized that a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged. Courts have recently confronted this issue when non-profit organizations whose religious beliefs prohibit them “from paying for, providing, or facilitating the distribution of contraceptives,” or in any way “be[ing] complicit in the provision of contraception” argued that the Affordable Care Act’s opt-out procedure—which enables organizations with religious objections to the contraceptive mandate to avoid providing such coverage by either filling out a form certifying that they have a religious objection to providing contraceptive coverage or directly notifying the Department of Health and Human Services of the religious objection—substantially burdens their religious practice. *See Eternal Word Television Network, Inc. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 818 F.3d 1122, 1132–33, 1143 (11th Cir. 2016).

Eight of the nine circuits to review the issue, including this court, have determined that the opt-out process does not constitute a substantial burden. *See id.* at 1141 (collecting cases); *see also Mich. Catholic Conf. & Catholic Family Servs. v. Burwell*, 807 F.3d 738 (6th Cir. 2015), *cert. granted, judgment vacated sub nom. Mich. Catholic Conf. v. Burwell*, 136 S. Ct. 2450 (2016).⁹ The courts reached this conclusion by examining the Affordable Care Act’s provisions and determining that it was the statute—and not the employer’s act of opting out—that “entitle[d] plan participants and beneficiaries to contraceptive coverage.” *See, e.g., Eternal Word*, 818 F.3d at 1148–49. As a result, the employers’ engagement with the opt-out process, though legally significant in that it leads the government to provide the organizations’ employees with access to contraceptive coverage through an alternative route, does not mean the employers are facilitating the provision of contraceptives in a way that violates their religious practice. *See id.*

We view the Funeral Home’s compliance with antidiscrimination laws in much the same light. Rost may sincerely believe that, by retaining Stephens as an employee, he is supporting and endorsing Stephens’s views regarding the mutability of sex. But as a matter of law, bare

⁹Though a number of these decisions have been vacated on grounds that are not relevant to this case, their reasoning remains useful here.

compliance with Title VII—without actually assisting or facilitating Stephens’s transition efforts—does not amount to an endorsement of Stephens’s views. As much is clear from the Supreme Court’s Free Speech jurisprudence, in which the Court has held that a statute requiring law schools to provide military and nonmilitary recruiters an equal opportunity to recruit students on campus was not improperly compelling schools to endorse the military’s policies because “[n]othing about recruiting suggests that law schools agree with any speech by recruiters,” and “students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy.” *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006) (citing *Bd. of Ed. of Westside Cnty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)); see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841–42 (1995) (being required to provide funds on an equal basis to religious as well as secular student publications does not constitute state university’s support for students’ religious messages). Similarly, here, requiring the Funeral Home to refrain from firing an employee with different religious views from Rost does not, as a matter of law, mean that Rost is endorsing or supporting those views. Indeed, Rost’s own behavior suggests that he sees the difference between employment and endorsement, as he employs individuals of any or no faith, “permits employees to wear Jewish head coverings for Jewish services,” and “even testified that he is *not* endorsing his employee’s religious beliefs by employing them.” Appellant Reply Br. at 18–19 (citing R. 61 (Def.’s Counter Statement of Disputed Facts ¶¶ 31, 37, 38) (Page ID #1834–36); R. 51-3 (Rost Dep. at 41–42) (Page ID #653)).¹⁰

At bottom, the fact that Rost sincerely believes that he is being compelled to make such an endorsement does not make it so. Cf. *Eternal Word*, 818 F.3d at 1145 (“We reject a framework that takes away from courts the responsibility to decide what action the government requires and leaves that answer entirely to the religious adherent. Such a framework improperly

¹⁰ Even ignoring any adverse inferences that might be drawn from the incongruity between Rost’s earlier deposition testimony and the Funeral Home’s current litigation position, as we must do when considering whether summary judgment is appropriate in the EEOC’s favor, we conclude as a matter of law that Rost does not express “support[] [for] the idea that sex is a changeable social construct rather than an immutable God-given gift” by continuing to hire Stephens, see R. 54-2 (Rost Aff. ¶¶ 43, 45) (Page ID #1334–35)—even if Rost sincerely believes otherwise.

substitutes religious belief for legal analysis regarding the operation of federal law.”). Accordingly, requiring Rost to comply with Title VII’s proscriptions on discrimination does not substantially burden his religious practice. The district court therefore erred in granting summary judgment to the Funeral Home on the basis of its RFRA defense, and we **REVERSE** the district court’s decision on this ground. As Rost’s purported burdens are insufficient as a matter of law, we **GRANT** summary judgment to the EEOC with respect to the Funeral Home’s RFRA defense.

iii. Strict Scrutiny Test

Because the Funeral Home has not established that Rost’s religious exercise would be substantially burdened by requiring the Funeral Home to comply with Title VII, we do not need to consider whether the EEOC has adequately demonstrated that enforcing Title VII in this case is the least restrictive means of furthering a compelling government interest. However, in the interest of completeness, we reach this issue and conclude that the EEOC has satisfied its burden. We therefore **GRANT** summary judgment to the EEOC with regard to the Funeral Home’s RFRA defense on the alternative grounds that the EEOC’s enforcement action in this case survives strict scrutiny.

(a) Compelling Government Interest

Under the “to the person” test, the EEOC must demonstrate that its compelling interest “is satisfied through application of the challenged law [to] . . . the particular claimant whose sincere exercise of religion is being substantially burdened.” *Gonzales*, 546 U.S. at 430–31 (citing 42 U.S.C. § 2000bb-1(b)). This requires “look[ing] beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants.” *Id.* at 431.

As an initial matter, the Funeral Home does not seem to dispute that the EEOC “has a compelling interest in the ‘elimination of workplace discrimination, including sex

discrimination.”” Appellee Br. at 41 (quoting Appellant Br. at 51).¹¹ However, the Funeral Home criticizes the EEOC for “cit[ing] a general, broadly formulated interest” to support enforcing Title VII in this case. *Id.* According to the Funeral Home, the relevant inquiry is whether the EEOC has a “specific interest in forcing [the Funeral Home] to allow its male funeral directors to wear the uniform for female funeral directors while on the job.” *Id.* The EEOC instead asks whether its interest in “eradicating employment discrimination” is furthered by ensuring that Stephens does not suffer discrimination (either on the basis of sex-stereotyping or her transgender status), lose her livelihood, or face the emotional pain and suffering of being effectively told “that as a transgender woman she is not valued or able to make workplace contributions.” Appellant Br. at 52, 54 (citing *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, at *1 (E.E.O.C. Apr. 1, 2015)). Stephens similarly argues that “Title VII serves a compelling interest in eradicating all the forms of invidious employment discrimination proscribed by the statute,” and points to studies demonstrating that transgender people have experienced particularly high rates of “bodily harm, violence, and discrimination because of their transgender status.” Intervenor Br. at 21, 23–25.

The Funeral Home’s construction of the compelling-interest test is off-base. Rather than focusing on the EEOC’s claim—that the Funeral Home terminated Stephens because of her proposed gender nonconforming behavior—the Funeral Home’s test focuses instead on its defense (discussed above) that the Funeral Home merely wishes to enforce an appropriate workplace uniform. But the Funeral Home has not identified any cases where the government’s compelling interest was framed as its interest in disturbing a company’s workplace policies. For instance, in *Hobby Lobby*, the issue, which the Court ultimately declined to adjudicate, was whether the government’s “interest in guaranteeing cost-free access to the four challenged contraceptive methods” was compelling—not whether the government had a compelling interest in requiring closely held organizations to act in a way that conflicted with their religious practice. *See* 134 S. Ct. at 2780.

¹¹While the district court did not hold that the EEOC had conclusively established the “compelling interest” element of its opposition to the Funeral Home’s RFRA defense, it assumed so *arguendo*. *See R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 857–59.

The Supreme Court's analysis in cases like *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Holt* guides our approach. In those cases, the Court ultimately determined that the interests *generally* served by a given government policy or statute would not be "compromised" by granting an exemption to a particular individual or group. *See Holt*, 135 S. Ct. at 863. Thus, in *Yoder*, the Court held that the interests furthered by the government's requirement of compulsory education for children through the age of sixteen (i.e., "to prepare citizens to participate effectively and intelligently in our open political system" and to "prepare[] individuals to be self-reliant and self-sufficient participants in society") were not harmed by granting an exemption to the Amish, who do not need to be prepared "for life in modern society" and whose own traditions adequately ensure self-sufficiency. 406 U.S. at 221–22. Similarly, in *Holt*, the Court recognized that the Department of Corrections has a compelling interest in preventing prisoners from hiding contraband on their persons, which is generally effectuated by requiring prisoners to adhere to a strict grooming policy, but the Court failed to see how the Department's "compelling interest in staunching the flow of contraband into and within its facilities . . . would be seriously compromised by allowing an inmate to grow a ½-inch beard." 135 S. Ct. at 863.

Here, the same framework leads to the opposite conclusion. Failing to enforce Title VII against the Funeral Home means the EEOC would be allowing a particular person—Stephens—to suffer discrimination, and such an outcome is directly contrary to the EEOC's compelling interest in combating discrimination in the workforce. *See, e.g., United States v. Burke*, 504 U.S. 229, 238 (1992) ("[I]t is beyond question that discrimination in employment on the basis of sex . . . is, as . . . this Court consistently has held, an invidious practice that causes grave harm to its victims.").¹² In this regard, this case is analogous to *Eternal Word*, in which the Eleventh Circuit determined that the government had a compelling interest in requiring a particular nonprofit

¹²Courts have repeatedly acknowledged that Title VII serves a compelling interest in eradicating all forms of invidious employment discrimination proscribed by the statute. *See, e.g., EEOC v. Miss. Coll.*, 626 F.2d 477, 488–89 (5th Cir. 1980). As the Supreme Court stated, the "stigmatizing injury" of discrimination, "and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984); *see also EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) ("By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority.' Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions."), *abrogation on other grounds recognized by Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1991).

organization with religious objections to the Affordable Care Act’s contraceptive mandate to follow the procedures associated with obtaining an accommodation to the Act because

applying the accommodation procedure *to the plaintiffs in these cases* furthers [the government’s] interests because the accommodation ensures that the plaintiffs’ female plan participants and beneficiaries—who may or may not share the same religious beliefs as their employer—have access to contraception without cost sharing or additional administrative burdens as the ACA requires.

818 F.3d at 1155 (emphasis added). The *Eternal Word* court reasoned that “[u]nlike the exception made in *Yoder* for Amish children,” who would be adequately prepared for adulthood even without compulsory education, the “poor health outcomes related to unintended or poorly timed pregnancies apply to the plaintiffs’ female plan participants or beneficiaries and their children just as they do to the general population.” *Id.* Similarly, here, the EEOC’s compelling interest in eradicating discrimination applies with as much force to Stephens as to any other employee discriminated against based on sex.

It is true, of course, that the specific harms the EEOC identifies in this case, such as depriving Stephens of her livelihood and harming her sense of self-worth, are simply permutations of the generic harm that is always suffered in employment discrimination cases. But *O Centro*’s “to the person” test does not mean that the government has a compelling interest in enforcing the laws only when the failure to enforce would lead to uniquely harmful consequences. Rather, the question is whether “the asserted harm of granting specific exemptions to particular religious claimants” is sufficiently great to require compliance with the law. *O Centro*, 546 U.S. at 431. Here, for the reasons stated above, the EEOC has adequately demonstrated that Stephens has and would suffer substantial harm if we exempted the Funeral Home from Title VII’s requirements.

Finally, we reject the Funeral Home’s claim that it should receive an exemption, notwithstanding any harm to Stephens or the EEOC’s interest in eradicating discrimination, because “the constitutional guarantee of free exercise[,] effectuated here via RFRA . . . [,] is a higher-order right that necessarily supersedes a conflicting statutory right,” Appellee Br. at 42. This point warrants little discussion. The Supreme Court has already determined that RFRA does not, in fact, “effectuate . . . the First Amendment’s guarantee of free exercise,” *id.*, because

it sweeps more broadly than the Constitution demands. *See Boerne*, 521 U.S. at 532. And in any event, the Supreme Court has expressly recognized that compelling interests can, at times, override religious beliefs—even those that are squarely protected by the Free Exercise Clause. *See Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) (“We do not read RLUIPA to elevate accommodation of religious observances over an institution’s need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests.”). We therefore decline to hoist automatically Rost’s religious interests above other compelling governmental concerns. The undisputed record demonstrates that Stephens has been and would be harmed by the Funeral Home’s discriminatory practices in this case, and the EEOC has a compelling interest in eradicating and remedying such discrimination.

(b) Least Restrictive Means

The final inquiry under RFRA is whether there exist “other means of achieving [the government’s] desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y].” *Hobby Lobby*, 134 S. Ct. at 2780 (citing 42 U.S.C. §§ 2000bb-1(a), (b)). “The least-restrictive-means standard is exceptionally demanding,” *id.* (citing *Boerne*, 521 U.S. at 532), and the EEOC bears the burden of showing that burdening the Funeral Home’s religious exercise constitutes the least restrictive means of furthering its compelling interests, *see id.* at 2779. Where an alternative option exists that furthers the government’s interest “equally well,” *see id.* at 2782, the government “must use it,” *Holt*, 135 S. Ct. at 864 (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 815 (2000)). In conducting the least-restrictive-alternative analysis, “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.” *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (quoting *Cutter*, 544 U.S. at 720). Cost to the government may also be “an important factor in the least-restrictive-means analysis.” *Id.* at 2781.

The district court found that requiring the Funeral Home to adopt a gender-neutral dress code would constitute a less restrictive alternative to enforcing Title VII in this case, and granted the Funeral Home summary judgment on this ground. According to the district court, the Funeral Home engaged in illegal sex stereotyping only with respect to “the clothing Stephens

[c]ould wear at work,” and therefore a gender-neutral dress code would resolve the case because Stephens would not be forced to dress in a way that conforms to Rost’s conception of Stephens’s sex and Rost would not be compelled to authorize Stephens to dress in a way that violates Rost’s religious beliefs. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 861, 863.

Neither party endorses the district court’s proposed alternative, and for good reason. The district court’s suggestion, although appealing in its tidiness, is tenable only if we excise from the case evidence of sex stereotyping in areas other than attire. Though Rost does repeatedly say that he terminated Stephens because she “wanted to *dress* as a woman” and “would no longer *dress* as a man,” *see* R. 54-5 (Rost 30(b)(6) Dep. at 136–37) (Page ID #1372) (emphasis added), the record also contains uncontested evidence that Rost’s reasons for terminating Stephens extended to other aspects of Stephens’s intended presentation. For instance, Rost stated that he fired Stephens because Stephens “was no longer going to *represent himself* as a man,” *id.* at 136 (Page ID #1372) (emphasis added), and Rost insisted that Stephens presenting as a female would disrupt clients’ healing process because female clients would have to “share a bathroom with a man dressed up as a woman,” *id.* at 74, 138–39 (Page ID #1365, 1373). The record thus compels the finding that Rost’s concerns extended beyond Stephens’s attire and reached Stephens’s appearance and behavior more generally.

At the summary-judgment stage, where a court may not “make credibility determinations, weigh the evidence, or draw [adverse] inferences from the facts,” *Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 178 (6th Cir. 1996) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, (1986)), the district court was required to account for the evidence of Rost’s non-clothing-based sex stereotyping in determining whether a proposed less restrictive alternative furthered the government’s “stated interests equally [as] well,” *Hobby Lobby*, 134 S. Ct. at 2782. Here, as the evidence above shows, merely altering the Funeral Home’s dress code would not address the discrimination Stephens faced because of her broader desire “to represent [her]self as a [wo]man.” R. 54-5 (Rost 30(b)(6) Dep. at 136) (Page ID #1372). Indeed, the Funeral Home’s counsel conceded at oral argument that Rost would have objected to Stephens’s coming “to work presenting clearly as a woman and acting as a woman,” regardless of whether

Stephens wore a man’s suit, because that “would contradict [Rost’s] sincerely held religious beliefs.” *See Oral Arg.* at 46:50–47:46.

The Funeral Home’s proposed alternative—to “permit businesses to allow the enforcement of sex-specific dress codes for employees who are public-facing representatives of their employer, so long as the dress code imposes equal burdens on the sexes and does not affect employee dress outside of work,” Appellee Br. at 44–45—is equally flawed. The Funeral Home’s suggestion would do nothing to advance the government’s compelling interest in preventing and remedying discrimination against Stephens based on her refusal to conform at work to stereotypical notions of how biologically male persons should dress, appear, behave, and identify. Regardless of whether the EEOC has a compelling interest in combating sex-specific dress codes—a point that is not at issue in this case—the EEOC does have a compelling interest in ensuring that the Funeral Home does not discriminate against its employees on the basis of their sex. The Funeral Home’s proposed alternative sidelines this interest entirely.¹³

The EEOC, Stephens, and several amici argue that searching for an alternative to Title VII is futile because enforcing Title VII is itself the least restrictive way to further EEOC’s interest in eradicating discrimination based on sex stereotypes from the workplace. *See, e.g.,* Appellant Br. at 55–61; Intervenor Br. at 27–33. We agree.

To start, the Supreme Court has previously acknowledged that “there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA.” *O Centro*, 546 U.S. at 436. The Court highlighted *Braunfeld v. Brown*, 366 U.S. 599 (1961), as an example of a case where the “need for uniformity” trumped “claims for religious exemptions.” *O Centro*, 546 U.S. at 435. In *Braunfeld*, the plurality “denied a claimed

¹³In its district court briefing, the Funeral Home proposed three additional purportedly less restrictive alternatives: the government could hire Stephens; the government could pay Stephens a full salary and benefits until she secures comparable employment; or the government could provide incentives to other employers to hire Stephens and allow her to dress as she pleases. R. 67 (Def.’s Reply Mem. of Law in Support of Def.’s Mot. for Summ. J. at 17–18) (Page ID #2117–18). Not only do these proposals fail to further the EEOC’s interest enabling Stephens to work for the Funeral Home without facing discrimination, but they also fail to consider the cost to the government, which is “an important factor in the least-restrictive-means analysis.” *Hobby Lobby*, 134 S. Ct. at 2781. We agree with the EEOC that the Funeral Home’s suggestions—which it no longer pushes on appeal—are not viable alternatives to enforcing Title VII in this case, as they do not serve the EEOC’s interest in eradicating discrimination “equally well.” *See id.* at 2782.

exception to Sunday closing laws, in part because . . . [t]he whole point of a ‘uniform day of rest for all workers’ would have been defeated by exceptions.” *O Centro*, 546 U.S. at 435 (quoting *Sherbert*, 374 U.S. at 408 (discussing *Braunfeld*)). *Braunfeld* thus serves as a particularly apt case to consider here, as it too concerned an attempt by an employer to seek an exemption that would elevate its religious practices above a government policy designed to benefit employees. If the government’s interest in a “uniform day of rest for all workers” is sufficiently weighty to preclude exemptions, *see O Centro*, 546 U.S. at 435, then surely the government’s interest in uniformly eradicating discrimination against employees exerts just as much force.

The Court seemingly recognized Title VII’s ability to override RFRA in *Hobby Lobby*, as the majority opinion stated that its decision should not be read as providing a “shield” to those who seek to “cloak[] as religious practice” their efforts to engage in “discrimination in hiring, for example on the basis of race.” 134 S. Ct. at 2783. As the *Hobby Lobby* Court explained, “[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.” *Id.* We understand this to mean that enforcement actions brought under Title VII, which aims to “provid[e] an equal opportunity to participate in the workforce without regard to race” and an array of other protected traits, *see id.*, will necessarily defeat RFRA defenses to discrimination made illegal by Title VII. The district court reached the opposite conclusion, reasoning that *Hobby Lobby* did not suggest that “a RFRA defense can never prevail as a defense to Title VII” because “[i]f that were the case, the majority would presumably have said so.” *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 857. But the majority *did* say that anti-discrimination laws are “precisely tailored” to achieving the government’s “compelling interest in providing an equal opportunity to participate in the workforce” without facing discrimination. *Hobby Lobby*, 134 S. Ct. at 2783.

As Stephens notes, at least two district-level federal courts have also concluded that Title VII constitutes the least restrictive means for eradicating discrimination in the workforce. *See Redhead v. Conf. of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 222 (E.D.N.Y. 2006) (holding that “the Title VII framework is the least restrictive means of furthering” the government’s interest in avoiding discrimination against non-ministerial employees of religious organization),

adhered to on reconsideration, 566 F. Supp. 2d 125 (E.D.N.Y. 2008); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810–11 (S.D. Ind. 2002) (“[I]n addition to finding that the EEOC’s intrusion into [the defendant’s] religious practices is pursuant to a compelling government interest,”—i.e., “the eradication of employment discrimination based on the criteria identified in Title VII”—“we also find that the intrusion is the least restrictive means that Congress could have used to effectuate its purpose.”).

We also find meaningful Congress’s decision not to include exemptions within Title VII to the prohibition on sex-based discrimination. As both the Supreme Court and other circuits have recognized, “[t]he very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive alternatives could exist.” *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 475 (5th Cir. 2014) (citing *Hobby Lobby*, 134 S. Ct. at 2781–82); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (“It is established in our strict scrutiny jurisprudence 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.’” (omission in original) (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring))). Indeed, a driving force in the *Hobby Lobby* Court’s determination that the government had failed the least-restrictive-means test was the fact that the Affordable Care Act, which the government sought to enforce in that case against a closely held organization, “already established an accommodation for nonprofit organizations with religious objections.” *See* 134 S. Ct. at 2782. Title VII, by contrast, does not contemplate any exemptions for discrimination on the basis of sex. Sex may be taken into account only if a person’s sex “is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise,” 42 U.S.C. § 2000e-2(e)(1)—and in that case, the preference is no longer discriminatory in a malicious sense. Where the government has developed a comprehensive scheme to effectuate its goal of eradicating discrimination based on sex, including sex stereotypes, it makes sense that the only way to achieve the scheme’s objectives is through its enforcement.

State courts' treatment of RFRA-like challenges to their own antidiscrimination laws is also telling. In several instances, state courts have concluded that their respective antidiscrimination laws survive strict scrutiny, such that religious claimants are not entitled to exemptions to enforcement of the state prohibitions on discrimination with regard to housing, employment, medical care, and education. *See State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 565–66 (Wash. 2017) (collecting cases), *petition for cert. filed Arlene's Flowers, Inc. v. Washington*, 86 U.S.L.W. 3047 (U.S. July 14, 2017) (No. 17-108). These holdings support the notion that antidiscrimination laws allow for fewer exceptions than other generally applicable laws.

As a final point, we reject the Funeral Home's suggestion that enforcing Title VII in this case would undermine, rather than advance, the EEOC's interest in combating sex stereotypes. According to the Funeral Home, the EEOC's requested relief reinforces sex stereotypes because the agency essentially asks that Stephens "be able to dress in a stereotypical feminine manner." *R.G. & G.R. Funeral Homes, Inc.*, 201 F. Supp. 3d at 863 (emphasis omitted). This argument misses the mark. Nothing in Title VII or this court's jurisprudence requires employees to reject their employer's stereotypical notions of masculinity or femininity; rather, employees simply may not be discriminated against for a failure to conform. *See Smith*, 378 F.3d at 572 (holding that a plaintiff makes out a *prima facie* case for discrimination under Title VII when he pleads that "his *failure to conform* to sex stereotypes concerning how a man should look and behave was the driving force behind" an adverse employment action (emphasis added)). Title VII protects both the right of male employees "to c[o]me to work with makeup or lipstick on [their] face[s]," *Barnes*, 401 F.3d at 734, and the right of female employees to refuse to "wear dresses or makeup," *Smith*, 378 F.3d at 574, without any internal contradiction.

In short, the district court erred in finding that EEOC had failed to adopt the least restrictive means of furthering its compelling interest in eradicating discrimination in the workplace. Thus, even if we agreed with the Funeral Home that Rost's religious exercise would be substantially burdened by enforcing Title VII in this case, we would nevertheless **REVERSE** the district court's grant of summary judgment to the Funeral Home and hold instead that requiring the Funeral Home to comply with Title VII constitutes the least restrictive means of

furthering the government's compelling interest in eradicating discrimination against Stephens on the basis of sex. Thus, even assuming Rost's religious exercise is substantially burdened by the EEOC's enforcement action in this case, we **GRANT** summary judgment to the EEOC on the Funeral Home's RFRA defense on this alternative ground.

C. Clothing-Benefit Discrimination Claim

The district court erred in granting summary judgment in favor of the Funeral Home on the EEOC's discriminatory clothing-allowance claim. We long ago held that the scope of the complaint the EEOC may file in federal court in its efforts to enforce Title VII is "limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." *EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977) (quoting *inter alia*, *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971)), *disapproved of on other grounds by Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)). The EEOC now urges us to hold that *Bailey* is incompatible with subsequent Supreme Court precedent and therefore no longer binding on this court. Because we believe that the EEOC may properly bring a clothing-allowance claim under *Bailey*, we need not decide whether *Bailey* has been rendered obsolete.

In *Bailey*, a white female employee charged that her employer failed to promote her on account of her sex, generally failed to promote women because of their sex, failed to pay equally qualified women as well as men, and failed to recruit and hire black women because of their race. *Id.* at 442. While investigating these claims, the EEOC found there was no evidence to support the complainant's charges of sex discrimination, but there was reasonable cause to believe the company had racially discriminatory hiring and promotion practices. In addition, the EEOC learned that the employer had seemingly refused to hire one applicant on the basis of his religion. After failed efforts at conciliation, the EEOC initiated a lawsuit against the employer alleging both racial and religious discrimination. We held that the EEOC lacked authority to bring an enforcement action regarding alleged religious discrimination because "[t]he portion of the EEOC's complaint incorporating allegations of religious discrimination exceeded the scope of the EEOC investigation of [the defendant employer] reasonably expected to grow out of [the original] charge of sex and race discrimination." *Id.* at 446. We determined, however, that the

EEOC was authorized to bring race discrimination claims against the employer because the original charge alleged racial discrimination against black applicants and employees and the charging party—a white woman—had standing under Title VII to file such a charge with the EEOC because she “may have suffered from the loss of benefits from the lack of association with racial minorities at work.” *Id.* at 452 (citations omitted).

As we explained in *Bailey*, the EEOC may sue for matters beyond those raised directly in the EEOC’s administrative charge for two reasons. First, limiting the EEOC complaint to the precise grounds listed in the charge of discrimination would undercut Title VII’s “effective functioning” because laypersons “who are unfamiliar with the niceties of pleading and are acting without the assistance of counsel” submit the original charge. *Id.* at 446 (quoting *Tipler*, 443 F.2d at 131). Second, an initial charge of discrimination does not trigger a lawsuit; it instead triggers an EEOC investigation. The matter evolves into a lawsuit only if the EEOC is unable “to obtain voluntary compliance with the law. . . . Thus it is obvious that the civil action is much more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation.” *Id.* at 447 (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970)).

At the same time, however, we concluded in *Bailey* that allowing the EEOC to sue for matters beyond those reasonably expected to arise from the original charge would undermine Title VII’s enforcement process. In particular, we understood that an original charge provided an employer with “notice of the allegation, an opportunity to participate in a complete investigation of such allegation, and an opportunity to participate in meaningful conciliation discussions should reasonable cause be found following the EEOC investigation.” *Id.* at 448. We believed that the full investigatory process would be short-circuited, and the conciliation process thereby threatened, if the EEOC did not file a separate charge and undertake a separate investigation when facts are learned suggesting an employer may have engaged in “discrimination of a type other than that raised by the individual party’s charge and unrelated to the individual party.” *Id.*

The EEOC now insists that *Bailey* is no longer good law after the Supreme Court’s decision in *General Telephone Company of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980). In *General Telephone*, the Supreme Court held that Rule 23 of the Federal Rules of Civil

Procedure, which governs class actions, does not apply to enforcement actions initiated by the EEOC. *Id.* at 331. As part of its reasoning, the Court found that various requirements of Rule 23—such as the requirement that “the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class,” FED. R. CIV. P. 23(a)(3)—are incompatible with the EEOC’s enforcement responsibilities under Title VII:

The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff’s claims. If Rule 23 were applicable to EEOC enforcement actions, it would seem that the Title VII counterpart to the Rule 23 named plaintiff would be the charging party, with the EEOC serving in the charging party’s stead as the representative of the class. Yet the Courts of Appeals have held that EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party’s complaint are actionable. The latter approach is far more consistent with the EEOC’s role in the enforcement of Title VII than is imposing the strictures of Rule 23, which would limit the EEOC action to claims typified by those of the charging party.

Gen. Tel., 446 U.S. at 330–31 (internal citations omitted). The EEOC argues that this passage directly contradicts the holding in *Bailey*, in which we rejected the EEOC’s argument that it “can investigate evidence of any other discrimination called to its attention during the course of an investigation.” *See* 563 F.2d at 446.

Though there may be merit to the EEOC’s argument, *see EEOC v. Kronos Inc.*, 620 F.3d 287, 297 (3d Cir. 2010) (citing *General Telephone* for the proposition that “[o]nce the EEOC begins an investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such evidence during the course of a reasonable investigation of the charge” (citing *Gen. Tel.*, 446 U.S. at 331)), we need not resolve *Bailey*’s compatibility with *General Telephone* at this time because our holding in *Bailey* does not preclude the EEOC from bringing a clothing-allowance-discrimination claim in this case.

First, the present case is factually distinguishable from *Bailey*. In *Bailey*, the court determined that allegations of religious discrimination were outside the scope of an investigation “reasonably related” to the original charge of sex and race discrimination because, in part, “[t]he evidence presented at trial by the EEOC to support its allegations of religious discrimination did not involve practices affecting [the original charger].” 563 F.2d at 447. Here, by contrast,

Stephens would have been directly affected by the Funeral Home's allegedly discriminatory clothing-allowance policy had she not been terminated, as the Funeral Home's current practice indicates that she would have received either no clothing allowance or a less valuable clothing allowance once she began working at the Funeral Home as a woman.¹⁴ And, unlike the EEOC's investigation of religious discrimination in *Bailey*, the EEOC's investigation into the Funeral Home's discriminatory clothing-allowance policy concerns precisely the same type of discrimination—discrimination on the basis of sex—that Stephens raised in her initial charge.

Second, we have developed a broad conception of the sorts of claims that can be “reasonably expected to grow out of the initial charge of discrimination.” *See Bailey*, 563 F.2d at 446. As we explained in *Davis v. Sodexho*, 157 F.3d 460 (6th Cir. 1998), “where facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim.” *Id.* at 463. And we have also cautioned that “EEOC charges must be liberally construed to determine whether . . . there was information given in the charge that reasonably should have prompted an EEOC investigation of [a] separate type of discrimination.” *Leigh v. Bur. of State Lottery*, 1989 WL 62509, at *3 (6th Cir. June 13, 1989) (Table) (citing *Bailey*, 563 F.2d at 447). Here, Stephens alleged that she was fired after she shared her intention to present and dress as a woman because the Funeral Home “management [told her that it] did not believe the public would be accepting of [her] transition” from male to female. R. 63-2 (Charge of Discrimination at 1) (Page ID #1952). It was reasonable to expect, in light of this allegation, that the EEOC would investigate the Funeral Home's employee-appearance requirements and expectations, would learn about the Funeral Home's sex-specific dress code, and would thereby uncover the Funeral Home's seemingly discriminatory clothing-allowance policy. As much is clear from our decision in *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981), in which “we held that the plaintiffs could bring equal pay claims alleging that their union discriminated in negotiating pay scales for different job designations, despite the fact that the plaintiffs' EEOC charge alleged only that the union failed to represent them in securing the higher paying job designations.”

¹⁴The Funeral Home insists that it would provide female funeral directors with a company-issued suit if it had any female Funeral Directors. *See* R. 53-3 (Rost Aff. ¶ 54) (Page ID #939). This is a factual claim that we cannot credit at the summary-judgment stage.

Weigel v. Baptist Hosp. of E. Tenn., 302 F.3d 367, 380 (6th Cir. 2002) (citing *Farmer*, 660 F.2d at 1105). As we recognized then, underlying the *Farmer* plaintiffs' claim was an implicit allegation that the plaintiffs were as qualified and responsible as the higher-paid employees, and this fact "could reasonably be expected to lead the EEOC to investigate why different job designations that required the same qualifications and responsibilities used disparate pay scales." *Id.* By the same token, Stephens's claim that she was fired because of her planned change in appearance and presentation contains an implicit allegation that the Funeral Home requires its male and female employees to look a particular way, and this fact could (and did) reasonably prompt the EEOC to investigate whether these appearance requirements imposed unequal burdens—in this case, fiscal burdens—on its male and female employees.

We therefore **REVERSE** the district court's grant of summary judgment to the Funeral Home on the EEOC's discriminatory-clothing-allowance claim and **REMAND** with instructions to consider the merits of the EEOC's claim.

III. CONCLUSION

Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII. The unrefuted facts show that the Funeral Home fired Stephens because she refused to abide by her employer's stereotypical conception of her sex, and therefore the EEOC is entitled to summary judgment as to its unlawful-termination claim. RFRA provides the Funeral Home with no relief because continuing to employ Stephens would not, as a matter of law, substantially burden Rost's religious exercise, and even if it did, the EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination. We therefore **REVERSE** the district court's grant of summary judgment in favor of the Funeral Home and **GRANT** summary judgment to the EEOC on its unlawful-termination claim. We also **REVERSE** the district court's grant of summary judgment on the EEOC's discriminatory-clothing-allowance claim, as the district court erred in failing to consider the EEOC's claim on the merits. We **REMAND** this case to the district court for further proceedings consistent with this opinion.

Bostock v. Clayton Cty. Bd. of Comm'rs

United States Court of Appeals for the Eleventh Circuit

July 18, 2018, Filed

No. 17-13801

Reporter

2018 U.S. App. LEXIS 19835 *; 2018 WL 3455013

GERALD LYNN BOSTOCK, Plaintiff - Appellant, versus CLAYTON COUNTY BOARD OF COMMISSIONERS, Defendant, CLAYTON COUNTY, Defendant - Appellee.

Prior History: [*1] Appeal from the United States District Court for the Northern District of Georgia. D.C. Docket No. 1:16-cv-01460-O.

A member of this Court in active service having requested a poll on whether this case should be reheard by the Court sitting en banc, and a majority of the judges in active service on this Court having voted against granting a rehearing en banc, it is ORDERED that this case will not be reheard en banc.

Dissent by: ROSENBAUM

Dissent

Bostock v. Clayton Cty. Bd. of Comm'rs, 723 Fed. Appx. 964, 2018 U.S. App. LEXIS 12405 (11th Cir. Ga., May 10, 2018)

Core Terms

en banc, individuals, http, visited, Workplace, lesbian, gender, cases, statistics, requires, employment discrimination, transgender, uscourts, appeals, conform, default, sexual, files, sites, views

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Judges: Before ED CARNES, Chief Judge, TJOFLAT, MARCUS, WILSON, WILLIAM PRYOR, MARTIN, JORDAN, ROSENBAUM, JILL PRYOR, NEWSOM, and BRANCH, Circuit Judges. ROSENBAUM, Circuit Judge, joined by JILL PRYOR, dissenting from the denial of rehearing en banc.

Opinion

BY THE COURT:

ROSENBAUM, Circuit Judge, joined by JILL PRYOR, dissenting from the denial of rehearing en banc:

The issue this case raises—whether Title VII protects gay and lesbian individuals from discrimination because their sexual preferences do not conform to [*2] their employers' views of whom individuals of their respective genders should love—is indisputably en-banc-worthy. Indeed, within the last fifteen months, two of our sister Circuits have found the issue of such extraordinary importance that they have each addressed it en banc.

See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc).¹

¹ And that's really saying something: in the past five years, the Second Circuit appears to have decided only two cases en banc—including *Zarda*—of the more than 24,000 appeals it terminated during that same period. See Westlaw search in CTA2 database: "adv:DA(aft 2008) & PR,PA,JU(en/2 banc)" (last visited July 10, 2018); Administrative Office of the United States Courts, Federal Court Management Statistics of the Courts of Appeals, http://www.uscourts.gov/sites/default/files/fcms_na_appprofile1231.2017.pdf; http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsummary1231.2016.pdf; http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsummary1231.2017.pdf.

No wonder. In 2011, about 8 million Americans identified as lesbian, gay, or bisexual.² See Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual, and Transgender?*, The Williams Inst., 1, 3, 6 (Apr. 2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf> (last visited July 10, 2018). Of those who so identify, roughly 25% report experiencing workplace discrimination because their sexual preferences do not match their employers' expectations.³ That's a whole lot of people potentially affected by this issue.⁴

Yet rather than address this [*3] objectively en-banc-worthy issue, we instead cling to a 39-year-old precedent, *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979), that was decided ten years before *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), the Supreme Court precedent that governs the issue and requires us to reach the opposite conclusion of *Blum*. Worse still, *Blum*'s "analysis" of the issue is as conclusory as it gets, consisting of a single sentence that, as relevant to Title VII, states in its entirety, "Discharge for homosexuality is not prohibited by Title VII." *Blum*, 597 F.2d at 938.⁵ And

if that's not bad enough, to support this proposition, *Blum* relies solely on *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (5th Cir. 1978)—a case that itself has been necessarily abrogated not only by *Price Waterhouse* but also by our own precedent in the form of *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).⁶ I cannot explain why a majority of our Court is content to rely on the precedential equivalent of an Edsel with a missing engine, when it comes to an issue that affects

appeals_summary_pages_december
_2015.pdf;http://www.uscourts.gov/sites/default/files/statistics_import_dir/appeals-fcms-summary-pages-december-2014.pdf;
http://www.uscourts.gov/sites/default/files/statistics_import_dir/appeals-fcms-summary-pages-december-2013.pdf. In fact, Chief Judge Katzmann has characterized the Second Circuit as having a "longstanding tradition of general deference to panel adjudication." *Ricci v. DeStefano*, 530 F.3d 88, 89 (2d Cir. 2008) (Katzmann, J., concurring in the denial of rehearing en banc); see also *id.* ("Throughout our history we have proceeded to a full hearing en banc only in rare and exceptional circumstances."). Similarly, in the past five years, the Seventh Circuit appears to have decided only sixteen cases en banc, including *Hiveley*, of the more than 15,000 appeals that Circuit has terminated during that time. See Westlaw search in CTA7 database: "adv:PR,PA,JU(en /2 banc) & DA(after 2012) % (den! /1 "en banc")" (last visited July 10, 2018); **Federal Court Management Statistics of the Courts of Appeals, United States Courts, supra**. Yet both Circuits found the question at issue here to be of such significance to warrant adding the respective cases to their very exclusive lists of en banc cases.

² Most statistics since that time include the number of individuals who identify as transgender. We have already held

that *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), superseded in part by The Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at **42 U.S.C. § 2000e-2(m)**), requires the conclusion that Title VII precludes discrimination against transgender individuals because they fail to conform to their employers' stereotypes of how a member of the individual's birth-assigned gender should act or feel. See *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

so many people.⁷

I have previously explained why *Price Waterhouse* abrogates *Blum* and requires the conclusion that Title VII prohibits discrimination against gay and lesbian individuals because their sexual preferences [*4] do not conform to their employers' views of whom individuals of their respective genders should love. See *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1261-73 (11th Cir.) (Rosenbaum, J., dissenting), cert. denied, 138 S. Ct. 557, 199 L. Ed. 2d 446 (2017). Both the Second and Seventh Circuits have likewise concluded that their respective pre-*Price Waterhouse* precedents reaching the same conclusion as *Blum* cannot stand. See *Zarda*, 883 F.3d at 113 (observing that attempts to distinguish *Price Waterhouse* amount to "semantic sleight[s] of hand . . . not a defense . . . a distraction"); *Hively*, 853

³ See, e.g., 2017 Workplace Equality Fact Sheet, Out & Equal Workplace Advocates, <http://outandequal.org/2017-workplace-equality-fact-sheet/> (last visited July 10, 2018) ("One in four LGBT employees report experiencing employment discrimination in the last five years."); *LGBT People in Georgia*, The Williams Inst., <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Georgia-fact-sheet.pdf> (last visited July 10, 2018) (finding 25% of LGBT Georgians reported workplace discrimination). I have been unable to find current statistics providing the percentage of only lesbian, gay, and bisexual individuals (without the inclusion of transgender individuals) who report discrimination in the workplace. Nevertheless, according to Professor Gary Gates's report for the Williams Institute, see *supra* at 1, "[a]n estimated 3.5% of adults in the United States identify as lesbian, gay, or bisexual and an estimated 0.3% of adults are transgender."

⁴ Studies show that this discrimination takes a myriad of forms: LGBT individuals are not interviewed and hired at the same rate as their heterosexual peers, and they face pay and promotional disparities. See Brad Spears, Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, The Williams Inst., 14 (July 2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf> (last visited July 10, 2018). Studies also show that employment discrimination against LGBT individuals correlates with effects beyond the employment sphere. For example, LGBT employees who experienced employment discrimination reported higher levels of psychological distress and health-related problems. See Craig R. Waldo, *Working in a Majority Context: A Structural Model of Heterosexism as Minority Stress in the Workplace*, 46 J. of Counseling Psych. 218, 224-28 (1999).

⁵ For comparison's sake, this issue spawned 163 pages of

F.3d at 350-51 ("It would require considerable calisthenics to remove 'sex' from 'sexual orientation' The logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line."). I continue to firmly believe that Title VII prohibits discrimination against gay and lesbian individuals because they fail to conform to their employers' views when it comes to whom they should love.

But I dissent today for an even more basic reason: regardless of whatever a majority of this Court's views may turn [*5] out to be on the substantive issue that *Bostock* raises, we have an obligation to, as a *Court*, at least subject the issue to the "crucial" "crucible of adversarial testing,"⁸ and after that trial "yield[s] insights or reveal[s] pitfalls we cannot muster guided only by our own lights,"⁹ to give a reasoned and principled explanation for our position on this issue—something

analysis from the Second Circuit in *Zarda* and 69 pages of analysis from the Seventh Circuit in *Hively*.

⁶ *Smith* concluded that Title VII does not prohibit discrimination against male employees who present as "effeminate." *Smith v. Liberty Mut. Ins.*, 569 F.2d 325, 328 (5th Cir. 1978). In *Price Waterhouse*, however, the Supreme Court concluded that Title VII did protect from discrimination a woman who acted "macho," 490 U.S. at 235—the same genre of problem that arose in *Smith*. And in *Glenn*, we found that *Price Waterhouse* requires the understanding that Title VII protects "[a]ll persons . . . from discrimination on the basis of gender stereotype." *Id. at 1318*.

⁷ The pernicious effects of this discrimination are not just limited to those on people, they also drag down the economy by, among other things, reducing worker productivity and increasing turnover. See M.V. Lee Badgett, *The Economic Case for Supporting LGBT Rights*, The Atlantic, Nov. 29, 2014, <https://www.theatlantic.com/business/archive/2014/11/the-economic-case-for-supporting-lgbt-rights/383131/> (last visited July 10, 2018) (comparing the impact of employment

we have never done.¹⁰

Particularly considering the amount of the public affected by this issue, the legitimacy of the law demands we explain ourselves. See Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, [56 U. Chi. L. Rev. 779, 798 \(1989\)](#) ("Reason . . . defines the federal judicial system. Nothing in the Constitution requires the written justification of judicial decisions, but a judiciary accountable to reason cannot resort to arbitrary acts. It requires candor from judges in addressing the strongest arguments against their own views."); [Conn. Bd. of](#)

discrimination against LGBT individuals on countries' gross domestic products); M.V. Lee Badgett et al., *The Business Impact of LGBT-Supportive Workplace Policies*, The Williams Inst. (May 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-LGBT-Policies-Full-Report-May-2013.pdf> (last visited July 10, 2018).

⁸I am, of course, aware that petitions for certiorari in *Bostock* and *Zarda* are currently pending before the Supreme Court. But as of the date we as a Circuit voted against granting en banc rehearing in this case and I distributed this dissent to my colleagues—July 10, 2018—nearly three months remain before the Supreme Court is even again in session. And who knows whether the Court will grant either petition? See Supreme Court, The Justice's Caseload, <https://www.supremecourt.gov/about/justicecaseload.aspx> (last visited July 10, 2018) (stating that the Supreme Court usually grants review in only 80 cases of the 8,000 certiorari petitions filed each year). We have been unhindered by similar impediments in the past. See, e.g., *In re Anthony Johnson*, [815 F.3d 733 \(11th Cir. 2016\)](#) (vacating panel order and ordering en banc rehearing where panel had held in abeyance petitioner's application to file second or successive § 2255 motion pending the Supreme Court's impending determination in *Welch v. United States*, [136 S. Ct. 790, 193 L. Ed. 2d 534 \(2016\)](#)), of whether the new rule announced by the Supreme Court in *Johnson v. United States*, [135 S. Ct. 2551, 192 L. Ed. 2d 569 \(2015\)](#), was retroactively applicable). Even if the Supreme Court grants one or both of these petitions eventually, we could simply hold our en banc proceedings in *Bostock* in abeyance pending the Supreme Court's resolution of the issue.

⁹*Sessions v. Dimaya*, [138 S. Ct. 1204, 1232, 200 L. Ed. 2d 549](#) (Gorsuch, J., concurring in part and concurring in the judgment) (citation and internal quotation marks omitted).

¹⁰In *Evans*, [850 F.3d 1248](#), the panel majority declined to address (or even consider) the substantive Title VII issue and instead dispensed with the case by relying solely on *Blum* and the prior-precedent rule. And *Bostock* simply invoked *Evans and Blum*. *Bostock v. Clayton Cty. Bd. of Commissioners*, [723 F. App'x 964, 964-65 \(11th Cir. 2018\)](#).

[Pardons v. Dumschat](#), [452 U.S. 458, 472, 101 S. Ct. 2460, 69 L. Ed. 2d 158 \(1981\)](#) (Stevens, J., dissenting) ("[Common law judges'] explanations of why they decided cases as they did provided guideposts for future decisions Many of us believe that those statements of reasons provided a better guarantee of justice than . . . a code written [*6] in sufficient detail to be fit for Napoleon."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, [73 Harv. L. Rev. 1, 19-20 \(1959\)](#) ("The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it."); 1 Blackstone, *Commentaries* 71 (1803) (observing that written court decisions have long been "held in the highest regard" because the public can examine and understand "the reasons the court gave for [its] judgment.").

Despite never offering a reasoned explanation tested by the adversarial process, a majority of this Court apparently believes that *Blum* somehow prophesized the correct post-*Price Waterhouse* legal conclusion in its one-sentence "analysis" that relies solely on authority itself abrogated by *Price Waterhouse*. If the majority truly believes that, it should grant en banc rehearing and perform the "considerable calisthenics" to explain why gender nonconformity claims are cognizable except for when a person fails to conform to the "ultimate" gender stereotype by being attracted to the "wrong" gender. *Hively*, [853 F.3d at 346, 350](#). And if it doesn't or if it believes—as I and others do—that these "calisthenics" are simply "impossible," *Hively*, [853 F.3d at 350-51](#), it should not sit idly by and leave victims of discrimination [*7] remediless by allowing *Blum* to continue to stand.

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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 RYAN KARNOSKI, et al.,

12 Plaintiffs,

13 v.

14 DONALD J. TRUMP, et al.,

15 Defendants.

16 CASE NO. C17-1297-MJP

17 ORDER GRANTING IN PART
18 AND DENYING IN PART
19 PLAINTIFFS' AND
20 WASHINGTON'S MOTIONS FOR
21 SUMMARY JUDGMENT;

22 GRANTING IN PART AND
23 DENYING IN PART
24 DEFENDANTS' MOTION FOR
 PARTIAL SUMMARY JUDGMENT

17 THIS MATTER comes before the Court on Plaintiffs' Motion for Summary Judgment
18 (Dkt. No. 129); the State of Washington's Motion for Summary Judgment (Dkt. No. 150); and
19 Defendants' Cross-Motion for Partial Summary Judgment (Dkt. No. 194.) Having reviewed the
20 Motions, the Responses (Dkt. Nos. 194, 207, 209), the Replies (Dkt. Nos. 201, 202, 212) and all
21 related papers, and having considered arguments made in proceedings before the Court, the
22 Court rules as follows: The Court GRANTS IN PART and DENIES IN PART Plaintiffs' and

1 Washington's Motions and GRANTS IN PART and DENIES IN PART Defendants' Cross-
 2 Motion.

3 **ORDER SUMMARY**

4 In July 2017, President Donald J. Trump announced on Twitter a ban on military service
 5 by openly transgender people (the "Ban"). Plaintiffs and the State of Washington
 6 ("Washington") challenged the constitutionality of the Ban, and moved for a preliminary
 7 injunction to prevent it from being carried out.

8 In December 2017, the Court—along with three other federal judges—entered a
 9 nationwide preliminary injunction preventing the military from implementing the Ban. The
 10 effect of the order was to maintain the status quo, allowing transgender people to join and serve
 11 in the military and receive transition-related medical care. For the past few months, they have
 12 done just that.

13 In March 2018, President Trump announced a plan to implement the Ban. With few
 14 exceptions, the plan excludes from military service people "with a history or diagnosis of gender
 15 dysphoria" and people who "require or have undergone gender transition." The plan provides
 16 that transgender people may serve in the military only if they serve in their "biological sex."
 17 Defendants claim that this plan resolves the constitutional issues raised by Plaintiffs and
 18 Washington.

19 In the following order, the Court concludes otherwise, and rules that the preliminary
 20 injunction will remain in effect. Each of the claims raised by Plaintiffs and Washington remains
 21 viable. The Court also rules that, because transgender people have long been subjected to
 22 systemic oppression and forced to live in silence, they are a protected class. Therefore, any
 23 attempt to exclude them from military service will be looked at with the highest level of care,

and will be subject to the Court’s “strict scrutiny.” This means that before Defendants can implement the Ban, they must show that it was sincerely motivated by compelling interests, rather than by prejudice or stereotype, and that it is narrowly tailored to achieve those interests.

The case continues forward on the issue of whether the Ban is well-supported by evidence and entitled to deference, or whether it fails as an impermissible violation of constitutional rights. The Court declines to dismiss President Trump from the case and allows Plaintiffs' and Washington's claims for declaratory relief to go forward against him.

BACKGROUND

I. The Ban on Military Service by Openly Transgender People¹

President Trump’s Announcement on Twitter: On July 26, 2017, President Donald J. Trump (@realDonaldTrump) announced over Twitter that the United States would no longer “accept or allow” transgender people “to serve in any capacity in the U.S. military” (the “Twitter Announcement”):



(Dkt. No. 149, Ex. 1.)

¹ As used throughout this Order, and as explained in greater detail in this section, the “Ban” refers to Defendants’ policy generally prohibiting military service by openly transgender people, as announced in President Trump’s Twitter Announcement and 2017 Memorandum and as further detailed in the Implementation Plan and 2018 Memorandum.

1 ***The 2017 Memorandum:*** On August 25, 2017, President Trump issued a Presidential
 2 Memorandum (the “2017 Memorandum”) formalizing his Twitter Announcement, and directing
 3 the Secretaries of Defense and Homeland Security to “return” to an earlier policy excluding
 4 transgender service members. (Dkt. No. 149, Ex. 2.) The 2017 Memorandum authorized the
 5 discharge of openly transgender service members (the “Retention Directive”); prohibited the
 6 accession of openly transgender service members (the “Accession Directive”); and prohibited the
 7 use of Department of Defense (“DoD”) and Department of Homeland Security (“DHS”)
 8 resources to fund “sex reassignment” surgical procedures (the “Medical Care Directive”). (Id. at
 9 §§ 1-3.) The Accession Directive was to take effect on January 1, 2018; the Retention and
 10 Medical Care Directives on March 23, 2018. (Id. at § 3.) The 2017 Memorandum also ordered
 11 the Secretary of Defense to “submit to [President Trump] a plan for implementing both [its]
 12 general policy . . . and [its] specific directives . . .” no later than February 21, 2018. (Id.)

13 ***Secretary Mattis’ Press Release and Interim Guidance:*** On August 29, 2017, Secretary
 14 of Defense James N. Mattis issued a press release confirming that the DoD had received the
 15 2017 Memorandum and, as directed, would “carry out” its policy direction. (Dkt. No. 197, Ex.
 16 2.) The press release explained that Secretary Mattis would “develop a study and
 17 implementation plan” and “establish a panel of experts . . . to provide advice and
 18 recommendation on the implementation of the [P]resident’s direction.” (Id.)

19 On September 14, 2017, Secretary Mattis issued interim guidance regarding President
 20 Trump’s Twitter Announcement and 2017 Memorandum to the military (the “Interim
 21 Guidance”). (Dkt. No. 149, Ex. 3.) The Interim Guidance again identified the DoD’s intent to
 22 “carry out the President’s policy and directives” and “present the President with a plan to
 23 implement the policy and directives in the [2017] Memorandum.” (Id. at 2.) The Interim
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1 Guidance provided (1) that transgender people would be prohibited from accession effective
 2 immediately; (2) that service members diagnosed with gender dysphoria would be provided
 3 “treatment,” however, “no new sex reassignment surgical procedures for military personnel
 4 [would] be permitted after March 22, 2018”; and (3) that no action would be taken “to
 5 involuntarily separate or discharge an otherwise qualified Service member solely on the basis of
 6 a gender dysphoria diagnosis or transgender status.” (Id. at 3.)

7 ***The Implementation Plan:*** On February 22, 2018, as directed, Secretary Mattis
 8 delivered to President Trump a plan for carrying out the policies set forth in his Twitter
 9 Announcement and 2017 Memorandum (Dkt. No. 224, Ex. 1) along with a “Report and
 10 Recommendations on Military Service by Transgender Persons” (Dkt. No. 224, Ex. 2)
 11 (collectively, the “Implementation Plan”). The Implementation Plan recommended the following
 12 policies:

- 13 • Transgender persons with a history or diagnosis of gender dysphoria are
 14 disqualified from military service, except under the following limited
 15 circumstances: (1) if they have been stable for 36 consecutive months in their
 16 biological sex prior to accession; (2) Service members diagnosed with gender
 17 dysphoria after entering into service may be retained if they do not require a
 18 change of gender and remain deployable within applicable retention
 19 standards; and (3) currently serving Service members who have been
 20 diagnosed with gender dysphoria since the previous administration’s policy
 21 took effect and prior to the effective date of this new policy, may continue to
 22 serve in their preferred gender and receive medically necessary treatment for
 23 gender dysphoria.
- 24 • Transgender persons who require or have undergone gender transition are
 25 disqualified from military service.
- 26 • Transgender persons without a history or diagnosis of gender dysphoria, who
 27 are otherwise qualified for service, may serve, like all other Service members,
 28 in their biological sex.

29 (Dkt. No. 224, Ex. 1 at 3-4.)

1 ***The 2018 Memorandum:*** On March 23, 2018, President Trump issued another
 2 Presidential Memorandum (the “2018 Memorandum”). (Dkt. No. 224, Ex. 3.) The 2018
 3 Memorandum confirms his receipt of the Implementation Plan, purports to “revoke” the 2017
 4 Memorandum and “any other directive [he] may have made with respect to military service by
 5 transgender individuals,” and directs the Secretaries of Defense and Homeland Security to
 6 “exercise their authority to implement any appropriate policies concerning military service by
 7 transgender individuals.” (Id. at 2-3.)

8 **II. The Carter Policy**

9 In 2010, Congress repealed the “Don’t Ask, Don’t Tell” policy that had previously
 10 prevented gay, lesbian, and bisexual people from serving openly in the military. (Dkt. No. 145 at
 11 ¶ 10.) The repeal of “Don’t Ask, Don’t Tell” raised questions about the military’s policy on
 12 transgender service members, as commanders became increasingly aware that there were capable
 13 and experienced transgender service members in every branch of the military. (Id. at ¶ 11; Dkt.
 14 No. 146 at ¶ 7.) In August 2014, the DoD eliminated its categorical ban on retention of
 15 transgender service members, enabling each branch of military service to reassess its own
 16 policies. (Dkt. No. 145 at ¶ 12; Dkt. No. 146 at ¶ 8.) In July 2015, then-Secretary of Defense
 17 Ashton Carter convened a group to evaluate policy options regarding openly transgender service
 18 members (the “Working Group”). (Dkt. No. 142 at ¶ 8.) The Working Group included senior
 19 uniformed officials from each branch, a senior civilian official, and various staff members. (Id.
 20 at ¶ 9.) It sought to “identify and address all relevant issues relating to service by openly
 21 transgender persons.” (Id. at ¶ 22.) To do so, it consulted with medical experts, personnel
 22 experts, readiness experts, and commanders whose units included transgender service members,
 23 and commissioned an independent study by the RAND Corporation to assess the implications of
 24

1 allowing transgender people to serve openly (the “RAND Study”). (Id. at ¶¶ 10-11, 22-27.) In
 2 particular, the RAND Study focused on: (1) the health care needs of transgender service
 3 members and the likely costs of providing coverage for transition-related care; (2) the readiness
 4 implications of allowing transgender service members to serve openly; and (3) the experiences of
 5 foreign militaries that allow for open service. (Dkt. No. 144, Ex. B at 4.) The RAND Study
 6 found “no evidence” that allowing transgender people to serve openly would adversely impact
 7 military effectiveness, readiness, or unit cohesion. (Dkt. No. 144 at ¶ 14.) Instead, the RAND
 8 Study found that discharging transgender service members would reduce productivity and result
 9 in “significant costs” associated with replacing skilled and qualified personnel. (Dkt. No. 142 at
 10 ¶ 21.) The results of the RAND Study were published in a 113-page report titled “Assessing the
 11 Implications of Allowing Transgender Personnel to Serve Openly.” (See Dkt. No. 144, Ex. B.)

12 After reviewing the results of the RAND Study and other evidence, the Working Group
 13 unanimously agreed that (1) transgender people should be allowed to serve openly and (2)
 14 excluding them from service based on a characteristic unrelated to their fitness to serve would
 15 undermine military efficacy. (Dkt. No. 142 at ¶¶ 26-27.) On June 30, 2016, Secretary Carter
 16 accepted the recommendations of the Working Group and issued Directive-type Memorandum
 17 16-005 (the “Carter Policy”), which affirmed that “service in the United States military should be
 18 open to all who can meet the rigorous standards for military service and readiness.” (Dkt. No.
 19 144, Ex. C.) The Carter Policy provided that “[e]ffective immediately, no otherwise qualified
 20 service member may be involuntarily separated, discharged or denied reenlistment or
 21 continuation of service, solely on the basis of their gender identity,” and further provided that

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transgender people would be allowed to accede into the military not later than July 1, 2017.² (Id. at 5.) Consistent with the Carter Policy, each branch of military service issued detailed instructions, policies, and regulations regarding separation and retention, accession, in-service transition, and medical care. (Dkt. No. 144 at ¶¶ 24-36, Exs. D, E, F; Dkt. No. 145 at ¶¶ 41-50, Exs. A, B; Dkt. No. 146 at ¶¶ 27-34, Ex. A.)

In reliance upon the Carter Policy and the DoD's assurances that it would not discharge them for being transgender, many service members came out to the military and had been serving openly for more than a year when President Trump issued his Twitter Announcement and 2017 Memorandum. (Dkt. No. 144, ¶ 37; Dkt. No. 145 at ¶ 51; Dkt. No. 146 at ¶ 35.)

III. Procedural History

On August 28, 2017, Plaintiffs filed this lawsuit challenging the constitutionality of the Ban, as set forth in the Twitter Announcement and the 2017 Memorandum. (See Dkt. No. 1.) Plaintiffs include nine transgender individuals (the “Individual Plaintiffs”) and three organizations (the “Organizational Plaintiffs”). (Dkt. No. 30 at ¶¶ 7-18.) Individual Plaintiffs Ryan Karnoski, D.L., and Connor Callahan aspire to enlist in the military; Staff Sergeant Cathrine Schmid, Chief Warrant Officer Lindsey Muller, Petty Officer First Class Terece Lewis, Petty Officer Second Class Phillip Stephens, and Petty Officer Second Class Megan Winters currently serve openly in the military. (Id. at ¶¶ 7-13.) Individual Plaintiff Jane Doe currently serves in the military, but does not serve openly. (Id. at ¶ 14.) Organizational Plaintiffs include the Human Rights Campaign (“HRC”), the Gender Justice League (“GJL”), and the American

² On June 30, 2017, Secretary Mattis extended the effective date for accepting transgender recruits to January 1, 2018. (Dkt. No. 197, Ex. 3.)

1 Military Partner Association (“AMPA”). (*Id.* at ¶¶ 16-18.) Defendants include President Trump,
 2 Secretary Mattis, the United States, and the DoD. (*Id.* at ¶¶ 19-22.)

3 On November 27, 2017, the Court granted intervention to Washington, which joined to
 4 protect its sovereign and quasi-sovereign interests in its natural resources and in the health and
 5 physical and economic well-being of its residents. (See Dkt. No. 101.)

6 On December 11, 2017, the Court issued a nationwide preliminary injunction barring
 7 Defendants from “taking any action relative to transgender individuals that is inconsistent with
 8 the status quo that existed prior to President Trump’s July 26, 2017 announcement.”³ (Dkt. No.
 9 103 at 23.) The Court found that Plaintiffs and Washington had standing to challenge the Ban
 10 and were likely to succeed on the merits of their claims for violation of equal protection,
 11 substantive due process, and the First Amendment. (*Id.* at 6-12, 15-20.)

12 On January 25, 2018, Plaintiffs and Washington filed separate motions for summary
 13 judgment.⁴ (Dkt. Nos. 129, 150.) Both seek an order declaring the Ban unconstitutional and
 14 permanently enjoining its implementation. (Dkt. No. 129 at 28-29; Dkt. No. 150-1.)

15 On February 28, 2018, Defendants filed an opposition and cross-motion for partial
 16 summary judgment seeking dismissal of all claims brought against President Trump. (Dkt. No.
 17 194.)

19 ³ Three other district courts also entered preliminary injunctions against the Ban. See
 20 Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017); Stone v. Trump, 280 F. Supp. 3d 747 (D.
 21 Md. 2017); Stockman v. Trump, No. 17-cv-1799-JGB-KK, Dkt. No. 79 (C.D. Cal. Dec. 22,
 22 2017).

23 ⁴ Plaintiffs are joined by amici the Constitutional Accountability Center (Dkt. No. 163,
 24 Ex. 1); Legal Voice (Dkt. No. 169); Retired Military Officers and Former National Security
 Officials (Dkt. No. 152, Ex. A); and the Commonwealths of Massachusetts and Pennsylvania,
 the States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, New Jersey,
 New Mexico, New York, Oregon, Rhode Island, Vermont, and the District of Columbia (Dkt.
 No. 170, Ex. A.)

1 On March 23, 2018, as these motions were pending and only days before the Court was
 2 set to hear oral argument, President Trump issued the 2018 Memorandum. (Dkt. No. 214, Ex.
 3 1.) On March 27, the Court ordered the parties to present supplemental briefing on the effect of
 4 the 2018 Memorandum and the Implementation Plan. (Dkt. No. 221.) That briefing has now
 5 been completed and this matter is ready for ruling. (See Dkt. Nos. 226, 227, 228.)

6 **DISCUSSION**

7 **I. Legal Standard**

8 Summary judgment is proper if “the movant shows that there is no genuine dispute as to
 9 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
 10 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue
 11 of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To defeat a motion for
 12 summary judgment, the non-movant must point to facts supported by the record which
 13 demonstrate a genuine issue of material fact. Lujan v. National Wildlife Federation, 497 U.S.
 14 871, 888 (1990). Conclusory, non-specific statements are not sufficient. Id. Similarly, “a party
 15 cannot manufacture a genuine issue of material fact merely by making assertions in its legal
 16 memoranda.” S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc., 690
 17 F.2d 1235, 1238 (9th Cir. 1982).

18 **II. Plaintiffs’ and Washington’s Motions for Summary Judgment**

19 Plaintiffs and Washington contend that summary judgment is proper because the Ban is
 20 unsupported by any constitutionally adequate government interest as a matter of law, and
 21 therefore violates equal protection, substantive due process, and the First Amendment. (Dkt. No.
 22 129 at 15-28; Dkt. No. 150 at 13-23.) Defendants respond that disputes of material fact preclude
 23 summary judgment, including disputes as to (1) whether Plaintiffs’ and Washington’s challenges
 24

1 are moot as a result of the 2018 Memorandum; (2) whether Plaintiffs and Washington have
 2 standing; and (3) whether the Ban satisfies the applicable level of scrutiny. (Dkt. No. 194 at
 3 5-24; Dkt. No. 226 at 3-11.) The Court addresses each of these issues in turn:

4 **A. Mootness**

5 Defendants claim that Plaintiffs' and Washington's challenges are now moot, as the
 6 policy set forth in the 2017 Memorandum has been "revoked" and replaced by that in the 2018
 7 Memorandum. (Dkt. No. 226 at 3-7.) Defendants claim the "new policy" has "changed
 8 substantially," such that it presents a "substantially different controversy." (*Id.* at 6 (citations
 9 omitted.)) Plaintiffs and Washington respond that there is no "new policy" at all, as the 2018
 10 Memorandum and the Implementation Plan merely implement the directives of the 2017
 11 Memorandum. (Dkt. No. 227 at 2; Dkt. No. 228 at 7-8.)

12 "The burden of demonstrating mootness 'is a heavy one.'" Los Angeles County v. Davis,
 13 440 U.S. 625, 631 (1979) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632-33
 14 (1953)). The Ninth Circuit has explained that a case is not moot unless "subsequent events make
 15 it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to
 16 recur," McCormack v. Herzog, 788 F.3d 1017, 1024 (9th Cir. 2015) (quoting Friends of the
 17 Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)), such that "the
 18 litigant no longer ha[s] any need of the judicial protection that is sought." Jacobus v. Alaska,
 19 338 F.3d 1095, 1102-03 (9th Cir. 2003) (quoting Adarand Constructors, Inc. v. Slater, 528 U.S.
 20 216, 224 (2000)). Accordingly, courts find cases moot only where the challenged policy has
 21 been completely revoked or rescinded, not merely voluntarily ceased. See Davis, 440 U.S. at
 22 631 (holding that a case is moot only where "there can be no reasonable expectation" that the
 23 alleged violation will recur and "interim relief or events have completely and irrevocably

1 eradicated the effects of the alleged violation”); City of Mesquite v. Aladdin’s Castle, Inc., 455
 2 U.S. 283, 289 (1982) (holding that “a defendant’s voluntary cessation of a challenged practice
 3 does not deprive a federal court of its power to determine the legality of the practice”); see also
 4 McCormack, 788 F.3d at 1025 (noting that a case is not moot where the government never
 5 “repudiated . . . as unconstitutional” the challenged policy).

6 The Court finds that the 2018 Memorandum and the Implementation Plan do not
 7 substantively rescind or revoke the Ban, but instead threaten the very same violations that caused
 8 it and other courts to enjoin the Ban in the first place. The 2017 Memorandum prohibited the
 9 accession and authorized the discharge of openly transgender service members (the Accession
 10 and Retention Directives); prohibited the use of DoD and DHS resources to fund transition-
 11 related surgical procedures (the Medical Care Directive); and directed Secretary Mattis to submit
 12 “a plan for implementing” both its “general policy” and its “specific directives” no later than
 13 February 21, 2018. (Dkt. No. 149, Ex. 2 at §§ 1-3.) The 2017 Memorandum did not direct
 14 Secretary Mattis to determine *whether* or not the directives should be implemented, but instead
 15 ordered the directives to be implemented by specific dates and requested a plan for *how* to do so.

16 The Implementation Plan adheres to the policy and directives set forth in the 2017
 17 Memorandum with few exceptions: With regard to the Accession and Retention Directives, the
 18 Implementation Plan excludes from military service and authorizes the discharge of transgender
 19 people who “require or have undergone gender transition” and those “with a history or diagnosis
 20 of gender dysphoria” unless they have been “stable for 36 consecutive months in their biological
 21 sex prior to accession.” (Dkt. No. 224, Ex. 1 at 3-4.) With regard to the Medical Care Directive,
 22 the Implementation Plan provides that the military will, with few exceptions, no longer provide

1 transition-related surgical care (as people who “require . . . gender transition” will no longer be
 2 permitted to serve and those who are currently serving will be subject to discharge). (Id.)

3 Defendants claim that the 2018 Memorandum and the Implementation Plan differ from
 4 the 2017 Memorandum in that they do not mandate a “categorical” prohibition on service by
 5 openly transgender people and “contain[] several exceptions allowing some transgender
 6 individuals to serve.” (Dkt. No. 226 at 6-7). The Court is not persuaded. The Implementation
 7 Plan prohibits transgender people—including those who have neither transitioned nor been
 8 diagnosed with gender dysphoria—from serving, unless they are “willing and able to adhere to
 9 all standards associated with their biological sex.” (Dkt. No. 224, Ex. 1 at 4, Ex. 2 at 7.)
 10 Requiring transgender people to serve in their “biological sex”⁵ does not constitute “open”
 11 service in any meaningful way, and cannot reasonably be considered an “exception” to the Ban.
 12 Rather, it would force transgender service members to suppress the very characteristic that
 13 defines them as transgender in the first place.⁶ (See Dkt. No. 143 at ¶ 19 (“The term
 14 ‘transgender’ is used to describe someone who experiences any significant degree of

15
 16 ⁵ The Court notes that the Implementation Plan uses the term “biological sex,” apparently
 17 to refer to the sex one is assigned at birth. This is somewhat misleading, as the record indicates
 18 that gender identity—“a person’s internalized, inherent sense of who they are as a particular
 19 gender (i.e., male or female)”—is also widely understood to have a “biological component.”
 20 (See Dkt. No. 143 at ¶¶ 20-21.)

21 ⁶ While the Implementation Plan contains an exception that allows current service
 22 members to serve openly and in their preferred gender and receive “medically necessary”
 23 treatment for gender dysphoria, the exception is narrow, and applies only to those service
 24 members who “were diagnosed with gender dysphoria by a military medical provider after the
 effective date of the Carter [P]olicy” (i.e., June 30, 2016) but “before the effective date” of the
 policy set forth in the Implementation Plan. (Dkt. No. 224, Ex. 2 at 7-8.) Further, this exception
 is severable from the remainder of the Implementation Plan. (Id. at 7 (“[S]hould [the DoD]’s
 decision to exempt these Service members be used by a court as a basis for invalidating the
 entire policy, this exemption is and should be deemed severable from the rest of the policy.”).)

1 misalignment between their gender identity and their assigned sex at birth.”); Dkt. No. 224, Ex. 2
 2 at 9 n.10 (“[T]ransgender” is “an umbrella term used for individuals who have sexual identity or
 3 gender expression that differs from their assigned sex at birth.”)

4 Therefore, the Court concludes that the 2018 Memorandum and the Implementation Plan
 5 do not moot Plaintiffs’ and Washington’s existing challenges.

6 **B. Standing**

7 Defendants claim that Plaintiffs and Washington lack standing to challenge the Ban, and
 8 that the 2018 Memorandum and Implementation Plan “have significantly changed the analysis.”
 9 (Dkt. No. 194 at 6-12; Dkt. No. 226 at 7.)

10 Standing requires (1) an “injury in fact”; (2) a “causal connection between the injury and
 11 the conduct complained of”; and (3) a likelihood “that the injury will be redressed by a favorable
 12 decision.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotation
 13 marks and citations omitted). An “injury in fact” exists where there is an invasion of a legally
 14 protected interest that is both “concrete and particularized” and “actual or imminent, not
 15 conjectural or hypothetical.” Id. at 560 (internal quotation marks and citations omitted).

16 While the Court previously concluded that both Plaintiffs and Washington established
 17 standing at the preliminary injunction stage (Dkt. No. 103 at 7-12), their burden for doing so on
 18 summary judgment is more exacting and requires them to set forth “by affidavit or other
 19 evidence ‘specific facts’” such that a “fair-minded jury” could find they have standing. Id. at
 20 561; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

21 The Court considers standing for the Individual Plaintiffs, the Organizational Plaintiffs,
 22 and Washington in turn:

1 **1. Individual Plaintiffs**

2 Each of the Individual Plaintiffs has submitted an affidavit detailing the ways in which
 3 they have already been harmed by the Ban, and would be further harmed were it to be
 4 implemented. (See Dkt. Nos. 130-138.) While Defendants claim that “Plaintiffs are obviously
 5 not suffering any harm from the revoked 2017 Memorandum,” and “would neither sustain an
 6 actual injury nor face an imminent threat of future injury” as a result of the 2018 Memorandum,
 7 the Court disagrees and concludes that each of the Individual Plaintiffs has standing to challenge
 8 the Ban.

9 Karnoski, D.L, and Callahan have “taken clinically appropriate steps to transition” and
 10 would be excluded from acceding under the Implementation Plan. (Dkt. No. 130 at ¶ 10; Dkt.
 11 No. 132 at ¶ 8; Dkt. No. 137 at ¶ 8.) Whether they could have acceded under the Carter Policy
 12 and whether they might be able to obtain “waivers,” as Defendants suggest, are irrelevant. (See
 13 Dkt. No. 226 at 8.) As the Court previously found, their injury “lies in the denial of an equal
 14 opportunity to compete, not the denial of the job itself,” and the Court need not “inquire into the
 15 plaintiff’s qualifications (or lack thereof) when assessing standing.” (Dkt. No. 103 at 10 n.3
 16 (citing Shea v. Kerry, 796 F.3d 42, 50 (D.C. Cir. 2015)) (emphasis in original).)

17 Doe does not currently serve openly, but was intending to come out and to transition
 18 surgically before President Trump’s Twitter Announcement. (Dkt. No. 138 at ¶¶ 8-11.) The Ban
 19 unambiguously subjects her to discharge should she seek to do either. (See Dkt. No. 224, Ex. 1.)
 20 Schmid, Muller, Lewis, Stephens, and Winters have been diagnosed with gender dysphoria, and
 21 likewise would be subject to discharge under the Ban.⁷ (Dkt. No. 131 at ¶ 9; Dkt. No. 133 at
 22

23 ⁷ Defendants claim that the currently serving Plaintiffs were “diagnosed with gender
 24 dysphoria within the relevant time period” and “therefore would be able to continue serving in
 their preferred gender, change their gender marker, and receive all medically necessary

1 ¶ 15; Dkt. No. 134 at ¶ 10; Dkt. No. 135 at ¶ 10; Dkt. No. 136 at ¶ 10.) The threat of discharge
 2 facing Doe, Schmid, Muller, Lewis, Stephens, and Winters is “actual or imminent, not
 3 conjectural or hypothetical,” and clearly gives rise to standing. See Lujan, 504 U.S. at 560
 4 (internal quotation marks and citation omitted).

5 Importantly, even if each of the Individual Plaintiffs were granted waivers or otherwise
 6 not excluded, discharged, or denied medical care, there can be no dispute that they would
 7 nevertheless have standing to challenge the Ban. This is because the Ban already has denied
 8 them the opportunity to serve in the military on the same terms as others; has deprived them of
 9 dignity; and has subjected them to stigmatization. (See Dkt. No. 103 at 8.) Policies that
 10 “stigmatiz[e] members of [a] disfavored group as ‘innately inferior’ . . . can cause serious
 11 non-economic injuries to those persons who are personally denied equal treatment solely because
 12 of their membership in a disfavored group.” Heckler v. Mathews, 465 U.S. 728, 737-740 (1984)
 13 (citation omitted). Such stigmatic injury, when identified in specific terms, is “one of the most
 14 serious consequences of discriminatory government action and is sufficient in some
 15 circumstances to support standing.” Allen v. Wright, 468 U.S. 737, 755 (1984), abrogated on
 16 other grounds, 134 S. Ct. 1377 (2014).

17
 18 treatment” under the Implementation Plan’s narrow exception. (Dkt. No. 226 at 8.) The record
 19 does not support this claim. As noted previously, the exception applies only to current service
 20 members who “were diagnosed with gender dysphoria by a military medical provider *after* the
 21 effective date of the Carter [P]olicy” (i.e., June 30, 2016) but “before the effective date” of the
 22 policy set forth in the Implementation Plan. (See supra, n.6; Dkt. No. 224, Ex. 2 at 7-8
 23 (emphasis added).) The record suggests that many, if not all, of the currently serving Plaintiffs
 24 were diagnosed *before* June 30, 2016. For example, Schmid was diagnosed “approximately four
 years ago.” (Dkt. No. 131 at ¶ 9.) Muller was diagnosed “approximately six years ago.” (Dkt.
 No. 133 at ¶ 15.) Lewis, Stephens, and Winters were diagnosed “approximately three years
 ago,” “approximately two and a half years ago,” and “approximately two years ago”
 respectively. (Dkt. No. 134 at ¶ 10; Dkt. No. 135 at ¶ 10; Dkt. No. 136 at ¶ 10.) There is also no
 indication that any of the currently serving Plaintiffs received their diagnosis from a “military
 medical provider.”

1 Each of the Individual Plaintiffs has detailed the stigmatic injuries they have suffered
 2 through affidavits. For example, Karnoski has explained that the Ban has caused him “great
 3 distress, discomfort, and pain.” (Dkt. No. 130 at ¶ 21.) Schmid has explained that the Ban’s
 4 “abrupt change in policy and implicit commentary on [her] value to the military and competency
 5 to serve has caused [her] to feel tremendous anguish,” and that since it was announced, she has
 6 lost sleep and suffered “an immense amount of anxiety.” (Dkt. No. 131 at ¶¶ 23-24, 26.) Muller
 7 has explained that the Ban was “devastating” and “wounded [her] more than any combat injury
 8 could.” (Dkt. No. 133 at ¶¶ 30-31.) Doe has explained that the Ban precludes her from
 9 expressing her authentic gender identity, and that as a result, she has not come out. (Dkt. No.
 10 138 at ¶¶ 10-11.) Doe’s self-censorship alone is a “constitutionally sufficient injury,” as it is
 11 based on her “actual and well-founded fear” of discharge. See Cal. Pro-Life Council, Inc. v.
 12 Getman, 328 F.3d 1088, 1095 (9th Cir. 2003) (holding that a person’s “actual and well-founded
 13 fear that [a] law will be enforced against him or her” may give rise to standing to bring
 14 pre-enforcement claims under the First Amendment and that “self-censorship is ‘a harm that can
 15 be realized even without an actual prosecution’”) (quoting Virginia v. Am. Booksellers Ass’n,
 16 484 U.S. 383, 393 (1988)).

17 Therefore, the Court concludes that each of the Individual Plaintiffs has standing.

18 **2. Organizational Plaintiffs**

19 As each of the Individual Plaintiffs has standing, so too do the organizations they
 20 represent. An organization has standing where “(a) its members would otherwise have standing
 21 to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s
 22 purpose; and (c) neither the claim asserted nor the relief requested requires the participation of
 23 individual members in the lawsuit.” Hunt v. Wash. State Apple Advert. Comm’n, 432 U.S. 333,
 24

1 343 (1977). Each of the Organizational Plaintiffs satisfies these requirements. Karnoski and
 2 Schmid are members of HRC, GJL, and AMPA, and Muller, Stephens, and Winters are also
 3 members of AMPA. (Dkt. No. 130 at ¶ 3; Dkt. No. 131 at ¶ 5; Dkt. No. 133 at ¶ 5; Dkt. No. 135
 4 at ¶ 4; Dkt. No. 136 at ¶ 4; Dkt. No. 140 at ¶ 3.) The interests each Organizational Plaintiff seeks
 5 to protect are germane to their organizational purposes, which include ending discrimination
 6 against lesbian, gay, bisexual, transgender and queer (“LGBTQ”) individuals (HRC and GJL)
 7 and supporting families and allies of LGBT service members and veterans (AMPA). (Dkt. No.
 8 139 at ¶ 2; Dkt. No. 140 at ¶ 2; Dkt. No. 141 at ¶ 2.)

9 Therefore, the Court concludes that each of the Organizational Plaintiffs has standing.

10 **3. Washington**

11 Defendants claim that “Washington has not even attempted to satisfy its burden to
 12 demonstrate standing,” and that “in granting Washington’s motion to intervene, the Court
 13 expressly declined to decide whether Washington possessed standing to sue.” (Dkt. No. 194 at
 14 12.) To the contrary, the Court explicitly found that Washington had standing in its own right,
 15 and not merely as an intervenor. (Dkt. No. 103 at 11-12.)

16 A state has standing to sue the federal government to vindicate its sovereign and quasi-
 17 sovereign interests. See Massachusetts v. E.P.A., 549 U.S. 497, 518-520 (2007). Sovereign
 18 interests include a state’s interest in protecting the natural resources within its boundaries. Id. at
 19 518-19. Quasi-sovereign interests include its interest in “the health and well-being—both
 20 physical and economic—of its residents,” and in “securing residents from the harmful effects of
 21 discrimination.” Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 607,
 22 609 (1982).

1 Washington contends that the Ban will impede its ability to protect its residents and
 2 natural resources and will undermine the efficacy of its National Guard. (Dkt. No. 150 at 9-10.)
 3 Washington is home to approximately 60,000 active, reserve, and National Guard members, and
 4 the military is the second largest public employer in the state. (*Id.* at 9.) Washington is also
 5 home to approximately 32,850 transgender adults, and its laws protect these residents against
 6 discrimination on the basis of sex, gender, and gender identity. (*Id.* at 9-10); RCW §§ 49.60.030;
 7 49.60.040(25)-(26).

8 Washington relies on the National Guard to assist with emergency preparedness and
 9 disaster recovery planning, and to protect the state's residents and natural resources from
 10 wildfires, landslides, flooding, and earthquakes. (Dkt. No. 150 at 9.) When the Governor
 11 deploys the National Guard for state active duty, Washington pays its members' wages and
 12 provides disability and life insurance benefits for injuries they may sustain while serving the
 13 state. (*Id.*); RCW § 38.24.050. The state also oversees recruitment efforts and exercises
 14 day-to-day command over Guard members in training and most forms of active duty. (Dkt. No.
 15 170, Ex. A at 20.) Further, the Governor must ensure that the Guard conforms to both federal
 16 and state laws and regulations, including the state's anti-discrimination laws and, were the Ban to
 17 be implemented, conflicting DoD policies regarding accession and retention. (Dkt. No. 150 at
 18 9-10; Dkt. No. 170, Ex. A at 21-22.) Thus, in addition to diminishing the number of eligible
 19 members for the National Guard, the Ban threatens Washington's ability to (1) protect its
 20 residents and natural resources in times of emergency and (2) "assur[e] its residents that it will
 21 act" to protect them from "the political, social, and moral damage of discrimination." See
 22 Snapp, 458 U.S. at 609. Defendants have not offered any contrary evidence with respect to
 23
 24

1 Washington's sovereign and quasi-sovereign interests. Therefore, the Court concludes that
 2 Washington has standing.

3 **C. Constitutional Violations**

4 Plaintiffs contend that the Ban violates equal protection, substantive due process, and the
 5 First Amendment. (Dkt. No. 129 at 15-28.) Washington contends that the Ban violates equal
 6 protection and substantive due process. (Dkt. No. 150 at 13-23.) Before it can reach the merits
 7 of these constitutional claims, the Court must determine (1) the applicable level of scrutiny and
 8 (2) the applicable level of deference owed to the Ban, if any. The Court addresses each of these
 9 issues in turn:

10 **1. Level of Scrutiny**

11 At the preliminary injunction stage, the Court found that transgender people were, at
 12 minimum, a quasi-suspect class. (Dkt. No. 103 at 15-16.) In light of additional evidence before
 13 it at this stage, the Court today concludes that they are a suspect class, such that the Ban must
 14 satisfy the most exacting level of scrutiny if it is to survive.

15 In determining whether a classification is suspect or quasi-suspect, the Supreme Court
 16 has observed that relevant factors include: (1) whether the class has been “[a]s a historical
 17 matter . . . subjected to discrimination,” Bowen v. Gilliard, 483 U.S. 587, 602 (1987); (2)
 18 whether the class has a defining characteristic that “frequently bears [a] relation to ability to
 19 perform or contribute to society,” City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432,
 20 440-41 (1985); (3) whether the class exhibits “obvious, immutable, or distinguishing
 21 characteristics that define [it] as a discrete group,” Bowen, 483 U.S. at 602; and (4) whether the
 22 class is “a minority or politically powerless.” *Id.*; see also Windsor v. U.S., 699 F.3d 169, 181
 23 (2d Cir. 2012), aff’d on other grounds, 570 U.S. 744 (2013). While “[t]he presence of any of the
 24

1 factors is a signal that the particular classification is ‘more likely than others to reflect
 2 deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,’”
 3 the first two factors alone may be dispositive. Golinski v. U.S. Office of Pers. Mgmt., 824 F.
 4 Supp. 2d 968, 983 (N.D. Cal. 2012) (quoting Pyler v. Doe, 457 U.S. 202, 216 n.14 (1982)).

5 The Court considers each of these factors in turn:

6 **i. History of Discrimination**

7 The history of discrimination and systemic oppression of transgender people in this
 8 country is long and well-recognized. Transgender people have suffered and continue to suffer
 9 endemic levels of physical and sexual violence, harassment, and discrimination in employment,
 10 education, housing, criminal justice, and access to health care. (See Dkt. No. 169, Ex. A at
 11 9-12.) According to a nationwide survey conducted by the National Center for Transgender
 12 Equality in 2015, 48 percent of transgender respondents reported being “denied equal treatment,
 13 verbally harassed, and/or physically attacked in the past year because of being transgender” and
 14 47 percent reported being “sexually assaulted at some point in their lifetime.” (Id. at 10.)
 15 Seventy-seven (77) percent report being “verbally harassed, prohibited from dressing according
 16 to their gender identity, or physically or sexually assaulted” in grades K-12. (Id. at 10-11.)
 17 Thirty (30) percent reported being “fired, denied a promotion, or experiencing some other form
 18 of mistreatment in the workplace related to their gender identity or expression, such as being
 19 harassed or attacked.” (Id. at 11.) Finally, “it is generally estimated that transgender women
 20 face *4.3 times the risk* of becoming homicide victims than the general population.” (Id. at 10
 21 (emphasis in original).)

ii. Contributions to Society

Discrimination against transgender people clearly is unrelated to their ability to perform and contribute to society. See Doe 1, 275 F. Supp. 3d at 209 (noting the absence of any “argument or evidence suggesting that being transgender in any way limits one’s ability to contribute to society”); Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (noting the absence of “any data or argument suggesting that a transgender person, simply by virtue of transgender status, is any less productive than any other member of society”). Indeed, the Individual Plaintiffs in this case contribute not only to society as a whole, but to the military specifically. For years, they have risked their lives serving in combat and non-combat roles, fighting terrorism around the world, and working to secure the safety and security of our forces overseas. (See, e.g., Dkt. No. 133 at ¶¶ 7-9; Dkt. No. 134 at ¶¶ 5-6; Dkt. No. 135 at ¶¶ 6-7; Dkt. No. 136 at ¶¶ 6-7.) Their exemplary service has been recognized by the military itself, with many having received awards and distinctions. (See Dkt. No. 131 at ¶ 15; Dkt. No. 133 at ¶ 12; Dkt. No. 134 at ¶ 7.)

iii. Immutability

Transgender people clearly have “immutable” and “distinguishing characteristics that define them as a discrete group.” Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ., 208 F. Supp. 3d 850, 874 (S.D Ohio 2016) (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986)). Experts agree that gender identity has a “biological component,” and there is a “medical consensus that gender identity is deep-seated, set early in life, and *impervious to external influences.*” (Dkt. No. 143 at ¶¶ 21-22 (emphasis added).) In other contexts, the Ninth Circuit has held that “[s]exual orientation and sexual identity” are “immutable” and are “so fundamental to one’s identity that a person should not be required to abandon them.”

1 | Hernandez-Montiel v. I.N.S., 225 F.3d 1087, 1093 (9th Cir. 2000), overruled on other grounds,

2 | 409 F.3d 1177 (9th Cir. 2005).

3 **iv. Political Power**

4 Despite increased visibility in recent years, transgender people as a group lack the
 5 relative political power to protect themselves from wrongful discrimination. While the exact
 6 number is unknown, transgender people make up less than 1 percent of the nation’s adult
 7 population. (Dkt. No. 143, Ex. B at 3 (estimating 0.3 percent)); see also Doe 1, 275 F. Supp. 3d
 8 at 209 (estimating 0.6 percent). Fewer than half of the states have laws that explicitly prohibit
 9 discrimination against transgender people. (Dkt. No. 169, Ex. A at 12.) Further, recent actions
 10 by President Trump’s administration have removed many of the limited protections afforded by
 11 federal law. (Id. at 12-13.) Finally, openly transgender people are vastly underrepresented in
 12 and have been “systematically excluded from the most important institutions of
 13 self-governance.” SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir.
 14 2014). There are no openly transgender members of the United States Congress or the federal
 15 judiciary, and only one out of more than 7,000 state legislators is openly transgender. (Dkt. No.
 16 169, Ex. A at 14); see also Adkins, 143 F. Supp. 3d at 140.

17 Recognizing these factors, courts have consistently found that transgender people
 18 constitute, at minimum, a quasi-suspect class.⁸ See, e.g., Doe 1, 275 F. Supp. 3d at 208-10;

20 8 The Ninth Circuit applies heightened scrutiny to equal protection claims involving
 21 discrimination based on sexual orientation. SmithKline, 740 F.3d at 484; Latta v. Otter, 771
 22 F.3d 456, 468 (9th Cir. 2014). This reasoning further supports the Court’s conclusion as to the
 23 applicable level of scrutiny, as discrimination based on transgender status burdens a group that
 24 has in many ways “experienced even greater levels of societal discrimination and
 marginalization.” Norsworthy, 87 F. Supp. 3d at 1119 n.8; see also Adkins, 143 F. Supp. 3d at
 140 (“Particularly in comparison to gay people . . . transgender people lack the political strength
 to protect themselves. . . . [A]lthough there are and were gay members of the United States

1 | Stone, 280 F. Supp. 3d at 768; Adkins, 143 F. Supp. 3d at 139-40; Highland, 208 F. Supp. 3d at
 2 | 873-74; Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015). Today, the Court
 3 | concludes that transgender people constitute a suspect class. Transgender people have long been
 4 | forced to live in silence, or to come out and face the threat of overwhelming discrimination.

5 Therefore, the Court GRANTS summary judgment in Plaintiffs' and Washington's favor
 6 as to the applicable level of scrutiny. The Ban specifically targets one of the most vulnerable
 7 groups in our society, and must satisfy strict scrutiny if it is to survive.

8 **2. Level of Deference**

9 Defendants claim that “considerable deference is owed to the President and the DoD in
 10 making military personnel decisions,” and that for this reason, Plaintiffs’ and Washington’s
 11 constitutional claims necessarily fail. (Dkt. No. 194 at 16.)

12 The Court previously found that the Ban—as set forth in President Trump’s Twitter
 13 Announcement and 2017 Memorandum—was not owed deference, as it was not supported by
 14 “any evidence of considered reason or deliberation.” (Dkt. No. 103 at 17-18.) Indeed, at the
 15 time he announced the Ban, “all of the reasons proffered by the President for excluding
 16 transgender individuals from the military were not merely unsupported, but were actually
 17 *contradicted* by the studies, conclusions, and judgment of the military itself.” Doe 1, 275 F.
 18 Supp. 3d at 212 (emphasis in original); see also Rostker v. Goldberg, 453 U.S. 57, 67-72 (1981)
 19 (concluding that deference is owed to well-reasoned policies that are not adopted “unthinkingly”
 20 or “reflexively and not for any considered reason”); Goldman v. Weinberger, 475 U.S. 503,
 21 507-08 (1986) (concluding that deference is owed where a policy results from the “professional

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 24 Congress . . . as well as gay federal judges, there is no indication that there have ever been any
 24 transgender members of the United States Congress or federal judiciary.”)

1 judgment of military authorities concerning the relative importance of a particular military
 2 interest"); compare Owens v. Brown, 455 F. Supp. 291, 305 (D.D.C. 1978) (concluding that
 3 deference is not owed where a policy is adopted "casually, over the military's objections and
 4 without significant deliberation").

5 Now that the specifics of the Ban have been further defined in the 2018 Memorandum
 6 and the Implementation Plan, whether the Court owes deference to the Ban presents a more
 7 complicated question. Any justification for the Ban must be "genuine, not hypothesized or
 8 invented post hoc in response to litigation." United States v. Virginia, 518 U.S. 515, 533 (1996).
 9 However, the Court is mindful that "complex[,] subtle, and professional decisions as to the
 10 composition . . . and control of a military force are essentially professional military judgments,"
 11 reserved for the Legislative and Executive Branches. Gilligan v. Morgan, 413 U.S. 1, 10 (1973).
 12 The Court's entry of a preliminary injunction was not intended to prevent the military from
 13 continuing to review the implications of open service by transgender people, nor to preclude it
 14 from *ever* modifying the Carter Policy.

15 Defendants claim that the military has done just that, and that the Ban—as set forth in the
 16 2018 Memorandum and the Implementation Plan—is now the product of a deliberative review.
 17 In particular, Defendants claim the Ban has been subjected to "an exhaustive study" and is
 18 consistent with the recommendations of a "Panel of Experts" convened by Secretary Mattis to
 19 study "military service by transgender individuals, focusing on military readiness, lethality, and
 20 unit cohesion," and tasked with "conduct[ing] an independent multi-disciplinary review and
 21 study of relevant data and information pertaining to transgender Service members." (See Dkt.
 22 No. 226 at 9-10; Dkt. No. 224, Ex. 2 at 19.) Defendants claim that the Panel was comprised of
 23 senior military leaders who received "support from medical and personnel experts from across
 24

1 the [DoD] and [DHS]," and considered "input from transgender Service members, commanders
 2 of transgender Service members, military medical professionals, and civilian medical
 3 professionals with experience in the care and treatment of individuals with gender dysphoria."
 4 (Dkt. No. 224, Ex. 2 at 20.) "Unlike previous reviews on military service by transgender
 5 individuals," Defendants claim that the Panel's analysis was "informed by the [DoD]'s own data
 6 obtained since the new policy began to take effect last year." (Dkt. No. 224, Ex. 1 at 3.) The
 7 Panel's findings are set forth in a 44-page "Report and Recommendations on Military Service by
 8 Transgender Persons," which concludes that "the realities associated with service by transgender
 9 individuals are far more complicated than the prior administration or RAND had assumed," and
 10 that because gender transition "would impede readiness, limit deployability, and burden the
 11 military with additional costs . . . the risks associated with maintaining the Carter [P]olicy . . .
 12 counsel in favor of" the Ban. (Dkt. No. 224, Ex. 2 at 46.)

13 Having carefully considered the Implementation Plan—including the content of the
 14 DoD's "Report and Recommendations on Military Service by Transgender Persons"—the Court
 15 concludes that whether the Ban is entitled to deference raises an unresolved question of fact.
 16 The Implementation Plan was not disclosed until March 29, 2018. (See Dkt. No. 224, Exs. 1, 2.)
 17 As Defendants' claims and evidence regarding their justifications for the Ban were presented to
 18 the Court only recently, Plaintiffs and Washington have not yet had an opportunity to test or
 19 respond to these claims. On the present record, the Court cannot determine whether the DoD's
 20 deliberative process—including the timing and thoroughness of its study and the soundness of
 21 the medical and other evidence it relied upon—is of the type to which Courts typically should
 22 defer. See Fed. R. Civ. P. 56(e)(1).

Accordingly, the Court DENIES summary judgment as to the level of deference due. The Court notes that, even in the event it were to conclude that deference is owed, it would not be rendered powerless to address Plaintiffs' and Washington's constitutional claims, as Defendants seem to suggest. ““The military has not been exempted from constitutional provisions that protect the rights of individuals” and, indeed, ‘[i]t is precisely the role of the courts to determine whether those rights have been violated.”” Doe 1, 275 F. Supp. 3d at 210 (quoting Emory v. Sec'y of Navy, 819 F.2d 291, 294 (D.C. Cir. 1987)); Chappell v. Wallace, 462 U.S. 296, 304 (1983) (“This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.”); Rostker, 453 U.S. at 70 (“[D]eference does not mean abdication.”). Indeed, the Court notes that Defendants' claimed justifications for the Ban—to promote “military lethality and readiness” and avoid “disrupt[ing] unit cohesion, or tax[ing] military resources”— are strikingly similar to justifications offered in the past to support the military's exclusion and segregation of African American service members, its “Don't Ask, Don't Tell” policy, and its policy preventing women from serving in combat roles. (Dkt. No. 224, Ex. 1 at 2-4; see also Dkt. No. 163, Ex. 1 at 8-16.)

3. Equal Protection, Due Process, and First Amendment Claims

A policy will survive strict scrutiny only where it is motivated by a “compelling state interest” and “the means chosen ‘fit’ the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate . . . prejudice or stereotype.” Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (citation omitted). In making this determination, the Court must carefully evaluate “the importance and the sincerity of the reasons advanced” by the government for the use of a particular classification in a particular context. Id. at 327.

1 Whether Defendants have satisfied their burden of showing that the Ban is constitutionally
 2 adequate (*i.e.*, that it was sincerely motivated by compelling state interests, rather than by
 3 prejudice or stereotype) necessarily turns on facts related to Defendants' deliberative process.
 4 As discussed previously, these facts are not yet before the Court. (See supra, § II.C.2.) Further,
 5 Defendants' responsive briefing addresses only the constitutionality of the Interim Guidance, a
 6 document that has never been, and is not now, the applicable policy before the Court. (See Dkt.
 7 No. 194 at 19-24.)

8 For the same reasons it cannot grant summary judgment as to the level of deference due
 9 at this stage, the Court cannot reach the merits of the alleged constitutional violations.
 10 Accordingly, the Court DENIES summary judgment as to Plaintiffs' and Washington's equal
 11 protection, due process, and First Amendment claims.

12 **IV. Defendants' Motion for Partial Summary Judgment**

13 Defendants contend that the Court is without jurisdiction to impose injunctive or
 14 declaratory relief against President Trump in his official capacity, and move for partial summary
 15 judgment on all claims against him individually. (Dkt. No. 194 at 25-27.) Plaintiffs and
 16 Washington do not oppose summary judgment as to injunctive relief, but respond that
 17 declaratory relief against President Trump is proper. (Dkt. No. 207 at 8-10; Dkt. No. 209 at 6-8.)

18 The Court is aware of no case holding that the President is immune from declaratory
 19 relief—Rather, the Supreme Court has explicitly affirmed the entry of such relief. See Clinton v.
20 City of New York, 524 U.S. 417, 425 n.9 (1998) (affirming entry of declaratory judgment
 21 against President Clinton stating that Line Item Veto Act was unconstitutional); NTEU v. Nixon,
 22 492 F.2d 587, 609 (1974) (“[N]o immunity established under any case known to this Court bars
 23 every suit against the president for injunctive, declaratory or mandamus relief.”); see also Hawaii

1 | v. Trump, 859 F.3d 741, 788 (9th Cir. 2017) (vacating injunctive relief against President Trump,
 2 but not dismissing him in suit for declaratory relief), vacated as moot, 874 F.3d 1112 (9th Cir.
 3 2017).

4 The Court concludes that, not only does it have jurisdiction to issue declaratory relief
 5 against the President, but that this case presents a “most appropriate instance” for such relief.
 6 See NTEU, 492 F.2d at 616. The Ban was announced by President Trump (@realDonaldTrump)
 7 on Twitter, and was memorialized in the 2017 and 2018 Presidential Memorandums, which were
 8 each signed by President Trump. (Dkt. No. 149, Exs. 1, 2; Dkt. No. 224, Ex. 3.) While
 9 President Trump’s Twitter Announcement suggests he authorized the Ban “[a]fter consultation
 10 with [his] Generals and military experts” (Dkt. No. 149, Ex. 1), Defendants to date have failed to
 11 identify even one General or military expert he consulted, despite having been ordered to do so
 12 repeatedly. (See Dkt. Nos. 204, 210, 211.) Indeed, the *only* evidence concerning the lead-up to
 13 his Twitter Announcement reveals that military officials were entirely unaware of the Ban, and
 14 that the abrupt change in policy was “unexpected.” (See Dkt. No. 208, Ex. 1 at 9 (General
 15 Joseph F. Dunford, Chairman of the Joint Chiefs of Staff stating on July 27, 2017 “Chiefs, I
 16 know yesterday’s announcement was unexpected . . .”); Dkt. No. 152, Ex. A at 11-12 (“The Joint
 17 Chiefs of Staff were not consulted at all on the decision . . . The decision was announced so
 18 abruptly that White House and Pentagon officials were unable to explain the most basic of
 19 details about how it would be carried out.”).) Even Secretary Mattis was given only one day’s
 20 notice before President Trump’s Twitter Announcement. (Id.; Dkt. No. 163, Ex. 1 at 26.) As no
 21 other persons have ever been identified by Defendants—despite repeated Court orders to do so—
 22 the Court is led to conclude that the Ban was devised by the President, and the President alone.

1 Therefore, the Court GRANTS Defendants' motion for partial summary judgment with
2 regard to injunctive relief and DENIES the motion with regard to declaratory relief.

3 **CONCLUSION**

4 The Court concludes that all Plaintiffs and Washington have standing; that the 2018
5 Memorandum and Implementation Plan do not moot their claims; and that transgender people
6 constitute a suspect class necessitating a strict scrutiny standard of review. The Court concludes
7 that questions of fact remain as to whether, and to what extent, deference is owed to the Ban, and
8 whether the Ban, when held to strict scrutiny, survives constitutional review.

9 Accordingly, the Court rules as follows:

10 1. The Court GRANTS Plaintiffs' and Washington's motions for summary judgment
11 with respect to the applicable level of scrutiny, which is strict scrutiny;

12 2. The Court DENIES Plaintiffs' and Washington's motions for summary judgment
13 with respect to the applicable level of deference;

14 3. The Court DENIES Plaintiffs' and Washington's motions for summary judgment
15 with respect to violations of equal protection, due process, and the First Amendment;

16 4. The Court GRANTS Defendants' cross-motion for summary judgment with
17 respect to injunctive relief against President Trump and DENIES the cross-motion with respect
18 to declarative relief against President Trump.

19 5. The preliminary injunction previously entered otherwise remains in full force and
20 effect. Defendants (with the exception of President Trump), their officers, agents, servants,
21 employees, and attorneys, and any other person or entity subject to their control or acting directly
22 or indirectly in concert or participation with Defendants are enjoined from taking any action

relative to transgender people that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement.

6. The Court's ruling today eliminates the need for Plaintiffs and Washington to respond to Defendants' Motion to Dissolve the Preliminary Injunction (Dkt. No. 223), which is hereby STRICKEN.

7. The parties are directed to proceed with discovery and prepare for trial on the issues of whether, and to what extent, deference is owed to the Ban and whether the Ban violates equal protection, substantive due process, and the First Amendment.

The clerk is ordered to provide copies of this order to all counsel.

Dated April 13, 2018.



Marsha J. Pechman
United States District Judge

No.

In the Supreme Court of the United States

IN RE UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

*ON PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK*

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

Whether, in an action seeking to set aside agency action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker—including by compelling the testimony of high-ranking Executive Branch officials—when there is no evidence that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis.

(I)

PARTIES TO THE PROCEEDING

Petitioners (defendants in the district court, and mandamus petitioners in the court of appeals) are the United States Department of Commerce; Wilbur L. Ross, Jr., in his official capacity as Secretary of Commerce; the United States Census Bureau, an agency within the United States Department of Commerce; and Ron S. Jarmin, in his capacity as the Director of the United States Census Bureau.

Respondent in this Court is the United States District Court for the Southern District of New York. Respondents also include the State of New York; the State of Connecticut; the State of Delaware; the District of Columbia; the State of Illinois; the State of Iowa; the State of Maryland; the Commonwealth of Massachusetts; the State of Minnesota; the State of New Jersey; the State of New Mexico; the State of North Carolina; the State of Oregon; the Commonwealth of Pennsylvania; the State of Rhode Island; the Commonwealth of Virginia; the State of Vermont; the State of Washington; the City of Chicago, Illinois; the City of New York; the City of Philadelphia; the City of Providence; the City and County of San Francisco, California; the United States Conference of Mayors; the City of Seattle, Washington; the City of Pittsburgh; the County of Cameron; the State of Colorado; the City of Central Falls; the City of Columbus; the County of El Paso; the County of Monterey; and the County of Hidalgo (collectively plaintiffs in the district court in No. 18-cv-2921, and real parties in interest in the court of appeals in Nos. 18-2652 and 18-2856). Respondents further include the New York Immigration Coalition; CASA de Maryland, Inc.; the American-Arab Anti-Discrimination Committee; ADC Research Institute; and Make the Road

III

New York (collectively plaintiffs in the district court in No. 18-cv-5025, and real parties in interest in the court of appeals in Nos. 18-2659 and 18-2857).

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In the Supreme Court of the United States

No.

IN RE UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

*ON PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK*

PETITION FOR A WRIT OF MANDAMUS

The Solicitor General, on behalf of the United States Department of Commerce, the Secretary of Commerce, the United States Census Bureau, and the Acting Director of the United States Census Bureau, respectfully petitions for a writ of mandamus to the United States District Court for the Southern District of New York. In the alternative, the Solicitor General respectfully requests that the Court treat this petition as a petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in this case denying mandamus relief.

OPINIONS BELOW

The oral order of the district court (App. 28a-110a) is unreported. The written order of the district court (App. 24a-27a) is not published in the Federal Supplement but is available at 2018 WL 5260467. The opinion and order of the district court (App. 9a-23a) is not yet reported in the Federal Supplement but is available at 2018 WL 4539659. The orders of the court of appeals (App. 1a-4a; 5a-8a) are unreported.

(1)

JURISDICTION

The orders of the district court were entered on July 3, August 17, and September 21, 2018. The orders of the court of appeals were entered on September 25 and October 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1651 or, in the alternative, 28 U.S.C. 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

Pertinent constitutional and statutory provisions are reprinted at App. 130a-133a.

STATEMENT

1. The Constitution requires that an “actual Enumeration” of the population be conducted every ten years to apportion Representatives in Congress among the States, and vests Congress with the authority to conduct that census “in such Manner as they shall by Law direct.” U.S. Const. Art. I, § 2, Cl. 3. The Census Act, 13 U.S.C. 1 *et seq.*, delegates to the Secretary of Commerce the responsibility to conduct the decennial census “in such form and content as he may determine,” and “authorize[s] [him] to obtain such other census information as necessary.” 13 U.S.C. 141(a). The United States Census Bureau assists the Secretary in the performance of this responsibility. See 13 U.S.C. 2, 4. The Act directs that the Secretary “shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.” 13 U.S.C. 5. Nothing in the Act directs the content of the questions that are to be included in the decennial census.

2. With the exception of 1840, decennial censuses from 1820 to 1880 asked for citizenship or birthplace in some form, and decennial censuses from 1890 through

1950 specifically requested citizenship information. 315 F. Supp. 3d 766, 776-777.

Citizenship-related questions continued to be asked of some respondents after the 1950 Census. In 1960, the Census Bureau asked 25% of the population for the respondent's birthplace and that of his or her parents. 315 F. Supp. 3d at 777-778. Between 1970 and 2000, the Census Bureau distributed a detailed "long form" questionnaire to a sample of the population (one in five households in 1970, one in six thereafter) in lieu of the "short form" questionnaire sent to the majority of households. See *id.* at 778. The long-form questionnaire included questions about the respondent's citizenship or birthplace, while the short form did not. *Ibid.*

Beginning in 2005, the Census Bureau began collecting the more extensive long-form data—including citizenship data—through the American Community Survey (ACS), which is sent yearly to about one in 38 households. 315 F. Supp. 3d at 778-779. Replacing the decennial long-form census with the yearly ACS enabled the 2010 census to be a "short-form-only" census. The 2020 census will also be a "short-form-only" census. The ACS will continue to be distributed each year, as usual, to collect additional data, and will continue to include a citizenship question.

Because the ACS collects information from only a small sample of the population, it produces annual estimates only for "census tract[s]" and "census-block groups." See U.S. Census Bureau, *Geography*, www.census.gov/geo/reference/webatlas/blocks.html. The decennial census attempts a full count of the people in each State and produces population counts as well as counts of other, limited information down to the smallest geographic level, known as the "census block." *Ibid.* As in

past years, the 2020 census questionnaire will pose a number of questions beyond the total number of individuals residing at a location, including questions regarding sex, Hispanic origin, race, and relationship status.

3. On March 26, 2018, the Secretary of Commerce issued a memorandum reinstating a citizenship question on the 2020 Census questionnaire and setting forth his reasons for doing so. App. 136a-151a. The Secretary issued the memorandum in response to a December 12, 2017 letter (Gary Letter) from the Department of Justice (DOJ). App. 152a-157a.

The Gary Letter stated that block-level citizenship data would be useful to DOJ's enforcement of Section 2 of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 (Supp. IV 2016), for several reasons, including that the decennial census questionnaire would provide more granular citizenship voting age population (CVAP) data than the ACS surveys. App. 152a-157a. Accordingly, DOJ "formally request[ed] that the Census Bureau reinstate into the 2020 Census a question regarding citizenship." App. 152a.

After receiving DOJ's formal request, the Secretary "initiated a comprehensive review process led by the Census Bureau," App. 136a, and asked the Census Bureau to evaluate the best means of providing the data identified in the letter. The Census Bureau initially presented three alternatives, one of which was simply to add the citizenship question to the decennial census. App. 139a-143a. After reviewing those alternatives, the Secretary asked the Census Bureau to consider a fourth option: reinstating a citizenship question on the decennial census while also using federal and state administrative records. App. 143a. Ultimately, the Secretary concluded that this fourth option would provide DOJ

with the most complete and accurate CVAP data. App. 143a-144a.

The Secretary also observed that collecting citizenship data in the decennial census has a long history and that the ACS has included a citizenship question since 2005. App. 138a. The Secretary therefore found, and the Census Bureau confirmed, that “the citizenship question has been well tested.” *Ibid.* He further confirmed with the Census Bureau that census-block-level citizenship data is not available from the ACS. *Ibid.*

The Secretary considered but rejected concerns that reinstating a citizenship question would reduce the response rate for noncitizens. App. 140a-142a, 144a-147a. While the Secretary agreed that a “significantly lower response rate by noncitizens could reduce the accuracy of the decennial census and increase costs for non-response follow up * * * operations,” he concluded that “neither the Census Bureau nor the concerned stakeholders could document that the response rate would in fact decline materially” as a result of reinstating a citizenship question. App. 140a. Based on his discussions with outside parties, Census Bureau leadership, and others within the Department of Commerce, the Secretary determined that, to the best of everyone’s knowledge, there is limited empirical data on how reinstating a citizenship question might affect response rates. App. 140a-142a, 145a. So despite the hypothesis “that adding a citizenship question could reduce response rates, the Census Bureau’s analysis did not provide definitive, empirical support for that belief.” App. 142a. The Secretary further explained that the Census Bureau intends to take steps to conduct respondent and stakeholder outreach in an effort to mitigate any impact on response rates of including a citizenship question. App. 147a.

The Secretary also emphasized that “[c]ompleting and returning decennial census questionnaires is required by Federal law,” meaning that concerns regarding a reduction in response rates were premised on speculation that some will “violat[e] [a] legal duty to respond.” App. 150a. In light of these considerations, the Secretary concluded that “even if there is some impact on responses, the value of more complete and accurate [citizenship] data derived from surveying the entire population outweighs such concerns.” *Ibid.*

A few months later, Secretary Ross issued a supplemental memorandum to clarify the informal procedures that led to the Gary Letter and his initial memorandum. App. 134a-135a. The Secretary explained that, “[s]oon after [his] appointment,” he “began considering various fundamental issues” regarding the 2020 Census, including whether to reinstate a citizenship question. App. 134a. As part of the Secretary’s deliberative process, he and his staff “consulted with Federal governmental components and inquired whether the Department of Justice (DOJ) would support, and if so would request, inclusion of a citizenship question as consistent with and useful for the enforcement of [the] Voting Rights Act.” *Ibid.* The result was the Gary Letter, which then triggered the Department of Commerce’s formal “hard look.” App. 136a.

4. a. Respondents (plaintiffs below) are governmental entities (including States, cities, and counties) and non-profit organizations. The operative complaints allege that the Secretary’s action violates the Enumeration Clause; is arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*; and denies equal protection by discriminating against racial minorities. See 18-cv-5025 Compl. ¶¶ 193-212;

18-cv-2921 Second Am. Compl. ¶¶ 178-197.¹ All of the claims rest on the premise that reinstating a citizenship question will reduce the self-response rate to the census because, notwithstanding the legal duty to answer the census, 13 U.S.C. 221, some households containing at least one noncitizen may be deterred from doing so (and those households will disproportionately contain racial minorities). Respondents maintain that Secretary Ross's stated reasons in his memorandum are pretextual, and that his decision was driven by secret reasons, including animus against minorities.

Respondents announced their intention to seek extra-record discovery before the administrative record had been filed. At a May 9, 2018 hearing, respondents asserted that "an exploration of the decision-makers' mental state" was necessary and that extra-record discovery on that issue, including deposition discovery, was thus justified, "prefatory to" the government's production of the administrative record. 18-cv-2921 D. Ct. Doc. 150, at 9.

b. At a July 3 hearing, the district court granted respondents' request for extra-record discovery over the government's objections. App. 93a-100a. The court concluded that respondents had made a sufficiently strong showing of bad faith to warrant extra-record discovery. App. 98a. The court offered four reasons to support this

¹ Challenges to the Secretary's decision have also been brought in district courts in California and Maryland. See *California v. Ross*, No. 18-cv-1865 (N.D. Cal. filed Mar. 26, 2018); *Kravitz v. United States Dep't of Commerce*, No. 18-cv-1041 (D. Md. filed Apr. 11, 2018); *City of San Jose v. Ross*, No. 18-cv-2279 (N.D. Cal. filed Apr. 17, 2018); *La Union Del Pueblo Entero v. Ross*, No. 18-cv-1570 (D. Md. filed May 31, 2018).

determination. First, the Secretary’s supplemental memorandum “could be read to suggest that the Secretary had already decided to add the citizenship question before he reached out to [DOJ]; that is, that the decision preceded the stated rationale.” *Ibid.* Second, the record submitted by the Department of Commerce “reveals that Secretary Ross overruled senior Census Bureau career staff,” who recommended against adding a question. App. 98a-99a. Third, the Secretary used an abbreviated decisionmaking process in deciding to reinstate a citizenship question, as compared to other instances in which questions had been added to the census. App. 99a. Fourth, respondents had made “a *prima facie* showing” that the Secretary’s stated justification for reinstating a citizenship question—that it would aid DOJ in enforcing the VRA—was “pretextual” because DOJ had not previously suggested that citizenship data collected through the decennial census was needed to enforce the VRA. App. 99a-100a.

Following that order, the government supplemented the administrative record with over 12,000 pages of documents, including materials reviewed and created by direct advisors to the Secretary. The government also produced additional documents in response to discovery requests, including nearly 11,000 pages from the Department of Commerce and more than 14,000 pages from DOJ. This Office is informed that those totals have since risen to more than 21,000 pages from the Department of Commerce and more than 128,000 pages from DOJ. Respondents have also deposed several senior Census Bureau and Department of Commerce officials, including the Acting Director of the Census Bureau and the Chief of Staff to the Secretary. Although the government strongly objected to the bad-faith finding and

subsequent discovery, it initially chose to comply rather than seek the extraordinary relief of mandamus.

c. On July 26, the district court dismissed respondents' Enumeration Clause claims. See 315 F. Supp. 3d at 799-806. The court did not dismiss respondents' APA and equal protection claims, concluding that respondents had alleged sufficient facts to demonstrate standing at the motion-to-dismiss stage, *id.* at 781-790; that respondents' claims were not barred by the political question doctrine, *id.* at 790-793; that the conduct of the census was not committed to the Secretary's discretion by law, *id.* at 794-799; and that respondents' allegations, accepted as true, stated a plausible claim of intentional discrimination, *id.* at 806-811.

d. On August 17, the district court entered an order compelling the deposition testimony of the Acting Assistant Attorney General (AAG) for the Department of Justice's Civil Rights Division, John M. Gore.² App. 24a-27a. The court concluded that Acting AAG Gore's testimony was "plainly 'relevant'" to respondents' case in light of his "apparent role" in drafting the Gary Letter, and concluded that he "possesses relevant information that cannot be obtained from another source." App. 25a.

On September 7, 2018, the government filed a petition for a writ of mandamus (and request for an interim stay) with the Second Circuit, asking to quash Acting AAG Gore's deposition. See 18-2652 C.A. Pet. for Writ of Mandamus. The government also sought to halt further extra-record discovery because that discovery was

² On October 11, 2018, the Senate confirmed Eric S. Dreiband as Assistant Attorney General for the Civil Rights Division. Mr. Gore was, however, the Acting AAG at all times relevant to this dispute.

based on the same erroneous bad-faith finding underlying the deposition order. On September 25, the court of appeals denied the petition, explaining that it could not “say that the district court clearly abused its discretion in concluding that [respondents] made a sufficient showing of ‘bad faith or improper behavior’ to warrant limited extra-record discovery,” including Acting AAG Gore’s deposition. App. 7a. On October 2, 2018, the Second Circuit declined to stay Acting AAG Gore’s deposition or other discovery. 18-2652 C.A. Doc. 74.

e. Meanwhile, respondents moved for an order compelling the deposition of Secretary Ross, and, on September 21, the district court entered an order compelling the deposition and denying a stay pending mandamus. App. 9a-23a. The court recognized that court-ordered depositions of high-ranking government officials are highly disfavored, but nonetheless concluded that “‘exceptional circumstances’” existed that “compel[led] the conclusion that a deposition of Secretary Ross is appropriate.” App. 10a-11a (citation omitted). The court reasoned that exceptional circumstances were present because, in the court’s view, “the intent and credibility of Secretary Ross” were “central” to respondents’ claims, and Secretary Ross has “‘unique first-hand knowledge’” about his reasons for reinstating a citizenship question that cannot “‘be obtained through other, less burdensome or intrusive means.’” App. 16a, 18a (citation omitted).

In concluding that Secretary Ross’s deposition was necessary, the district court rejected the government’s contention that the information respondents sought could be obtained from other sources, including a deposition under Federal Rule of Civil Procedure 30(b)(6), interrogatories, or requests for admission. App. 19a. The

court found these alternatives unacceptable because they would not allow respondents to assess Secretary Ross's credibility or to ask him follow-up questions. *Ibid.* The court also believed that a deposition would be a more efficient use of the Secretary's time, because additional interrogatories, depositions, or requests for admissions would also burden the Secretary. *Ibid.*

On September 27, 2018, the government filed a petition for a writ of mandamus (and request for an interim stay) with the Second Circuit, asking to quash Secretary Ross's deposition. See 18-2856 C.A. Pet. for Writ of Mandamus. The government also sought a stay to preclude the depositions of Secretary Ross and Acting AAG Gore and to preclude further extra-record discovery pending this Court's review. *Id.* at 31-32. On October 9, the court of appeals denied the petition, holding that the district court had not clearly abused its discretion in finding that "only the Secretary himself would be able to answer the Plaintiffs' questions." App. 3a.

5. In the meantime, on October 3, 2018, the government filed a stay application in this Court, No. 18A350, pending disposition of all further proceedings, including the government's forthcoming petition for a writ of mandamus or, in the alternative, certiorari. On October 5, Justice Ginsburg denied the stay without prejudice, "provided that the Court of Appeals will afford sufficient time for either party to seek relief in this Court before the depositions in question are taken." 18A350 Docket. Acting AAG Gore's deposition had been set to begin at 9 a.m. on October 10, and Secretary Ross's on October 11. The government therefore renewed its stay request in the Second Circuit. 18-2856 C.A. Doc. 44 (Oct. 5, 2018). On October 9, the court of appeals stayed Secretary Ross's deposition for only 48 hours, App. 4a, and

Acting AAG Gore’s deposition for only 36 hours, 18-2652 C.A. Doc. 81 (Oct. 9, 2018).

Accordingly, the government renewed its stay application in this Court, No. 18A375, on October 9, 2018. Justice Ginsburg entered an administrative stay that same day. On October 22, 2018, the Court granted a stay as to the September 21 order compelling Secretary Ross’s deposition, to “remain in effect until disposition of [this] petition,” as long as it was filed “by or before October 29, 2018 at 4 p.m.” (which it was). 18A375 slip op. 1. The Court denied a stay as to Acting AAG Gore’s deposition and further extra-record discovery into Secretary Ross’s mental processes, but did “not preclude the [government] from making arguments with respect to those orders.” *Ibid.*

Justice Gorsuch, joined by Justice Thomas, would have “take[n] the next logical step and simply stay[ed] all extra-record discovery pending [this Court’s] review” because the depositions and the extra-record discovery all “stem[] from the same doubtful bad faith ruling.” 18A375 slip op. 3. Justice Gorsuch also expressed concern about “the need to protect the very review [this Court] invite[s].” *Ibid.* “One would expect that the Court’s order today would prompt the district court to postpone the scheduled trial and await further guidance. After all, that is what normally happens when we grant certiorari or indicate that we are likely to do so in a case where trial is imminent.” *Ibid.*

On October 26, 2018, however, both the district court (App. 111a-129a) and the Second Circuit (18-2856 C.A. Doc. 75) denied the government’s motion to stay the November 5 trial date. Among other reasons, the district court faulted the government because it had been “given the opportunity to file a summary judgment motion” in

a September 30 order, but “elected not to file such a motion.” App. 112a. The September 30, 2018 order stated that “the [c]ourt remains *firmly convinced* that a trial will be necessary” and that “it seems *quite clear* from the existing record that there will be genuine disputes of material fact precluding summary judgment.” 18-cv-2921 Docket entry No. 363 (emphases added). Accordingly, the court said that although it would “not bar [the government] from making a motion for summary judgment,” the government “would be far better off devoting [its] time and resources to preparing [its] pre-trial materials than to preparing summary judgment papers.” *Ibid.*

Acting AAG Gore was deposed on October 26, 2018.

REASONS FOR GRANTING THE PETITION

Secretary Ross reinstated to the decennial census a wholly unremarkable question asking about citizenship—as had been asked of at least a sample of the population on all but one decennial census from 1820 to 2000, and as has been (and continues to be) asked of a small sample of the population on annual ACS surveys for the last 13 years. Respondents speculate that some people in some households with unlawfully present aliens might refuse to answer the question (despite their legal obligation to do so) and that Secretary Ross’s decision to ask the question despite this speculative possibility was driven by secret motives, including animus against racial minorities. On this novel theory, the district court ordered discovery outside the administrative record to probe Secretary Ross’s mental processes when he made his decision, including by compelling the depositions of Secretary Ross and other high-ranking Executive Branch officials.

The district court’s orders defy decades of settled law establishing that in a challenge to agency action,

“the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.” *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). And the orders defy equally well settled law establishing that plaintiffs challenging agency action may not probe the subjective mental processes of the agency decisionmaker, especially by compelling his testimony. *United States v. Morgan*, 313 U.S. 409, 421-422 (1941) (*Morgan II*). Although this Court has recognized a narrow exception where the plaintiffs make “a strong showing of bad faith or improper behavior,” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), the district court clearly erred in applying that exception here.

Accordingly, the Court should issue a writ of mandamus to the district court, ordering it to (1) halt the deposition of Commerce Secretary Ross; (2) exclude from its consideration the extra-record discovery that has already been produced, including Acting AAG Gore’s testimony; and (3) confine its review of the Secretary’s decision to the administrative record. A court may issue a writ of mandamus when (1) the petitioner’s “right to issuance of the writ is ‘clear and indisputable’”; (2) “no other adequate means [exist] to attain the relief he desires”; and (3) “the writ is appropriate under the circumstances.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (quoting *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-381 (2004)) (brackets in original). Each of those prerequisites for mandamus relief is met here.

The district court’s rationale for its “highly unusual” orders, 18A375 slip op. 2 (opinion of Gorsuch, J.), is that there is strong evidence that Secretary Ross acted in

bad faith because, whether or not the reasons in the administrative record are objectively valid, he allegedly had secret motives in deciding to reinstate the citizenship question. But as long as the Secretary sincerely believed the grounds on which he formally based his decision, and did not irreversibly prejudge the decision or act on a legally forbidden basis, any additional subjective reasons or motives he might have had do not constitute bad faith. The district court thus has no authority to review the Secretary’s decision on anything but the administrative record. And because the district court and the court of appeals have refused to reconsider or even stay the orders compelling extra-record discovery—indeed, the district court has, contrary to what “[o]ne would expect,” *id.* at 3, thus far refused even to stay the two-week trial set to begin on November 5—mandamus is the only adequate and appropriate means to give the government relief.

In the alternative, the Court could construe this petition as a petition for a writ of certiorari, grant the writ, and reverse the court of appeals’ refusal to grant mandamus relief. If the Court so chooses, the government respectfully requests that this petition be resolved without an additional round of duplicative briefing and the delay that would entail. All parties agree that finalizing the decennial census questionnaire is time-sensitive, and so the district court’s review of respondents’ challenges should occur only once, thereby leaving sufficient time for appellate review. It is thus important to resolve as soon as possible whether the district court’s review should take the form of a trial, with extra-record evidence into the Secretary’s mental processes, or whether the court should resolve respondents’ claims solely on the administrative record.

A. The Government’s Right To Mandamus Relief Is Clear And Indisputable

1. *The district court clearly and indisputably erred in allowing discovery beyond the administrative record to probe the Secretary’s mental processes*

“This Court has recognized, ever since *Fletcher v. Peck*, 6 Cranch 87, 130-131 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government.” *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). In part for that reason, “[t]he APA specifically contemplates judicial review” only on the basis of “the record the agency presents to the reviewing court.” *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); see *Camp*, 411 U.S. at 143. This Court has “made it abundantly clear” that APA review focuses on the “contemporaneous explanation of the agency decision” that the agency rests upon. *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 549 (1978) (citing *Camp*, 411 U.S. at 143).

Accordingly, courts must “confin[e] * * * review to a judgment upon the validity of the grounds upon which the [agency] itself based its action.” *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). The agency decision must be upheld if the record reveals a “rational” basis supporting it. *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). Conversely, if the record supplied by the agency is inadequate to support the agency’s decision, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Florida Power & Light Co.*, 470 U.S. at 744. Either way, “the focal point for judicial review should

be the administrative record already in existence, not some new record made initially in the reviewing court.” *Camp*, 411 U.S. at 142. The administrative record is hardly sparse; it comprises “all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency’s position.” *Thompson v. United States Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (citation omitted).³

This Court has recognized a narrow exception to the general rule prohibiting discovery beyond the administrative record if there is “a strong showing of bad faith or improper behavior.” *Overton Park*, 401 U.S. at 420. Respondents did not make this “strong showing” here. In nevertheless allowing extra-record discovery into the Secretary’s mental processes, the district court made two critical errors.

a. The district court improperly “assum[ed] the truth of the allegations in [respondents’] complaints,” App. 100a, and drew disputed inferences in respondents’ favor. That approach is deeply misguided. It is inconsistent with the requirement that plaintiffs make a “strong showing”—not just an allegation that passes some minimum threshold of plausibility—before taking the extraordinary step of piercing the administrative record to examine a decisionmaker’s mental processes. *Overton Park*, 401 U.S. at 420. It is inconsistent with the presumption of regularity, which requires courts to presume that executive officers act in good faith. See

³ As the district court recognized (App. 101a), respondents cannot evade these principles by pointing to their constitutional claims because the APA governs those claims too. See 5 U.S.C. 706(2)(B) (providing cause of action to “set aside agency action” “contrary to constitutional right”); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

United States v. Armstrong, 517 U.S. 456, 464 (1996); cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). And it is inconsistent with principles of inter-Branch comity, which caution against imputing bad faith to officials of a coordinate Branch—particularly a Senate-confirmed, Cabinet-level constitutional officer. See *Cheney*, 542 U.S. at 381. Instead, as discussed below, the court seemed to go out of its way to adopt the most uncharitable reading possible of the Secretary’s actions.

b. The district court also fundamentally misunderstood what a showing of “bad faith or improper behavior” requires in this context. That high standard is not triggered even if an agency decisionmaker favors a particular outcome before fully considering and deciding an issue, or has additional reasons for the decision beyond the ones expressly relied upon. Were that enough to constitute “bad faith,” extra-record review would be the rule rather than the rare exception. Instead, an “extraordinary claim of bad faith against a coordinate branch of government requires an extraordinary justification.” 18A375 slip op. 2 (opinion of Gorsuch, J.). Allegations of mere pretext, therefore, are insufficient; for as long as the decisionmaker sincerely believes the stated grounds on which he ultimately bases his decision, and does not irreversibly prejudge the decision or act on a legally forbidden basis, neither initial inclinations nor additional subjective motives constitute bad faith or improper bias. See *Jagers v. Federal Crop Ins. Corp.*, 758 F.3d 1179, 1184-1185 (10th Cir. 2014) (“subjective hope” that factfinding would support a desired outcome does not “demonstrate improper bias on the part of agency decisionmakers”). The court continues to misunderstand this point, repeatedly conflating “pretext” with

“bad faith” in its most recent order declining to stay the November 5 trial date. App. 123a-124a.

The court relied on four circumstances that do not, individually or taken together, constitute a “strong showing” of bad faith or improper behavior entitling respondents to venture beyond the administrative record to probe the Secretary’s mental processes. And in its latest order denying a stay of trial, the district court added a fifth—that the Secretary “provided false explanations of his reasons,” App. 124a—that is similarly infirm.⁴

i. The district court concluded that Secretary Ross’s supplemental memorandum “could be read to suggest” that the Secretary had already decided to add the citizenship question before he reached out to DOJ. App. 98a. But the memorandum, fairly read, says only that the Secretary *“thought* reinstating a citizenship question *could be warranted,”* and so reached out to DOJ and other officials to ask if they would support it. App. 134a (emphases added). That does not indicate prejudgment; it simply shows that the Secretary was leaning in favor of adding the question at the time. “[T]here’s nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, [and] soliciting support from other agencies to bolster his views.” 18A375 slip op. 2 (opinion of Gorsuch, J.). As the D.C. Circuit has explained in a related context, it “would eviscerate the proper evolution of policymaking were we to disqualify every administrator who has opinions on the correct course of his agency’s future actions.”

⁴ The district court also cited several cases that, in its view, demonstrate that lower courts routinely order discovery beyond the administrative record in APA cases. App. 117a, 124a. If so, that is all the more reason for this Court to intervene.

Air Transp. Ass'n of Am., Inc. v. National Mediation Bd., 663 F.3d 476, 488 (2011) (citation omitted); see *Jagers*, 758 F.3d at 1185.

Rather, to make a strong showing of pre-judgment, respondents should have to show that the Secretary “act[ed] with an ‘unalterably closed mind’” or was “‘unwilling or unable’ to rationally consider arguments.” *Mississippi Comm’n on Envtl. Quality v. EPA*, 790 F.3d 138, 183 (D.C. Cir. 2015) (per curiam) (citation omitted). Neither has been shown here. Nothing in Secretary Ross’s memoranda (or any other document) suggests that Secretary Ross would have asserted the VRA-enforcement rationale had DOJ disagreed or, conversely, that DOJ’s request made the Secretary’s decision a *fait accompli*. To the contrary, after the Secretary received the Gary Letter, he “initiated a comprehensive review process led by the Census Bureau.” App. 136a. There is no basis to conclude that this process was a sham or that Secretary Ross had an unalterably closed mind and could not or would not consider new evidence and arguments.

Nor did the Secretary’s supplemental memorandum change the Secretary’s rationale or otherwise contradict his original memorandum. The original memorandum understandably focused on the *formal* decision-making process that began with DOJ’s formal request letter. See App. 136a-151a. It is unremarkable that the memorandum did not discuss the *informal* intra- and inter-agency deliberations that preceded the formal process. Such informal deliberations are routine, and agency decision documents rarely if ever discuss them. In light of this litigation and respondents’ allegations of bad faith, the supplemental memorandum provided “further background and context” about the informal process that preceded the formal one. App. 134a. The only

way to view the two memoranda as contradictory is to ignore this context, to take respondents' speculative allegations in their complaints as true and draw all inferences in their favor, and (in circular fashion) to presume bad faith on Secretary Ross's part.

ii. The district court also relied on the fact that "Secretary Ross overruled senior Census Bureau career staff," who recommended against reintroducing a citizenship question. App. 98a-99a. But "the mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision." *Wisconsin v. City of New York*, 517 U.S. 1, 23 (1996). Indeed, "there's nothing unusual about a new cabinet secretary['] * * * disagreeing with staff." 18A375 slip op. 2 (opinion of Gorsuch, J.). That is particularly true where, as here, the Secretary explained why he disagreed with the proposals favored by the staff. Besides, the ultimate issue is one of policy—whether the benefits of reinstating the question outweigh the potential costs—and it is solely the Secretary, not his staff, "to whom Congress has delegated its constitutional authority over the census." *Wisconsin*, 517 U.S. at 23. It was thus clear legal error to treat overruling career staff as an indicium of bad faith.

iii. The district court further concluded that respondents' "allegations suggest that [the government] deviated significantly from standard operating procedures in adding the citizenship question" because it did not conduct "any testing at all." App. 99a. But, as Secretary Ross explained, the citizenship question "has already undergone the * * * testing required for new questions" because the question "is already included on the ACS." App. 148a. Therefore, "the citizenship question *has* been well tested." App. 138a (emphasis added);

see 18A375 slip op. 2 (opinion of Gorsuch, J.) (remarking that “there’s nothing unusual about * * * cutting through red tape”). The court’s crediting respondents’ allegations was thus clearly erroneous.

iv. The district court concluded that respondents had made “a *prima facie* showing” of “*pretext[]*” because DOJ had never previously “suggested that citizenship data collected as part of the decennial census * * * would be helpful let alone necessary to litigating [VRA] claims.” App. 99a. But from 1970 to 2000 DOJ *did* rely on such data from the decennial census (from the long-form questionnaire) to enforce the VRA. App. 154a. And the court never engaged with the reasons set forth in the Gary Letter for why census citizenship data would be more appropriate for VRA enforcement than ACS data, including that the latter does “not align in time with the decennial census data” used for redistricting and requires “relying on two different data sets.” App. 155a-156a. Contemporaneous emails produced in response to the court’s discovery order only reinforce the conclusion that Department of Commerce officials sincerely believed “that DOJ has a legitimate need for the question to be included.” App. 158a.

The bare fact that respondents *alleged* that “the current Department of Justice has shown little interest in enforcing the [VRA],” App. 99a, neither establishes a *prima facie* case of *Secretary Ross*’s bad faith nor calls into question DOJ’s commitment to enforce the VRA. Cf. *Armstrong*, 517 U.S. at 464 (presumption of good faith applies to Executive Branch officials). As DOJ explained in the Gary Letter, block-level citizenship data would be useful to enforce Section 2 of the VRA, which prohibits “vote dilution” by state and local officials en-

gaged in redistricting. App. 153a. Because redistricting cycles are tied to the census and the next cycle of redistricting will not begin until after the census is taken, there is little Section 2 enforcement to be undertaken at this time. Besides, DOJ’s conclusion that block-level citizenship data would be useful in enforcing Section 2 remains true regardless of whether the current administration will have the opportunity to use the information collected.

v. In its latest order denying a stay of trial, the district court also said that extra-record discovery was justified because Secretary Ross “provided false explanations of his reasons for, and the genesis of, the citizenship question—in both his decision memorandum and in testimony under oath before Congress.” App. 124a; see App. 15a (compelling the Secretary’s deposition because his credibility was “squarely at issue in these cases”). But none of the statements is false, and the court’s uncharitable inferences to the contrary ignore the context of these statements and violate the presumption of regularity. *Armstrong*, 517 U.S. at 464.

For example, contrary to the district court’s characterization, the Secretary in his March 2018 memorandum did not say he “‘set out to take a hard look’ *at adding the citizenship question ‘following receipt’*” of the Gary Letter. App. 15a (emphasis altered; brackets and citation omitted). The Secretary actually said he “set out to take a hard look *at the request*” following receipt of DOJ’s request. App. 136a (emphasis added). The Secretary never said that he had not previously considered whether to reinstate a citizenship question, or that he had not had informal discussions with other agencies or government officials before he received DOJ’s formal request.

Similarly, the Secretary’s March 20 statement to Congress that he was “responding *solely* to the Department of Justice’s request,” App. 15a (quoting 2018 WLNR 8815056), was actually in answer to a question asking whether he was also responding to requests *from third parties*. See 2018 WLNR 8815056.⁵ And the Secretary’s admittedly imprecise March 22 statement that DOJ “initiated the request for inclusion of the citizenship question,” App. 15a (quoting 2018 WLNR 8951469), was in response to a question about whether the Department of Commerce planned to include a citizenship question on the 2020 census, not a question about the Secretary’s decision-making process. See 2018 WLNR 8951469.⁶ The statement was immediately followed by an acknowledgment that he had been communicating with “quite a lot of parties on both sides of th[e] question” and that he “ha[d] not made a final decision, as yet,” on this “very important and very complicated question.” *Ibid.*

Only by ignoring the context of these statements and eliding the presumption of regularity could the district court find that the Secretary “provided false explanations.” App. 124a. Besides, even if the Secretary inaccurately suggested that DOJ initiated the informal request, it does not in any way establish that the Secretary *disbelieved* that adding a citizenship question

⁵ *Hearing to Consider FY2019 Budget Request for Department of Commerce Programs Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the House Comm. on Appropriations*, 115th Cong., 2d Sess. (2018), available at 2018 WLNR 8815056.

⁶ *Hearing on Recent Trade Actions, Including Section 232 Determinations on Steel and Aluminum Before the House Comm. on Ways and Means*, 115th Cong., 2d Sess. (2018), available at 2018 WLNR 8951469.

would be useful in VRA enforcement, or that he acted on a legally forbidden basis in adding the question.

2. *The district court clearly and indisputably erred in compelling the deposition of Secretary Ross*

Beyond improperly finding that respondents had made a “strong showing of bad faith,” *Overton Park*, 401 U.S. at 420—thereby opening the doors to discovery into Secretary Ross’s mental processes—the district court exacerbated its error by compelling the deposition of Secretary Ross himself.

a. “[A] district court should rarely, if ever, compel the attendance of a high-ranking official in a judicial proceeding.” *In re USA*, 624 F.3d 1368, 1376 (11th Cir. 2010). So said this Court in *Morgan II*, 313 U.S. at 421-422. Instead, as this Court and lower courts applying *Morgan II* and its predecessor, *Morgan v. United States*, 304 U.S. 1 (1938) (*Morgan I*), have recognized, compelling the testimony of high-ranking government officials is justified only in “extraordinary instances.” *Arlington Heights*, 429 U.S. at 268; accord, e.g., *Lederman v. New York City Dep’t of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013), cert. denied, 571 U.S. 1237 (2014); *In re United States*, 542 Fed. Appx. 944, 948 (Fed. Cir. 2013); *In re USA*, 624 F.3d at 1376; *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007); *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). That strict limitation on the compelled testimony of high-ranking officials is necessary because such orders raise significant “separation of powers concerns.” *In re USA*, 624 F.3d at 1372 (citation omitted); see *Arlington Heights*, 429 U.S. at 268 & n.18. As *Morgan II* emphasized, administrative decisionmaking and judicial processes are “collaborative instrumentalities of justice and the appropriate independence of each

should be respected by the other.” 313 U.S. at 422. “Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected.” *Ibid.* (citation omitted).

As a practical matter, requiring high-ranking officials to appear for depositions also threatens to “disrupt the functioning of the Executive Branch.” *Cheney*, 542 U.S. at 386. High-ranking government officials “have ‘greater duties and time constraints than other witnesses.’” *Lederman*, 731 F.3d at 203 (citation omitted). As a result, “[i]f courts did not limit the[] depositions [of high-ranking officials], such officials would spend ‘an inordinate amount of time tending to pending litigation.’” *Ibid.* (citation omitted). The threat to inter-Branch comity is particularly acute where, as here, the district court orders a Cabinet Secretary’s deposition expressly to test the Secretary’s credibility and to probe his deliberations with other Executive Branch officials. See App. 13a-17a.

b. The district court clearly erred in concluding that “exceptional circumstances” justify Secretary Ross’s deposition. App. 10a (citation omitted). The court’s “exceptional circumstances” finding was based on its conclusion that “the intent and credibility of Secretary Ross himself” are “central” to respondents’ claims. App. 16a. That conclusion was erroneous for the reasons above: in a challenge to an agency decision, it is “not the function of the court to probe the mental processes of the Secretary.” *Morgan II*, 313 U.S. at 422 (quoting *Morgan I*, 304 U.S. at 18).

The district court purported to find an exception to this rule in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). The court

reasoned that, to prevail on their APA claims, respondents “must show that Secretary Ross ‘relied on factors which Congress had not intended [him] to consider, . . . [or] offered an explanation for [his] decision that runs counter to the evidence before the agency.’” App. 11a (quoting *Home Builders*, 551 U.S. at 658) (brackets in original). The court then concluded that, because Secretary Ross was the decisionmaker, his deposition would aid respondents in making that showing. App. 13a. But *Home Builders* does not suggest that APA plaintiffs may look beyond the stated reasons for the agency’s decision and the administrative record to prove their claims, let alone that they should be permitted to depose a Cabinet Secretary to probe his mental processes. To the contrary, the Court emphasized that courts must “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Home Builders*, 551 U.S. at 658 (citations omitted). Here, the path Secretary Ross took to his decision to reinstate a citizenship question can readily be discerned from his decisional memorandum, his supplemental memorandum, and the extensive administrative record.

c. Nor did the district court properly evaluate whether respondents could obtain the information they sought by other means. “The duties of high-ranking executive officers should not be interrupted by judicial demands for information that could be obtained elsewhere.” *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (per curiam). To date, the Department of Commerce has given respondents thousands of pages of materials, including materials reviewed and created by the Secretary’s most senior advisers, among other discovery responses. And respondents have deposed a number of senior Census

Bureau and Department of Commerce officials. Respondents are well aware of the circumstances that led to the decision to reinstate a citizenship question. Secretary Ross's deposition is unlikely to add any material details, all the more so because much of his testimony likely would be privileged. See *Arlington Heights*, 429 U.S. at 268 (decisionmaker's testimony "frequently will be barred by privilege").

The district court barely paused to consider whether these materials satisfied respondents' informational demands. Nor did the court ask whether "the Secretary can prepare formal findings * * * that will provide an adequate explanation for his action" as an alternative to direct testimony. *Overton Park*, 401 U.S. at 420. The court refused to consider *any* alternative to deposing the Secretary—such as interrogatories, requests for admission, or a Rule 30(b)(6) deposition, all of which the government offered—because none would allow respondents to probe the Secretary's credibility or ask follow-up questions. See App. 19a.

d. Instead, the district court jumped straight to ordering a deposition on the ground that Secretary Ross had "unique first-hand knowledge" about his intent in reinstating a citizenship question. App. 11a (citation omitted). But none of the court's rationales withstands scrutiny.

i. The district court asserted that Secretary Ross was "personally and directly involved" in the decision to reinstate a citizenship question "to an unusual degree." App. 13a. Yet the court did not explain how Secretary Ross's direct participation in the decision to reinstate a citizenship question was "unusual." It is not at all exceptional for an agency head to participate actively in an agency's consideration of a significant policy decision—

particularly one that concerns, as the court described it, one of the agency head’s “most important dut[ies].” App. 22a. Nor is it “unusual” that Secretary Ross informally consulted with staff and DOJ before DOJ sent its formal request. For these reasons, courts have rejected the notion that a decisionmaker’s personal involvement in the decision qualifies as an exceptional circumstance in this context. *In re United States*, 542 Fed. Appx. at 946 (rejecting plaintiffs’ assertion that a high-ranking official’s “personal involvement in the decision-making process” provided a basis for deposing that official); *In re FDIC*, 58 F.3d 1055, 1061 (5th Cir. 1995) (that three directors of the FDIC were the only “persons responsible for making the [challenged] decision” did not justify their depositions).

ii. The district court likewise erred in concluding that Secretary Ross’s testimony was needed “to fill in critical blanks in the current record.” App. 17a. The court identified those “blanks” as “the substance and details of Secretary Ross’s early conversations” with “the Attorney General,” “interested third parties such as Kansas Secretary of State Kris Kobach,” and “other senior Administration officials.” *Ibid.* (citation omitted). But the details of Secretary Ross’s consultations with other people have no bearing on the legality of his decision to reinstate the citizenship question. “[T]he fact that agency heads considered the preferences (even political ones) of other government officials concerning how th[eir] discretion should be exercised does not establish the required degree of bad faith or improper behavior.” *In re FDIC*, 58 F.3d at 1062; see *Sierra Club v. Costle*, 657 F.2d 298, 408-409 (D.C. Cir. 1981).

The proper focus of a court’s review of Secretary Ross’s decision is on the reasons the Secretary gave for

making that decision. That some stakeholders might have had other reasons for supporting the reinstatement of a citizenship question that they shared with the Secretary is of no consequence. And it affirmatively contradicts the presumption of regularity and inter-Branch comity to impute any alleged biases of these third parties to Secretary Ross. See *Armstrong*, 517 U.S. at 464; see also *Cheney*, 542 U.S. at 381. In any event, the administrative record does reflect the substantive views of the stakeholders who communicated with Secretary Ross and the Department of Commerce, including Secretary Kobach and DOJ. See, e.g., App. 152a-157a (Gary Letter); Administrative Record 763-764 (emails from Secretary Kobach); *id.* at 765-1276 (additional communications).⁷ And to the extent respondents seek information about the Secretary’s deliberations with other government officials, those discussions likely are privileged, rendering the Secretary’s deposition both improper and futile. See *Arlington Heights*, 429 U.S. at 268 (decisionmaker’s testimony “frequently will be barred by privilege”).

B. No Other Adequate Means Exist To Attain Relief

Absent review on mandamus, the district court’s orders will effectively be unreviewable on appeal from final judgment. Secretary Ross will be forced to prepare for and attend a deposition, which cannot be undone, and the government will have to prepare for and participate in a trial with extensive evidence concerning Secretary Ross’s mental processes. The government thus has “no other adequate means” of protecting its interests aside from this petition. *Perry*, 558 U.S. at 190 (citation omitted).

⁷ A link to the administrative record, which is publicly available, is in 18-cv-2921 D. Ct. Doc. 173 (June 8, 2018).

To be sure, the government might be able to raise some of the arguments asserted in this petition following a trial in the event the district court enters a judgment in favor of respondents. But an appellate reversal at that point would hardly provide an “adequate” means of relief for the irreversible burdens of preparing for and being deposed, and preparing for and participating in a two-week trial to resolve an issue that under bedrock principles of administrative law should be resolved solely on the administrative record. *Cheney*, 542 U.S. at 380 (citation omitted); see, e.g., *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.) (granting mandamus where appeal after final judgment would not provide an “adequate” means of obtaining relief), cert. denied, 135 S. Ct. 1163 (2015); *In re Justices of Supreme Court of P.R.*, 695 F.2d 17, 20-25 (1st Cir. 1982) (Breyer, J.) (same); 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3932 (3d ed. 2012 & Supp. 2018) (citing similar cases).

Moreover, if the court of appeals or this Court were to rule in the government’s favor following a trial, the judgment would have to be vacated and the district court would have to redo its analysis of the legality of Secretary Ross’s order, this time on the administrative record alone. That sequence of events could potentially leave insufficient time for orderly appellate review before the decennial census questionnaire needs to be finalized.⁸ It is thus in all parties’ interest that the dis-

⁸ The district court’s proposed solution—to conduct *two* proceedings in parallel, one based on the administrative record and one a trial with evidence into Secretary Ross’s mental processes, App. 114a—would impose all of the same harms on the government and would be needlessly complex. As explained in the government’s

trict court review respondents’ challenges to the Secretary’s decision only once, and so it is critical that the question whether the district court must confine itself to the administrative record be definitively resolved *before* the court undertakes that review.

C. Mandamus Is Appropriate Under The Circumstances

As this Court has recognized, “mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch’s ability to discharge its constitutional responsibilities.” *Cheney*, 542 U.S. at 382. Here, a Cabinet Secretary will be forced to prepare for and attend a deposition, and government lawyers will have to prepare for and participate in a trial into the Secretary’s mental processes, which will indisputably “interfer[e] with” their “ability to discharge [their] constitutional responsibilities.” *Ibid.* And document discovery—especially into the Secretary’s mental processes—also is intrusive and “burdens a coordinate branch in most unusual ways.” 18A375 slip op. 3 (opinion of Gorsuch, J.); cf. *In re United States*, 138 S. Ct. 443, 445 (2017) (per curiam). Nor is it of any moment that the extra-record discovery and the depositions (save for Secretary Ross’s) have already occurred; expeditious resolution of this petition would still foreclose Secretary Ross’s deposition and avoid the need for a wasteful trial on the legality of Secretary Ross’s order, which should be reviewed solely on the agency’s stated reasons for its action and the objective evidence in the administrative record.

simultaneously filed application for a stay and for expedition, the more appropriate course is for this Court to stay the trial and resolve this petition before the district court undertakes its analysis.

CONCLUSION

The Court should issue a writ of mandamus to the district court, ordering it to (1) halt the deposition of Secretary Ross; (2) exclude from its consideration the extra-record discovery that has already been produced, including Acting AAG Gore's testimony; and (3) confine its review of the Secretary's decision to the administrative record. In the alternative, the Court should treat this petition as a petition for a writ of certiorari, grant the petition, and reverse the court of appeals' decisions denying the petitions for writs of mandamus below. In the event the Court chooses to construe the petition as one for a writ of certiorari, the government respectfully requests that the Court forgo an additional round of briefing and the delay that would entail.

Respectfully submitted.

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OCTOBER 2018

No.

In the Supreme Court of the United States

STEPHEN M. SHAPIRO,
O. JOHN BENISEK, AND MARIA B. PYCHA
Petitioners,

v.

BOBBIE S. MACK AND LINDA H. LAMONE,
Respondents.

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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QUESTION PRESENTED

The Three-Judge Court Act requires the convening of three-judge district courts to hear a wide range of particularly important lawsuits, including constitutional challenges to the apportionment of congressional districts and certain actions under the Voting Rights Act, Bipartisan Campaign Reform Act, Prison Litigation Reform Act, and Communications Act. The Three-Judge Court Act provides that a three-judge court shall be convened to hear such cases unless the single judge to whom the case is initially referred “determines that three judges are not required.” 28 U.S.C. § 2284(a), (b)(1).

In *Goosby v. Osser*, 409 U.S. 512 (1973), this Court held that the Three-Judge Court Act “does not require the convening of a three-judge court when the [claim] is insubstantial.” *Id.* at 518. A claim is insubstantial “for this purpose” if it is “obviously frivolous,” “essentially fictitious,” or “inescapably * * * foreclose[d]” by this Court’s precedents. *Ibid.*

The question presented, which has divided the lower courts, is as follows:

May a single-judge district court determine that a complaint covered by 28 U.S.C. § 2284 is insubstantial, and that three judges therefore are not required, not because it concludes that the complaint is wholly frivolous, but because it concludes that the complaint fails to state a claim under Rule 12(b)(6)?

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PETITION FOR A WRIT OF CERTIORARI

Stephen M. Shapiro, O. John Benisek, and Maria B. Pycha respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is reported at 584 F. App'x 140. The single-judge district court's order granting respondents' motion to dismiss (App., *infra*, 3a-21a) is reported at 11 F. Supp. 3d 516.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 2014. A timely petition for rehearing en banc was denied on November 12, 2014. App., *infra*, 22a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2284, Title 28, of the U.S. Code provides:

- (a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.
- (b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:
 - (1) Upon the filing of a request for three judges, the judge to whom the request is presented

shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

- (2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.
- (3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

STATEMENT

Section 2284 of Title 28 of the U.S. Code provides that “[a] district court of three judges” shall hear any case “challenging the constitutionality of the apportionment of congressional districts” unless the single judge to whom the case is initially referred “determines that three judges are not required.” This Court has held that Section 2284 “does not require the convening of a three-judge court when the [claim] is insubstantial.” *Goosby v. Osser*, 409 U.S. 512, 518 (1973). A claim is insubstantial, the Court explained, when it is “obviously frivolous” or “inescapably” meritless. *Ibid.*

This case involves a First Amendment challenge to the 2011 reapportionment of congressional districts in Maryland. Although recognizing that Maryland’s convoluted redistricting map may violate the representational rights of a large swath of Maryland voters, a single judge declined to convene a three-judge court to consider the First Amendment claim in this case—not because the judge determined that the claim is wholly frivolous (it is not), but because, in his singular view, the complaint failed to state a First Amendment claim under Federal Rule of Civil Procedure 12(b)(6).

In taking that approach, the district court was following the Fourth Circuit’s direction in *Duckworth v. State Administration Board of Election Laws*, 332 F.3d 769 (2003). There, the Fourth Circuit held that when a complaint fails to state a claim under Rule 12(b)(6), it is by definition “insubstantial” and properly subject to dismissal without the convening of a three-judge court. The Fourth Circuit summarily affirmed the district court’s dismissal of petitioners’ complaint in this case on that basis.

That decision warrants this Court’s review. The Fourth Circuit’s interpretation of Section 2284 conflicts with this Court’s precedents and with the holdings of the D.C., Fifth, and Seventh Circuits. Because the claim at issue is non-frivolous (indeed, it should not have been dismissed at all), it should have been heard by a three-judge district court under this Court’s teachings, and it would have been heard by a three-judge district court if it had been brought in any of those other jurisdictions.

Proper resolution of the question presented is a matter of great practical importance. The issue is frequently recurring, both in apportionment challenges like this one and in many other cases brought under the Voting Rights Act, Bipartisan Campaign Reform Act, Prison Litigation Reform Act, and other statutes. Congress requires such suits to be heard by three-judge district courts precisely because they implicate important and sensitive matters: The three-judge procedure provides for direct appellate review before this Court, guaranteeing timely resolutions of time-sensitive claims. And it promotes conscientious deliberation and guards against the influence of any one judge’s predilections, ensuring greater public confidence and more accurate judicial decisionmaking. Further review is warranted.

A. Statutory background

This case concerns the Three-Judge Court Act of 1910. As since amended, the Act provides that a district court of three judges must be convened “when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body” or “when otherwise required by Act of Congress.” 28 U.S.C. § 2284(a). When a suit covered by Section

2284(a) is filed, the single-judge court to which the case is initially referred “shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge * * * to hear and determine the action or proceeding.” 28 U.S.C. § 2284(b)(1).¹

At issue here is the meaning of the phrase “unless he determines that three judges are not required.” The long-settled rule is that a three-judge court is “not required” under Section 2284(a) when “the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts.” *Gonzalez v. Automatic Emps. Credit Union*, 419 U.S. 90, 100 (1974). Because “general subject-matter jurisdiction is lacking when the claim of unconstitutionality is insubstantial” (*McLucas v. De-Champlain*, 421 U.S. 21, 28 (1975)), the Three-Judge Court Act “does not require the convening of a three-judge court” in that circumstance (*Goosby*, 409 U.S. at 518).

Tied as it is to the federal courts’ jurisdiction, the word “insubstantial” is a term of art in constitutional litigation—it means “essentially fictitious,” ‘wholly insubstantial,’ ‘obviously frivolous,’ and ‘obviously without merit.’” *Goosby*, 409 U.S. at 518 (citations omitted). In this context, “[t]he limiting words

¹ This language was initially codified at 28 U.S.C. § 2281 but was, in 1976, recodified at 28 U.S.C. § 2284. See Pub. L. No. 94-381 § 3, 90 Stat. 1119 (1976). The lower courts agree that the 1976 recodification had no impact on the question presented here. See *Kalson v. Paterson*, 542 F.3d 281, 288 n.13 (2d Cir. 2008) (citing *LaRouche v. Fowler*, 152 F.3d 974, 982 & n.7 (D.C. Cir. 1998), aff’d, 529 U.S. 1035 (2000)).

‘wholly’ and ‘obviously’ have cogent legal significance,” indicating that “claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous.” *Ibid.* In contrast, “previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281.” *Ibid.*

Once a case has been referred to a three-judge district court, “[a] single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except” that “[a] single judge shall not *** enter judgment on the merits.” 28 U.S.C. § 2284(b)(3).

Appeals in cases heard by three-judge district courts lie with this Court in the first instance, without intermediate review by the courts of appeals. 28 U.S.C. § 1253; 52 U.S.C. § 10304(a). By contrast, “dismissal[s] of a complaint by a single judge [without convening a three-judge court] are *** reviewable in the court of appeals.” *Gonzalez*, 419 U.S. at 100. In an appeal from the refusal to convene a three-judge court, however, the court of appeals is limited to deciding whether the case should have been heard by three judges and is “precluded from reviewing on the merits a case which should have originally been determined by a court of three judges” and appealed directly to this Court. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715-716 (1962) (per curiam) (citing *Stratton v. St. Louis Sw. Ry.*, 282 U.S. 10 (1930)).

B. Factual background

Following the 2010 census, the Maryland General Assembly enacted a congressional redistricting plan. See app., *infra*, 23a. The news media have de-

scribed the plan as the most gerrymandered in the Nation. See Mike Maciag, *Which States, Districts Are Most Gerrymandered?*, Governing (Oct. 25, 2012), <http://perma.cc/82PD-XBRX>; Christopher Ingraham, *America's most gerrymandered congressional districts*, Wash. Post (May 15, 2014), <http://perma.cc/WWP9-454G>.

The news media are not alone in their description of Maryland's congressional districts. In a separate case raising different claims from those presented here, Judge Niemeyer described Maryland's Third Congressional District as "reminiscent of a broken-winged pterodactyl, lying prostrate across the center of the State." *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 902 n.5 (D. Md. 2011), aff'd, 133 S. Ct. 29 (2012). The perimeter of that contorted district is an astonishing 225 miles (see Erin Cox, "*Gerrymander meander*" highlights twisted district, Baltimore Sun (Sept. 19, 2014), <http://perma.cc/3W52-XB4D>)—significantly longer than the entire east-west span of the State (see <http://perma.cc/F8YA-VYQT>).

Several other districts feature narrow, meandering ribbons linking together larger, geographically distant regions. The Sixth District, for example, connects the mountainous, westernmost region of the state with Potomac, a densely populated suburb of Washington, D.C. As District Judge Titus explained in his concurring opinion in *Fletcher*, linking these regions brings together a group of voters "who have an interest in farming, mining, tourism, paper production, and the hunting of bears *** with voters who abhor the hunting of bears and do not know what a coal mine or paper mill even looks like." 831 F. Supp. 2d at 906.

C. Procedural background

1. Petitioners—a bipartisan group of concerned Marylanders—filed a complaint in the District Court for the District of Maryland, challenging the constitutionality Maryland’s redistricting plan. As relevant here, petitioners alleged that the plan burdens their First Amendment rights “along the lines suggested by Justice Kennedy in his concurrence in *Vieth* [v. *Jubelirer*, 541 U.S. 267 (2004)].” Am. Compl. ¶ 23. See also *id.* ¶ 2 (map violates “First Amendment rights of political association”); *id.* ¶ 5 (“the structure and composition of the abridged sections constitute infringement of First Amendment rights of political association”). According to Justice Kennedy’s concurrence in *Vieth*, political gerrymanders may “impose burdens and restrictions on groups or persons by reason of their views,” which “would likely be a First Amendment violation, unless the State shows some compelling interest.” 541 U.S. at 315.

Petitioners also expressly requested the convening of a three-judge court. Am. Compl. ¶ 6.

2. A single-judge district court dismissed the case without referring the matter to a three-judge court. App., *infra*, 3a-21a. The court “recognize[d] that some early cases appear to eschew the traditional 12(b)(6) standard in favor of one that looks to whether a plaintiff’s complaint sets forth a ‘substantial question.’” App., *infra*, 7a. But, the court explained, “in the present context, the ‘substantial question’ standard and the legal sufficiency standard are one and the same” because, “where a plaintiff’s ‘pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court.’” App., *infra*, 7a-8a (quoting *Duck-*

worth, 332 F.3d at 772-773). The single-judge court therefore “appl[ied] the usual Rule 12(b)(6) standard in deciding th[e] motion.” App., *infra*, 8a.

Applying that standard, the single-judge court dismissed petitioners’ First Amendment claim on the merits. The court was “not insensitive to Plaintiffs’ contention that Maryland’s districts as they are currently drawn work an unfairness” and recognized that “[i]t may well be that the 4th, 6th, 7th, and 8th congressional districts, which are at issue in this case, fail to provide ‘fair and effective representation for all citizens.’” App., *infra*, 19a-20a (quoting *Reynolds v. Sims*, 377 U.S. 533, 565-566 (1964)).

The court nevertheless rejected petitioners’ First Amendment claim because, in its unilateral view, the claim “is not one for which relief can be granted.” App., *infra*, 21a. That is so, the court concluded, because “nothing about the congressional districts at issue in this case affects in any proscribed way Plaintiffs’ ability to participate in the political debate.” App., *infra*, 20a (internal quotation marks and alteration marks omitted). Petitioners “are free,” the court continued, “to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives.” App., *infra*, 21a (internal quotation marks omitted). On that basis, the single-judge court dismissed the claim on the merits, refusing to convene a three-judge court. *Ibid.*²

² The court also dismissed as nonjusticiable certain other claims brought under various sections of Article I and the Fourteenth Amendment. App., *infra*, 13a-20a. The merits of the court’s jusiticiability holding are not subject to challenge here. Cf. *infra*, 29 n.12.

3. The court of appeals summarily affirmed (App., *infra*, 1a-2a) and denied petitioners' request for rehearing en banc (App., *infra*, 22a).

REASONS FOR GRANTING THE PETITION

This case presents the question whether a single-judge district court may refuse to refer a non-frivolous suit governed by 28 U.S.C. § 2284(a) to a three-judge court because, in the single judge's singular view, the complaint fails to state a claim under Civil Rule 12(b)(6). In conflict with the holdings of the D.C., Fifth, and Seventh Circuits, the Fourth Circuit has held that it may.

That decision should not stand. Aside from ignoring this Court's precedents, it creates a conflict of authority among the lower courts. As a result, the Three-Judge Court Act is being applied differently in jurisdictions throughout the Nation. What is more, proper resolution of the question presented is a matter of great practical importance. Section 2284 governs not only redistricting challenges like this one, but also suits brought under the Voting Rights Act, the Prison Litigation Reform Act, Communications Act, and nearly a dozen other statutes. And this case presents a suitable vehicle with which to resolve the conflict: Petitioners' claims are not obviously frivolous and should have been decided by a three-judge panel, followed by a right of appeal directly to this Court. Further review is warranted.

A. *Duckworth* conflicts with this Court's precedents

According to the Fourth Circuit's decision in *Duckworth*, when a plaintiff's "pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district

court without convening a three-judge court.” 332 F.3d at 772-773. Thus, within the Fourth Circuit, there is “no material distinction” “between a complaint that ‘does not state a substantial claim for relief’ and the Rule 12(b)(6) standard.” *Fletcher*, 831 F. Supp. 2d at 892 (Niemeyer, J.).

The *Duckworth* rule is flatly inconsistent with this Court’s precedents in two separate respects.

First, whereas *Goosby* forbids the dismissal of a case by a single-judge court when the case involves an arguable legal theory, *Duckworth* permits it. According to *Goosby*, Section 2284 “does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial.” 409 U.S. at 518. But,

‘[c]onstitutional insubstantiality’ for this purpose has been equated with such concepts as ‘essentially fictitious,’ ‘wholly insubstantial,’ ‘obviously frivolous,’ and ‘obviously without merit.’ The limiting words ‘wholly’ and ‘obviously’ have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if ‘its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.’

Ibid. (internal citations omitted). The insubstantiality standard sets so high a bar because the consequences of its application are severe: “general subject-matter jurisdiction is lacking when the claim of unconstitutionality is insubstantial.” *McLucas*, 421 U.S. at 28.

But it hardly requires stating that, under the 12(b)(6) framework, “failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.” *Hagans*, 415 U.S. at 542 (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). Thus, the sufficiency of a complaint under Rule 12(b)(6) is “a question of law *** [that] must be decided after and not before the court has assumed jurisdiction over the controversy.” *Bell*, 327 U.S. at 682. The basis for that conclusion is evident: “[n]othing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable,” “indisputably meritless,” or “fantastic or delusional.” *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). On the contrary, “Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of [any] dispositive issue of law, *** without regard to whether [the claim] is based on an outlandish legal theory or on a close but ultimately unavailing one.” *Id.* at 326-327.

There is no way to reconcile this Court’s holding in *Goosby* with the Fourth Circuit’s decision in *Duckworth*. Indeed, *Duckworth* equates two concepts that this Court repeatedly has said are distinct. By doing so, it permits precisely what *Goosby* forbids: It allows a single-judge court to refuse to refer a non-frivolous complaint to a three-judge court based upon “previous decisions that merely render claims of doubtful or questionable merit.” 409 U.S. at 518.

Second, whereas *Idlewild* forbids the courts of appeals from ruling on the merits of a case that should have been decided by a three-judge district court, *Duckworth* frequently requires it. This conflict is fundamental: “When an application for a statutory three-judge court is addressed to a [single-judge] district court, the [single-judge] court’s inquiry is appropriately limited to determining whether the constitutional question raised is substantial, *** and whether the case presented otherwise comes within the requirements of the three-judge statute.” *Idlewild*, 370 U.S. at 715. If the requirements are met, the case must be referred to a three-judge court, appeals from which are reserved exclusively for this Court’s mandatory docket. *Gonzalez*, 419 U.S. at 97.

Thus, when a plaintiff appeals from a single-judge court’s refusal to refer a matter to a three-judge court, the court of appeals must determine whether the refusal was proper, *and no more*; it is “precluded from reviewing on the merits a case which should have originally been determined by a court of three judges.” *Idlewild*, 370 U.S. at 715-716 (citing *Stratton*, 282 U.S. at 10). That conclusion follows not only from this Court’s exclusive mandatory jurisdiction over such cases on appeal, but also from the settled rule that a court of appeals’ “jurisdiction over the merits of [a] claim[] is a function of the district court’s jurisdiction” over the claim. *Page v. Bartels*, 248 F.3d 175, 184 (3d Cir. 2001).

Duckworth turns that settled jurisdictional framework on its head. Under *Duckworth*, the Fourth Circuit must review the merits of any case dismissed under Rule 12(b)(6), even when the court ultimately determines that the dismissal was erroneous and a three-judge court should have been con-

vened. As a result, the Fourth Circuit will inevitably find itself issuing merits holdings that paradoxically deprive it of jurisdiction to issue merits holdings, in manifest conflict with *Idlewild*. There is no way around that conflict or the conflict with *Goosby*.³

B. *Duckworth* conflicts with the holdings of other courts of appeals

Unsurprisingly, *Duckworth* also conflicts with the holdings of other courts of appeals. Two other courts of appeals—the D.C. Circuit and Fifth Circuit—have confronted the question whether single-judge courts are permitted to rule on motions to dismiss and have held that they cannot. Both courts thus require single-judge district courts to refer Section 2284 cases to three-judge district courts unless the complaint is obviously frivolous. And in a different legal context, the Seventh Circuit expressly rejected the reasoning that underlies *Duckworth*. The outcome of this case would have been different in any one of those other jurisdictions.

District of Columbia Circuit. The District of Columbia Circuit’s holding in *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), aff’d, 529 U.S. 1035 (2000), expressly rejected the rule later adopted by the Fourth Circuit in *Duckworth*.

³ *Duckworth* also short-circuits Section 2284(b)(3)’s prohibition on merits rulings by single-judge courts. To be sure, “[t]he constraints imposed by § 2284(b)(3) on a single district judge’s authority to act are not triggered unless the action is one that is required, under the terms of § 2284(a), to be heard by a district court of three judges,” which is the question at issue. *Page*, 248 F.3d at 184. But according to *Duckworth*, before Section 2284-(b)(3)’s prohibition on merits rulings by single-judge courts can be “triggered,” the single-judge court *must issue a ruling on the merits*. That makes nonsense of the statutory scheme.

The plaintiff in *LaRouche* “sought the appointment of a three-judge district court to hear the case, pursuant to section 5 of the Voting Rights Act and 28 U.S.C. § 2284.” 152 F.3d at 977. But “the district court denied the application for a three-judge court and dismissed the entire complaint, with prejudice as to all defendants, pursuant to Fed. R. Civ. P. 12(b)(6).” *Ibid.*

On appeal, the D.C. Circuit held that it “lack[ed] jurisdiction to decide the merits of [the case] because the [merits] question properly belong[ed] before a three-judge district court.” *LaRouche*, 152 F.3d at 981. In reaching that conclusion, Judge Garland, writing for the court, explained that Section 2284 permits “a single judge [to] determine that three judges are not required * * * only if a plaintiff’s challenge is wholly insubstantial.” *Id.* at 982 (internal quotation marks and alteration marks omitted). A single-judge court may not, however, “determine the merits of [the] claims.” *Id.* at 981.

Thus, the D.C. Circuit rejected the Democratic National Committee’s argument that Section 2284 “permit[s] a single judge to grant a motion to dismiss” under the Rule 12(b)(6) standard. *LaRouche*, 152 F.3d at 982. According to that court, a single-judge court has no authority to “enter judgment on the merits of a claim * * * that is not ‘wholly insubstantial’ or ‘obviously frivolous.’” *Id.* at 983. And the “substantiality” necessary to get to a three-judge court requires only a “minimal” showing: “A claim is insubstantial only if its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the questions sought to be

raised can be the subject of controversy.” *Id.* at 982 (quoting *Goosby*, 409 U.S. at 518).

Finding that the claims in that case were not obviously frivolous, the D.C. Circuit held that the single-judge court erred by dismissing the plaintiff’s claims under Rule 12(b)(6) and “remand[ed] them for consideration by a three-judge court.” *LaRouche*, 152 F.3d at 986. Recognizing the difference between frivolousness and failure to state a claim, moreover, the court was careful to “say only enough to determine whether LaRouche’s claims [were] ‘obviously frivolous’ or ‘wholly insubstantial,’ and not to intimate a final view as to their merits.” *Id.* at 983.

Fifth Circuit. The Fifth Circuit took a similar approach in *LULAC of Texas v. Texas*, 113 F.3d 53 (5th Cir. 1997) (per curiam), a Voting Rights Act case. There, “[t]he district court, without convening a three-judge court, * * * concluded that no election change had occurred” during the relevant time “and dismissed appellants’ claims pursuant to Fed. R. Civ. P. 12(b)(6).” *Id.* at 55.

On appeal, the Fifth Circuit explained that Section 5 cases generally “must be referred to a three-judge court for the determination of whether the political subdivision has adopted a change covered by § 5 without first obtaining preclearance.” *LULAC*, 113 F.3d at 55. “However, where § 5 claims are ‘wholly insubstantial’ and completely without merit, such as where the claims are frivolous, essentially fictitious, or determined by prior case law, a single judge may dismiss the claims without convening a three-judge court.” *Ibid.*

Recognizing that the plaintiff’s claims were arguable, the Fifth Circuit could not “conclude that

from a legal standpoint LULAC’s claim is ‘wholly insubstantial.’” *LULAC*, 113 F.3d at 55. On that basis, the Fifth Circuit held that the single-judge court had erred by not referring the matter to a three-judge court: “Because we conclude that neither the legal nor the factual basis for LULAC’s § 5 claim is ‘wholly insubstantial,’ we reverse the district court’s order dismissing LULAC’s claim and remand for the convening of a three-judge court.” *Id.* at 56.

Seventh Circuit. The decision below is also irreconcilable with the Seventh Circuit’s decision in *Bovee v. Broom*, 732 F.3d 743 (7th Cir. 2013). As that court explained in a different legal context, “a constitutional theory can be so feeble that it falls outside federal jurisdiction.” *Id.* at 744 (citing *Goosby* and *Hagans v. Lavine*, 415 U.S. 528 (1974)). But, according to the Seventh Circuit, a dismissal under the *Goosby* standard (which calls for a decision on jurisdiction) is distinct from a dismissal under the Rule 12(b)(6) standard (which calls for a decision “on the merits”). *Ibid.* The court thus rejected the “assum[ption] that any complaint that fails to state a claim on which relief may be granted also falls outside federal subject-matter jurisdiction.” *Ibid.* Unless a claim is “obviously frivolous” (and assuming that “all [other] formal aspects of a federal claim [are] satisfied”), the claim must be “resolved on the merits rather than tossed for lack of jurisdiction.” *Ibid.*

Duckworth cannot be squared with *LaRouche*, *LULAC*, or *Bovee*. There is no doubt that this case would have been heard by a three-judge district court in the D.C., Fifth, and Seventh Circuits. Further review is therefore warranted to ensure that

Section 2284 is applied uniformly throughout the Nation.⁴

C. The question presented is important

Whether a case like this one should be dismissed by a single-judge court or instead referred to a three-judge court is a recurring matter of substantial practical importance, and this case affords an ideal opportunity to address the issue.

1. The question presented arises in a great many cases. Three-judge district courts are most commonly convened to consider matters relating to redistricting following a decennial census. Following the 2010 census—the first census conducted after *Duckworth* was decided in 2003—three-judge courts were convened in two dozen voter-right-related cases outside the Fourth Circuit.⁵ Doubtless, many of those cases

⁴ The case would likely have been referred to a three-judge court in the Second and Third Circuits, as well. The Second Circuit applied the obviously-frivolous standard in *Kalson v. Patterson*, 542 F.3d 281 (2008). The Third Circuit did the same in *Page*. And the substantiality doctrine, according to the Third Circuit, “set[s] an extremely high bar”: “To be deemed frivolous, a constitutional claim must be ‘essentially fictitious,’ ‘wholly insubstantial,’ and ‘legally speaking non-existent.’” 248 F.3d at 192 (quoting *Bailey v. Patterson*, 369 U.S. 31, 33 (1962)).

⁵ See *Arizona State Leg. v. Arizona Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014); *Evenwel v. Perry*, 2014 WL 5780507 (W.D. Tex. Nov. 5, 2014); *Harris v. Arizona Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Ariz. 2014) (per curiam), statement of jurisdiction filed, 83 U.S.L.W. 3118 (U.S. Aug. 25, 2014) (No. 14-232); *Kostick v. Nago*, 960 F. Supp. 2d 1074 (D. Haw. 2013) (per curiam), aff'd, 134 S. Ct. 1001 (2014); *Brown v. Kentucky Leg. Research Comm'n*, 966 F. Supp. 2d 709 (E.D. Ky. 2013) (per curiam); *Perez v. Texas*, 970 F. Supp. 2d 593 (W.D. Tex. 2013); *Alabama Leg. Black Caucus v. Alabama*, 988 F. Supp. 2d 1285 (M.D. Ala.

would have been dismissed (improperly, we submit) by single-judge courts if they had been filed in the Fourth Circuit.

Within the Fourth Circuit, the convening of a three-judge district court was requested in ten cases after the 2010 census, including in this one; those requests were granted in six cases⁶ and denied in

2013); *New Hampshire v. Holder*, 293 F.R.D. 1 (D.D.C. 2013); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012) (per curiam); *Essex v. Kobach*, 874 F. Supp. 2d 1069 (D. Kan. 2012) (per curiam); *Favors v. Cuomo*, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012); *James v. FEC*, 914 F. Supp. 2d 1 (D.D.C. 2012), vacated, 134 S. Ct. 1806 (2014); *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012), rev'd, 134 S. Ct. 1434 (2014); *Mi Familia Vota Educ. Fund v. Detzner*, 891 F. Supp. 2d 1326 (M.D. Fla. 2012); *NAACP v. Snyder*, 879 F. Supp. 2d 662 (E.D. Mich. 2012) (per curiam); *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), vacated and remanded, 133 S. Ct. 2885 (2013); *Desena v. Maine*, 793 F. Supp. 2d 456 (D. Me. 2011); *Little v. Strange*, 796 F. Supp. 2d 1314 (M.D. Ala. 2011) (per curiam); *Petteway v. Henry*, 2011 WL 6148674 (S.D. Tex. Dec. 9, 2011); *Schonberg v. FEC*, 792 F. Supp. 2d 14 (D.D.C. 2011) (per curiam); *Smith v. Hosemann*, 852 F. Supp. 2d 757 (S.D. Miss. 2011); *United States v. Sandoval Cnty.*, 797 F. Supp. 2d 1249 (D.N.M. 2011) (per curiam); *Clemons v. U.S. Dep't of Commerce*, 710 F. Supp. 2d 570 (N.D. Miss.), vacated, 131 S. Ct. 821 (2010); *City of Kings Mountain v. Holder*, 746 F. Supp. 2d 46 (D.D.C. 2010) (per curiam).

⁶ *Page v. Virginia State Bd. of Elections*, 15 F. Supp. 3d 657 (E.D. Va. 2014); *Somers v. South Carolina State Election Comm'n*, 871 F. Supp. 2d 490 (D.S.C. 2012); *Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C.), aff'd, 133 S. Ct. 156 (2012); *Jefferson Cnty. Comm'n v. Tennant*, 876 F. Supp. 2d 682 (S.D. W. Va.), rev'd and remanded, 133 S. Ct. 3 (2012) (per curiam); *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), aff'd, 133 S. Ct. 29 (2012); *Butler v. City of Columbia*, 2010 WL 1372299 (D.S.C. Apr. 5, 2010).

four.⁷ In three of the four denials, a single judge, sitting alone, invoked *Duckworth* to dismiss the case on the merits under Rule 12(b)(6).⁸ The question presented is therefore affecting the treatment of many challenges to the reapportionment of congressional districts.

The question presented is also relevant to many more cases outside the redistricting context. Section 2284 provides for the convocation of three-judge courts to hear any case when “otherwise required by Act of Congress.” 28 U.S.C. § 2284(a). There are over one dozen other statutory provisions that require the convening of three-judge courts under Section 2284, including several relevant to campaigning and elections, like the Voting Rights Act (52 U.S.C. §§ 10101(g), 10303(a)(5), 10304(a), 10306(c), 10504, 10701(a)(2)), the Bipartisan Campaign Reform Act (52 U.S.C. § 30110 note), and the Presidential Election Campaign Fund Act (26 U.S.C. § 9010(c)).⁹

⁷ In addition to this case, see *Gorrell v. O’Malley*, 2012 WL 226919 (D. Md. Jan. 19, 2012); *Olson v. O’Malley*, 2012 WL 764421 (D. Md. Mar. 6, 2012); *Carter v. Virginia State Bd. of Elections*, 2011 WL 1637942 (W.D. Va. Apr. 29, 2011).

⁸ Those cases included *Gorrell*, *Olson*, and this case. In addition, and notwithstanding the Third Circuit’s decision in *Page*, the Eastern District of Pennsylvania recently declined to convene a three-judge court under the *Duckworth* standard. See *Garcia v. 2011 Legislative Reapportionment Com’n*, 938 F. Supp. 2d 542, 554 (E.D. Pa. 2013) (citing *Duckworth*, 332 F.3d at 772-773). The Third Circuit affirmed on unrelated standing grounds. *Garcia v. 2011 Legislative Reapportionment Com’n*, 559 F. App’x 128 (3d Cir. 2014).

⁹ Among the notable cases heard by three-judge district courts under those statutes are *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (BCRA), *Perry v. Perez*, 132 S. Ct. 934 (2012) (VRA), *Citizens United v. FEC*, 558 U.S. 310 (2010) (BCRA), *League of*

Other statutes requiring three-judge review include the Prison Litigation Reform Act (18 U.S.C. § 3626-(a)(3)(B)), and the Communications Act (47 U.S.C. § 555(c)(1)),¹⁰ among others. See 2 U.S.C. §§ 8(b)(4), 922(a)(5); 42 U.S.C. § 2000a-5(b); 45 U.S.C. § 719.

The question presented is likely to affect many suits brought under these other important statutes. A question that recurs so frequently under so many different statutes deserves nationwide resolution.

2. The question presented is also inherently important, wholly apart from its perpetual recurrence. “Allegations of unconstitutional bias in apportionment are most serious claims.” *Vieth*, 541 U.S. at 311-312 (Kennedy, J., concurring). Congress requires the convening of three-judge courts in congressional redistricting cases because “[q]uestions regarding the legitimacy of the state legislative apportionment (and particularly its review by the federal courts) are highly sensitive matters.” *Page*, 248 F.3d at 190. “[I]n such redistricting challenges, the potential for

United Latin American Citizens v. Perry, 548 U.S. 399 (2006) (VRA), *McConnell v. FEC*, 540 U.S. 93 (2003) (BCRA), and *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (Presidential Election Campaign Fund Act). These cases remain frequently recurring. E.g., *Rufer v. FEC*, 2014 WL 4076053, at *4-5 (D.D.C. Aug. 19, 2014) (in a BCRA case, declining to reach the merits and applying the substantiality standard instead).

¹⁰ Among the notable cases heard by three-judge district courts under the PLRA and Communications Act are *Brown v. Plata*, 131 S. Ct. 1910 (2011) (PLRA), *Coleman v. Brown*, 952 F. Supp. 2d 901 (E.D. Cal. 2013) (PLRA), *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal. 2009) (PLRA), *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (Communications Act), and *National Interfaith Cable Coal., Inc. v. FCC*, 512 U.S. 1230 (1994) (Mem.) (Communications Act).

federal disruption of a state's internal political structure is great." *Ibid.* As this Court has noted, such cases typically involve "confrontations between state and federal power * * * [and the] potential for substantial interference with government administration." *Allen v. State Bd. of Elections*, 393 U.S. 544, 562 (1969).

The importance and sensitivity of redistricting challenges "counsel[] in favor of the establishment of a specialized adjudicatory machinery" (*Page*, 248 F.3d at 190) for two reasons.

First, the three-judge procedure, which bypasses review by the circuit courts and permits direct appeals to this Court, "accelerat[es] a final determination on the merits." Leland C. Nielsen, *Three-Judge Courts: A Comprehensive Study*, 66 F.R.D. 495, 499 (1975). See also 148 Cong. Rec. S2142 (2002) (three-judge courts ensure "prompt and efficient resolution of the litigation") (statement of Sen. Feingold). Speedy resolution of cases subject to Section 2284 is essential because "the length of time required to appeal through the circuit courts to the Supreme Court" may be "disrupt[ive]" to the state laws being challenged. Nielsen, 66 F.R.D. at 499-500. In voting rights cases—the merits of which are implicated in each election annually—delay may also undermine the underlying purpose of the suit: "a court order permitting a man to vote is a hollow victory, when the order is handed down after the election has been held and the votes counted." 110 Cong. Rec. 1536 (1964) (statement of Congressman McCulloch).

The difference between appeals from single-judge courts and three-judge courts thus has very real consequences. Take, for example, this Court's consideration this Term of *Arizona State Legislature v. Ari-*

zona Independent Redistricting Commission, No. 13-1314. In that case, the initial single-judge court recognized that the plaintiffs' claims were unlikely to succeed on the merits but properly referred the matter to a three-judge court because the judge could not say that "the plaintiff's constitutional claim is so obviously foreclosed *** that there can be no controversy on the issue as a matter of law." *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 2013 WL 4177067, at *3 (D. Ariz. Aug. 14, 2013). A three-judge court later granted the defendants' motion to dismiss (997 F. Supp. 2d 1047, 1056 (D. Ariz. 2014)), and an appeal was taken directly to this Court.

The course of that case would have been very different if it had arisen in the Fourth Circuit. Under *Duckworth*, the initial single-judge court would have had authority to grant the defendant's motion to dismiss without referring the matter to a three-judge court. Thus, rather than appealing immediately to this Court from a decision of a three-judge court pursuant to Section 1253, the Arizona legislature would have had to notice an appeal to the circuit court—a process that, by itself, may have dragged on for longer than two years. If the appellate court had affirmed, there would have been no review as of right before this Court. And if it had reversed, the case would have gone back down to a three-judge court, and only once that court had issued a decision on the merits would a direct appeal to this Court have been available.

Congress never intended for time-sensitive redistricting cases to be decided according to such a convoluted process; it "preserve[d] three-judge courts for cases" like this one precisely because "these issues are of such importance that they ought to be heard

by a three-judge court,” with the benefit of streamlined appellate review. *Page*, 248 F.3d at 190 (quoting S. Rep. No. 94-204 (1976), reprinted in 1976 U.S.C.C.A.N. 1988, 1996).

Second, convening three-judge courts “assure[s] more weight and greater deliberation by not leaving the fate of such litigation to a single judge.” *Phillips v. United States*, 312 U.S. 246, 250 (1941). In other words, the procedure “affords a greater likelihood of freedom from personal bias, of careful deliberation, and of recognition of the seriousness of the issue involved.” Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 Harv. L. Rev. 299, 302 (1963). This not only “reduce[s] the chance that * * * state [action will] be invalidated by the caprice or bias of a single judge” but also “quiet[s] public discontent with unpopular decisions” because “people [can] rest [more] eas[ily] under” a decision by three judges. Note, *Judicial Limitation of Three-Judge Court Jurisdiction*, 85 Yale L.J. 564, 565 & n.7 (1976) (internal quotation marks omitted).

These observations are not merely academic. It is not uncommon for a three-judge district court to decide a case by divided vote.¹¹ Such disagreement among judges in cases like this one opens the very real possibility that some cases dismissed by single-

¹¹ See *Harris*, 993 F. Supp. 2d at 1080-1090 (Silver, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 1090-1109 (Wake, J., concurring in part, dissenting in part, and dissenting from the judgment); *Alabama Leg. Black Caucus*, 988 F. Supp. 2d at 1315-1343 (Thompson, J., concurring in part and dissenting in part); *Texas*, 887 F. Supp. 2d at 190-196 (Griffith, J., dissenting in part); *Petteway*, 2011 WL 6148674, at *3-*9 (Hoyt, J., dissenting).

judge district courts under *Duckworth* would have been decided differently by courts of three judges.

Indeed, that is just what happened in a recent Voting Rights Act case in the Fifth Circuit: A single judge refused to refer the matter to a three-judge court and dismissed the case under the traditional 12(b)(6) framework. Order at 11-13, *LULAC v. Texas*, No. 5:08-cv-389 (W.D. Tex.) (Dkt. 15). The Fifth Circuit reversed and remanded with instructions to convene a three-judge court. 318 F. App'x 261 (5th Cir. 2009) (per curiam). On remand, the three-judge court denied summary judgment to the defendants (651 F. Supp. 2d 700 (W.D. Tex. 2009)), who subsequently obtained the Section 5 preclearance that the plaintiffs had argued all along was required (428 F. App'x 460, 462 (5th Cir. 2011) (per curiam)).

Page is also an instructive example. In the words of the Third Circuit, the district court's opinion denying relief in that case was "less than pellucid." 248 F.3d at 186. Cognizant of "the potentially disruptive effects that [its] actions could have on New Jersey's electoral process," the Third Circuit—sitting, of course, as a panel of three judges—issued a lengthy and fastidious opinion disagreeing with the single-judge court and "articulat[ing] [its] disposition *** with surgical accuracy." 248 F.3d at 179, 198. Against this backdrop, there is no serious question that review by a three-judge court affects the quality of judicial decisionmaking and has the potential to change outcomes on the merits.

This Court's immediate intervention is therefore imperative. Given the cyclical nature of most election-related litigation under Section 2284, there may not be another opportunity to resolve the question presented until after the next census in 2020. And by

the time such a case finally wends its way to this Court’s doors, several more cases are likely to have been improperly dismissed under *Duckworth*. Conversely, if *Duckworth* was rightly decided, many more cases outside the Fourth Circuit will have been erroneously referred to three-judge courts.

This case presents a clean, uncomplicated vehicle for resolving the question presented. The Court accordingly should take this opportunity to restore uniformity to the application of Section 2284 throughout the Nation.

D. Petitioners’ First Amendment claim is not obviously frivolous

Because petitioners’ First Amendment claim is not frivolous—indeed, it should not have been dismissed even under Rule 12(b)(6)—the single-judge district court’s application of *Duckworth* improperly deprived them of consideration of their claim by a three-judge court and an immediate appeal to this Court.

Petitioners allege that Maryland’s redistricting map violates their First Amendment rights. Giving the claim little more than the back of its hand, the single-judge court stated conclusorily that the redistricting map does not limit petitioners’ “ability to participate in the political debate in any of the Maryland congressional districts in which they might find themselves” or “to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives.” App., *infra*, 20a-21a (internal quotation marks omitted). And it asserted that First Amendment protections do not, in any event, “extend beyond those more directly, and per-

haps only, provided by the fourteenth and fifteenth amendments.” App., *infra*, 21a (internal quotation marks omitted).

None of this Court’s precedents compels those conclusions. On the contrary, Justice Kennedy’s concurrence in *Vieth*—which may be understood as the controlling opinion in that case (see *Marks v. United States*, 430 U.S. 188, 193 (1977))—confirms that citizens enjoy an essential First Amendment interest in not being “burden[ed] or penaliz[ed]” for “participation in the electoral process,” for their “voting history,” for “association with a political party,” or for “expression of political views.” 541 U.S. at 314 (citing *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality) and *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)).

Thus, “First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.” *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). “In the [specific] context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters’ representational rights.” *Ibid.* And “[i]f a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest.” *Id.* at 315.

That is just what petitioners have alleged here. Maryland’s congressional redistricting map subjects Republicans to disfavored treatment by sorting them into distant Democratic-dominated districts based on their past voting behavior and political-party affilia-

tion. In combination with Maryland’s closed primary system, the redistricting map thus “burden[s]” Republican voters on the basis of their “voting history” and “association with a political party.” *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring).

That is not all. The end result of the Maryland gerrymander is not only to penalize Republican Marylanders for exercising core First Amendment rights, but also to discourage them from further engaging in the political process *at all*, whether by association with their political party, expression of their political views, or any other form of political participation. By condemning Republicans to a Sisyphean fate, in other words, Maryland’s redistricting map (together with a closed primary system) chills those First Amendment activities that are most essential to the proper functioning of representative government.

This Court’s ballot-access cases thus offer an additional basis for measuring the burdens at issue here: “A burden that falls unequally on [particular] political parties * * * impinges, by its very nature, on associational choices protected by the First Amendment.” *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983). On this score, “[t]he inquiry is whether the challenged restriction unfairly or unnecessarily burdens the ‘availability of political opportunity.’” *Clements v. Fashing*, 457 U.S. 957, 964 (1982) (quoting *Lubin v. Panish*, 415 U.S. 709, 716 (1974)). Thus, for example, “classification schemes that impose burdens on new or small political parties or independent candidates” may violate “First Amendment interests in ensuring freedom of association” by effectively penalizing individuals’ “association with particular political parties.” *Id.* at 964-965. “Consequently, the

State may not act to maintain the ‘status quo’ by making it virtually impossible for” candidates from other parties to achieve certain measures of electoral success. *Id.* at 965. (citing *Williams v. Rhodes*, 393 U.S. 23, 25 (1968)). That is what is alleged here.

In dismissing petitioners’ First Amendment claim all the same, the lower court relied exclusively on prior opinions of the District of Maryland and the Fourth Circuit. See App., *infra*, 20a-21a (citing *Duckworth v. State Bd. of Elections*, 213 F. Supp. 2d 543, 557-558 (D. Md. 2002); *Anne Arundel Cty. Republican Cent. Comm. v. State Admin. Bd. of Elections*, 781 F. Supp. 394, 401 (D. Md. 1991); and *Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981)). But none of those cases deals with the arguments laid out above. And in any event, a claim can be substantial despite the existence of adverse circuit precedent, as, for example, when it is inconsistent with intervening Supreme Court precedent.

Against this legal backdrop, petitioners’ First Amendment claim is non-frivolous and, indeed, should not have been dismissed under the more demanding Rule 12(b)(6) standard. Petitioners accordingly were entitled to present their case to a three-judge district court.¹²

¹² If the Court grants the petition and ultimately remands the First Amendment claim for consideration by a three-judge court, it should do so with instructions to refer the entire complaint. See *Lake Carriers’ Ass’n v. MacMullan*, 406 U.S. 498, 504 n.5 (1972) (if a single claim in a complaint is properly referred to a three-judge court, “three-judge court jurisdiction exists over all of [the] claims [in the complaint],” including ones that might not independently qualify); *Page*, 248 F.3d at 187-188 (“the entire case, and not just [certain] claims, must be heard by a three-judge court”).

CONCLUSION

The petition should be granted.

Respectfully submitted.

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FEBRUARY 2015

APPENDICES

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 14-1417

O. John Benisek; Stephen M. Shapiro;
Maria B. Pycha,

Plaintiffs-Appellants,

v.

Bobbie S. Mack, Chairman; Linda H. Lamone,
Defendants-Appellees.

Appeal from the United States District Court for the
District of Maryland, at Baltimore

James K. Bredar, District Judge

(1:13-cv-03233-JKB)

Submitted: Sept. 30, 2014

Decided: Oct. 7, 2014

Before NIEMEYER and KING, Circuit Judges,
and DAVIS, Senior Circuit Judge.

PER CURIAM:

O. John Benisek, Stephen Shapiro, and Maria Pycha appeal the district court's order dismissing a civil complaint challenging, on several grounds, Maryland's congressional districting plan enacted by the state legislature in 2011. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. Benisek v. Mack, No. 1:13-cv-03233-JKB (D. Md. Apr. 8, 2014). We deny Shapiro's motion for oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

O. JOHN BENISEK, *et al.*,
Plaintiffs,

v.

BOBBIE S. MACK, Chair, Maryland State Board of
Elections, *et al.*, in their official capacities,

Defendants.

Civil No. JKB-13-3233

MEMORANDUM

O. John Benisek, Stephen M. Shapiro, and Maria B. Pycha (collectively “Plaintiffs”) brought this suit against Bobbie S. Mack, Chair of the Maryland State Board of Elections, and Linda H. Lamone, State Administrator of the Maryland State Board of Elections, (collectively “Defendants”), in their official capacities, alleging that the 2011 congressional districts established by the Maryland General Assembly violate Plaintiffs’ rights under Article I, Section 2 of the United States Constitution, as well as under the First and Fourteenth Amendments to the United States Constitution. Now pending before the Court is Defendants’ motion to dismiss for failure to state a claim (ECF No. 13). The issues have been briefed and no hearing is required. Local Rule 105.6. For the reasons set forth below, the motion will be granted.

I. BACKGROUND¹

In 2011, following the 2010 decennial census, the Maryland General Assembly enacted a congressional redistricting plan. Md. Code Ann., Elec. Law § 8-701 *et seq.*; (Am. Compl., ECF No. 11, at ¶¶ 7-8.) This plan closely followed the recommendations of the Governor’s Redistricting Advisory Committee (“GRAC”), which included the President of the Maryland Senate and the Speaker of the Maryland House of Delegates. (Am. Compl. at ¶ 8.) Several of the districts created under this plan—in particular the 4th, 6th, 7th, and 8th congressional districts—are composed of two “de-facto non-contiguous segments”—i.e., discrete segments that would be wholly non-contiguous but for the placement of one or more narrow orifices or ribbons connecting the discrete segments.” (*Id.* at ¶ 10.) Further, in each of these districts, one of the two “de-facto non-continuous segments” is “far more populous than the other as well as being socioeconomically, demographically, and politically inconsistent with the other segment” (*Id.* at ¶ 11.)

For example, Plaintiffs describe the 4th congressional district as follows²:

This district is a majority African-American district that was first developed in 1990 to account for the increasing population of African-American residents within Prince

¹ The facts are recited here as alleged by the Plaintiff, this being a motion to dismiss. See *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997).

² Plaintiffs make similar claims as to the 6th, 7th, and 8th congressional districts. (*Id.* at ¶ 12(b)-(d).).

George's County. The dominant portion of the 4th district is centered in the portion of Prince George's County within the Capital Beltway and bordering the District of Columbia. This portion of the [congressional] district contains 450,000 residents who are predominantly (74%) African-American (and 16% Hispanic and 6% white), urban, lower-middle income, and overwhelmingly Democratic voters. President Obama received 96% of the vote within this portion in 2008. This segment is attached through a narrow ribbon to the smaller segment of 185,000 residents in northeastern Anne Arundel County who are predominantly Republican voters. President Obama received 42% of the vote within this portion in 2008. These Anne Arundel residents share little in common with their Prince George's counterparts that is relevant to effective or meaningful representation.... Given the composition of this district, its Representative will be elected by the voters of the Prince George's segment, and will almost certainly be a Democrat.... As [a] practical matter, the election of the district's Representative will be determined by the Democratic primary election.

(*Id.* at ¶¶ 12(a)(1)-(2).)

On November 11, 2013, Plaintiffs filed this suit challenging "the narrow ribbons and orifices used to tie de-facto non-contiguous and demographically inconsistent segments into individual districts." (*Id.* at ¶ 2.) Specifically, Plaintiffs allege that the "non-contiguous structure and discordant composition of the separate distinct pieces comprising the 4th, 6th,

7th, and 8th [c]ongressional districts” violates their rights “of representation as protected by Article I Section 2 of the U.S Constitution,” their “right to vote for . . . Representatives to Congress, as protected by both the first and second clauses to the 14th Amendment of the U.S. Constitution,” and their “First Amendment rights of political association.” (*Id.*)

On December 2, 2013, Plaintiffs filed an amended complaint. (Am. Compl.) Defendants now move to dismiss this amended complaint for failure to state a claim for which relief can be granted. (ECF No. 13.)

II. LEGAL STANDARD

The present action challenges the “constitutionality of the apportionment of congressional districts” and is therefore required to be heard and determined by a “district court of three judges.” 28 U.S.C. § 2284(a). However, the single judge to whom the request for a three-judge panel is presented may “determine[] that three judges are not required” and “may conduct all proceedings except the trial and enter all orders permitted by the rules of civil procedure except as provided in this subsection.”³ § 2284(b)(1), (3). In particular, the single judge may grant a defendant’s motion to dismiss under Rule 12(b)(6) where a plaintiff’s pleadings fail to state a claim for which relief can be granted. *Duckworth v. State Admin. Bd. Of Election Laws*, 332 F.3d 769 (4th Cir. 2003).

³ The statute further provides that “[a] single judge shall not appoint a master, or order a reference or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits.” § 2284(b)(3).

This motion to dismiss, like all others under Rule 12(b)(6) of the Federal Rules of Civil Procedure, is a test of the legal sufficiency of a complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). See also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. v. Twombly*, 550 U.S. 544, 556-57 (2007). The Court will therefore evaluate it under the usual Rule 12(b)(6) standard.

The Court recognizes that some early cases appear to eschew the traditional 12(b)(6) standard in favor of one that looks to whether a plaintiff's complaint sets forth a "substantial question." *Faustino v. Immigration and Naturalization Services*, 302 F. Supp. 212, 213 (S.D.N.Y. 1969), aff'd 386 F.2d 449, cert. denied 391 U.S. 915; *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 884 (S.D.N.Y. 1967), aff'd 386 F.2d 449, cert. denied 391 U.S. 915. In *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 D.2d 606 (4th Cir. 1970), for example, the Fourth Circuit held that "[w]hen it appears that there is no substantial question for a three judge court to answer, dismissal of the claim for injunctive relief by the single district judge is consistent with the purpose of the three-judge statutes, and it avoids the waste and delay inherent in a cumbersome procedure." *Id.* at 611 (emphasis added); see also *Simkins v. Gressette*, 631 F.2d 287, 295 (4th Cir. 1980) ("[T]he plaintiffs have not alleged sufficient facts to raise a substantial claim requiring the convening of a three-judge court.") (emphasis added).

However, in fact, in the present context, the "substantial question" standard and the legal sufficiency standard are one and the same. In *Duckworth*, 332 F.3d 769, the Fourth Circuit clarified that where

a plaintiff's "pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court." *Id.* at 772-73. Further, in *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), a three judge panel of this Court held that "[f]or purposes of construing § 2284, we find no material distinction" between the Rule 12(b)(6) standard and the "substantial question" standard. *Id.* at 892. Therefore, the Court will apply the usual Rule 12(b)(6) standard in deciding this motion.

To pass the Rule 12(b)(6) legal sufficiency test, a complaint need only present enough factual content to render its claims "plausible on [their] face" and enable the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plaintiff may not, however, rely on naked assertions, speculation, or legal conclusions. *Bell Atl. v. Twombly*, 550 U.S. 544, 556-57 (2007). In assessing the merits of a motion to dismiss, the court must take all well-pled factual allegations in the complaint as true and construe them in the light most favorable to the Plaintiff. *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). If after viewing the complaint in this light the court cannot infer more than "the mere possibility of misconduct," then the motion should be granted and the complaint dismissed. *Iqbal*, 556 U.S. at 679.

III. ANALYSIS

Plaintiffs' complaint sets forth two claims. The first is a claim made under both Article I, Section 2 and the Fourteenth Amendment of the United States Constitution. (Am. Compl. at ¶ 2; ECF No. 18 at 28.) Specifically Plaintiffs "claim that the structure and

composition of the 4th, 6th, 7th, and 8th districts constitute impermissible abridgment of representational and voting rights.” (ECF No. 18 at 28.) The second is a claim under the First Amendment to the United States Constitution. (Am. Compl. at ¶¶ 5, 23, 32, 32; ECF No. 18 at 41.) With regard to this second claim, Plaintiffs allege that “the intentional structure and composition of the challenged districts, . . . aggravated by the operation of Maryland’s closed primary election system” infringes upon their First Amendment rights as Republican voters. (ECF No. 18 at 41.)

The Court will consider these two claims in turn. However, the Court will first address Defendants’ assertion that the present action is barred by *res judicata*.

A. Res judicata

In their motion to dismiss, Defendants assert that because the congressional redistricting plan at issue in this case was previously upheld in *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md.), *summarily aff’d* 133 S. Ct. 29, the instant lawsuit should be dismissed under principles of *res judicata*. Ultimately, however, the Court does not find Defendants’ argument persuasive.

Fletcher involved a lawsuit brought by nine African-American residents of Maryland against state election officials, in which plaintiffs alleged that the 2011 congressional redistricting plan violated “their rights under Article I, § 2, of the U.S. Constitution; the Fourteenth and Fifteenth Amendments of the U.S. Constitution; and § 2 of the Voting Rights Act of 1965 because the plan dilutes African-American voting strength within the State and intentionally dis-

criminated against African-Americans.” *Id.* at 890. Particularly relevant to the case at bar is the *Fletcher* plaintiffs’ claim that “Maryland’s redistricting plan is an impermissible partisan gerrymander. Specifically, they argue[d] that the redistricting map was drawn in order to reduce the number of Republican-held congressional seats from two to one by adding Democratic voters to the Sixth District.” *Id.* at 904. The *Fletcher* Court rejected Plaintiffs’ arguments on this count—and all other counts and entered judgment for the State on a motion for summary judgment. *Id.*

In this Circuit, “[f]or the doctrine of *res judicata* to be applicable, there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits.” *Martin v. American Bancorporation Retirement Plan*, 407 F.3d 643, 651 (4th Cir. 2005) (quoting *Pueschel v. United States*, 369 F.3d 345, 354-55 (4th Cir. 2004)). With regard to the third element, under the theory of “virtual representation,” a non-party whose interests were adequately represented by a party to the original action will be considered in privity with that original party. *Id.* However, virtual representation is narrowly defined:

The doctrine of virtual representation does not authorize application of a bar to relitigation of a claim by a nonparty to the original judgment where the . . . parties to the first suit are not accountable to the nonparties who file a subsequent suit. In addition, a party acting as a virtual representative for a nonparty must do so with at least the tacit approval of the court.

Id. (quoting *Klugh v. United States*, 818 F.2d 294, 300 (4th Cir. 1987)). The essential question in determining whether the “tacit approval” requirement is met is “whether there is a disclosed relationship in which the party is accorded authority to appear as a party on behalf of others.” *Id.* (quoting Restatement (Second) of Judgments § 36 (1), cmt. b (1982)).

Here, Defendants assert that there is an identity of the cause of action in both the present suit and the *Fletcher* suit. Indeed, Defendants offer that “[a]lthough not clear in every respect, the *Benisek* Plaintiffs’ claims focus on the shapes of the congressional district and the effect that those shapes have on voters. Those same types of claims were litigated extensively in *Fletcher*, and there can be no doubt that the three-judge court carefully reviewed the shapes of the districts.” (ECF No. 13-2 at 10.) However, at issue in *Fletcher* was the fact that “the redistricting map was drawn in order to reduce the number of Republican-held congressional seats from two to one by adding Democratic voters to the [s]ixth [d]istrict.” *Fletcher*, 831 F. Supp.2d at 904. In the case at bar, however, Plaintiffs’ claim regards the 4th, 6th, 7th and 8th congressional districts. Further, as Judge Titus wrote in his concurring opinion in *Fletcher*, the *Fletcher* plaintiffs “premised their claim of political gerrymandering on allegedly improper racial motivations.” *Id.* at 905. In contrast, the present case does not allege any such improper racial motivations. As a result the Court is unconvinced by Defendants’ argument that there is an identity of the cause of action in both this case and *Fletcher*.

In addition, the Court is not convinced by Defendants’ claim that the *Fletcher* plaintiffs virtually represented the *Benisek* Plaintiffs. Indeed, Defend-

ants' argument, in this respect, is that the "*Fletcher* plaintiffs had exactly the same interest as the *Benisek* Plaintiffs: throwing out the plan of redistricting and drawing a new one." (ECF No. 13-2 at 11.) However, even if the Court were to credit Defendants' assertion, the doctrine of virtual representation requires more in this Circuit. Indeed, "the doctrine of virtual representation does not authorize application of a bar to relitigation of a claim by a non-party to the original judgment where the . . . parties to the first suit are not accountable to the nonparties who file a subsequent suit." *Martin*, 407 F.3d at 651. Here, Defendants have not shown the Court how the *Fletcher* plaintiffs were accountable to the *Benisek* Plaintiffs.

Defendants appear to argue that because the *Fletcher* Court gave its tacit approval to the plaintiffs in that case to act as a virtual representative of "all who claimed to be aggrieved by the [redistricting] plan," they, in fact, served as virtual representatives of the *Benisek* Plaintiffs. However, while the tacit approval requirement is necessary to establish virtual representation, it is not sufficient. *Id.* ("In addition, a party acting as a virtual representative for a nonparty must do so with at least the tacit approval of the court.") (emphasis added). Defendants have failed to show that the *Fletcher* plaintiffs were accountable to the *Benisek* Plaintiffs—an independent prerequisite—and therefore have failed to persuade the Court of their virtual representation claim.

Therefore, the Court does not find that Plaintiffs' claims are barred by *res judicata*. Ultimately, however, the Court will grant Defendants' motion on dismiss on other grounds.

B. Plaintiffs' claim under Article I, Section 2 and the Fourteenth Amendment of the United States Constitution

Plaintiffs' first claim is "that the structure and composition of the 4th, 6th, 7th, and 8th [congressional] districts constitute impermissible abridgment of representational and voting rights guaranteed under Article I, Section 2 and the 14th Amendment Sections 1 & 2." (ECF No. 18 at 28.) This claim is not one that is justiciable and therefore must be dismissed.

The courts have long struggled with their role in policing the drawing of districting maps by state legislatures. Indeed, the Constitution appears to entrust the responsibility of overseeing state legislatures in this regard primarily to Congress. Article I, Section 4 gives "state legislatures the initial power to draw districts for federal elections, [but] permits Congress to 'make or alter' those districts if it wish[es]." *Vieth v. Jubelirer*, 541 U.S. 267, 275 (2010) (plurality opinion) (quoting U.S. Const. art I, § 4). However, since *Baker v. Carr*, 369 U.S. 186 (1962), Courts have "consistently adjudicated equal protection claims in the legislative districting context regarding inequalities in population between districts," giving rise to the formulation of the "one person, one vote" rule. *Davis v. Bandemer*, 478 U.S. 109, 118 (1986) (plurality opinion), rev'd on other grounds, 541 U.S. 267 (2010); *Reynolds v. Sims*, 377 U.S. 533, 557-661 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964). Further, even where there are no population inequalities among districts, courts have "reviewed, and on occasion rejected, districting plans that unconstitutionally diminished the effectiveness of the

votes of racial minorities.” *Bandemer*, 478 U.S. at 199 (collecting cases).

However, here, Plaintiffs make neither an unequal population claim nor a racial discrimination claim. Rather, Plaintiffs’ claim is that because the 4th, 6th, 7th, and 8th congressional districts are composed of “de facto non-contiguous” segments, the voters in those districts—particularly those in the smaller segment of the district—are marginalized in that they enjoy decreased quality of representation and suffer a harm akin to vote dilution. (ECF No. 1 at 29.) Theirs is, in essence, a claim of political gerrymandering.

In *Davis v. Bandemer*, the Supreme Court further expanded the judiciary’s role in overseeing the districting process. It ruled that political gerrymandering claims—or, as the Court phrased it, “claim[s] that each political group in a State should have the same chance to elect representatives of its choice as any other political group”—were justiciable. *Id.* at 124. The Court went on to explain that where unconstitutional vote dilution is alleged with regard to an individual district, courts should focus their inquiry “on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate.” *Id.* at 133.

However, the *Bandemer* standard faced harsh criticism from its inception. In her dissenting opinion, Justice O’Connor noted that the *Bandemer* opinion implicitly endorsed “some use of simple proportionality as the standard for measuring the normal representational entitlements of a political party.”

“[T]he plurality opinion,” she continued, “ultimately rests on a political preference for proportionality—not an outright claim that proportional results are required, but a conviction that the greater the departure from proportionality, the more suspect an apportionment becomes.” *Id.* at 158. The plurality’s standard, she predicted, “will over time either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality.” *Id.* at 155.

Eighteen years later, in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the Supreme Court, endorsing Justice O’Connor’s dissent, reversed *Bandemer*. Indeed, the Court found that:

Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists. As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.

Id. at 281.

In so holding, the Court distinguished political gerrymandering claims from claims involving districts of unequal population. It expressly stated that the one-person, one-vote standard had “no bearing upon this question [of political gerrymandering], neither in principle nor in practicality” *Id.* at 290. With regard to principle, echoing Justice O’Connor’s dissent in *Bandemer*, the Court explained that “to say that each individual must have an equal say in the selection of representatives, and hence that a majori-

ty of individuals must have a majority say, is not at all to say that each discernible group, whether farmers or urban dwellers or political parties, must have representation equivalent to its numbers.” *Id.* The Constitution “guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups.” *Id.* at 288.

And, with regard to practicality, the Court noted that:

the easily administrable [one-person, one-vote] standard of population equality adopted by *Wesberry* and *Reynolds* enables judges to decide whether a violation has occurred (and to remedy it) essentially on the basis of three readily determined factors—where the plaintiff lives, how many voters are in his district, and how many voters are in other districts; whereas requiring judges to decide whether a districting system will produce a statewide majority for a majority party casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon.

Id. at 290.

The Court in *Vieth* also highlighted the contrast between *political* gerrymandering claims and *racial* gerrymandering claims. On the one hand, “[t]he Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics.” *Id.* at 285. On the other hand, “the purpose of segregating voters on the basis of race is not a lawful one.” *Id.* at 286. While “[a] purpose to discriminate on the basis of race receives the strictest scrutiny under the

Equal Protection Clause, . . . a similar purpose to discriminate on the basis of politics does not.” *Id.* at 293. In rejecting a proposed test for political gerrymandering loosely based on racial discrimination cases applying § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, the Court explained:

A person’s politics is rarely as discernible—and never as permanently discernible—as a person’s race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold. These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally craft a remedy.

Vieth, 541 U.S. at 287.

Although the holding in *Vieth* was that the political gerrymandering claim advanced there was not justiciable, in a concurring opinion, Justice Kennedy, who provided the *Vieth* plurality with the crucial fifth vote, did leave open the door to judicial relief in future cases “if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.” *Id.* at 306 (Kennedy, J., concurring). In *League of United Latin American Citizens (LULAC) v. Perry*, 584 U.S. 399 (2006), the Court explained that “a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must . . . show a burden, as measured by a reliable standard, on the complainants’ representational rights.” *Id.* at 418. Nonethe-

less, this reliable standard—described in *Baker* as a “judicially discoverable and manageable standard[]”—has proved elusive. 369 U.S. at 217. As this Court noted in *Fletcher*, “all of the lower courts to apply the Supreme Court’s *Vieth* and *LULAC* decisions have rejected” parties’ proposed standards. *Fletcher*, 831 F. Supp. 2d at 904; *see also Radogno v. Illinois State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5868225 (N.D. Ill. Nov. 22, 2011) (reviewing seven standards the Supreme Court has rejected).

In the case at bar, Plaintiffs urge the Court to recognize that “constitutionally adequate representation must consist of more than just equal population,” and they offer a “standard for judging whether minimal representational rights are afforded or abridged within the smaller segments of the 4th, 6th, 7th, and 8th districts.” (Am. Compl. at ¶¶ 17, 3.) Specifically, Plaintiffs contend that “the presence of either (1) geographic or (2) demographic/political contiguity—i.e., real or de-facto contiguity or similarity in the demographic/partisan composition of non-contiguous (including essentially or de-facto non-contiguous) segments—” is required by Article I, Section 2 and the Fourteenth Amendment of the Constitution.

However, the standard Plaintiffs propose is, in substance, markedly similar to tests that have already been rejected by the courts. Indeed, Justice Kennedy in his concurring opinion in *Vieth* specifically observed that “even those criteria that might seem promising at the outset (e.g., continuity and compactness) are not altogether sound as independent judicial standards for measuring a burden on representational rights. They cannot promise politi-

cal neutrality when used as the basis for relief.” *Vieth*, 541 U.S. at 308-09; *see also* M. Altman, Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders, 17 Pol. Geography 989, 1000-1006 (1998) (explaining that compactness standards help Republicans because Democrats are more likely to live in high density regions). And, as this Court pointed out in *Fletcher*, the Supreme Court has made clear that “[t]he Constitution does not mandate regularity of district shape.” *Fletcher*, 831 F. Supp. 2d at 903 (quoting *Bush v. Vera*, 517 U.S 952, 962 (1996)).

The Court is not insensitive to Plaintiffs’ contention that Maryland’s districts as they are currently drawn work an unfairness to Republicans.⁴ Referring to Maryland’s third congressional district, Judge Niemeyer despaired that “the original Massachusetts Gerrymander looks tame by comparison, as this is more reminiscent of a broken-winged pterodactyl, lying prostrate across the center of the State.” *Id.* at 902 n.5. Further, although “Maryland’s Republican Party regularly receives 40% of the statewide vote . . . [it] might well retain only 12.5% of the congressional seats.” *Id.* at 903.

⁴ In other states, where Republicans control the state legislature, Democrats contend that they are unjustly disadvantaged by the layout of congressional districts. *See, e.g.*, Suzy Khimm, Don’t Mess with Texas Democrats, Mother Jones, Sept./Oct. 2010, <http://www.motherjones.com/politics/2010/08/matt-angle-texas-redistricting> (“The Texas Republican [Tom DeLay], known as ‘The Hammer,’ had orchestrated a Machiavellian scheme to redraw the state’s congressional districts and banish Democrats from power. In 2004, [U.S. Representative] Martin Frost was one of the four Texas Dems in the House picked off as a result.”)

It may well be that the 4th, 6th, 7th, and 8th congressional districts, which are at issue in this case fail to provide “fair and effective representation for all citizens.” *Reynolds*, 377 U.S. at 565-68. However, as the Supreme Court has made clear in *Vieth* and *LULAC*, this Court lacks “judicially discoverable and manageable standards for resolving” Plaintiffs’ claim. *Vieth*, 541 U.S. at 277-281 (quoting *Baker*, 369 U.S. at 217); *see also LULAC*, 548 U.S. at 423. As a result, it is a nonjusticiable political question. The power to address Plaintiffs’ concerns thus lies not with the judiciary but rather with the State of Maryland and the United States Congress. See United States Constitution art. I, § 4. Plaintiffs’ claim must therefore be dismissed.

C. Plaintiffs’ First Amendment Claim

Plaintiffs’ second claim is that the structure and composition of the 4th, 6th, 7th, and 8th congressional districts infringe upon their First Amendment rights of political association. (Am. Compl. at ¶ 5.) As Plaintiffs explain, “[m]uch of our contention here rests on the impact on Republican voters, due to their party affiliation, resulting from the intentional structure and composition of the challenged districts and which is aggravated by the operation of Maryland’s closed primary election system.” (ECF No. 18 at 41.)

However, just as in *Anne Arundel County Republican Central Committee v. State Administrative Board of Elections*, 781 F. Supp. 394, 401 (D. Md. 1991) and *Duckworth*, 213 F. Supp. 2d at 557-58, “nothing [about the congressional districts at issue in this case] . . . affects in any proscribed way . . . [P]laintiffs’ ability to participate in the political debate in any of the Maryland congressional districts in

which they might find themselves. They are free to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives.”

Further, as the Fourth Circuit ruled in *Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981), “to the extent [the First Amendment] protects the voting rights here asserted . . . their protections do not in any event extend beyond those more directly, and perhaps only, provided by the fourteenth and fifteenth amendments [sic].”

Accordingly, Plaintiffs’ claim under the First Amendment is not one for which relief can be granted, and it must therefore be dismissed.

IV. CONCLUSION

The Court therefore GRANTS Defendants’ motion to dismiss (ECF No. 13) without referring the present matter to a three-judge panel.

APPENDIX C

FILED: November 12, 2014

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 14-1417
(1:13-cv-03233-JKB)

O. John Benisek; Stephen M. Shapiro;
Maria B. Pycha,
Plaintiffs-Appellants,

v.

Bobbie S. Mack, Chairman; Linda H. Lamone,
Defendants-Appellees.

O R D E R

The court denies the petition for rehearing and
rehearing en banc. No judge requested a poll under
Fed. R. App. P. 35 on the petition for rehearing en
banc.

Entered at the direction of the panel: Judge
Niemeyer, Judge King, and Senior Judge Davis.

For the Court

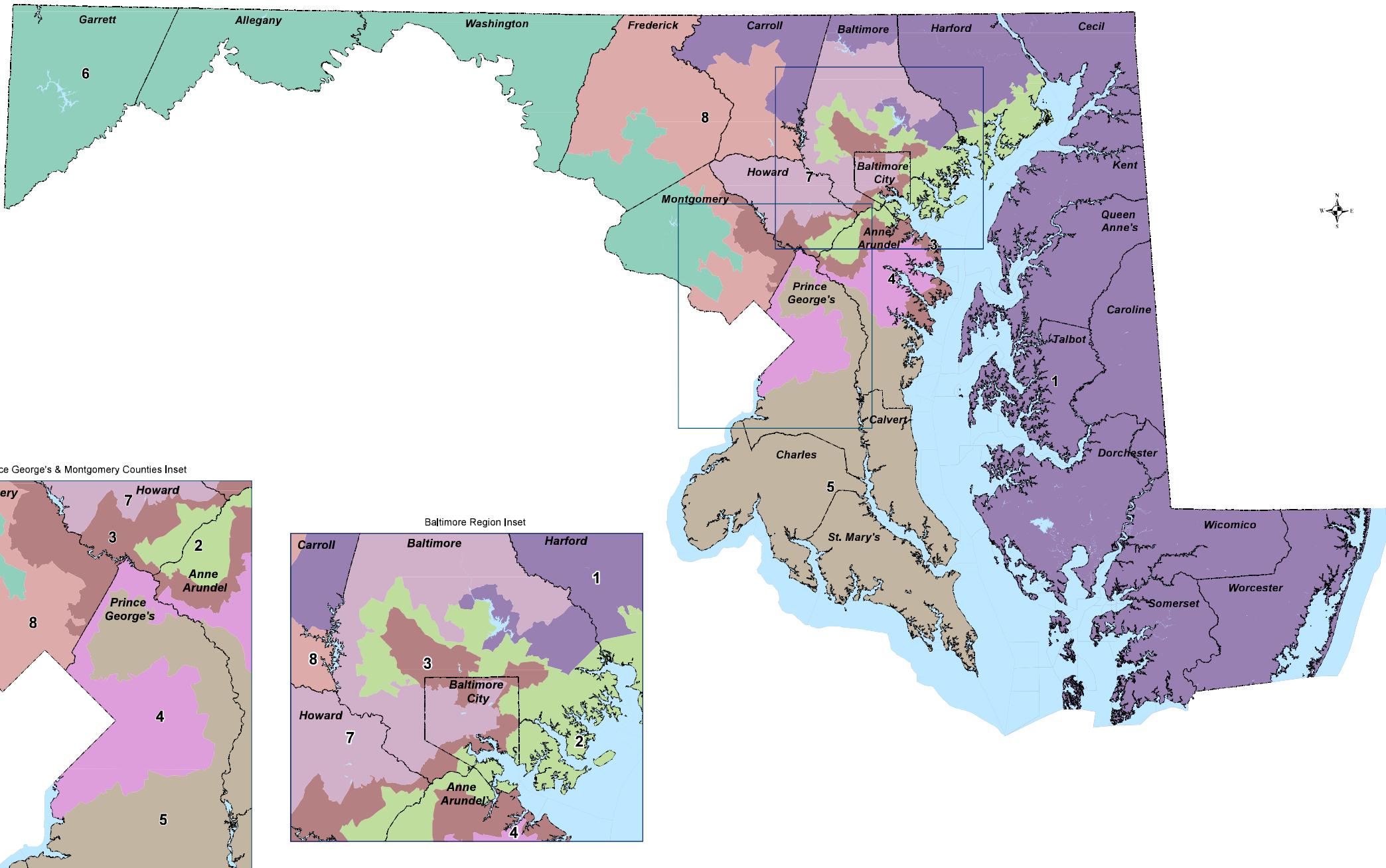
/s/ Patricia S. Connor, Clerk

APPENDIX D

Maryland 2011 Congressional Districts

Senate Bill 1

October 20, 2011



[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-15208

D.C. Docket No. 2:15-cv-00497-MHT-TFM

WEST ALABAMA WOMEN'S CENTER,
on behalf of themselves and their patients,
WILLIAM J. PARKER, M.D.,
on behalf of himself and his patients,
ALABAMA WOMEN'S CENTER,
YASHICA ROBINSON WHITE, M.D.,

Plaintiffs-Appellees,

versus

DONALD E. WILLIAMSON,
in his official capacity as State Health Officer, et al.,

Defendants,

THOMAS M. MILLER, M.D.,
in his official capacity as State Health Officer,
ATTORNEY GENERAL, STATE OF ALABAMA,
LYN HEAD,
in her official capacity as District Attorney for Tuscaloosa County,
ROBERT L. BROUSSARD,
in his official capacity as District Attorney for Madison County,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Alabama

(August 22, 2018)

Before ED CARNES, Chief Judge, DUBINA, Circuit Judge, and ABRAMS,* District Judge.

ED CARNES, Chief Judge:

Some Supreme Court Justices have been of the view that there is constitutional law and then there is the aberration of constitutional law relating to abortion.¹ If so, what we must apply here is the aberration.

* Honorable Leslie J. Abrams, United States District Judge for the Middle District of Georgia, sitting by designation.

¹ See, e.g., Whole Woman's Health v. Hellerstedt, 579 U.S. __, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting) (referring to “the Court’s habit of applying different rules to different constitutional rights — especially the putative right to abortion”); Stenberg v. Carhart, 530 U.S. 914, 954, 120 S. Ct. 2597, 2621 (2000) (Scalia, J., dissenting) (stating that the “jurisprudential novelty” in that case “must be chalked up to the Court’s inclination to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue”); Hill v. Colorado, 530 U.S. 703, 742, 120 S. Ct. 2480, 2503 (2000) (Scalia, J., dissenting) (“Because, like the rest of our abortion jurisprudence, today’s decision is in stark contradiction of the constitutional principles we apply in all other contexts, I dissent.”); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 814, 106 S. Ct. 2169, 2206 (1986) (O’Connor, J., dissenting) (“This Court’s abortion decisions have already worked a major distortion in the Court’s constitutional jurisprudence.”); id. (“Today’s decision . . . makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.”).

I. BACKGROUND

A. The Act

This case involves a method of abortion that is clinically referred to as Dilation and Evacuation (D & E). Or dismemberment abortion, as the State less clinically calls it. That name is more accurate because the method involves tearing apart and extracting piece-by-piece from the uterus what was until then a living unborn child. This is usually done during the 15 to 18 week stage of development, at which time the unborn child's heart is already beating.²

At that stage of pregnancy, it is settled under existing Supreme Court decisions that the State of Alabama cannot forbid this method of abortion entirely. See Stenberg, 530 U.S at 945–46, 120 S. Ct. at 2617. Recognizing that, the State has instead sought to make the procedure more humane by enacting the Alabama Unborn Child Protection from Dismemberment Abortion Act, which forbids dismembering a living unborn child. See Ala. Code § 26-23G-2(3).

Under the Act, the one performing the abortion is required to kill the unborn child before ripping apart its body during the extraction. See id. Killing an unborn child and then dismembering it is permitted; killing an unborn child by

² Like the district court and the parties, our references to the age of the unborn child measure the stage of a pregnancy by “gestational age.” It starts counting on the first day of the mother’s last menstrual period, as opposed to “post-fertilization age,” which starts counting weeks after that. (Fertilization happens midway through the menstrual cycle.) All numbers and statistics have been adjusted accordingly.

dismembering it is not. The parties agree that for these purposes an unborn child is alive while its heart is beating, which usually begins around six weeks. See How Your Fetus Grows During Pregnancy, Am. Coll. of Obstetricians & Gynecologists (April 2018), <http://www.acog.org/patients/faqs/how-your-fetus-grows-during-pregnancy>. The Act does have an exception permitting the dismemberment of a living unborn child if “necessary to prevent serious health risk to the unborn child’s mother.” Ala. Code § 26-23G-3(a). Dismemberment abortions of a living unborn child that do not fit within that exception are crimes punishable by up to two years imprisonment and fines of \$10,000. Id. § 26-23G-7.

B. Procedural History

The plaintiffs are the West Alabama Women’s Center, the Alabama Women’s Center, and the medical directors of both clinics.³ In 2016 the plaintiffs sued on behalf of themselves and their present and future patients, claiming that the Act was unconstitutional on its face.⁴

³ The West Alabama Women’s Center is in Tuscaloosa and is the only abortion clinic in West Alabama. It performed about 58% of Alabama abortions in 2014. The Alabama Women’s Center is the only abortion clinic in Huntsville, Alabama, and it performed about 14% of Alabama abortions in 2014. Those two clinics are the only two in Alabama that perform dismemberment abortions.

⁴ Their complaint also challenged a zoning law that forbade the Alabama Department of Public Health from issuing or renewing medical licenses to abortion clinics located within 2,000 feet of a school. That claim is not at issue in this appeal.

They then moved for a preliminary injunction barring enforcement of the Act. After holding an evidentiary hearing the district court entered an order preliminarily enjoining enforcement of the Act. In the course of doing so, the court issued an opinion with findings that there are no safe and effective ways for abortion practitioners to comply with the Act by killing the unborn child before dismembering it.

The State appealed the district court's order. Briefs were filed, the attorneys and three judges prepared for oral argument, but on the very eve of it, the district court issued a permanent injunction and replaced its previous opinion with a longer one. Because of that we had to dismiss as moot the State's appeal from the preliminary injunction. See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 314, 119 S. Ct. 1961, 1966 (1999) ("Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter."). To keep things going, the State immediately filed an appeal from the judgment granting the permanent injunction; we issued a new briefing schedule and reset oral argument.

In its opinion accompanying the permanent injunction, the district court found that the Act would effectively eliminate pre-viability abortion access at or

after the 15-week mark because none of the State’s proposed fetal demise methods were feasible. The court reasoned that the State’s proffered interests — which it only assumed were legitimate — could not justify placing what it found to be “substantial, and even insurmountable, obstacles before Alabama women seeking pre-viability abortions.” As a result, the court ruled that the Act “constitutes an undue burden on abortion access and is unconstitutional,” and it granted as-applied injunctive relief to the plaintiffs. This is the State’s appeal.

II. STANDARDS OF REVIEW

“We review a district court’s decision to grant a permanent injunction for an abuse of discretion.” Estate of Brennan ex rel. Britton v. Church of Scientology Flag Serv. Org., Inc., 645 F.3d 1267, 1272 (11th Cir. 2011). The district court’s conclusions of law we review de novo. Id. Its findings of fact we review for clear error. Id. “A finding of fact is clearly erroneous [only] if, upon reviewing the evidence as a whole, we are left with the definite and firm conviction that a mistake has been committed.” U.S. Commodity Futures Trading Comm’n v. Hunter Wise Commodities, LLC, 749 F.3d 967, 974 (11th Cir. 2014) (quotation marks omitted). And “[w]here there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” Anderson v. City of Bessemer City, 470 U.S. 564, 574, 105 S. Ct. 1504, 1511 (1985). The grip of

the clearly erroneous standard is even tighter when the district court hears testimony, giving it the opportunity to observe the demeanor of witnesses. See id. at 575, 105 S. Ct. at 1512 (findings based on the credibility of live witnesses are entitled to “even greater deference” because “only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said”).

The State tries to slip the grip of that narrow standard by contending that most of the facts here are not “adjudicative facts” to which the clear error standard applies but “legislative facts” that we decide de novo. But they aren’t. “Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those developed in a particular case.” United States v. Bowers, 660 F.2d 527, 531 (5th Cir. Unit B 1981) (quotation marks omitted).

We have recognized a distinction between legislative facts and adjudicative facts in two contexts, neither of which exists here. First, in the area of administrative law, legislative facts can be found in a rulemaking proceeding, while adjudicative facts must be found on a case by case basis through hearings. See, e.g., Broz v. Heckler, 721 F.2d 1297, 1299 (11th Cir. 1983) (holding that the effect of a claimant’s age on his ability to work was an adjudicative fact to be

determined on a case by case basis). Second, in criminal cases, when a district court takes judicial notice of an adjudicative fact Federal Rule of Evidence 201(f) requires that the court instruct the jury “that it may or may not accept the noticed fact as conclusive.” Fed. R. Evid. 201(f); see also Bowers, 660 F.2d at 531. Not so with a legislative fact.

The State has not cited, nor have we found, any authority suggesting that the facts on which this case turns are legislative instead of adjudicative.⁵ So the clear error standard applies when we get to the facts, but we will begin our discussion with the applicable abortion law.

III. DISCUSSION

A. Abortion Law

The Supreme Court has interpreted the Fourteenth Amendment to bestow on women a fundamental constitutional right of access to abortions. See Roe v. Wade, 410 U.S. 113, 153–54, 93 S. Ct. 705, 727 (1973). About twenty years after

⁵ Unable to find support in the law of this circuit, the State cites some opinions from our sister circuits noting that a reviewing court should consider facts found by a legislature in the exercise of its lawmaking power. Those cases involved federal laws supported by findings in the Congressional Record. See United States v. Singleterry, 29 F.3d 733, 740 (1st Cir. 1994) (finding that the Congressional Record provided sufficient information to uphold the distinction between cocaine base and cocaine in the federal sentencing scheme); Nat'l Abortion Fed. v. Gonzales, 437 F.3d 278, 302 (2d Cir. 2006) (Straub, J., dissenting), vacated, 224 F. App'x 88 (2d Cir. 2007) (The court should defer to “legislative facts found by a legislature in the exercise of its lawmaking power.”). By contrast, this case involves a state law unaccompanied by legislative findings. See Ala. Code § 26-23G-2(3).

a majority of the Court had discovered that right lurking somewhere in the “penumbras of the Bill of Rights” as illuminated by the “concept of ordered liberty,” *id.* at 152, 93 S. Ct. at 726, a majority of the Court devised an “undue burden” test to go with it, see Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 964, 112 S. Ct. 2791, 2866 (1992) (Rehnquist, C.J., dissenting) (“The end result of the joint opinion’s paeans of praise for legitimacy is the enunciation of a brand new standard for evaluating state regulation of a woman’s right to abortion — the ‘undue burden’ standard.”). The Court’s most recent articulation of that test goes like this:

[T]here exists an undue burden on a woman’s right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the purpose or effect of the provision is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

Whole Woman’s Health, 136 S. Ct. at 2300 (quotation marks omitted).

Over the past couple of decades the Supreme Court has issued several decisions drawing and redrawing the contours of the undue burden standard. Three of those decisions bear on the outcome of this case. First, in Stenberg, the Court struck down a Nebraska law that banned partial birth abortion.⁶ 530 U.S. at 946,

⁶ To perform a partial birth abortion, also known as “intact D & E,” the abortion practitioner begins delivering the fetus “in a way conducive to pulling out its entire body, instead of ripping it apart.” Gonzales v. Carhart, 550 U.S. 124, 137, 127 S. Ct. 1610, 1622 (2007). Once the practitioner has delivered the unborn child to a certain anatomical point inside the woman,

120 S. Ct. at 2617. The Court found two fatal flaws in that law: (1) it could be construed to ban not only partial birth abortion, but also dismemberment abortion, which is “the most commonly used method for performing previability second trimester abortions,” id. at 945–46, 120 S. Ct. at 2617; and (2) it had no exception allowing partial birth abortion to preserve the health of the mother, id. at 930, 120 S. Ct. at 2609.

Seven years later the Court upheld a federal ban on partial birth abortion. Gonzales, 550 U.S. at 133, 127 S. Ct. at 1619. In light of Stenberg the government conceded that the ban would be invalid if it covered dismemberment abortions. Id. at 147, 127 S. Ct. at 1627. But unlike the law at issue in Stenberg, the Court did not construe the federal ban to forbid dismemberment abortions. Id. at 150, 127 S. Ct. at 1629. Because the federal ban advanced legitimate interests and also permitted dismemberment abortions, the Court held that it did not impose an undue burden on a woman’s right to choose an abortion. Id. at 160, 164, 127 S. Ct. at 1634–35, 1637; see also id. at 158, 127 S. Ct. at 1633 (“Where it has a rational basis to act, and it does not impose an undue burden, the State may use its

however, he uses an instrument to kill it. For instance, he may crush the unborn child’s skull, or instead he may make an incision in the skull and vacuum out the brain matter. Id. at 138–40, 127 S. Ct. at 1621–23. Then the remains are delivered, generally in one piece (hence the term “intact D & E”). Id. at 137, 127 S. Ct. at 1622.

regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.”).

The Gonzales Court upheld the federal ban despite its lack of an exception permitting partial birth abortion if necessary to preserve the health of the mother, which was one of the fatal flaws afflicting the Nebraska law in Stenberg. Compare id. at 161, 127 S. Ct. at 1635, with Stenberg, 530 U.S. at 930, 120 S. Ct. at 2609. The Court explained that the ban would have been invalid if it subjected women to “significant health risks.” Gonzales, 550 U.S. at 161, 127 S. Ct. at 1635. But there was medical disagreement about whether, given the continuing availability of dismemberment abortions, the federal ban on partial birth abortions “would ever impose significant health risks on women.” And lawmakers have “wide discretion to pass legislation in areas where there is medical and scientific uncertainty.” Id.

The Court reasoned that:

Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. The medical uncertainty over whether the [federal ban] creates significant health risks provides a sufficient basis to conclude in this facial attack that the [federal ban] does not impose an undue burden.

Id. at 162–64, 127 S. Ct. at 1636–37 (citation omitted).

Most recently, in Whole Woman's Health, the Court struck down two Texas regulations that required abortion practitioners to have certain qualifications and abortion clinics to have meet certain physical requirements. 136 S. Ct. at 2300. The Fifth Circuit had reversed the district court for “substituting its own judgment for that of the legislature when it conducted its undue burden inquiry, in part because medical uncertainty underlying a statute is for resolution by legislatures, not the courts.” Id. at 2309 (quotation marks omitted). The Supreme Court responded:

The statement that legislatures, and not courts, must resolve questions of medical uncertainty is . . . inconsistent with [the Supreme] Court’s case law. Instead, the Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial proceedings. In Casey, for example, we relied heavily on the District Court’s factual findings and the research-based submissions of amici in declaring a portion of the law at issue unconstitutional.

Id. at 2310. After declining to defer to the Texas legislature, the Court struck down the regulations because they “provide[] few, if any, health benefits for women, pose[] a substantial obstacle to women seeking abortions, and constitute[] an ‘undue burden’ on their constitutional right to do so.” Id. at 2318.

B. The State’s Interest

One requirement that Casey and its progeny establish, which is carried in the “purpose or effect” language of the opinions, is that a state regulation that applies

to pre-viability stage abortions must have a legitimate or valid purpose other than simply reducing the number of abortions. See id. at 2300. The district court did not decide whether the State had a legitimate interest in requiring that the unborn child be humanely killed before it is torn apart. It only assumed the State did. But, to borrow Holmes' words from another setting, “[t]his is not a matter for polite assumptions; we must look facts in the face.” Frank v. Mangum, 237 U.S. 309, 349, 35 S. Ct. 582, 595 (1915) (Holmes, J., dissenting).

The facts that show the State’s interests furthered by the Act are those that describe what the method of abortion involves. See Gonzales, 550 U.S. at 156, 127 S. Ct. at 1632 (“A description of the prohibited abortion procedure demonstrates the rationale for the [prohibition].”). So we will look those facts in the face, setting them out in language that does not obscure matters for people who, like us, are untrained in medical terminology. See Stenberg, 530 U.S. at 957–58, 120 S. Ct. at 2623 (Kennedy, J., dissenting) (“Repeated references to sources understandable only to a trained physician may obscure matters for persons not trained in medical terminology. Thus it seems necessary at the outset to set forth what may happen during an abortion.”).

As Justice Kennedy has described this method of ending a pregnancy, dismemberment abortion “requires the abortionist to use instruments to grasp a

portion (such as a foot or hand) of a developed and living fetus and drag the grasped portion out of the uterus into the vagina.”⁷ Id. at 958, 120 S. Ct. at 2624. The practitioner then “uses the traction created by the opening between the uterus and vagina to dismember the fetus, tearing the grasped portion away from the remainder of the body.” Id. That is not the result of any sadistic impulses of the practitioner but instead is part and parcel of the method. See id. One practitioner explained:

⁷ A word about words. The State uses the term “abortionist” to refer to those who perform abortions. That term does appear in several opinions of Supreme Court Justices. See, e.g., Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551, 2571 (2015) (Thomas, J., concurring); Stenberg, 530 U.S. at 953–54, 120 S. Ct. at 2621 (Scalia, J., dissenting); id. at 957–60, 964–65, 968, 974–76, 120 S. Ct. at 2623–24, 2627, 2629, 2632–33 (Kennedy, J., dissenting, joined by Rehnquist, C.J.); Colautti v. Franklin, 439 U.S. 379, 403, 407–09, 99 S. Ct. 675, 689, 691–92 (1979) (White, J., dissenting, joined by Burger, C.J., and Rehnquist, J.). Some people, however, consider the term pejorative. See, e.g., Warren M. Hern, “Abortionist” Carries a Charged Meaning, N.Y. Times, Sept. 7, 1993 (“The term abortionist has been used most often to describe illegal actors in a sleazy world of avaricious, incompetent criminals exploiting immoral women in a sordid and hazardous procedure.”).

The plaintiffs refer to those who perform abortions as “physicians” and “doctors.” Those terms also appear in several Supreme Court abortion decisions. See, e.g., Whole Woman’s Health, 136 S. Ct. at 2301 (referring to persons who perform abortions as “physicians”); Gonzales, 550 U.S. at 133–35, 139, 127 S. Ct. at 1619–21, 1623 (“physicians” and “doctors”); Stenberg, 530 U.S. at 922, 937–38, 120 S. Ct. at 2605, 2612–13 (same). Some people, however, view those terms as inapposite, if not oxymoronic, in the abortion context. See, e.g., Is “Abortion Doctor” Pejorative? Cont’d, Nat’l Rev., Apr. 22, 2007 (“The truth is that persons performing what we ordinarily think of when we use the term ‘abortions’ are not acting as doctors (i.e., healers) at all. Whether or not they hold a medical degree and license to practice medicine, the object of their action is not healing but killing.”) (quoting Letter from Robert P. George, Professor of Jurisprudence, Princeton University, to Jonah Goldberg, Senior Editor, Nat’l Rev., Apr. 22, 2007).

We will take a middle course and use the term “practitioner,” except where one of the other terms appears in a quotation.

The traction between the uterus and vagina is essential to the procedure because attempting to abort a fetus without using that traction is [like] “pulling the cat’s tail” or “drag[ging] a string across the floor, you’ll just keep dragging it. It’s not until something grabs the other end that you are going to develop traction.”

Id.

In this type of abortion the unborn child dies the way anyone else would if dismembered alive. “It bleeds to death as it is torn limb from limb.” Id. at 958–59, 120 S. Ct. at 2624. It can, however, “survive for a time while its limbs are being torn off.” Id. at 959, 120 S. Ct. at 2624. The plaintiff practitioner in the Stenberg case testified that using ultrasound he had observed a heartbeat even with “extensive parts of the fetus removed.” Id. But the heartbeat cannot last. At the end of the abortion — after the larger pieces of the unborn child have been torn off with forceps and the remaining pieces sucked out with a vacuum — the “abortionist is left with ‘a tray full of pieces.’” Id. It is no wonder that Justice Ginsburg has described this method of abortion as “gruesome” and “brutal.” Gonzales, 550 U.S. at 182, 127 S. Ct. at 1647 (Ginsburg, J., dissenting) (comparing this method to partial birth abortion and stating that this one “could equally be characterized as brutal, involving as it does tearing a fetus apart and ripping off its limbs,” describing it as “equally gruesome,” and arguing that it is no less “akin to infanticide” than partial birth abortion) (quotation marks omitted).

Having looked the facts in the face and described dismemberment abortion for what it is, we recognize at least three legitimate interests that animate the State's effort to prevent an unborn child from being dismembered while its heart is beating. First, the State "may use its voice and its regulatory authority to show its profound respect for the life within the woman." Id. at 157, 127 S. Ct. at 1633; see also Casey, 505 U.S. at 877, 112 S. Ct. at 2821 (recognizing as a legitimate interest the State's "profound respect for the life of the unborn"). Second, it may regulate a "brutal and inhumane procedure" to avoid "coarsen[ing] society to the humanity of not only newborns, but all vulnerable and innocent human life." Gonzales, 550 U.S. at 157, 127 S. Ct. at 1633 (quotation marks omitted). And third, it may enact laws to protect the integrity of the medical profession, including the health and well-being of practitioners. See id. at 157, 160, 127 S. Ct. at 1633–34.

Dismemberment abortions exact emotional and psychological harm on at least some of those who participate in the procedure or are present during it. See Br. of Am. Assoc. of Pro-Life Obstetricians & Gynecologists at 20–24.⁸

⁸ The amici debate whether an unborn child can feel pain at the gestational stage at which dismemberment abortions are performed. Compare Br. of Am. Coll. of Obstetricians & Gynecologists at 15 n.36 ("Rigorous scientific studies have found that the . . . brain structures necessary to process [pain] do not develop until at least 24 weeks of gestation.") (quotation marks omitted), with Br. of Am. Assoc. of Pro-Life Obstetricians & Gynecologists at 5 ("Researchers have found that unborn children can experience pain in some capacity from as early as eight weeks of development."). The plaintiffs' expert testified that "fetal pain" is a "biological impossibility" at that early stage, and the State did not argue to the district court that the Act is designed to avoid inflicting pain on the unborn child. So we won't weigh in on that

The State has an actual and substantial interest in lessening, as much as it can, the gruesomeness and brutality of dismemberment abortions. That interest is so obvious that the plaintiffs do not contest it. But the fact that the Act furthers legitimate state interests does not end the constitutional inquiry. The legitimacy of the interest is necessary but not sufficient for a pre-viability abortion restriction to pass the undue burden test. See Whole Woman's Health, 136 S. Ct. at 2309 ("[A] statute which, while furthering [the interest in potential life or some other] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.") (citing Casey, 505 U.S. at 877, 112 S. Ct. at 2820 (plurality opinion)); see also Gonzales, 550 U.S. at 161, 127 S. Ct. at 1635 ("The Act's furtherance of legitimate government interests bears upon, but does not resolve, . . . whether the Act has the effect of imposing an unconstitutional burden on the abortion right . . .").

C. The District Court's Factfindings

The dispositive question is whether by prohibiting the dismemberment of a living unborn child the Act imposes an undue burden on a woman's right to

issue. See Richardson v. Ala. State Bd. of Educ., 935 F.2d 1240, 1247 (11th Cir. 1991) (noting that absent "exceptional circumstances, amici curiae may not expand the scope of an appeal to implicate issues not presented by the parties to the district court").

terminate a pre-viability pregnancy. See Whole Woman’s Health, 136 S. Ct. at 2300. The State says the Act does not unduly burden that right because there are methods by which abortion practitioners can kill an unborn child before dismembering it without impeding a woman’s access to an abortion. Before discussing the State’s proposed methods of fetal demise,⁹ we will recount some facts about abortion providers and women who seek their services because those facts bear on the feasibility of the State’s proposed methods.

1. Abortions in Alabama

The district court found that 99.6% of abortions in Alabama occur in outpatient clinics.¹⁰ That matters because outpatient clinics lack resources that hospitals possess — like anesthesia staffing, operating rooms, and blood banks — which means some procedures that are feasible in a hospital setting may not be in an outpatient clinic.

Nearly 93% of abortions performed in Alabama occur before 15 weeks, at which time dismemberment abortion is unnecessary because the unborn child is small enough for practitioners to use other methods that the Act does not prohibit.

⁹ Another word about words. The district court and the parties use the phrase “causing fetal demise” to mean killing an unborn child. We will follow their lead on that for the sake of consistency.

¹⁰ The district court and the parties relied mainly on abortion statistics from 2014, apparently because those were the most recent ones available, and nothing in the record suggests that those statistics have changed materially in recent years.

For the 7% of abortions that occur after 15 weeks, 99% of them are by dismemberment. That's because at that later stage of pregnancy dismemberment abortion is simpler and safer than other methods, with major complications arising less than 1% of the time. Of those post-15 week dismemberment abortions, one year hospitals performed 7 and clinics performed about 500. Those 500 dismemberment abortions occurred at only two clinics: the West Alabama Women's Center and the Alabama Women's Center. So the plaintiffs are the only clinics in Alabama that perform abortions at or after the 15-week mark.

The district court also found that a majority of Alabama women who seek abortions at the plaintiff clinics are low income. Sixty percent of patients at the Alabama Women's Center receive income-based financial assistance. Patients at the West Alabama Women's Center are also indigent: 82% live at or below 110% of the federal poverty level. Those facts matter, the district court reasoned, because the State's proposed methods for killing the unborn child before dismemberment prolong the abortion. Low-income patients, the court reasoned, may not have the financial means to make several trips to a clinic or stay in its vicinity for an extended period of time.

2. The State's Proposed Fetal Demise Methods

With those background facts in mind, we turn to the State's proposed fetal demise methods. The State contends that practitioners can cause fetal demise without much difficulty, so the Act does not effectively prohibit dismemberment abortions and thereby impose an undue burden on women seeking abortions. But the State conceded at oral argument: “[I]f there [is] no safe and effective way to cause fetal demise before [dismemberment,] . . . this law would be unconstitutional.” See Crowe v. Coleman, 113 F.3d 1536, 1542 (11th Cir. 1997) (“That concessions and admissions of counsel at oral argument in appellate courts can count against them is doubtlessly true.”). As a result, this case turns on whether the fetal demise methods are feasible, which in this context means safe, effective, and available. The State proposes three methods: (1) injecting potassium chloride into the unborn child’s heart; (2) cutting the umbilical cord in utero; and (3) injecting digoxin into the amniotic fluid. The district court found each to be infeasible.

a. *Potassium chloride injections*

The State’s first proposed method is the most technically challenging to administer. Potassium chloride injections involve using a sonogram (the image an ultrasound machine makes) to guide a long spinal needle through the patient’s

abdomen, into her uterus, through the amniotic fluid, and into the fetus' heart, which at 15 weeks is "smaller than a dime."

The district court found that potassium chloride injections were not feasible for three reasons. First, the injection requires great technical skill, and abortion practitioners in Alabama have no practical way to learn how to perform it safely. The only practitioners trained to perform potassium chloride injections are maternal-fetal medicine fellows pursuing a subspecialty in high risk pregnancy. Even those highly trained subspecialists rarely get the chance to practice the procedure — the State's witness testified that the hospital where he practices performs fewer than 10 injections per year. And another expert testified that a practitioner must perform at least 100 potassium chloride injections to become competent at it.

Second, many of the plaintiffs' patients have anatomical problems that make potassium chloride even harder to inject. For example, fibroids, or "benign growths in the uterus," can block the needle from reaching the fetus. Other factors, like obesity, can also cause complications. More than 50% of the plaintiffs' patients have fibroids and more than 40% are obese.

Finally, the district court reasoned that a potassium chloride injection introduces health risks into the otherwise safe (for the woman) dismemberment

abortion procedure. A botched injection into a patient's blood vessels can cause cardiac arrest. The injection also increases the risk of puncturing or infecting the uterus. For those reasons, the district court held that potassium chloride injections were not a feasible method of complying with the Act.

b. Umbilical cord transection

The State's next proposed fetal demise method, umbilical cord transection, involves dilating a patient's cervix and cutting the umbilical cord. After inducing dilation, the abortion practitioner would use a sonogram to locate the cord, insert a surgical instrument into the uterus, and cut the cord. The practitioner would then wait for the unborn child's heartbeat to stop, which can take more than 10 minutes, before he could begin dismembering it.

The district court found that umbilical cord transection is not feasible for three reasons. First, the procedure is technically challenging. On a sonogram, amniotic fluid contrasts with the unborn child and the umbilical cord, making it easy to distinguish the contents of the uterus. But before he can cut the cord the practitioner must puncture the amniotic sac, which causes the fluid to drain and obscures visualization into the uterus. Drainage also causes the uterus to contract, which compresses the cord and the unborn child. That poses another hurdle for the practitioner because if he cuts fetal tissue instead of, or in addition to the cord, he

has arguably performed the conduct that the Act prohibits. See Ala. Code § 26-23G-2(3). The result is that a practitioner must find and cut a cord that is the width of a piece of yarn without being able to see or physically touch it and without cutting any surrounding fetal tissue, lest he violate the Act.

Second, the district court found that cord transection carries serious health risks, including blood loss, infection, and uterine injury. Cutting the cord increases the risk of hemorrhage compared to a routine dismemberment abortion, especially considering that it can take over 10 minutes for the heart to stop before the dismemberment can begin. While the abortion practitioner waits for the unborn child's heart to stop, the patient may undergo uterine contractions and hemorrhage. The risks are worse in the outpatient setting because clinics lack access to blood banks. The plaintiff clinics also possess less sophisticated ultrasound machines than hospitals, which makes it harder for them to locate the cord.

Third, there is no available training in Alabama to teach the cord transection procedure to practitioners. The plaintiffs have no training in it, and there are few opportunities to observe others performing the procedure. Given the climate of hostility toward abortions in Alabama, it is unlikely that the plaintiff-clinics could attract practitioners already trained in the procedure. For those reasons, the district

court found that umbilical cord transection was not a feasible method of complying with the Act.

c. Digoxin injections

The State's last proposed method of fetal demise — digoxin — poses less of a technical challenge than the other methods because it can be injected into the amniotic fluid, which is a bigger target than a fetal heart. Although digoxin isn't too difficult to administer, the district court found that it too was not feasible, for five reasons. First, unlike the other methods, digoxin fails to kill the unborn child between 10% and 15% of the time. If the first dose fails, the Act would require an abortion practitioner to either inject a second dose or try an alternative method of fetal demise. See Ala. Code § 26-23G-2(3). Because there is no medical literature on the proper dosage for a second digoxin injection or the potential risks of one, successive injections would subject a woman seeking a dismemberment abortion to what the district court characterized as an experimental medical procedure.

Second, digoxin injections can be obstructed by the same anatomical obstacles that impede potassium chloride injections, like fibroids and obesity. Third, digoxin injections are untested during the stage at which most Alabama women receive dismemberment abortions. The bulk of digoxin research considers its effect on pregnancies at or after 18 weeks; a few studies include cases at 17

weeks; and none have researched the efficacy, dosage, or safety of digoxin on women before 17 weeks. Yet 80% of dismemberment abortions are performed between 15 to 18 weeks, at which time the effect and dosage of digoxin is largely unstudied. So administering digoxin to most women who seek a post-15 week abortion could be considered experimental.

Fourth, digoxin injections carry health risks. The injections increase the odds of infection, hospitalization, and what the profession calls “extramural delivery,” meaning delivery outside the clinic. Extramural delivery is dangerous because the patient lacks medical attention in case of complications (like hemorrhage), and may be alone.

Finally, the district court found that using digoxin injections would create logistical hurdles to abortion access. A digoxin injection would increase the duration of a dismemberment abortion from one day to two, not counting the 48-hour waiting period mandated by Alabama law. All told, a woman seeking a second trimester abortion would have to meet with her doctor at least three times over four days, before the 15-minute procedure was performed. That burden, the district court found, would be heavier for the plaintiffs’ patients, who are mostly low income. For those reasons, the district court held that digoxin was not a feasible method of causing fetal demise.

D. Applying the Undue Burden Test

In applying the undue burden test, we look at whether the three methods of fetal demise that the State has proposed are safe, effective, and available. If they are not, we look to whether the health exception saves the Act.

1. The State's Proposed Methods Are Not Safe, Effective, or Available

The district court decided that the State's proposed fetal demise methods were not safe, effective, and available, and for that reason it decided that the Act imposes an undue burden. We begin with its findings about the safety of the proposed methods.

The State conceded at oral argument that the proposed methods would increase the risks associated with a dismemberment abortion.¹¹ But the State disputes whether those risks are "significant." See Gonzales, 550 U.S. at 161, 127 S. Ct. at 1635. The district court rejected that position and concluded that each of the fetal demise methods carry "significant health risks." It found that potassium chloride injections can cause uterine perforation and infection and cardiac arrest if introduced into the bloodstream. That umbilical cord transection raises the risk of hemorrhage and uterine infection and injury. And that digoxin injections increase the risk of hemorrhage, infection, and extramural delivery. And that all of those

¹¹ At oral argument, counsel for the State agreed that "there's no uncertainty that [requiring fetal demise] raises the risk some." Oral Argument at 14:30, <http://www.ca11.uscourts.gov/oral-argument-recordings?title=17-15208>.

risks are increased when fetal demise is attempted in an outpatient setting — where nearly all Alabama abortions take place — because clinics lack resources that are commonplace in hospitals.

The district court heard the testimony, including that of competing experts, and thoroughly explained its resolution of all the material conflicts in the evidence. We are not left with a “definite and firm conviction that a mistake has been committed” in any of the court’s material findings. See Hunter Wise Commodities, LLC, 749 F.3d at 974 (quotation marks omitted). The State relies on some studies that it says constitute “ample documented medical support for the safety of the [fetal demise] procedures.” But, as the district court pointed out, because those studies took place in hospitals, not outpatient clinics, they do not take into account the risks of attempting fetal demise in an outpatient setting. Not only that but the State’s own expert admitted that two of the fetal demise methods posed serious health risks.¹² The State cannot win the factual battle.

Nor the legal one. The State contends that the district court made a legal error by weighing the evidence of those risks. It argues that, under Gonzales,

¹² The State’s expert, Dr. Joseph Biggio, testified that digoxin injections would subject women to “an approximately 5–10% risk of spontaneous onset of labor, rupture of the membranes or development of intrauterine infection,” and “small risks of bleeding, infection, and inadvertent penetration of the bowel or bladder with the needle.” He also testified that potassium chloride subjects women to bleeding, sepsis, bowel or bladder injury, and cardiac arrest.

states may restrict an abortion method as long as there is medical uncertainty about whether the restriction creates significant health risks. See Gonzales, 550 U.S. at 164, 127 S. Ct. at 1637. The State asserts that it is up to states themselves, not the courts, to resolve any “medical uncertainty” about the significance of the risks that are created and to weigh those risks. And according to the State, its preferred studies create medical uncertainty by suggesting that the proposed fetal demise methods would not impose significant health risks.

The State’s argument fails for three reasons. First, the “medical uncertainty” sentence in Gonzales was pegged to facial relief, not to as-applied relief, which is what was granted in this case. Id. (“The medical uncertainty over whether the [ban] creates significant health risks provides a sufficient basis to conclude in this facial attack that the [ban] does not impose an undue burden.”) (emphasis added). The State asserts (without support) that here “the district court did not convert this [case] into an as-applied challenge when it purported to grant ‘as-applied relief,’” but that is exactly what the district court did. And the court had the authority to do that both because district courts enjoy discretion in crafting injunctive relief, Britton, 645 F.3d at 1272, and because the law favors as-applied relief, Gonzales, 550 U.S. at 168, 127 S. Ct. at 1639. The district court did not err in granting as-

applied relief to the plaintiffs, and Gonzales' "medical uncertainty" dictum does not apply.¹³

The second reason that the State's medical uncertainty argument fails is that controlling precedent refutes it. See Whole Woman's Health, 136 S. Ct. at 2309–10 (rejecting the view that "legislatures, and not courts, must resolve questions of medical uncertainty" and noting that courts "retain[] an independent constitutional duty to review factual findings where constitutional rights are at stake") (emphasis, citation, and quotation marks omitted). The State and its amici argue that part of Whole Woman's Health does not control this case because the Court was considering health-based regulations instead of an abortion method ban. But the Court in Whole Woman's Health cited several abortion method ban cases to conclude the regulations at issue imposed an undue burden. See 136 S. Ct. at 2309–10. The State cites no support for the proposition that a different version of

¹³ The State also argues that the district court should not have awarded as-applied relief because "clinics do not have a substantive due process right to an abortion; women do." Generally, a plaintiff cannot challenge a statute by asserting the rights of another. United States v. Raines, 362 U.S. 17, 21–22, 80 S. Ct. 519, 522–23 (1960). But not surprisingly — after all, we're dealing with abortion here, a most-favored constitutional right — the Court has been "especially forgiving of third-party standing criteria for one particular category of cases: those involving the purported substantive due process right of a woman to abort her unborn child." Whole Woman's Health, 136 S. Ct. at 2322 (Thomas, J., dissenting); see also Singleton v. Wulff, 428 U.S. 106, 116, 96 S. Ct. 2868, 2876 (1976) (plurality opinion) ("[I]t generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision"). Indeed, all the landmark abortion cases since Roe v. Wade have been brought by physicians or clinics. See Whole Woman's Health, 136 S. Ct. at 2301; Gonzales, 550 U.S. at 132–33, 127 S. Ct. at 1619; Stenberg, 530 U.S. at 922, 120 S. Ct. at 2605; Casey, 505 U.S. at 845, 112 S. Ct. at 2803. So the State's argument is meritless.

the undue burden test applies to a law regulating abortion facilities. The question in all abortion cases is whether “the purpose or effect of the [law at issue] is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” Id. at 2300 (quotation marks omitted).

The third reason that the State’s medical uncertainty argument fails is that the uncertainty in Gonzales was about whether the federal partial birth abortion ban “would ever impose significant health risks on women” given the continuing availability of dismemberment abortion. Gonzales, 550 U.S. at 162, 127 S. Ct. at 1636 (emphasis added). By contrast, in this case the State conceded that by requiring pre-dismemberment death of the unborn child the Act would always impose some increased health risks on women.

The State’s remaining arguments on this front are even less persuasive. It argues that we need not worry about the risks attending umbilical cord transection because that method of fetal demise imposes “the same categories of risks that are already inherent in the standard [dismemberment] procedure.” Categories of risk are one thing, degree of risk is another. The district court found as a fact that cutting the umbilical cord increases the degree of risk to the woman. The State cites no support for the proposition that a state may subject women to an increased

degree of risk as long as it doesn't subject them to a new category of risk. There is none.

The State also argues that the Act does not impose an undue burden because it "is only relevant to a small percentage of abortions" as compared to all abortions performed in Alabama. It is true that 93% of Alabama abortions occur before 15 weeks, and for them dismemberment abortion is neither necessary nor used. But that fact is irrelevant because "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." Casey, 505 U.S. at 894, 112 S. Ct. at 2829; see also id. ("The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.").

As for the effect of the Act on the availability of pre-viability abortions in Alabama, the district court made additional findings. It noted that the Act's fetal demise requirement would increase by one day the time required from preparation to the actual dismemberment procedure, which would in turn increase the costs of travel and lodging for women who do not live near the plaintiff clinics. The court explained that this delay and extra cost would be especially burdensome for low-income women, who comprise a large proportion of the plaintiffs' patients.

Although that increased time and expense would not be enough by itself to invalidate the Act, see Gonzales, 550 U.S. at 157–58, 127 S. Ct. at 1633 (“[T]he fact that a law which serves a valid purpose . . . has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.”), it does support the conclusion that the Act would “place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability,” Whole Woman’s Health, 136 S. Ct. at 2300 (emphasis and quotation marks omitted).

Continuing on the subject of availability, the district court found that there were few if any opportunities for the plaintiff physicians to learn how to inject potassium chloride or cut the umbilical cord. For potassium chloride injections, the most challenging of the methods, the State’s own expert conceded that he knew of no opportunities for the plaintiffs to learn it. The district court found that the plaintiff clinics could not easily attract out-of-state practitioners already trained in those procedures. Its finding that the lack of training opportunities coupled with the difficulties of recruiting trained practitioners renders potassium chloride and umbilical cord transection unavailable in Alabama clinics support the conclusion that the Act imposes an undue burden.¹⁴

¹⁴ The State responds that practitioners who cannot perform the more difficult methods can instead try injecting digoxin. But the district court found that the effect of digoxin on

All of those findings about the fetal demise methods — their attendant risks; their technical difficulty; their untested nature; the time and cost associated with performing them; the lack of training opportunities; and the inability to recruit experienced practitioners to perform them — support the conclusion that the Act would “place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” Id. (emphasis and quotation marks omitted). So does the fact that every court to consider the issue has ruled that laws banning dismemberment abortions are invalid and that fetal demise methods are not a suitable workaround.¹⁵ See Glossip v. Gross, 576 U.S. __, 135 S. Ct. 2726, 2740 (2015) (“Our review is even more deferential where, as here, multiple trial courts have reached the same finding, and multiple appellate courts have affirmed those findings.”); cf. Cooper v. Harris, 581 U.S. __, 137 S. Ct. 1455, 1468 (2017) (“[A]ll

pregnancies between weeks 15 and 18 — the period during which 85% of dismemberment abortions are performed — is unstudied. And there is also a dearth of medical research on the effect on women of successive doses of digoxin. Considering that digoxin fails up to 15% of the time and that a practitioner may not be trained in another method of fetal demise, the Act will in a significant number of cases leave the practitioner with no choice but to administer another and therefore experimental dose of digoxin on a woman before beginning the dismemberment abortion.

¹⁵ See, e.g., Whole Woman’s Health v. Paxton, 280 F. Supp. 3d 938, 940–41, 953–54 (W.D. Tex. 2017); Hopkins v. Jegley, 267 F. Supp. 3d 1024, 1058, 1061–65, 1111 (E.D. Ark. 2017); Planned Parenthood of Cent. N.J. v. Verniero, 41 F. Supp. 2d 478, 480, 500 (D.N.J. 1998), aff’d sub nom. Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127 (3d Cir. 2000); Evans v. Kelley, 977 F. Supp. 1283, 1290, 1318–20 (E.D. Mich. 1997).

else equal, a finding is more likely to be plainly wrong if some judges disagree with it.”).¹⁶

2. Neither the Health Exception nor the Intent Requirement Saves the Act

The Act’s health exception does not resolve the constitutional problems created by the fetal demise requirement.¹⁷ That exception provides that an abortion practitioner may dismember an unborn child without first killing it when “necessary to prevent serious health risk” to the mother. Ala. Code § 26-23G-3(a).

A “serious health risk” exists when:

In reasonable medical judgment, the child’s mother has a condition that so complicates her medical condition that it necessitates the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions.

Id. § 26-23G-2(6).

¹⁶ Swinging for the fences, the plaintiffs invite us to adopt a *per se* rule invalidating any law banning the “most commonly used second-trimester abortion method.” We won’t. The fact that dismemberment abortion is the most prevalent second-trimester abortion method does not mean that any law that bans or burdens it is automatically unconstitutional. The question is whether in light of the prohibition or restriction there remains an alternative method that is safe, effective, and available.

¹⁷ The plaintiffs rely on a decision of the Sixth Circuit striking down a similar act, which held that “it is unnecessary for us to address exceptions to an unconstitutional and unenforceable general rule.” Northland Family Planning Clinic, Inc. v. Cox, 487 F.3d 323, 340 (6th Cir. 2007). The conclusion in that case may have been correct but the logic leading to that conclusion is not. One cannot determine if this kind of Act is “unconstitutional and unenforceable” without deciding whether exceptions to its application avoid or cure any constitutional problem with it.

The State argues that “it makes no sense to say that the [Act] threatens a woman’s health when it includes an express exception to allow the prohibited procedure when a woman’s health is threatened.” Maybe so, but the exception does not apply to all threats to a woman’s health. It applies only when necessary to avoid death, or avoid a particular kind of risk of physical harm: a “serious risk” of “substantial and irreversible physical impairment of a major bodily function.” *Id.* (emphasis added). By its express terms, the health exception would not apply when complying with the Act would result in the woman being subjected to a serious risk of reversible, substantial physical impairment of a major bodily function. (Even where the reversal of the impairment and the recovery of the woman took a long time.) Nor would the exception apply to irreversible substantial physical impairments of a minor bodily function (whatever that is) — or two or three of them for that matter.

The State says not to worry, that it will not construe the health exception so narrowly. Mid-litigation assurances are all too easy to make and all too hard to enforce, which probably explains why the Supreme Court has refused to accept them. See Stenberg, 530 U.S. at 940–41, 120 S. Ct. at 2614 (rejecting the Attorney General’s interpretation of the statute and warning against accepting as

authoritative a state's litigation position when it does not bind state courts or law enforcement authorities).

The State argues that whatever the problems with the health exception in general, it provides a safety valve when coupled with the umbilical cord transection method of fetal demise. If that procedure fails, the State believes the danger to the woman would be so great that the health exception would kick in and allow a practitioner to perform a dismemberment abortion on the still living unborn child. That theory assumes that a cord transection fails at a discrete point in time. It doesn't. Even when all goes according to plan, after the practitioner cuts the cord, the Act requires him to wait to dismember the unborn child until its heartbeat stops. During that time — one witness testified it can take as long as 13 minutes — the patient loses blood while undergoing contractions and placental separation. As she lies bleeding on the table, the practitioner must decide whether to wait for her to bleed even more in order to trigger the health exception, or to start the dismemberment of the unborn child and risk having a jury second guess his judgment that the risk to the woman's health justified doing so. The health exception is cold comfort to practitioners and women, regardless of which fetal demise method they attempt. There are enough problems with the health exception to prevent it from rescuing the Act from unconstitutionality.

Finally, the State suggests that the Act's intent requirement when combined with the umbilical cord transection method of fetal demise provides a work around for the constitutional problems.¹⁸ It starts with the proposition that the intent requirement shields from liability practitioners who accidentally cut fetal tissue when trying to cut the umbilical cord. But a practitioner in that situation would have committed the prohibited conduct and would be subjecting himself to the tender mercies of a prosecutor's discretion and the vagaries of a jury's decision about his subjective intent moments before he began to dismember an unborn child. See Ala. Code § 26-23G-2(3). The practitioner would face that risk every time he performed cord transection because it is always possible he might accidentally grasp and cut fetal tissue instead of the cord. Given that a prosecution and adverse jury determination could result in up to two years imprisonment and a \$10,000 fine, it is no surprise that both plaintiff practitioners testified that they would not perform cord transections if the Act came into effect. Even if the intent requirement would usually shield practitioners from liability, the risk that it might

¹⁸ The State made only one passing reference to the intent requirement in its briefs in this appeal from the district court's permanent injunction ruling. See Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 681 (11th Cir. 2014) ("[A]n appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority."). But the State had elaborated on that argument in its briefs in the appeal from the preliminary injunction ruling and we have discretion to consider it. In the interest of completeness, we will.

not would deter practitioners from performing dismemberment abortions, which would in turn deny women access to pre-viability abortions.

IV. CONCLUSION

In our judicial system, there is only one Supreme Court, and we are not it. As one of the “inferior Courts,” we follow its decisions. U.S. Const. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). The primary factfinder is the district court, and we are not it. Our role is to apply the law the Supreme Court has laid down to the facts the district court found. The result is that we affirm the judgment of the district court.

AFFIRMED.

DUBINA, Circuit Judge, concurring specially.

I concur fully in Chief Judge Carnes's opinion because it correctly characterizes the record in this case, and it correctly analyzes the law. I write separately to agree on record with Justice Thomas's concurring opinion in *Gonzales v. Carhart*, 550 U.S. 124, 168-69, 127 S. Ct. 1610, 1639-40 (2007) (Thomas, J., concurring), with whom then Justice Scalia also joined. Specifically, Justice Thomas wrote, "I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* [*Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992)] and *Roe v. Wade*, 410 U. S. 113, 93 S. Ct. 705 (1973), has no basis in the Constitution." *Id.* at 169, 127 S. Ct. at 1639. The problem I have, as noted in the Chief Judge's opinion, is that I am not on the Supreme Court, and as a federal appellate judge, I am bound by my oath to follow all of the Supreme Court's precedents, whether I agree with them or not.

Therefore, I concur.

ABRAMS, District Judge:

I concur in the judgment only.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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August 22, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-15208-FF
Case Style: West Alabama Women's Center, et al v. Thomas Miller, et al
District Court Docket No: 2:15-cv-00497-MHT-TFM

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against the appellants.

Please use the most recent version of the Bill of Costs form available on the court's website at www.ca11.uscourts.gov.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Janet K. Mohler, FF at (404) 335-6178.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna Clark
Phone #: 404-335-6161

OPIN-1A Issuance of Opinion With Costs

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES**Syllabus**

WHOLE WOMAN'S HEALTH ET AL. *v.* HELLERSTEDT,
COMMISSIONER, TEXAS DEPARTMENT OF STATE
HEALTH SERVICES, ET AL.

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

No. 15–274. Argued March 2, 2016—Decided June 27, 2016

A “State has a legitimate interest in seeing to it that abortion . . . is performed under circumstances that insure maximum safety for the patient.” *Roe v. Wade*, 410 U. S. 113, 150. But “a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends,” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 877 (plurality opinion), and “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right,” *id.*, at 878.

In 2013, the Texas Legislature enacted House Bill 2 (H. B. 2), which contains the two provisions challenged here. The “admitting-privileges requirement” provides that a “physician performing or inducing an abortion . . . must, on the date [of service], have active admitting privileges at a hospital . . . located not further than 30 miles from the” abortion facility. The “surgical-center requirement” requires an “abortion facility” to meet the “minimum standards . . . for ambulatory surgical centers” under Texas law. Before the law took effect, a group of Texas abortion providers filed the *Abbott* case, in which they lost a facial challenge to the constitutionality of the admitting-privileges provision. After the law went into effect, petitioners, another group of abortion providers (including some *Abbott* plaintiffs), filed this suit, claiming that both the admitting-privileges and the surgical-center provisions violated the Fourteenth Amendment, as interpreted in *Casey*. They sought injunctions preventing enforcement of the admitting-privileges provision as applied to physi-

Syllabus

cians at one abortion facility in McAllen and one in El Paso and prohibiting enforcement of the surgical-center provision throughout Texas.

Based on the parties' stipulations, expert depositions, and expert and other trial testimony, the District Court made extensive findings, including, but not limited to: as the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20; this decrease in geographical distribution means that the number of women of reproductive age living more than 50 miles from a clinic has doubled, the number living more than 100 miles away has increased by 150%, the number living more than 150 miles away by more than 350%, and the number living more than 200 miles away by about 2,800%; the number of facilities would drop to seven or eight if the surgical-center provision took effect, and those remaining facilities would see a significant increase in patient traffic; facilities would remain only in five metropolitan areas; before H. B. 2's passage, abortion was an extremely safe procedure with very low rates of complications and virtually no deaths; it was also safer than many more common procedures not subject to the same level of regulation; and the cost of compliance with the surgical-center requirement would most likely exceed \$1.5 million to \$3 million per clinic. The court enjoined enforcement of the provisions, holding that the surgical-center requirement imposed an undue burden on the right of women in Texas to seek previability abortions; that, together with that requirement, the admitting-privileges requirement imposed an undue burden in the Rio Grande Valley, El Paso, and West Texas; and that the provisions together created an "impermissible obstacle as applied to all women seeking a previability abortion."

The Fifth Circuit reversed in significant part. It concluded that res judicata barred the District Court from holding the admitting-privileges requirement unconstitutional statewide and that res judicata also barred the challenge to the surgical-center provision. Reasoning that a law is "constitutional if (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus and (2) it is reasonably related to . . . a legitimate state interest," the court found that both requirements were rationally related to a compelling state interest in protecting women's health.

Held:

1. Petitioners' constitutional claims are not barred by res judicata.
Pp. 10–18.

(a) Res judicata neither bars petitioners' challenges to the admitting-privileges requirement nor prevents the Court from awarding fa-

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cial relief. The fact that several petitioners had previously brought the unsuccessful facial challenge in *Abbott* does not mean that claim preclusion, the relevant aspect of res judicata, applies. Claim preclusion prohibits “successive litigation of the very same claim,” *New Hampshire v. Maine*, 532 U. S. 742, 748, but petitioners’ as-applied postenforcement challenge and the *Abbott* plaintiffs’ facial preenforcement challenge do not present the same claim. Changed circumstances showing that a constitutional harm is concrete may give rise to a new claim. *Abbott* rested upon facts and evidence presented before enforcement of the admitting-privileges requirement began, when it was unclear how clinics would be affected. This case rests upon later, concrete factual developments that occurred once enforcement started and a significant number of clinics closed.

Res judicata also does not preclude facial relief here. In addition to requesting as-applied relief, petitioners asked for other appropriate relief, and their evidence and arguments convinced the District Court of the provision’s unconstitutionality across the board. Federal Rule of Civil Procedure 54(c) provides that a “final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings,” and this Court has held that if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is “proper,” *Citizens United v. Federal Election Comm’n*, 558 U. S. 310, 333. Pp. 10–15.

(b) Claim preclusion also does not bar petitioners’ challenge to the surgical-center requirement. In concluding that petitioners should have raised this claim in *Abbott*, the Fifth Circuit did not take account of the fact that the surgical-center provision and the admitting-privileges provision are separate provisions with two different and independent regulatory requirements. Challenges to distinct regulatory requirements are ordinarily treated as distinct claims. Moreover, the surgical-center provision’s implementing regulations had not even been promulgated at the time *Abbott* was filed, and the relevant factual circumstances changed between the two suits. Pp. 16–18.

2. Both the admitting-privileges and the surgical-center requirements place a substantial obstacle in the path of women seeking a previability abortion, constitute an undue burden on abortion access, and thus violate the Constitution. Pp. 19–39.

(a) The Fifth Circuit’s standard of review may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when deciding the undue burden question, but *Casey* requires courts to consider the burdens a law imposes on abortion access together with the benefits those laws confer, see 505 U. S.,

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at 887–898. The Fifth Circuit’s test also mistakenly equates the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable to, *e.g.*, economic legislation. And the court’s requirement that legislatures resolve questions of medical uncertainty is inconsistent with this Court’s case law, which has placed considerable weight upon evidence and argument presented in judicial proceedings when determining the constitutionality of laws regulating abortion procedures. See *id.*, at 888–894. Explicit legislative findings must be considered, but there were no such findings in H. B. 2. The District Court applied the correct legal standard here, considering the evidence in the record—including expert evidence—and then weighing the asserted benefits against the burdens. Pp. 19–21.

(b) The record contains adequate legal and factual support for the District Court’s conclusion that the admitting-privileges requirement imposes an “undue burden” on a woman’s right to choose. The requirement’s purpose is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure, but the District Court, relying on evidence showing extremely low rates of serious complications before H. B. 2’s passage, found no significant health-related problem for the new law to cure. The State’s record evidence, in contrast, does not show how the new law advanced the State’s legitimate interest in protecting women’s health when compared to the prior law, which required providers to have a “working arrangement” with doctors who had admitting privileges. At the same time, the record evidence indicates that the requirement places a “substantial obstacle” in a woman’s path to abortion. The dramatic drop in the number of clinics means fewer doctors, longer waiting times, and increased crowding. It also means a significant increase in the distance women of reproductive age live from an abortion clinic. Increased driving distances do not always constitute an “undue burden,” but they are an additional burden, which, when taken together with others caused by the closings, and when viewed in light of the virtual absence of any health benefit, help support the District Court’s “undue burden” conclusion. Pp. 21–28.

(c) The surgical-center requirement also provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an “undue burden” on their constitutional right to do so. Before this requirement was enacted, Texas law required abortion facilities to meet a host of health and safety requirements that were policed by inspections and enforced through administrative, civil, and criminal penalties. Record evidence shows that the new provision imposes a number of additional requirements that are generally unnecessary in the abortion clinic context; that it

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provides no benefit when complications arise in the context of a medical abortion, which would generally occur after a patient has left the facility; that abortions taking place in abortion facilities are safer than common procedures that occur in outside clinics not subject to Texas' surgical-center requirements; and that Texas has waived no part of the requirement for any abortion clinics as it has done for nearly two-thirds of other covered facilities. This evidence, along with the absence of any contrary evidence, supports the District Court's conclusions, including its ultimate legal conclusion that requirement is not necessary. At the same time, the record provides adequate evidentiary support for the District Court's conclusion that the requirement places a substantial obstacle in the path of women seeking an abortion. The court found that it "strained credulity" to think that the seven or eight abortion facilities would be able to meet the demand. The Fifth Circuit discounted expert witness Dr. Grossman's testimony that the surgical-center requirement would cause the number of abortions performed by each remaining clinic to increase by a factor of about 5. But an expert may testify in the "form of an opinion" as long as that opinion rests upon "sufficient facts or data" and "reliable principles and methods." Fed. Rule Evid. 702. Here, Dr. Grossman's opinion rested upon his participation, together with other university researchers, in research tracking the number of facilities providing abortion services, using information from, among other things, the state health services department and other public sources. The District Court acted within its legal authority in finding his testimony admissible. Common sense also suggests that a physical facility that satisfies a certain physical demand will generally be unable to meet five times that demand without expanding physically or otherwise incurring significant costs. And Texas presented no evidence at trial suggesting that expansion was possible. Finally, the District Court's finding that a currently licensed abortion facility would have to incur considerable costs to meet the surgical-center requirements supports the conclusion that more surgical centers will not soon fill the gap left by closed facilities. Pp. 28–36.

(d) Texas' three additional arguments are unpersuasive. Pp. 36–39.

790 F. 3d 563 and 598, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. GINSBURG, J., filed a concurring opinion. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 15–274

WHOLE WOMAN'S HEALTH, ET AL., PETITIONERS *v.*
JOHN HELLERSTEDT, COMMISSIONER, TEXAS
DEPARTMENT OF STATE HEALTH SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June 27, 2016]

JUSTICE BREYER delivered the opinion of the Court.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 878 (1992), a plurality of the Court concluded that there “exists” an “undue burden” on a woman’s right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the “*purpose or effect*” of the provision “*is to place a substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability.” (Emphasis added.) The plurality added that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.” *Ibid.*

We must here decide whether two provisions of Texas’ House Bill 2 violate the Federal Constitution as interpreted in *Casey*. The first provision, which we shall call the “*admitting-privileges requirement*,” says that

“[a] physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital

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that . . . is located not further than 30 miles from the location at which the abortion is performed or induced.” Tex. Health & Safety Code Ann. §171.0031(a) (West Cum. Supp. 2015).

This provision amended Texas law that had previously required an abortion facility to maintain a written protocol “for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital.” 38 Tex. Reg. 6546 (2013).

The second provision, which we shall call the “*surgical-center requirement*,” says that

“the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [the Texas Health and Safety Code section] for ambulatory surgical centers.” Tex. Health & Safety Code Ann. §245.010(a).

We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, *Casey, supra*, at 878 (plurality opinion), and each violates the Federal Constitution. Amdt. 14, §1.

I

A

In July 2013, the Texas Legislature enacted House Bill 2 (H. B. 2 or Act). In September (before the new law took effect), a group of Texas abortion providers filed an action in Federal District Court seeking facial invalidation of the law’s admitting-privileges provision. In late October, the District Court granted the injunction. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 901 (WD Tex. 2013). But three days later, the Fifth Circuit vacated the injunction,

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thereby permitting the provision to take effect. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F. 3d 406, 419 (2013).

The Fifth Circuit subsequently upheld the provision, and set forth its reasons in an opinion released late the following March. In that opinion, the Fifth Circuit pointed to evidence introduced in the District Court the previous October. It noted that Texas had offered evidence designed to show that the admitting-privileges requirement “will reduce the delay in treatment and decrease health risk for abortion patients with critical complications,” and that it would “‘screen out’ untrained or incompetent abortion providers.” *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F. 3d 583, 592 (2014) (*Abbott*). The opinion also explained that the plaintiffs had not provided sufficient evidence “that abortion practitioners will likely be unable to comply with the privileges requirement.” *Id.*, at 598. The court said that all “of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio,” would “continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges.” *Ibid.* The *Abbott* plaintiffs did not file a petition for certiorari in this Court.

B

On April 6, one week after the Fifth Circuit’s decision, petitioners, a group of abortion providers (many of whom were plaintiffs in the previous lawsuit), filed the present lawsuit in Federal District Court. They sought an injunction preventing enforcement of the admitting-privileges provision as applied to physicians at two abortion facilities, one operated by Whole Woman’s Health in McAllen and the other operated by Nova Health Systems in El Paso. They also sought an injunction prohibiting enforcement of the surgical-center provision anywhere in Texas.

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They claimed that the admitting-privileges provision and the surgical-center provision violated the Constitution's Fourteenth Amendment, as interpreted in *Casey*.

The District Court subsequently received stipulations from the parties and depositions from the parties' experts. The court conducted a 4-day bench trial. It heard, among other testimony, the opinions from expert witnesses for both sides. On the basis of the stipulations, depositions, and testimony, that court reached the following conclusions:

1. Of Texas' population of more than 25 million people, "approximately 5.4 million" are "women" of "reproductive age," living within a geographical area of "nearly 280,000 square miles." *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 681 (2014); see App. 244.
2. "In recent years, the number of abortions reported in Texas has stayed fairly consistent at approximately 15–16% of the reported pregnancy rate, for a total number of approximately 60,000–72,000 legal abortions performed annually." 46 F. Supp. 3d, at 681; see App. 238.
3. Prior to the enactment of H. B. 2, there were more than 40 licensed abortion facilities in Texas, which "number dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement that went into effect in late-October 2013." 46 F. Supp. 3d, at 681; App. 228–231.
4. If the surgical-center provision were allowed to take effect, the number of abortion facilities, after September 1, 2014, would be reduced further, so that "only seven facilities and a potential eighth will exist in Texas." 46 F. Supp. 3d, at 680; App. 182–183.

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5. Abortion facilities “will remain only in Houston, Austin, San Antonio, and the Dallas/Fort Worth metropolitan region.” 46 F. Supp. 3d, at 681; App. 229–230. These include “one facility in Austin, two in Dallas, one in Fort Worth, two in Houston, and either one or two in San Antonio.” 46 F. Supp. 3d, at 680; App. 229–230.

6. “Based on historical data pertaining to Texas’s average number of abortions, and assuming perfectly equal distribution among the remaining seven or eight providers, this would result in each facility serving between 7,500 and 10,000 patients per year. Accounting for the seasonal variations in pregnancy rates and a slightly unequal distribution of patients at each clinic, it is foreseeable that over 1,200 women per month could be vying for counseling, appointments, and follow-up visits at some of these facilities.” 46 F. Supp. 3d, at 682; cf. App. 238.

7. The suggestion “that these seven or eight providers could meet the demand of the entire state stretches credulity.” 46 F. Supp. 3d, at 682; see App. 238.

8. “Between November 1, 2012 and May 1, 2014,” that is, before and after enforcement of the admitting-privileges requirement, “the decrease in geographical distribution of abortion facilities” has meant that the number of women of reproductive age living more than 50 miles from a clinic has doubled (from 800,000 to over 1.6 million); those living more than 100 miles has increased by 150% (from 400,000 to 1 million); those living more than 150 miles has increased by more than 350% (from 86,000 to 400,000); and those living more than 200 miles has increased by about 2,800% (from 10,000 to 290,000). After September 2014, should the surgical-center requirement go into effect, the number of women of reproductive age living significant distances from an abortion

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provider will increase as follows: 2 million women of reproductive age will live more than 50 miles from an abortion provider; 1.3 million will live more than 100 miles from an abortion provider; 900,000 will live more than 150 miles from an abortion provider; and 750,000 more than 200 miles from an abortion provider. 46 F. Supp. 3d, at 681–682; App. 238–242.

9. The “two requirements erect a particularly high barrier for poor, rural, or disadvantaged women.” 46 F. Supp. 3d, at 683; cf. App. 363–370.

10. “The great weight of evidence demonstrates that, before the act’s passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.” 46 F. Supp. 3d, at 684; see, *e.g.*, App. 257–259, 538; see also *id.*, at 200–202, 253–257.

11. “Abortion, as regulated by the State before the enactment of House Bill 2, has been shown to be much safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny.” 46 F. Supp. 3d, at 684; see, *e.g.*, App. 223–224 (describing risks in colonoscopies), 254 (discussing risks in vasectomy and endometrial biopsy, among others), 275–277 (discussing complication rate in plastic surgery).

12. “Additionally, risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities.” 46 F. Supp. 3d, at 684; App. 202–206, 257–259.

13. “[W]omen will not obtain better care or experience more frequent positive outcomes at an ambulatory surgi-

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cal center as compared to a previously licensed facility.” 46 F. Supp. 3d, at 684; App. 202–206.

14. “[T]here are 433 licensed ambulatory surgical centers in Texas,” of which “336 . . . are apparently either ‘grandfathered’ or enjo[y] the benefit of a waiver of some or all” of the surgical-center “requirements.” 46 F. Supp. 3d, at 680–681; App. 184.

15. The “cost of coming into compliance” with the surgical-center requirement “for existing clinics is significant,” “undisputedly approach[ing] 1 million dollars,” and “most likely exceed[ing] 1.5 million dollars,” with “[s]ome . . . clinics” unable to “comply due to physical size limitations of their sites.” 46 F. Supp. 3d, at 682. The “cost of acquiring land and constructing a new compliant clinic will likely exceed three million dollars.” *Ibid.*

On the basis of these and other related findings, the District Court determined that the surgical-center requirement “imposes an undue burden on the right of women throughout Texas to seek a previability abortion,” and that the “admitting-privileges requirement, . . . in conjunction with the ambulatory-surgical-center requirement, imposes an undue burden on the right of women in the Rio Grande Valley, El Paso, and West Texas to seek a previability abortion.” *Id.*, at 687. The District Court concluded that the “two provisions” would cause “the closing of almost all abortion clinics in Texas that were operating legally in the fall of 2013,” and thereby create a constitutionally “impermissible obstacle as applied to all women seeking a previability abortion” by “restricting access to previously available legal facilities.” *Id.*, at 687–688. On August 29, 2014, the court enjoined the enforcement of the two provisions. *Ibid.*

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C

On October 2, 2014, at Texas' request, the Court of Appeals stayed the District Court's injunction. *Whole Woman's Health v. Lakey*, 769 F. 3d 285, 305. Within the next two weeks, this Court vacated the Court of Appeals' stay (in substantial part) thereby leaving in effect the District Court's injunction against enforcement of the surgical-center provision and its injunction against enforcement of the admitting-privileges requirement as applied to the McAllen and El Paso clinics. *Whole Woman's Health v. Lakey*, 574 U. S. ___ (2014). The Court of Appeals then heard Texas' appeal.

On June 9, 2015, the Court of Appeals reversed the District Court on the merits. With minor exceptions, it found both provisions constitutional and allowed them to take effect. *Whole Women's Health v. Cole*, 790 F. 3d 563, 567 (*per curiam*), modified, 790 F. 3d 598 (CA5 2015). Because the Court of Appeals' decision rests upon alternative grounds and fact-related considerations, we set forth its basic reasoning in some detail. The Court of Appeals concluded:

- The District Court was wrong to hold the admitting-privileges requirement unconstitutional because (except for the clinics in McAllen and El Paso) the providers had not asked them to do so, and principles of res judicata barred relief. *Id.*, at 580–583.
- Because the providers could have brought their constitutional challenge to the surgical-center provision in their earlier lawsuit, principles of res judicata also barred that claim. *Id.*, at 581–583.
- In any event, a state law “regulating previability abortion is constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legiti-

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mate state interest.” *Id.*, at 572.

- “[B]oth the admitting privileges requirement and” the surgical-center requirement “were rationally related to a legitimate state interest,” namely, “rais[ing] the standard and quality of care for women seeking abortions and . . . protect[ing] the health and welfare of women seeking abortions.” *Id.*, at 584.
- The “[p]laintiffs” failed “to proffer competent evidence contradicting the legislature’s statement of a legitimate purpose.” *Id.*, at 585.
- “[T]he district court erred by substituting its own judgment [as to the provisions’ effects] for that of the legislature, albeit . . . in the name of the undue burden inquiry.” *Id.*, at 587.
- Holding the provisions unconstitutional on their face is improper because the plaintiffs had failed to show that either of the provisions “imposes an undue burden on a large fraction of women.” *Id.*, at 590.
- The District Court erred in finding that, if the surgical-center requirement takes effect, there will be too few abortion providers in Texas to meet the demand. That factual determination was based upon the finding of one of plaintiffs’ expert witnesses (Dr. Grossman) that abortion providers in Texas “will not be able to go from providing approximately 14,000 abortions annually, as they currently are, to providing the 60,000 to 70,000 abortions that are done each year in Texas once all” of the clinics failing to meet the surgical-center requirement “are forced to close.” *Id.*, at 589–590. But Dr. Grossman’s opinion is (in the Court of Appeals’ view) “*ipse dixit*”; the “record lacks any actual evidence regarding the current or future capacity of the eight clinics”; and there is no “evidence in the record that” the providers that currently meet the surgical-center requirement “are operating at full capacity or that they cannot increase capacity.” *Ibid.*

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For these and related reasons, the Court of Appeals reversed the District Court's holding that the admitting-privileges requirement is unconstitutional and its holding that the surgical-center requirement is unconstitutional. The Court of Appeals upheld in part the District Court's more specific holding that the requirements are unconstitutional as applied to the McAllen facility and Dr. Lynn (a doctor at that facility), but it reversed the District Court's holding that the surgical-center requirement is unconstitutional as applied to the facility in El Paso. In respect to this last claim, the Court of Appeals said that women in El Paso wishing to have an abortion could use abortion providers in nearby New Mexico.

II

Before turning to the constitutional question, we must consider the Court of Appeals' procedural grounds for holding that (but for the challenge to the provisions of H. B. 2 as applied to McAllen and El Paso) petitioners were barred from bringing their constitutional challenges.

A

Claim Preclusion—Admitting-Privileges Requirement

The Court of Appeals held that there could be no facial challenge to the admitting-privileges requirement. Because several of the petitioners here had previously brought an unsuccessful facial challenge to that requirement (namely, *Abbott*, 748 F. 3d, at 605; see *supra*, at 2–3), the Court of Appeals thought that “the principle of res judicata” applied. 790 F. 3d, at 581. The Court of Appeals also held that res judicata prevented the District Court from granting facial relief to petitioners, concluding that it was improper to “facially invalidat[e] the admitting privileges requirement,” because to do so would “gran[t] more relief than anyone requested or briefed.” *Id.*, at 580. We hold that res judicata neither bars petitioners’ challenges

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to the admitting-privileges requirement nor prevents us from awarding facial relief.

For one thing, to the extent that the Court of Appeals concluded that the principle of res judicata bars any facial challenge to the admitting-privileges requirement, see *ibid.*, the court misconstrued petitioners' claims. Petitioners did not bring a facial challenge to the admitting-privileges requirement in this case but instead challenged that requirement as applied to the clinics in McAllen and El Paso. The question is whether res judicata bars petitioners' particular as-applied claims. On this point, the Court of Appeals concluded that res judicata was no bar, see 790 F. 3d, at 592, and we agree.

The doctrine of claim preclusion (the here-relevant aspect of res judicata) prohibits "successive litigation of the very same claim" by the same parties. *New Hampshire v. Maine*, 532 U. S. 742, 748 (2001). Petitioners' postenforcement as-applied challenge is not "the very same claim" as their preenforcement facial challenge. The Restatement of Judgments notes that development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim. See Restatement (Second) of Judgments §24, Comment *f* (1980) ("Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first"); cf. *id.*, §20(2) ("A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied"); *id.*, §20, Comment *k* (discussing relationship of this rule with §24, Comment *f*). The Courts of Appeals have used similar rules to determine the contours of a new

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claim for purposes of preclusion. See, e.g., *Morgan v. Covington*, 648 F. 3d 172, 178 (CA3 2011) (“[R]es judicata does not bar claims that are predicated on events that postdate the filing of the initial complaint”); *Ellis v. CCA of Tenn. LLC*, 650 F. 3d 640, 652 (CA7 2011); *Bank of N. Y. v. First Millennium, Inc.*, 607 F. 3d 905, 919 (CA2 2010); *Smith v. Potter*, 513 F. 3d 781, 783 (CA7 2008); *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F. 3d 521, 529 (CA6 2006); *Manning v. Auburn*, 953 F. 2d 1355, 1360 (CA11 1992). The Restatement adds that, where “important human values—such as the lawfulness of continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.” §24, Comment f; see *Bucklew v. Lombardi*, 783 F. 3d 1120, 1127 (CA8 2015) (allowing as-applied challenge to execution method to proceed notwithstanding prior facial challenge).

We find this approach persuasive. Imagine a group of prisoners who claim that they are being forced to drink contaminated water. These prisoners file suit against the facility where they are incarcerated. If at first their suit is dismissed because a court does not believe that the harm would be severe enough to be unconstitutional, it would make no sense to prevent the same prisoners from bringing a later suit if time and experience eventually showed that prisoners were dying from contaminated water. Such circumstances would give rise to a new claim that the prisoners’ treatment violates the Constitution. Factual developments may show that constitutional harm, which seemed too remote or speculative to afford relief at the time of an earlier suit, was in fact indisputable. In our view, such changed circumstances will give rise to a new constitutional claim. This approach is sensible, and it is consistent with our precedent. See *Abie State Bank v. Bryan*, 282 U. S. 765, 772 (1931) (where “suit was brought

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immediately upon the enactment of the law,” “decision sustaining the law cannot be regarded as precluding a subsequent suit for the purpose of testing [its] validity . . . in the lights of the later actual experience”); cf. *Lawlor v. National Screen Service Corp.*, 349 U. S. 322, 328 (1955) (judgment that “precludes recovery on claims arising prior to its entry” nonetheless “cannot be given the effect of extinguishing claims which did not even then exist”); *United States v. Carolene Products Co.*, 304 U. S. 144, 153 (1938) (“[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist”); *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405, 415 (1935) (“A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied” (footnote omitted)); *Third Nat. Bank of Louisville v. Stone* 174 U. S. 432, 434 (1899) (“A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen”). JUSTICE ALITO’s dissenting opinion is simply wrong that changed circumstances showing that a challenged law has an unconstitutional effect cannot give rise to a new claim. See *post*, at 14–15 (hereinafter the dissent).

Changed circumstances of this kind are why the claim presented in *Abbott* is not the same claim as petitioners’ claim here. The claims in both *Abbott* and the present case involve “important human values.” Restatement (Second) of Judgments §24, Comment f. We are concerned with H. B. 2’s “effect . . . on women seeking abortions.” *Post*, at 30 (ALITO, J., dissenting). And that effect has changed dramatically since petitioners filed their first lawsuit. *Abbott* rested on facts and evidence presented to the District Court in October 2013. 748 F. 3d, at 599, n. 14 (declining to “consider any arguments” based on “developments since the conclusion of the bench trial”).

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Petitioners' claim in this case rests in significant part upon later, concrete factual developments. Those developments matter. The *Abbott* plaintiffs brought their facial challenge to the admitting-privileges requirement *prior to its enforcement*—before many abortion clinics had closed and while it was still unclear how many clinics would be affected. Here, petitioners bring an as-applied challenge to the requirement *after its enforcement*—and after a large number of clinics have in fact closed. The postenforcement consequences of H. B. 2 were unknowable before it went into effect. The *Abbott* court itself recognized that “[l]ater as-applied challenges can always deal with subsequent, concrete constitutional issues.” *Id.*, at 589. And the Court of Appeals in this case properly decided that new evidence presented by petitioners had given rise to a new claim and that petitioners' as-applied challenges are not precluded. See 790 F. 3d, at 591 (“We now know with certainty that the non-[surgical-center] abortion facilities have actually closed and physicians have been unable to obtain admitting privileges after diligent effort”).

When individuals claim that a particular statute will produce serious constitutionally relevant adverse consequences before they have occurred—and when the courts doubt their likely occurrence—the factual difference that those adverse consequences *have in fact occurred* can make all the difference. Compare the Fifth Circuit's opinion in the earlier case, *Abbott*, *supra*, at 598 (“All of the major Texas cities . . . continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges”), with the facts found in this case, 46 F. Supp. 3d, at 680 (the two provisions will leave Texas with seven or eight clinics). The challenge brought in this case and the one in *Abbott* are not the “very same claim,” and the doctrine of claim preclusion consequently does not bar a new challenge to the constitutionality of the admitting-privileges requirement. *New Hampshire v. Maine*,

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532 U. S., at 748. That the litigants in *Abbott* did not seek review in this Court, as the dissent suggests they should have done, see *post*, at 10, does not prevent them from seeking review of new claims that have arisen after *Abbott* was decided. In sum, the Restatement, cases from the Courts of Appeals, our own precedent, and simple logic combine to convince us that res judicata does not bar this claim.

The Court of Appeals also concluded that the award of facial relief was precluded by principles of res judicata. 790 F. 3d, at 581. The court concluded that the District Court should not have “granted more relief than anyone requested or briefed.” *Id.*, at 580. But in addition to asking for as-applied relief, petitioners asked for “such other and further relief as the Court may deem just, proper, and equitable.” App. 167. Their evidence and arguments convinced the District Court that the provision was unconstitutional across the board. The Federal Rules of Civil Procedure state that (with an exception not relevant here) a “final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” Rule 54(c). And we have held that, if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is “proper.” *Citizens United v. Federal Election Comm’n*, 558 U. S. 310, 333 (2010); see *ibid.* (in “the exercise of its judicial responsibility” it may be “necessary . . . for the Court to consider the facial validity” of a statute, even though a facial challenge was not brought); cf. Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1339 (2000) (“[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly ‘as-applied’ cases”). Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners’ as-applied claims.

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B

Claim Preclusion—Surgical-Center Requirement

The Court of Appeals also held that claim preclusion barred petitioners from contending that the surgical-center requirement is unconstitutional. 790 F. 3d, at 583. Although it recognized that petitioners did not bring this claim in *Abbott*, it believed that they should have done so. The court explained that petitioners' constitutional challenge to the surgical-center requirement and the challenge to the admitting-privileges requirement mounted in *Abbott*

"arise from the same 'transactio[n] or series of connected transactions.' . . . The challenges involve the same parties and abortion facilities; the challenges are governed by the same legal standards; the provisions at issue were enacted at the same time as part of the same act; the provisions were motivated by a common purpose; the provisions are administered by the same state officials; and the challenges form a convenient trial unit because they rely on a common nucleus of operative facts." 790 F. 3d, at 581.

For all these reasons, the Court of Appeals held petitioners' challenge to H. B. 2's surgical-center requirement was precluded.

The Court of Appeals failed, however, to take account of meaningful differences. The surgical-center provision and the admitting-privileges provision are separate, distinct provisions of H. B. 2. They set forth two different, independent requirements with different enforcement dates. This Court has never suggested that challenges to two different statutory provisions that serve two different functions must be brought in a single suit. And lower courts normally treat challenges to distinct regulatory requirements as "separate claims," even when they are part of one overarching "[g]overnment regulatory scheme."

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18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §4408, p. 52 (2d ed. 2002, Supp. 2015); see *Hamilton's Bogarts, Inc. v. Michigan*, 501 F. 3d 644, 650 (CA6 2007).

That approach makes sense. The opposite approach adopted by the Court of Appeals would require treating every statutory enactment as a single transaction which a given party would only be able to challenge one time, in one lawsuit, in order to avoid the effects of claim preclusion. Such a rule would encourage a kitchen-sink approach to any litigation challenging the validity of statutes. That outcome is less than optimal—not only for litigants, but for courts.

There are other good reasons why petitioners should not have had to bring their challenge to the surgical-center provision at the same time they brought their first suit. The statute gave the Texas Department of State Health Services authority to make rules implementing the surgical-center requirement. H. B. 2, §11(a), App. to Pet. for Cert. 201a. At the time petitioners filed *Abbott*, that state agency had not yet issued any such rules. Cf. *EPA v. Brown*, 431 U. S. 99, 104 (1977) (*per curiam*); 13B Wright, *supra*, §3532.6, at 629 (3d ed. 2008) (most courts will not “undertake review before rules have been adopted”); *Natural Resources Defense Council, Inc. v. EPA*, 859 F. 2d 156, 204 (CA DC 1988).

Further, petitioners might well have expected that those rules when issued would contain provisions grandfathering some then-existing abortion facilities and granting full or partial waivers to others. After all, more than three quarters of non-abortion-related surgical centers had benefited from that kind of provision. See 46 F. Supp. 3d, at 680–681 (336 of 433 existing Texas surgical centers have been grandfathered or otherwise enjoy a waiver of some of the surgical-center requirements); see also App. 299–302, 443–447, 468–469.

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Finally, the relevant factual circumstances changed between *Abbott* and the present lawsuit, as we previously described. See *supra*, at 14–15.

The dissent musters only one counterargument. According to the dissent, if statutory provisions “impos[e] the same kind of burden . . . on the same kind of right” and have mutually reinforcing effects, “it is evident that” they are “part of the same transaction” and must be challenged together. *Post*, at 20, 22. But for the word “evident,” the dissent points to no support for this conclusion, and we find it unconvincing. Statutes are often voluminous, with many related, yet distinct, provisions. Plaintiffs, in order to preserve their claims, need not challenge each such provision of, say, the USA PATRIOT Act, the Bipartisan Campaign Reform Act of 2002, the National Labor Relations Act, the Clean Water Act, the Antiterrorism and Effective Death Penalty Act of 1996, or the Patient Protection and Affordable Care Act in their first lawsuit.

For all of these reasons, we hold that the petitioners did not have to bring their challenge to the surgical-center provision when they challenged the admitting-privileges provision in *Abbott*. We accordingly hold that the doctrine of claim preclusion does not prevent them from bringing that challenge now.

* * *

In sum, in our view, none of petitioners’ claims are barred by res judicata. For all of the reasons described above, we conclude that the Court of Appeals’ procedural ruling was incorrect. Cf. Brief for Professors Michael Dorf et al. as *Amici Curiae* 22 (professors in civil procedure from Cornell Law School, New York University School of Law, Columbia Law School, University of Chicago Law School, and Duke University Law School) (maintaining that “the panel’s procedural ruling” was “clearly incorrect”). We consequently proceed to consider the merits of petitioners’ claims.

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III

Undue Burden—Legal Standard

We begin with the standard, as described in *Casey*. We recognize that the “State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient.” *Roe v. Wade*, 410 U. S. 113, 150 (1973). But, we added, “a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.” *Casey*, 505 U. S., at 877 (plurality opinion). Moreover, “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.” *Id.*, at 878.

The Court of Appeals wrote that a state law is “constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest.” 790 F. 3d, at 572. The Court of Appeals went on to hold that “the district court erred by substituting its own judgment for that of the legislature” when it conducted its “undue burden inquiry,” in part because “medical uncertainty underlying a statute is for resolution by legislatures, not the courts.” *Id.*, at 587 (citing *Gonzales v. Carhart*, 550 U. S. 124, 163 (2007)).

The Court of Appeals’ articulation of the relevant standard is incorrect. The first part of the Court of Appeals’ test may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden. The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits

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those laws confer. See 505 U. S., at 887–898 (opinion of the Court) (performing this balancing with respect to a spousal notification provision); *id.*, at 899–901 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.) (same balancing with respect to a parental notification provision). And the second part of the test is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U. S. 483, 491 (1955). The Court of Appeals' approach simply does not match the standard that this Court laid out in *Casey*, which asks courts to consider whether any burden imposed on abortion access is “undue.”

The statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court's case law. Instead, the Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial proceedings. In *Casey*, for example, we relied heavily on the District Court's factual findings and the research-based submissions of *amici* in declaring a portion of the law at issue unconstitutional. 505 U. S., at 888–894 (opinion of the Court) (discussing evidence related to the prevalence of spousal abuse in determining that a spousal notification provision erected an undue burden to abortion access). And, in *Gonzales* the Court, while pointing out that we must review legislative “factfinding under a deferential standard,” added that we must not “place dispositive weight” on those “findings.” 550 U. S., at 165. *Gonzales* went on to point out that the “*Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.*” *Ibid.* (emphasis added). Although there we upheld a statute regulating abortion, we did not do so solely on the basis of legislative findings

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explicitly set forth in the statute, noting that “evidence presented in the District Courts contradicts” some of the legislative findings. *Id.*, at 166. In these circumstances, we said, “[u]ncritical deference to Congress’ factual findings . . . is inappropriate.” *Ibid.*

Unlike in *Gonzales*, the relevant statute here does not set forth any legislative findings. Rather, one is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women’s health). *Id.*, at 149–150. For a district court to give significant weight to evidence in the judicial record in these circumstances is consistent with this Court’s case law. As we shall describe, the District Court did so here. It did not simply substitute its own judgment for that of the legislature. It considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony. It then weighed the asserted benefits against the burdens. We hold that, in so doing, the District Court applied the correct legal standard.

IV

Undue Burden—Admitting-Privileges Requirement

Turning to the lower courts’ evaluation of the evidence, we first consider the admitting-privileges requirement. Before the enactment of H. B. 2, doctors who provided abortions were required to “have admitting privileges or have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications.” Tex. Admin. Code, tit. 25, §139.56 (2009) (emphasis added). The new law changed this requirement by requiring that a “physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced.” Tex. Health & Safety

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Code Ann. §171.0031(a). The District Court held that the legislative change imposed an “undue burden” on a woman’s right to have an abortion. We conclude that there is adequate legal and factual support for the District Court’s conclusion.

The purpose of the admitting-privileges requirement is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure. Brief for Respondents 32–37. But the District Court found that it brought about no such health-related benefit. The court found that “[t]he great weight of evidence demonstrates that, before the act’s passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.” 46 F. Supp. 3d, at 684. Thus, there was no significant health-related problem that the new law helped to cure.

The evidence upon which the court based this conclusion included, among other things:

- A collection of at least five peer-reviewed studies on abortion complications in the first trimester, showing that the highest rate of major complications—including those complications requiring hospital admission—was less than one-quarter of 1%. See App. 269–270.
- Figures in three peer-reviewed studies showing that the highest complication rate found for the much rarer second trimester abortion was less than one-half of 1% (0.45% or about 1 out of about 200). *Id.*, at 270.
- Expert testimony to the effect that complications rarely require hospital admission, much less immediate transfer to a hospital from an outpatient clinic. *Id.*, at 266–267 (citing a study of complications occurring within six weeks after 54,911 abortions that had been paid for by the fee-for-service California Medicaid Program finding that the incidence of complications was 2.1%, the incidence of

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complications requiring hospital admission was 0.23%, and that of the 54,911 abortion patients included in the study, only 15 required immediate transfer to the hospital on the day of the abortion).

- Expert testimony stating that “it is extremely unlikely that a patient will experience a serious complication at the clinic that requires emergent hospitalization” and “in the rare case in which [one does], the quality of care that the patient receives is not affected by whether the abortion provider has admitting privileges at the hospital.” *Id.*, at 381.
- Expert testimony stating that in respect to surgical abortion patients who do suffer complications requiring hospitalization, most of these complications occur in the days after the abortion, not on the spot. See *id.*, at 382; see also *id.*, at 267.
- Expert testimony stating that a delay before the onset of complications is also expected for medical abortions, as “abortifacient drugs take time to exert their effects, and thus the abortion itself almost always occurs after the patient has left the abortion facility.” *Id.*, at 278.
- Some experts added that, if a patient needs a hospital in the day or week following her abortion, she will likely seek medical attention at the hospital nearest her home. See, e.g., *id.*, at 153.

We have found nothing in Texas’ record evidence that shows that, compared to prior law (which required a “working arrangement” with a doctor with admitting privileges), the new law advanced Texas’ legitimate interest in protecting women’s health.

We add that, when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case. See Tr. of Oral Arg. 47.

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This answer is consistent with the findings of the other Federal District Courts that have considered the health benefits of other States' similar admitting-privileges laws. See *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 953 (WD Wis. 2015), aff'd *sub nom. Planned Parenthood of Wis., Inc. v. Schimel*, 806 F. 3d 908 (CA7 2015); *Planned Parenthood Southeast, Inc. v. Strange*, 33 F. Supp. 3d 1330, 1378 (MD Ala. 2014).

At the same time, the record evidence indicates that the admitting-privileges requirement places a "substantial obstacle in the path of a woman's choice." *Casey*, 505 U. S., at 877 (plurality opinion). The District Court found, as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20. 46 F. Supp. 3d, at 681. Eight abortion clinics closed in the months leading up to the requirement's effective date. See App. 229–230; cf. Brief for Planned Parenthood Federation of America et al. as *Amici Curiae* 14 (noting that abortion facilities in Waco, San Angelo, and Midland no longer operate because Planned Parenthood is "unable to find local physicians in those communities with privileges who are willing to provide abortions due to the size of those communities and the hostility that abortion providers face"). Eleven more closed on the day the admitting-privileges requirement took effect. See App. 229–230; Tr. of Oral Arg. 58.

Other evidence helps to explain why the new requirement led to the closure of clinics. We read that other evidence in light of a brief filed in this Court by the Society of Hospital Medicine. That brief describes the undisputed general fact that "hospitals often condition admitting privileges on reaching a certain number of admissions per year." Brief for Society of Hospital Medicine et al. as *Amici Curiae* 11. Returning to the District Court record, we note that, in direct testimony, the president of Nova

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Health Systems, implicitly relying on this general fact, pointed out that it would be difficult for doctors regularly performing abortions at the El Paso clinic to obtain admitting privileges at nearby hospitals because “[d]uring the past 10 years, over 17,000 abortion procedures were performed at the El Paso clinic [and n]ot a single one of those patients had to be transferred to a hospital for emergency treatment, much less admitted to the hospital.” App. 730. In a word, doctors would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit.

Other *amicus* briefs filed here set forth without dispute other common prerequisites to obtaining admitting privileges that have nothing to do with ability to perform medical procedures. See Brief for Medical Staff Professionals as *Amici Curiae* 20–25 (listing, for example, requirements that an applicant has treated a high number of patients in the hospital setting in the past year, clinical data requirements, residency requirements, and other discretionary factors); see also Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 16 (ACOG Brief) (“[S]ome academic hospitals will only allow medical staff membership for clinicians who also . . . accept faculty appointments”). Again, returning to the District Court record, we note that Dr. Lynn of the McAllen clinic, a veteran obstetrics and gynecology doctor who estimates that he has delivered over 15,000 babies in his 38 years in practice was unable to get admitting privileges at any of the seven hospitals within 30 miles of his clinic. App. 390–394. He was refused admitting privileges at a nearby hospital for reasons, as the hospital wrote, “not based on clinical competence considerations.” *Id.*, at 393–394 (emphasis deleted). The admitting-privileges requirement does not serve any relevant credentialing function.

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In our view, the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas' clinics, or thereabouts. Those closures meant fewer doctors, longer waiting times, and increased crowding. Record evidence also supports the finding that after the admitting-privileges provision went into effect, the "number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000." 46 F. Supp. 3d, at 681. We recognize that increased driving distances do not always constitute an "undue burden." See *Casey*, 505 U.S., at 885–887 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.). But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's "undue burden" conclusion. Cf. *id.*, at 895 (opinion of the Court) (finding burden "undue" when requirement places "substantial obstacle to a woman's choice" in "a large fraction of the cases in which" it "is relevant").

The dissent's only argument why these clinic closures, as well as the ones discussed in Part V, *infra*, may not have imposed an undue burden is this: Although "H. B. 2 caused the closure of *some* clinics," *post*, at 26 (emphasis added), other clinics may have closed for other reasons (so we should not "actually count" the burdens resulting from those closures against H. B. 2), *post*, at 30–31. But petitioners satisfied their burden to present evidence of causation by presenting direct testimony as well as plausible inferences to be drawn from the timing of the clinic closures. App. 182–183, 228–231. The District Court credited that evidence and concluded from it that H. B. 2 in fact

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led to the clinic closures. 46 F. Supp. 3d, at 680–681. The dissent’s speculation that perhaps other evidence, not presented at trial or credited by the District Court, might have shown that some clinics closed for unrelated reasons does not provide sufficient ground to disturb the District Court’s factual finding on that issue.

In the same breath, the dissent suggests that one benefit of H. B. 2’s requirements would be that they might “force unsafe facilities to shut down.” *Post*, at 26. To support that assertion, the dissent points to the Kermit Gosnell scandal. Gosnell, a physician in Pennsylvania, was convicted of first-degree murder and manslaughter. He “staffed his facility with unlicensed and indifferent workers, and then let them practice medicine unsupervised” and had “[d]irty facilities; unsanitary instruments; an absence of functioning monitoring and resuscitation equipment; the use of cheap, but dangerous, drugs; illegal procedures; and inadequate emergency access for when things inevitably went wrong.” Report of Grand Jury in No. 0009901–2008 (1st Jud. Dist. Pa., Jan. 14, 2011), p. 24, online at <http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf> (as last visited June 27, 2016). Gosnell’s behavior was terribly wrong. But there is no reason to believe that an extra layer of regulation would have affected that behavior. Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations. Regardless, Gosnell’s deplorable crimes could escape detection only because his facility went uninspected for more than 15 years. *Id.*, at 20. Pre-existing Texas law already contained numerous detailed regulations covering abortion facilities, including a requirement that facilities be inspected at least annually. See *infra*, at 28 (describing those regulations). The record contains nothing to suggest that H. B. 2 would be more effective than pre-existing

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Texas law at deterring wrongdoers like Gosnell from criminal behavior.

V

Undue Burden—Surgical-Center Requirement

The second challenged provision of Texas' new law sets forth the surgical-center requirement. Prior to enactment of the new requirement, Texas law required abortion facilities to meet a host of health and safety requirements. Under those pre-existing laws, facilities were subject to annual reporting and recordkeeping requirements, see Tex. Admin. Code, tit. 25, §§139.4, 139.5, 139.55, 139.58; a quality assurance program, see §139.8; personnel policies and staffing requirements, see §§139.43, 139.46; physical and environmental requirements, see §139.48; infection control standards, see §139.49; disclosure requirements, see §139.50; patient-rights standards, see §139.51; and medical- and clinical-services standards, see §139.53, including anesthesia standards, see §139.59. These requirements are policed by random and announced inspections, at least annually, see §§139.23, 139.31; Tex. Health & Safety Code Ann. §245.006(a) (West 2010), as well as administrative penalties, injunctions, civil penalties, and criminal penalties for certain violations, see Tex. Admin. Code, tit. 25, §139.33; Tex. Health & Safety Code Ann. §245.011 (criminal penalties for certain reporting violations).

H. B. 2 added the requirement that an “abortion facility” meet the “minimum standards . . . for ambulatory surgical centers” under Texas law. §245.010(a) (West Cum. Supp. 2015). The surgical-center regulations include, among other things, detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements. The nursing staff must comprise at least “an adequate number of [registered nurses] on duty to meet the following minimum staff requirements: director

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of the department (or designee), and supervisory and staff personnel for each service area to assure the immediate availability of [a registered nurse] for emergency care or for any patient when needed,” Tex. Admin. Code, tit. 25, §135.15(a)(3) (2016), as well as “a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility” for facilities that provide moderate sedation, such as most abortion facilities, §135.15(b)(2)(A). Facilities must include a full surgical suite with an operating room that has “a clear floor area of at least 240 square feet” in which “[t]he minimum clear dimension between built-in cabinets, counters, and shelves shall be 14 feet.” §135.52(d)(15)(A). There must be a preoperative patient holding room and a postoperative recovery suite. The former “shall be provided and arranged in a one-way traffic pattern so that patients entering from outside the surgical suite can change, gown, and move directly into the restricted corridor of the surgical suite,” §135.52(d)(10)(A), and the latter “shall be arranged to provide a one-way traffic pattern from the restricted surgical corridor to the postoperative recovery suite, and then to the extended observation rooms or discharge,” §135.52(d)(9)(A). Surgical centers must meet numerous other spatial requirements, see generally §135.52, including specific corridor widths, §135.52(e)(1)(B)(iii). Surgical centers must also have an advanced heating, ventilation, and air conditioning system, §135.52(g)(5), and must satisfy particular piping system and plumbing requirements, §135.52(h). Dozens of other sections list additional requirements that apply to surgical centers. See generally §§135.1–135.56.

There is considerable evidence in the record supporting the District Court’s findings indicating that the statutory provision requiring all abortion facilities to meet all surgical-center standards does not benefit patients and is not

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necessary. The District Court found that “risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities.” 46 F. Supp. 3d, at 684. The court added that women “will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility.” *Ibid.* And these findings are well supported.

The record makes clear that the surgical-center requirement provides no benefit when complications arise in the context of an abortion produced through medication. That is because, in such a case, complications would almost always arise only after the patient has left the facility. See *supra*, at 23; App. 278. The record also contains evidence indicating that abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements. See, e.g., *id.*, at 223–224, 254, 275–279. The total number of deaths in Texas from abortions was five in the period from 2001 to 2012, or about one every two years (that is to say, one out of about 120,000 to 144,000 abortions). *Id.*, at 272. Nationwide, childbirth is 14 times more likely than abortion to result in death, *ibid.*, but Texas law allows a midwife to oversee childbirth in the patient’s own home. Colonoscopy, a procedure that typically takes place outside a hospital (or surgical center) setting, has a mortality rate 10 times higher than an abortion. *Id.*, at 276–277; see ACOG Brief 15 (the mortality rate for liposuction, another outpatient procedure, is 28 times higher than the mortality rate for abortion). Medical treatment after an incomplete miscarriage often involves a procedure identical to that involved in a nonmedical abortion, but it often takes place outside a hospital or surgical center. App. 254; see ACOG Brief 14 (same). And Texas partly or wholly grandfathers (or waives in whole or in part the surgical-center

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requirement for) about two-thirds of the facilities to which the surgical-center standards apply. But it neither grandfathered nor provides waivers for any of the facilities that perform abortions. 46 F. Supp. 3d, at 680–681; see App. 184. These facts indicate that the surgical-center provision imposes “a requirement that simply is not based on differences” between abortion and other surgical procedures “that are reasonably related to” preserving women’s health, the asserted “purpos[e] of the Act in which it is found.” *Doe*, 410 U. S., at 194 (quoting *Morey v. Doud*, 354 U. S. 457, 465 (1957); internal quotation marks omitted).

Moreover, many surgical-center requirements are inappropriate as applied to surgical abortions. Requiring scrub facilities; maintaining a one-way traffic pattern through the facility; having ceiling, wall, and floor finishes; separating soiled utility and sterilization rooms; and regulating air pressure, filtration, and humidity control can help reduce infection where doctors conduct procedures that penetrate the skin. App. 304. But abortions typically involve either the administration of medicines or procedures performed through the natural opening of the birth canal, which is itself not sterile. See *id.*, at 302–303. Nor do provisions designed to safeguard heavily sedated patients (unable to help themselves) during fire emergencies, see Tex. Admin. Code, tit. 25, §135.41; App. 304, provide any help to abortion patients, as abortion facilities do not use general anesthesia or deep sedation, *id.*, at 304–305. Further, since the few instances in which serious complications do arise following an abortion almost always require hospitalization, not treatment at a surgical center, *id.*, at 255–256, surgical-center standards will not help in those instances either.

The upshot is that this record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court’s conclusion that “[m]any of the building standards mandated by the act and its im-

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plementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary.” 46 F. Supp. 3d, at 684. That conclusion, along with the supporting evidence, provides sufficient support for the more general conclusion that the surgical-center requirement “will not [provide] better care or . . . more frequent positive outcomes.” *Ibid.* The record evidence thus supports the ultimate legal conclusion that the surgical-center requirement is not necessary.

At the same time, the record provides adequate evidentiary support for the District Court’s conclusion that the surgical-center requirement places a substantial obstacle in the path of women seeking an abortion. The parties stipulated that the requirement would further reduce the number of abortion facilities available to seven or eight facilities, located in Houston, Austin, San Antonio, and Dallas/Fort Worth. See App. 182–183. In the District Court’s view, the proposition that these “seven or eight providers could meet the demand of the entire State stretches credulity.” 46 F. Supp. 3d, at 682. We take this statement as a finding that these few facilities could not “meet” that “demand.”

The Court of Appeals held that this finding was “clearly erroneous.” 790 F. 3d, at 590. It wrote that the finding rested upon the “*ipse dixit*” of one expert, Dr. Grossman, and that there was no evidence that the current surgical centers (*i.e.*, the seven or eight) are operating at full capacity or could not increase capacity. *Ibid.* Unlike the Court of Appeals, however, we hold that the record provides adequate support for the District Court’s finding.

For one thing, the record contains charts and oral testimony by Dr. Grossman, who said that, as a result of the surgical-center requirement, the number of abortions that the clinics would have to provide would rise from ““14,000 abortions annually” to ““60,000 to 70,000”—an increase by a factor of about five. *Id.*, at 589–590. The District

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Court credited Dr. Grossman as an expert witness. See 46 F. Supp. 3d, at 678–679, n. 1; *id.*, at 681, n. 4 (finding “indicia of reliability” in Dr. Grossman’s conclusions). The Federal Rules of Evidence state that an expert may testify in the “form of an opinion” as long as that opinion rests upon “sufficient facts or data” and “reliable principles and methods.” Rule 702. In this case Dr. Grossman’s opinion rested upon his participation, along with other university researchers, in research that tracked “the number of open facilities providing abortion care in the state by . . . requesting information from the Texas Department of State Health Services . . . [, t]hrough interviews with clinic staff[,] and review of publicly available information.” App. 227. The District Court acted within its legal authority in determining that Dr. Grossman’s testimony was admissible. See Fed. Rule Evid. 702; see also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 589 (1993) (“[U]nder the Rules the trial judge must ensure that any and all [expert] evidence admitted is not only relevant, but reliable”); 29 C. Wright & V. Gold, *Federal Practice and Procedure: Evidence* §6266, p. 302 (2016) (“Rule 702 impose[s] on the trial judge additional responsibility to determine whether that [expert] testimony is likely to promote accurate factfinding”).

For another thing, common sense suggests that, more often than not, a physical facility that satisfies a certain physical demand will not be able to meet five times that demand without expanding or otherwise incurring significant costs. Suppose that we know only that a certain grocery store serves 200 customers per week, that a certain apartment building provides apartments for 200 families, that a certain train station welcomes 200 trains per day. While it is conceivable that the store, the apartment building, or the train station could just as easily provide for 1,000 customers, families, or trains at no significant additional cost, crowding, or delay, most of us

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would find this possibility highly improbable. The dissent takes issue with this general, intuitive point by arguing that many places operate below capacity and that in any event, facilities could simply hire additional providers. See *post*, at 32. We disagree that, according to common sense, medical facilities, well known for their wait times, operate below capacity as a general matter. And the fact that so many facilities were forced to close by the admitting-privileges requirement means that hiring more physicians would not be quite as simple as the dissent suggests. Courts are free to base their findings on commonsense inferences drawn from the evidence. And that is what the District Court did here.

The dissent now seeks to discredit Dr. Grossman by pointing out that a preliminary prediction he made in his testimony in *Abbott* about the effect of the admitting-privileges requirement on capacity was not borne out after that provision went into effect. See *post*, at 31, n. 22. If every expert who overestimated or underestimated any figure could not be credited, courts would struggle to find expert assistance. Moreover, making a hypothesis—and then attempting to verify that hypothesis with further studies, as Dr. Grossman did—is not irresponsible. It is an essential element of the scientific method. The District Court's decision to credit Dr. Grossman's testimony was sound, particularly given that Texas provided no credible experts to rebut it. See 46 F. Supp. 3d, at 680, n. 3 (declining to credit Texas' expert witnesses, in part because Vincent Rue, a nonphysician consultant for Texas, had exercised “considerable editorial and discretionary control over the contents of the experts' reports”).

Texas suggests that the seven or eight remaining clinics could expand sufficiently to provide abortions for the 60,000 to 72,000 Texas women who sought them each year. Because petitioners had satisfied their burden, the obligation was on Texas, if it could, to present evidence

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rebutting that issue to the District Court. Texas admitted that it presented no such evidence. Tr. of Oral Arg. 46. Instead, Texas argued before this Court that one new clinic now serves 9,000 women annually. *Ibid.* In addition to being outside the record, that example is not representative. The clinic to which Texas referred apparently cost \$26 million to construct—a fact that even more clearly demonstrates that requiring seven or eight clinics to serve five times their usual number of patients does indeed represent an undue burden on abortion access. See Planned Parenthood Debuts New Building: Its \$26 Million Center in Houston is Largest of Its Kind in U. S., Houston Chronicle, May 21, 2010, p. B1.

Attempting to provide the evidence that Texas did not, the dissent points to an exhibit submitted in *Abbott* showing that three Texas surgical centers, two in Dallas as well as the \$26-million facility in Houston, are each capable of serving an average of 7,000 patients per year. See *post*, at 33–35. That “average” is misleading. In addition to including the Houston clinic, which does not represent most facilities, it is underinclusive. It ignores the evidence as to the Whole Woman’s Health surgical-center facility in San Antonio, the capacity of which is described as “severely limited.” The exhibit does nothing to rebut the commonsense inference that the dramatic decline in the number of available facilities will cause a shortfall in capacity should H. B. 2 go into effect. And facilities that were still operating after the effective date of the admitting-privileges provision were not able to accommodate increased demand. See App. 238; Tr. of Oral Arg. 30–31; Brief for National Abortion Federation et al. as *Amici Curiae* 17–20 (citing clinics’ experiences since the admitting-privileges requirement went into effect of 3-week wait times, staff burnout, and waiting rooms so full, patients had to sit on the floor or wait outside).

More fundamentally, in the face of no threat to women’s

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health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfactories. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand, see 46 F. Supp. 3d, at 682, may find that quality of care declines. Another commonsense inference that the District Court made is that these effects would be harmful to, not supportive of, women's health. See *id.*, at 682–683.

Finally, the District Court found that the costs that a currently licensed abortion facility would have to incur to meet the surgical-center requirements were considerable, ranging from \$1 million per facility (for facilities with adequate space) to \$3 million per facility (where additional land must be purchased). *Id.*, at 682. This evidence supports the conclusion that more surgical centers will not soon fill the gap when licensed facilities are forced to close.

We agree with the District Court that the surgical-center requirement, like the admitting-privileges requirement, provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an “undue burden” on their constitutional right to do so.

VI

We consider three additional arguments that Texas makes and deem none persuasive.

First, Texas argues that facial invalidation of both challenged provisions is precluded by H. B. 2’s severability clause. See Brief for Respondents 50–52. The severability clause says that “every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provision in this Act, are severable from

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each other.” H. B. 2, §10(b), App. to Pet. for Cert. 200a. It further provides that if “any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected.” *Ibid.* That language, Texas argues, means that facial invalidation of parts of the statute is not an option; instead, it says, the severability clause mandates a more narrowly tailored judicial remedy. But the challenged provisions of H. B. 2 close most of the abortion facilities in Texas and place added stress on those facilities able to remain open. They vastly increase the obstacles confronting women seeking abortions in Texas without providing any benefit to women’s health capable of withstanding any meaningful scrutiny. The provisions are unconstitutional on their face: Including a severability provision in the law does not change that conclusion.

Severability clauses, it is true, do express the enacting legislature’s preference for a narrow judicial remedy. As a general matter, we attempt to honor that preference. But our cases have never required us to proceed application by conceivable application when confronted with a facially unconstitutional statutory provision. “We have held that a severability clause is an aid merely; not an inexorable command.” *Reno v. American Civil Liberties Union*, 521 U. S. 844, 884–885, n. 49 (1997) (internal quotation marks omitted). Indeed, if a severability clause could impose such a requirement on courts, legislatures would easily be able to insulate unconstitutional statutes from most facial review. See *ibid.* (“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government”

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(internal quotation marks omitted)). A severability clause is not grounds for a court to “devise a judicial remedy that . . . entail[s] quintessentially legislative work.” *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 329 (2006). Such an approach would inflict enormous costs on both courts and litigants, who would be required to proceed in this manner whenever a single application of a law might be valid. We reject Texas’ invitation to pave the way for legislatures to immunize their statutes from facial review.

Texas similarly argues that instead of finding the entire surgical-center provision unconstitutional, we should invalidate (as applied to abortion clinics) only those specific surgical-center regulations that unduly burden the provision of abortions, while leaving in place other surgical-center regulations (for example, the reader could pick any of the various examples provided by the dissent, see *post*, at 42–43). See Brief for Respondents 52–53. As we have explained, Texas’ attempt to broadly draft a requirement to sever “applications” does not require us to proceed in piecemeal fashion when we have found the statutory provisions at issue facially unconstitutional.

Nor is that approach to the regulations even required by H. B. 2 itself. The statute was meant to require abortion facilities to meet the integrated surgical-center standards—not some subset thereof. The severability clause refers to severing applications of words and phrases *in the Act*, such as the surgical-center requirement as a whole. See H. B. 2, §4, App. to Pet. for Cert. 194a. It does not say that courts should go through the individual components of the different, surgical-center statute, let alone the individual *regulations* governing surgical centers to see whether those requirements are severable from each other as applied to abortion facilities. Facilities subject to some subset of those regulations do not qualify as surgical centers. And the risk of harm caused by inconsistent

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application of only a fraction of interconnected regulations counsels against doing so.

Second, Texas claims that the provisions at issue here do not impose a substantial obstacle because the women affected by those laws are not a “large fraction” of Texan women “of reproductive age,” which Texas reads *Casey* to have required. See Brief for Respondents 45, 48. But *Casey* used the language “large fraction” to refer to “a large fraction of cases in which [the provision at issue] is relevant,” a class narrower than “all women,” “pregnant women,” or even “the class of *women seeking abortions* identified by the State.” 505 U. S., at 894–895 (opinion of the Court) (emphasis added). Here, as in *Casey*, the relevant denominator is “those [women] for whom [the provision] is an actual rather than an irrelevant restriction.” *Id.*, at 895.

Third, Texas looks for support to *Simopoulos v. Virginia*, 462 U. S. 506 (1983), a case in which this Court upheld a surgical-center requirement as applied to second-trimester abortions. This case, however, unlike *Simopoulos*, involves restrictions applicable to all abortions, not simply to those that take place during the second trimester. Most abortions in Texas occur in the first trimester, not the second. App. 236. More importantly, in *Casey* we discarded the trimester framework, and we now use “viability” as the relevant point at which a State may begin limiting women’s access to abortion for reasons unrelated to maternal health. 505 U. S., at 878 (plurality opinion). Because the second trimester includes time that is both previability and postviability, *Simopoulos* cannot provide clear guidance. Further, the Court in *Simopoulos* found that the petitioner in that case, unlike petitioners here, had waived any argument that the regulation did not significantly help protect women’s health. 462 U. S., at 517.

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* * *

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

It is so ordered.

GINSBURG, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 15–274

WHOLE WOMAN’S HEALTH, ET AL., PETITIONERS *v.*
JOHN HELLERSTEDT, COMMISSIONER, TEXAS
DEPARTMENT OF STATE HEALTH SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June 27, 2016]

JUSTICE GINSBURG, concurring.

The Texas law called H. B. 2 inevitably will reduce the number of clinics and doctors allowed to provide abortion services. Texas argues that H. B. 2’s restrictions are constitutional because they protect the health of women who experience complications from abortions. In truth, “complications from an abortion are both rare and rarely dangerous.” *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F. 3d 908, 912 (CA7 2015). See Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 6–10 (collecting studies and concluding “[a]bortion is one of the safest medical procedures performed in the United States”); Brief for Social Science Researchers as *Amici Curiae* 5–9 (compiling studies that show “[c]ompliation rates from abortion are very low”). Many medical procedures, including childbirth, are far more dangerous to patients, yet are not subject to ambulatory-surgical-center or hospital admitting-privileges requirements. See *ante*, at 31; *Planned Parenthood of Wis.*, 806 F. 3d, at 921–922. See also Brief for Social Science Researchers 9–11 (comparing statistics on risks for abortion with tonsillectomy, colonoscopy, and in-office dental surgery); Brief for American Civil Liberties Union et al. as *Amici Curiae* 7 (all District Courts to consider admitting-

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privileges requirements found abortion “is at least as safe as other medical procedures routinely performed in outpatient settings”). Given those realities, it is beyond rational belief that H. B. 2 could genuinely protect the health of women, and certain that the law “would simply make it more difficult for them to obtain abortions.” *Planned Parenthood of Wis.*, 806 F. 3d, at 910. When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety. See Brief for Ten Pennsylvania Abortion Care Providers as *Amici Curiae* 17–22. So long as this Court adheres to *Roe v. Wade*, 410 U. S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992), Targeted Regulation of Abortion Providers laws like H. B. 2 that “do little or nothing for health, but rather strew impediments to abortion,” *Planned Parenthood of Wis.*, 806 F. 3d, at 921, cannot survive judicial inspection.

THOMAS, J., dissenting

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June 27, 2016]

JUSTICE THOMAS, dissenting.

Today the Court strikes down two state statutory provisions in all of their applications, at the behest of abortion clinics and doctors. That decision exemplifies the Court’s troubling tendency “to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue.” *Stenberg v. Carhart*, 530 U. S. 914, 954 (2000) (Scalia, J., dissenting). As JUSTICE ALITO observes, see *post* (dissenting opinion), today’s decision creates an abortion exception to ordinary rules of res judicata, ignores compelling evidence that Texas’ law imposes no unconstitutional burden, and disregards basic principles of the severability doctrine. I write separately to emphasize how today’s decision perpetuates the Court’s habit of applying different rules to different constitutional rights—especially the putative right to abortion.

To begin, the very existence of this suit is a jurisprudential oddity. Ordinarily, plaintiffs cannot file suits to vindicate the constitutional rights of others. But the Court employs a different approach to rights that it favors. So in this case and many others, the Court has erroneously allowed doctors and clinics to vicariously vindicate the putative constitutional right of women seeking abortions.

This case also underscores the Court’s increasingly

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common practice of invoking a given level of scrutiny—here, the abortion-specific undue burden standard—while applying a different standard of review entirely. Whatever scrutiny the majority applies to Texas' law, it bears little resemblance to the undue-burden test the Court articulated in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992), and its successors. Instead, the majority eviscerates important features of that test to return to a regime like the one that *Casey* repudiated.

Ultimately, this case shows why the Court never should have bent the rules for favored rights in the first place. Our law is now so riddled with special exceptions for special rights that our decisions deliver neither predictability nor the promise of a judiciary bound by the rule of law.

I

This suit is possible only because the Court has allowed abortion clinics and physicians to invoke a putative constitutional right that does not belong to them—a woman's right to abortion. The Court's third-party standing jurisprudence is no model of clarity. See *Kowalski v. Tesmer*, 543 U. S. 125, 135 (2004) (THOMAS, J., concurring). Driving this doctrinal confusion, the Court has shown a particular willingness to undercut restrictions on third-party standing when the right to abortion is at stake. And this case reveals a deeper flaw in straying from our normal rules: when the wrong party litigates a case, we end up resolving disputes that make for bad law.

For most of our Nation's history, plaintiffs could not challenge a statute by asserting someone else's constitutional rights. See *ibid.* This Court would "not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it." *Clark v. Kansas City*, 176 U. S. 114, 118 (1900) (internal quotation marks omitted). And

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for good reason: “[C]ourts are not roving commissions assigned to pass judgment on the validity of the Nation’s laws.” *Broadrick v. Oklahoma*, 413 U. S. 601, 610–611 (1973).

In the 20th century, the Court began relaxing that rule. But even as the Court started to recognize exceptions for certain types of challenges, it stressed the strict limits of those exceptions. A plaintiff could assert a third party’s rights, the Court said, but only if the plaintiff had a “close relation to the third party” and the third party faced a formidable “hindrance” to asserting his own rights. *Powers v. Ohio*, 499 U. S. 400, 411 (1991); accord, *Kowalski, supra*, at 130–133 (similar).

Those limits broke down, however, because the Court has been “quite forgiving” in applying these standards to certain claims. *Id.*, at 130. Some constitutional rights remained “personal rights which . . . may not be vicariously asserted.” *Alderman v. United States*, 394 U. S. 165, 174 (1969) (Fourth Amendment rights are purely personal); see *Rakas v. Illinois*, 439 U. S. 128, 140, n. 8 (1978) (so is the Fifth Amendment right against self-incrimination). But the Court has abandoned such limitations on other rights, producing serious anomalies across similar factual scenarios. Lawyers cannot vicariously assert potential clients’ Sixth Amendment rights because they lack any current, close relationship. *Kowalski, supra*, at 130–131. Yet litigants can assert potential jurors’ rights against race or sex discrimination in jury selection even when the litigants have never met potential jurors and do not share their race or sex. *Powers, supra*, at 410–416; *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 129 (1994). And vendors can sue to invalidate state regulations implicating potential customers’ equal protection rights against sex discrimination. *Craig v. Boren*, 429 U. S. 190, 194–197 (1976) (striking down sex-based age restrictions on purchasing beer).

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Above all, the Court has been especially forgiving of third-party standing criteria for one particular category of cases: those involving the purported substantive due process right of a woman to abort her unborn child. In *Singleton v. Wulff*, 428 U. S. 106 (1976), a plurality of this Court fashioned a blanket rule allowing third-party standing in abortion cases. *Id.*, at 118. “[I]t generally is appropriate,” said the Court, “to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision.” *Ibid.* Yet the plurality conceded that the traditional criteria for an exception to the third-party standing rule were not met. There are no “insurmountable” obstacles stopping women seeking abortions from asserting their own rights, the plurality admitted. Nor are there jurisdictional barriers. *Roe v. Wade*, 410 U. S. 113 (1973), held that women seeking abortions fell into the mootness exception for cases “capable of repetition, yet seeking review,” enabling them to sue after they terminated their pregnancies without showing that they intended to become pregnant and seek an abortion again. *Id.*, at 125. Yet, since *Singleton*, the Court has unquestioningly accepted doctors’ and clinics’ vicarious assertion of the constitutional rights of hypothetical patients, even as women seeking abortions have successfully and repeatedly asserted their own rights before this Court.¹

¹ Compare, e.g., *Gonzales v. Carhart*, 550 U. S. 124 (2007), and *Stenberg v. Carhart*, 530 U. S. 914 (2000); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 851 (1992) (assuming that physicians and clinics can vicariously assert women’s right to abortion), with, e.g., *Leavitt v. Jane L.*, 518 U. S. 137, 139 (1996) (*per curiam*); *Hodgson v. Minnesota*, 497 U. S. 417, 429 (1990); *H. L. v. Matheson*, 450 U. S. 398, 400 (1981); *Williams v. Zbaraz*, 448 U. S. 358, 361 (1980); *Harris v. McRae*, 448 U. S. 297, 303 (1980); *Bellotti v. Baird*, 428 U. S. 132, 137–138 (1976); *Poelker v. Doe*, 432 U. S. 519, 519 (1977) (*per curiam*); *Beal v. Doe*, 432 U. S. 438, 441–442 (1977); *Maher v. Roe*, 432 U. S. 464, 467 (1977) (women seeking abortions have capably asserted their own

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Here too, the Court does not question whether doctors and clinics should be allowed to sue on behalf of Texas women seeking abortions as a matter of course. They should not. The central question under the Court’s abortion precedents is whether there is an undue burden on a woman’s access to abortion. See *Casey*, 505 U. S., at 877 (plurality opinion); see Part II, *infra*. But the Court’s permissive approach to third-party standing encourages litigation that deprives us of the information needed to resolve that issue. Our precedents encourage abortion providers to sue—and our cases then relieve them of any obligation to prove what burdens women actually face. I find it astonishing that the majority can discover an “undue burden” on women’s access to abortion for “those [women] for whom [Texas’ law] is an actual rather than an irrelevant restriction,” *ante*, at 39 (internal quotation marks omitted), without identifying how many women fit this description; their proximity to open clinics; or their preferences as to where they obtain abortions, and from whom. “[C]ommonsense inference[s]” that such a burden exists, *ante*, at 36, are no substitute for actual evidence. There should be no surer sign that our jurisprudence has gone off the rails than this: After creating a constitutional right to abortion because it “involve[s] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,” *Casey*, *supra*, at 851 (majority opinion), the Court has created special rules that cede its enforcement to others.

II

Today’s opinion also reimagines the undue-burden standard used to assess the constitutionality of abortion restrictions. Nearly 25 years ago, in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, a plurality of

rights, as plaintiffs).

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this Court invented the “undue burden” standard as a special test for gauging the permissibility of abortion restrictions. *Casey* held that a law is unconstitutional if it imposes an “undue burden” on a woman’s ability to choose to have an abortion, meaning that it “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Id.*, at 877. *Casey* thus instructed courts to look to whether a law substantially impedes women’s access to abortion, and whether it is reasonably related to legitimate state interests. As the Court explained, “[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power” to regulate aspects of abortion procedures, “all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.” *Gonzales v. Carhart*, 550 U. S. 124, 158 (2007).

I remain fundamentally opposed to the Court’s abortion jurisprudence. *E.g.*, *id.*, at 168–169 (THOMAS, J., concurring); *Stenberg*, 530 U. S., at 980, 982 (THOMAS, J., dissenting). Even taking *Casey* as the baseline, however, the majority radically rewrites the undue-burden test in three ways. First, today’s decision requires courts to “consider the burdens a law imposes on abortion access together with the benefits those laws confer.” *Ante*, at 19. Second, today’s opinion tells the courts that, when the law’s justifications are medically uncertain, they need not defer to the legislature, and must instead assess medical justifications for abortion restrictions by scrutinizing the record themselves. *Ibid.* Finally, even if a law imposes no “substantial obstacle” to women’s access to abortions, the law now must have more than a “reasonabl[e] relat[ion] to . . . a legitimate state interest.” *Ibid.* (internal quotation marks omitted). These precepts are nowhere to be found in *Casey* or its successors, and transform the undue-burden test to something much more akin to strict scrutiny.

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First, the majority’s free-form balancing test is contrary to *Casey*. When assessing Pennsylvania’s recordkeeping requirements for abortion providers, for instance, *Casey* did not weigh its benefits and burdens. Rather, *Casey* held that the law had a legitimate purpose because data collection advances medical research, “so it cannot be said that the requirements serve no purpose other than to make abortions more difficult.” 505 U. S., at 901 (joint opinion of O’Connor, KENNEDY, and Souter, JJ.). The opinion then asked whether the recordkeeping requirements imposed a “substantial obstacle,” and found none. *Ibid.* Contrary to the majority’s statements, see *ante*, at 19, *Casey* did not balance the benefits and burdens of Pennsylvania’s spousal and parental notification provisions, either. Pennsylvania’s spousal notification requirement, the plurality said, imposed an undue burden because findings established that the requirement would “likely . . . prevent a significant number of women from obtaining an abortion”—not because these burdens outweighed its benefits. 505 U. S., at 893 (majority opinion); see *id.*, at 887–894. And *Casey* summarily upheld parental notification provisions because even pre-*Casey* decisions had done so. *Id.*, at 899–900 (joint opinion).

Decisions in *Casey*’s wake further refute the majority’s benefits-and-burdens balancing test. The Court in *Mazurek v. Armstrong*, 520 U. S. 968 (1997) (*per curiam*), had no difficulty upholding a Montana law authorizing only physicians to perform abortions—even though no legislative findings supported the law, and the challengers claimed that “all health evidence contradict[ed] the claim that there is any health basis for the law.” *Id.*, at 973 (internal quotation marks omitted). *Mazurek* also deemed objections to the law’s lack of benefits “squarely foreclosed by *Casey* itself.” *Ibid.* Instead, the Court explained, “the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed

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professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.”* *Ibid.* (quoting *Casey, supra*, at 885; emphasis in original); see *Gonzales, supra*, at 164 (relying on *Mazurek*).

Second, by rejecting the notion that “legislatures, and not courts, must resolve questions of medical uncertainty,” *ante*, at 20, the majority discards another core element of the *Casey* framework. Before today, this Court had “given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.” *Gonzales*, 550 U. S., at 163. This Court emphasized that this “traditional rule” of deference “is consistent with *Casey*.” *Ibid.* This Court underscored that legislatures should not be hamstrung “if some part of the medical community were disinclined to follow the proscription.” *Id.*, at 166. And this Court concluded that “[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends.” *Ibid.*; see *Stenberg, supra*, at 971 (KENNEDY, J., dissenting) (“the right of the legislature to resolve matters on which physicians disagreed” is “establish[ed] beyond doubt”). This Court could not have been clearer: Whenever medical justifications for an abortion restriction are debatable, that “provides a sufficient basis to conclude in [a] facial attack that the [law] does not impose an undue burden.” *Gonzales*, 550 U. S., at 164. Otherwise, legislatures would face “too exacting” a standard. *Id.*, at 166.

Today, however, the majority refuses to leave disputed medical science to the legislature because past cases “placed considerable weight upon the evidence and argument presented in judicial proceedings.” *Ante*, at 20. But while *Casey* relied on record evidence to uphold Pennsylvania’s spousal-notification requirement, that requirement had nothing to do with debated medical science. 505 U. S., at 888–894 (majority opinion). And while *Gonzales* ob-

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served that courts need not blindly accept all legislative findings, see *ante*, at 20, that does not help the majority. *Gonzales* refused to accept Congress' finding of "a medical consensus that the prohibited procedure is never medically necessary" because the procedure's necessity was debated within the medical community. 550 U. S., at 165–166. Having identified medical uncertainty, *Gonzales* explained how courts should resolve conflicting positions: by respecting the legislature's judgment. See *id.*, at 164.

Finally, the majority overrules another central aspect of *Casey* by requiring laws to have more than a rational basis even if they do not substantially impede access to abortion. *Ante*, at 19–20. "Where [the State] has a rational basis to act and it does not impose an undue burden," this Court previously held, "the State may use its regulatory power" to impose regulations "in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *Gonzales, supra*, at 158 (emphasis added); see *Casey, supra*, at 878 (plurality opinion) (similar). No longer. Though the majority declines to say how substantial a State's interest must be, *ante*, at 20, one thing is clear: The State's burden has been ratcheted to a level that has not applied for a quarter century.

Today's opinion does resemble *Casey* in one respect: After disregarding significant aspects of the Court's prior jurisprudence, the majority applies the undue-burden standard in a way that will surely mystify lower courts for years to come. As in *Casey*, today's opinion "simply . . . highlight[s] certain facts in the record that apparently strike the . . . Justices as particularly significant in establishing (or refuting) the existence of an undue burden." 505 U. S., at 991 (Scalia, J., concurring in judgment in part and dissenting in part); see *ante*, at 23–24, 31–34. As in *Casey*, "the opinion then simply announces that the provision either does or does not impose a 'substantial

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obstacle' or an 'undue burden.'" 505 U. S., at 991 (opinion of Scalia, J); see *ante*, at 26, 36. And still "[w]e do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been appropriate." 505 U. S., at 991 (opinion of Scalia, J.); cf. *ante*, at 26, 31–32. All we know is that an undue burden now has little to do with whether the law, in a "real sense, deprive[s] women of the ultimate decision," *Casey, supra*, at 875, and more to do with the loss of "individualized attention, serious conversation, and emotional support," *ante*, at 36.

The majority's undue-burden test looks far less like our post-*Casey* precedents and far more like the strict-scrutiny standard that *Casey* rejected, under which only the most compelling rationales justified restrictions on abortion. See *Casey, supra*, at 871, 874–875 (plurality opinion). One searches the majority opinion in vain for any acknowledgment of the "premise central" to *Casey*'s rejection of strict scrutiny: "that the government has a legitimate and substantial interest in preserving and promoting fetal life" from conception, not just in regulating medical procedures. *Gonzales, supra*, at 145 (internal quotation marks omitted); see *Casey, supra*, at 846 (majority opinion), 871 (plurality opinion). Meanwhile, the majority's undue-burden balancing approach risks ruling out even minor, previously valid infringements on access to abortion. Moreover, by second-guessing medical evidence and making its own assessments of "quality of care" issues, *ante*, at 23–24, 30–31, 36, the majority reappoints this Court as "the country's *ex officio* medical board with powers to disapprove medical and operative practices and standards throughout the United States." *Gonzales, supra*, at 164 (internal quotation marks omitted). And the majority seriously burdens States, which must guess at how much more compelling their interests must be to pass muster

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and what “commonsense inferences” of an undue burden this Court will identify next.

III

The majority’s furtive reconfiguration of the standard of scrutiny applicable to abortion restrictions also points to a deeper problem. The undue-burden standard is just one variant of the Court’s tiers-of-scrutiny approach to constitutional adjudication. And the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right—be it “rational basis,” intermediate, strict, or something else—is increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat.

Though the tiers of scrutiny have become a ubiquitous feature of constitutional law, they are of recent vintage. Only in the 1960’s did the Court begin in earnest to speak of “strict scrutiny” versus reviewing legislation for mere rationality, and to develop the contours of these tests. See Fallon, Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1274, 1284–1285 (2007). In short order, the Court adopted strict scrutiny as the standard for reviewing everything from race-based classifications under the Equal Protection Clause to restrictions on constitutionally protected speech. *Id.*, at 1275–1283. *Roe v. Wade*, 410 U. S. 113, then applied strict scrutiny to a purportedly “fundamental” substantive due process right for the first time. *Id.*, at 162–164; see Fallon, *supra*, at 1283; accord, *Casey, supra*, at 871 (plurality opinion) (noting that post-*Roe* cases interpreted *Roe* to demand “strict scrutiny”). Then the tiers of scrutiny proliferated into ever more gradations. See, e.g., *Craig*, 429 U. S., at 197–198 (intermediate scrutiny for sex-based classifications); *Lawrence v. Texas*, 539 U. S. 558, 580 (2003) (O’Connor, J., concurring in judgment) (“a more searching form of rational basis review” applies to

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laws reflecting “a desire to harm a politically unpopular group”); *Buckley v. Valeo*, 424 U. S. 1, 25 (1976) (*per curiam*) (applying “closest scrutiny” to campaign-finance contribution limits). *Casey*’s undue-burden test added yet another right-specific test on the spectrum between rational-basis and strict-scrutiny review.

The illegitimacy of using “made-up tests” to “displace longstanding national traditions as the primary determinant of what the Constitution means” has long been apparent. *United States v. Virginia*, 518 U. S. 515, 570 (1996) (Scalia, J., dissenting). The Constitution does not prescribe tiers of scrutiny. The three basic tiers—“rational basis,” intermediate, and strict scrutiny—“are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case.” *Id.*, at 567; see also *Craig, supra*, at 217–221 (Rehnquist, J., dissenting).

But the problem now goes beyond that. If our recent cases illustrate anything, it is how easily the Court tinkers with levels of scrutiny to achieve its desired result. This Term, it is easier for a State to survive strict scrutiny despite discriminating on the basis of race in college admissions than it is for the same State to regulate how abortion doctors and clinics operate under the putatively less stringent undue-burden test. All the State apparently needs to show to survive strict scrutiny is a list of aspirational educational goals (such as the “cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry”) and a “reasoned, principled explanation” for why it is pursuing them—then this Court defers. *Fisher v. University of Tex. at Austin, ante*, at 7, 12 (internal quotation marks omitted). Yet the same State gets no deference under the undue-burden test, despite producing evidence that abortion safety, one rationale for Texas’ law, is medically debated. See *Whole Woman’s Health v. Lakey*, 46 F. Supp.

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3d 673, 684 (WD Tex. 2014) (noting conflict in expert testimony about abortion safety). Likewise, it is now easier for the government to restrict judicial candidates' campaign speech than for the Government to define marriage—even though the former is subject to strict scrutiny and the latter was supposedly subject to some form of rational-basis review. Compare *Williams-Yulee v. Florida Bar*, 575 U. S. ___, ___–___ (2015) (slip op., at 8–9), with *United States v. Windsor*, 570 U. S. ___, ___ (2013) (slip op., at 20).

These more recent decisions reflect the Court's tendency to relax purportedly higher standards of review for less-preferred rights. E.g., *Nixon v. Shrink Missouri Government PAC*, 528 U. S. 377, 421 (2000) (THOMAS, J., dissenting) ("The Court makes no effort to justify its deviation from the tests we traditionally employ in free speech cases" to review caps on political contributions). Meanwhile, the Court selectively applies rational-basis review—under which the question is supposed to be whether "any state of facts reasonably may be conceived to justify" the law, *McGowan v. Maryland*, 366 U. S. 420, 426 (1961)—with formidable toughness. E.g., *Lawrence*, 539 U. S., at 580 (O'Connor, J., concurring in judgment) (at least in equal protection cases, the Court is "most likely" to find no rational basis for a law if "the challenged legislation inhibits personal relationships"); see *id.*, at 586 (Scalia, J., dissenting) (faulting the Court for applying "an unheard-of form of rational-basis review").

These labels now mean little. Whatever the Court claims to be doing, in practice it is treating its "doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied." *Williams-Yulee*, *supra*, at ___ (slip op., at 1) (BREYER, J., concurring). The Court should abandon the pretense that anything other than policy preferences underlies its balancing of constitutional rights and inter-

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ests in any given case.

IV

It is tempting to identify the Court's invention of a constitutional right to abortion in *Roe v. Wade*, 410 U. S. 113, as the tipping point that transformed third-party standing doctrine and the tiers of scrutiny into an unworkable morass of special exceptions and arbitrary applications. But those roots run deeper, to the very notion that some constitutional rights demand preferential treatment. During the *Lochner* era, the Court considered the right to contract and other economic liberties to be fundamental requirements of due process of law. See *Lochner v. New York*, 198 U. S. 45 (1905). The Court in 1937 repudiated *Lochner*'s foundations. See *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 386–387, 400 (1937). But the Court then created a new taxonomy of preferred rights.

In 1938, seven Justices heard a constitutional challenge to a federal ban on shipping adulterated milk in interstate commerce. Without economic substantive due process, the ban clearly invaded no constitutional right. See *United States v. Carolene Products Co.*, 304 U. S. 144, 152–153 (1938). Within Justice Stone's opinion for the Court, however, was a footnote that just three other Justices joined—the famous *Carolene Products* Footnote 4. See *ibid.*, n. 4; Lusky, Footnote Redux: A *Carolene Products* Reminiscence, 82 Colum. L. Rev. 1093, 1097 (1982). The footnote's first paragraph suggested that the presumption of constitutionality that ordinarily attaches to legislation might be “narrower . . . when legislation appears on its face to be within a specific prohibition of the Constitution.” 304 U. S., at 152–153, n. 4. Its second paragraph appeared to question “whether legislation which restricts those political processes, which can ordinarily be expected to bring about repeal of undesirable legislation, is to be

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subjected to more exacting judicial scrutiny under the general prohibitions of the [14th] Amendment than are most other types of legislation.” *Ibid.* And its third and most familiar paragraph raised the question “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” *Ibid.*

Though the footnote was pure dicta, the Court seized upon it to justify its special treatment of certain personal liberties like the First Amendment and the right against discrimination on the basis of race—but also rights not enumerated in the Constitution.² As the Court identified which rights deserved special protection, it developed the tiers of scrutiny as part of its equal protection (and, later, due process) jurisprudence as a way to demand extra justifications for encroachments on these rights. See Fallon, 54 UCLA L. Rev., at 1270–1273, 1281–1285. And, having created a new category of fundamental rights, the Court loosened the reins to recognize even putative rights like abortion, see *Roe*, 410 U. S., at 162–164, which hardly implicate “discrete and insular minorities.”

The Court also seized upon the rationale of the *Caroline Products* footnote to justify exceptions to third-party standing doctrine. The Court suggested that it was tilting the analysis to favor rights involving actual or perceived minorities—then seemingly counted the right to contra-

²See Fallon, Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1278–1291 (2007); see also Linzer, The *Caroline Products* Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone, 12 Const. Commentary 277, 277–278, 288–300 (1995); *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 544 (1942) (Stone, C. J., concurring) (citing the *Caroline Products* footnote to suggest that the presumption of constitutionality did not fully apply to encroachments on the unenumerated personal liberty to procreate).

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ception as such a right. According to the Court, what matters is the “relationship between one who acted to protect the rights of a minority and the minority itself”—which, the Court suggested, includes the relationship “between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so.” *Eisenstadt v. Baird*, 405 U. S. 438, 445 (1972) (citing Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599, 631 (1962)).

Eighty years on, the Court has come full circle. The Court has simultaneously transformed judicially created rights like the right to abortion into preferred constitutional rights, while disfavoring many of the rights actually enumerated in the Constitution. But our Constitution renounces the notion that some constitutional rights are more equal than others. A plaintiff either possesses the constitutional right he is asserting, or not—and if not, the judiciary has no business creating ad hoc exceptions so that others can assert rights that seem especially important to vindicate. A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment. Unless the Court abides by one set of rules to adjudicate constitutional rights, it will continue reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear.

* * *

Today’s decision will prompt some to claim victory, just as it will stiffen opponents’ will to object. But the entire Nation has lost something essential. The majority’s embrace of a jurisprudence of rights-specific exceptions and balancing tests is “a regrettable concession of defeat—an acknowledgement that we have passed the point where ‘law,’ properly speaking, has any further application.” Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1182 (1989). I respectfully dissent.

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SUPREME COURT OF THE UNITED STATES

No. 15–274

WHOLE WOMAN’S HEALTH, ET AL., PETITIONERS *v.*
JOHN HELLERSTEDT, COMMISSIONER, TEXAS
DEPARTMENT OF STATE HEALTH SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June 27, 2016]

JUSTICE ALITO, with whom THE CHIEF JUSTICE and
JUSTICE THOMAS join, dissenting.

The constitutionality of laws regulating abortion is one of the most controversial issues in American law, but this case does not require us to delve into that contentious dispute. Instead, the dispositive issue here concerns a workaday question that can arise in any case no matter the subject, namely, whether the present case is barred by res judicata. As a court of law, we have an obligation to apply such rules in a neutral fashion in all cases, regardless of the subject of the suit. If anything, when a case involves a controversial issue, we should be especially careful to be scrupulously neutral in applying such rules.

The Court has not done so here. On the contrary, determined to strike down two provisions of a new Texas abortion statute in all of their applications, the Court simply disregards basic rules that apply in all other cases.

Here is the worst example. Shortly after Texas enacted House Bill 2 (H. B. 2) in 2013, the petitioners in this case brought suit, claiming, among other things, that a provision of the new law requiring a physician performing an abortion to have admitting privileges at a nearby hospital is “facially” unconstitutional and thus totally unenforceable. Petitioners had a fair opportunity to make their case,

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but they lost on the merits in the United States Court of Appeals for the Fifth Circuit, and they chose not to petition this Court for review. The judgment against them became final. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891 (WD Tex. 2013), aff'd in part and rev'd in part, 748 F. 3d 583 (CA5 2014) (*Abbott*).

Under the rules that apply in regular cases, petitioners could not relitigate the exact same claim in a second suit. As we have said, “a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise.” *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U. S. 104, 107 (1991).

In this abortion case, however, that rule is disregarded. The Court awards a victory to petitioners on the very claim that they unsuccessfully pressed in the earlier case. The Court does this even though petitioners, undoubtedly realizing that a rematch would not be allowed, did not presume to include such a claim in their complaint. The Court favors petitioners with a victory that they did not have the audacity to seek.

Here is one more example: the Court’s treatment of H. B. 2’s “severability clause.” When part of a statute is held to be unconstitutional, the question arises whether other parts of the statute must also go. If a statute says that provisions found to be unconstitutional can be severed from the rest of the statute, the valid provisions are allowed to stand. H. B. 2 contains what must surely be the most emphatic severability clause ever written. This clause says that every single word of the statute and every possible application of its provisions is severable. But despite this language, the Court holds that no part of the challenged provisions and no application of any part of them can be saved. Provisions that are indisputably constitutional—for example, provisions that require facili-

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ties performing abortions to follow basic fire safety measures—are stricken from the books. There is no possible justification for this collateral damage.

The Court’s patent refusal to apply well-established law in a neutral way is indefensible and will undermine public confidence in the Court as a fair and neutral arbiter.

I

Res judicata—or, to use the more modern terminology, “claim preclusion”—is a bedrock principle of our legal system. As we said many years ago, “[p]ublic policy dictates that there be an end of litigation[,] that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.” *Baldwin v. Iowa State Traveling Men’s Assn.*, 283 U. S. 522, 525 (1931). This doctrine “is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. . . . To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Montana v. United States*, 440 U. S. 147, 153–154 (1979). These are “vital public interests” that should be “cordially regarded and enforced.” *Federated Department Stores, Inc. v. Moitie*, 452 U. S. 394, 401 (1981).

The basic rule of preclusion is well known and has been frequently stated in our opinions. Litigation of a “cause of action” or “claim” is barred if (1) the same (or a closely related) party (2) brought a prior suit asserting the same cause of action or claim, (3) the prior case was adjudicated by a court of competent jurisdiction and (4) was decided on the merits, (5) a final judgment was entered, and (6) there is no ground, such as fraud, to invalidate the prior judg-

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ment. See *Montana, supra*, at 153; *Commissioner v. Sunnen*, 333 U. S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U. S. 351, 352–353 (1877).

A

I turn first to the application of this rule to petitioners' claim that H. B. 2's admitting privileges requirement is facially unconstitutional.

Here, all the elements set out above are easily satisfied based on *Abbott*, the 2013 case to which I previously referred. That case (1) was brought by a group of plaintiffs that included petitioners in the present case, (2) asserted the same cause of action or claim, namely, a facial challenge to the constitutionality of H. B. 2's admitting privileges requirement, (3) was adjudicated by courts of competent jurisdiction, (4) was decided on the merits, (5) resulted in the entry of a final judgment against petitioners, and (6) was not otherwise subject to invalidation. All of this is clear, and that is undoubtedly why petitioners' attorneys did not even include a facial attack on the admitting privileges requirement in their complaint in this case. To have done so would have risked sanctions for misconduct. See *Robinson v. National Cash Register Co.*, 808 F. 2d 1119, 1131 (CA5 1987) (a party's "persistence in litigating [a claim] when res judicata clearly barred the suit violated rule 11"); *McLaughlin v. Bradlee*, 602 F. Supp. 1412, 1417 (DC 1985) ("It is especially appropriate to impose sanctions in situations where the doctrines of *res judicata* and collateral estoppel plainly preclude relitigation of the suit").

Of the elements set out above, the Court disputes only one. The Court concludes that petitioners' prior facial attack on the admitting privileges requirement and their current facial attack on that same requirement are somehow not the same cause of action or claim. But that conclusion is unsupported by authority and plainly wrong.

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B

Although the scope of a cause of action or claim for purposes of res judicata is hardly a new question, courts and scholars have struggled to settle upon a definition.¹ But the outcome of the present case does not depend upon the selection of the proper definition from among those adopted or recommended over the years because the majority’s holding is not supported by any of them.

In *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316 (1927), we defined a cause of action as an “actionable wrong.” *Id.*, at 321; see also *ibid.* (“A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show”). On this understanding, the two claims at issue here are indisputably the same.

The same result is dictated by the rule recommended by the American Law Institute (ALI) in the first Restatement of Judgments, issued in 1942. Section 61 of the first Restatement explains when a claim asserted by a plaintiff in a second suit is the same for preclusion purposes as a claim that the plaintiff unsuccessfully litigated in a prior case. Under that provision, “the plaintiff is precluded from subsequently maintaining a second action based upon the same transaction, if the evidence needed to sustain the second action would have sustained the first action.” Restatement of Judgments §61. There is no doubt that this rule is satisfied here.

The second Restatement of Judgments, issued by the ALI in 1982, adopted a new approach for determining the scope of a cause of action or claim. In *Nevada v. United States*, 463 U. S. 110 (1983), we noted that the two Restatements differ in this regard, but we had no need to determine which was correct. *Id.*, at 130–131, and n. 12.

¹See, e.g., Note, Developments in the Law: Res Judicata, 65 Harv. L. Rev. 818, 824 (1952); Cleary, Res Judicata Reexamined, 57 Yale L. J. 339, 339–340 (1948).

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Here, the majority simply assumes that we should follow the second Restatement even though that Restatement—on the Court's reading, at least—leads to a conclusion that differs from the conclusion clearly dictated by the first Restatement.

If the second Restatement actually supported the majority's holding, the Court would surely be obligated to explain why it chose to follow the second Restatement's approach. But here, as in *Nevada, supra*, at 130–131, application of the rule set out in the second Restatement does not change the result. While the Court relies almost entirely on a comment to one section of the second Restatement, the Court ignores the fact that a straightforward application of the provisions of that Restatement leads to the conclusion that petitioners' two facial challenges to the admitting privileges requirement constitute a single claim.

Section 19 of the second Restatement sets out the general claim-preclusion rule that applies in a case like the one before us: “A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.” Section 24(1) then explains the scope of the “claim” that is extinguished: It “includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.” Section 24's Comment *b*, in turn, fleshes out the key term “transaction,” which it defines as “a natural grouping or common nucleus of operative facts.” Whether a collection of events constitutes a single transaction is said to depend on “their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes.” *Ibid.*

Both the claim asserted in petitioners' first suit and the claim now revived by the Court involve the same “nucleus of operative facts.” Indeed, they involve the very same

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“operative facts,” namely, the enactment of the admitting privileges requirement, which, according to the theory underlying petitioners’ facial claims, would inevitably have the effect of causing abortion clinics to close. This is what petitioners needed to show—and what they attempted to show in their first facial attack: not that the admitting privileges requirement had *already* imposed a substantial burden on the right of Texas women to obtain abortions, but only that it *would have* that effect once clinics were able to assess whether they could practicably comply.

The Court’s decision in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992), makes that clear. *Casey* held that Pennsylvania’s spousal notification requirement was facially unconstitutional even though that provision had been enjoined prior to enforcement. See *id.*, at 845. And the Court struck down the provision because it “*will impose* a substantial obstacle.” *Id.*, at 893–894 (emphasis added). See also *id.*, at 893 (“The spousal notification requirement *is thus likely to prevent* a significant number of women from obtaining an abortion” (emphasis added)); *id.*, at 894 (Women “*are likely to be deterred* from procuring an abortion” (emphasis added)).

Consistent with this understanding, what petitioners tried to show in their first case was that the admitting privileges requirement would cause clinics to close. They claimed that their evidence showed that “at least one-third of the State’s licensed providers *would stop* providing abortions once the privileges requirement took effect.”²

²Brief for Plaintiffs-Appellees in *Abbott*, No. 13–51008 (CA5), p. 5 (emphasis added); see also *id.*, at 23–24 (“[T]he evidence established that as a result of the admitting privileges requirement, approximately one-third of the licensed abortion providers in Texas *would stop* providing abortions. . . . As a result, one in three women in Texas *would be unable* to access desired abortion services. . . . [T]he immediate, widespread reduction of services caused by the admitting privileges re-

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Agreeing with petitioners, the District Court enjoined enforcement of the requirement on the ground that “there *will be* abortion clinics *that will close.*” *Abbott*, 951 F. Supp. 2d, at 900 (emphasis added). The Fifth Circuit found that petitioners’ evidence of likely effect was insufficient, stating that petitioners failed to prove that “any woman *will lack* reasonable access to a clinic within Texas.” *Abbott*, 748 F. 3d, at 598 (some emphasis added; some emphasis deleted). The correctness of that holding is irrelevant for present purposes. What matters is that the “operative fact” in the prior case was the enactment of the admitting privileges requirement, and that is precisely the same operative fact underlying petitioners’ facial attack in the case now before us.³

C

In light of this body of authority, how can the Court maintain that the first and second facial claims are really

quirement *would produce* a shortfall in the capacity of providers to serve all of the women seeking abortions” (emphasis added)).

³Even if the “operative facts” were actual clinic closures, the claims in the two cases would still be the same. The Court suggests that many clinics closed between the time of the Fifth Circuit’s decision in the first case and the time of the District Court’s decision in the present case by comparing what the Court of Appeals said in *Abbott* about the effect of the admitting privileges requirement alone, 748 F. 3d, at 598 (“All of the major Texas cities . . . continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges”), with what the District Court said in this case about the combined effect of the admitting privileges requirement and the ambulatory surgical center requirement, 46 F. Supp. 3d 673, 680 (WD Tex. 2014) (Were the surgical center requirement to take effect on September 1, 2014, only seven or eight clinics would remain open). See *ante*, at 14–15. Obviously, this comparison does not show that the effect of the admitting privileges requirement alone was greater at the time of the District Court’s decision in this second case. Simply put, the Court presents no new clinic closures allegedly caused by the admitting privileges requirement beyond those already accounted for in *Abbott*, as I discuss, *infra*, at 15–17, and accompanying notes.

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two different claims? The Court’s first argument is that petitioners did not bring two facial claims because their complaint in the present case sought only as-applied relief and it was the District Court, not petitioners, who injected the issue of facial relief into the case. *Ante*, at 11. (After the District Court gave them statewide relief, petitioners happily accepted the gift and now present their challenge as a facial one. See Reply Brief 24–25 (“[F]acial invalidation is the only way to ensure that the Texas requirements do not extinguish women’s liberty”.) The thrust of the Court’s argument is that a trial judge can circumvent the rules of claim preclusion by granting a plaintiff relief on a claim that the plaintiff is barred from relitigating. Not surprisingly, the Court musters no authority for this proposition, which would undermine the interests that the doctrine of claim preclusion is designed to serve. A “fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive.” *Arizona v. California*, 460 U. S. 605, 619 (1983). This interest in finality is equally offended regardless of whether the precluded claim is included in a complaint or inserted into the case by a judge.⁴

Another argument tossed off by the Court is that the judgment on the admitting privileges claim in the first case does not have preclusive effect because it was based on “the prematurity of the action.” See *ante*, at 11–12 (quoting Restatement (Second) of Judgments §20(2)). But this argument grossly mischaracterizes the basis for the judgment in the first case. The Court of Appeals did not hold that the facial challenge was premature. It held that the evidence petitioners offered was insufficient. See

⁴I need not quibble with the Court’s authorities stating that facial relief can sometimes be appropriate even where a plaintiff has requested only as-applied relief. *Ante*, at 15. Assuming that this is generally proper, it does not follow that this may be done where the plaintiff is precluded by res judicata from bringing a facial claim.

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Abbott, 748 F. 3d, at 598–599; see also n. 9, *infra*. Petitioners could have sought review in this Court, but elected not to do so.

This brings me to the Court's main argument—that the second facial challenge is a different claim because of “changed circumstances.” What the Court means by this is that petitioners now have better evidence than they did at the time of the first case with respect to the number of clinics that would have to close as a result of the admitting privileges requirement. This argument is contrary to a cardinal rule of *res judicata*, namely, that a plaintiff who loses in a first case cannot later bring the same case simply because it has now gathered better evidence. Claim preclusion does not contain a “better evidence” exception. See, e.g., *Torres v. Shalala*, 48 F. 3d 887, 894 (CA5 1995) (“If simply submitting new evidence rendered a prior decision factually distinct, *res judicata* would cease to exist”); *Geiger v. Foley Hoag LLP Retirement Plan*, 521 F. 3d 60, 66 (CA1 2008) (Claim preclusion “applies even if the litigant is prepared to present different evidence . . . in the second action”); *Saylor v. United States*, 315 F. 3d 664, 668 (CA6 2003) (“The fact that . . . new evidence might change the outcome of the case does not affect application of claim preclusion doctrine”); *International Union of Operating Engineers-Employers Constr. Industry Pension, Welfare and Training Trust Funds v. Karr*, 994 F. 2d 1426, 1430 (CA9 1993) (“The fact that some different evidence may be presented in this action . . . , however, does not defeat the bar of *res judicata*”); Restatement (Second) of Judgments §25, Comment b (“A mere shift in the evidence offered to support a ground held unproved in a prior action will not suffice to make a new claim avoiding the preclusive effect of the judgment”); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4403, p. 33 (2d ed. 2002) (Wright & Miller) (*Res judicata* “ordinarily applies despite the availability of new evidence”); Restate-

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ment of Judgments §1, Comment *b* (The ordinary rules of claim preclusion apply “although the party against whom a judgment is rendered is later in a position to produce better evidence so that he would be successful in a second action”).

In an effort to get around this hornbook rule, the Court cites a potpourri of our decisions that have no bearing on the question at issue. Some are not even about res judicata.⁵ And the cases that do concern res judicata, *Abie State Bank v. Bryan*, 282 U. S. 765, 772 (1931), *Lawlor v. National Screen Service Corp.*, 349 U. S. 322, 328 (1955), and *Third Nat. Bank of Louisville v. Stone*, 174 U. S. 432, 434 (1899), endorse the unremarkable proposition that a prior judgment does not preclude new claims based on acts occurring after the time of the first judgment.⁶ But petitioners’ second facial challenge is not based on new acts postdating the first suit. Rather, it is based on the same underlying act, the enactment of H. B. 2, which allegedly posed an undue burden.

I come now to the authority on which the Court chiefly relies, Comment *f* to §24 of the second Restatement. This is how it reads:

“Material operative facts occurring after the decision of an action with respect to the same subject matter

⁵See *ante*, at 13 (citing *United States v. Carolene Products Co.*, 304 U. S. 144, 153 (1938), and *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405, 415 (1935)).

⁶The Court’s contaminated-water hypothetical, see *ante*, at 12–13, may involve such a situation. If after their loss in the first suit, the same prisoners continued to drink the water, they would not be barred from suing to recover for subsequent injuries suffered as a result. But if the Court simply means that the passage of time would allow the prisoners to present better evidence in support of the same claim, the successive suit would be barred for the reasons I have given. In that event, their recourse would be to move for relief from the judgment. See Restatement (Second) of Judgments §73.

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may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which *may* be made the basis of a second action not precluded by the first. See Illustrations 10–12. Where important human values—such as the lawfulness of a continuing personal disability or restraint—are at stake, even a slight change of circumstances *may* afford a sufficient basis for concluding that a second action may be brought.” (Emphasis added.)

As the word I have highlighted—“*may*”—should make clear, this comment does not say that “[m]aterial operative facts occurring after the decision of an action” always or even usually form “the basis of a second action not precluded by the first.” Rather, the comment takes the view that this “*may*” be so. Accord, *ante*, at 11 (“[D]evelopment of new material facts *can* mean that a new case and an otherwise similar previous case do not present the same claim” (emphasis added)). The question, then, is *when* the development of new material facts should lead to this conclusion. And there are strong reasons to conclude this should be a very narrow exception indeed. Otherwise, this statement, relegated to a mere comment, would revolutionize the rules of claim preclusion—by permitting a party to relitigate a lost claim whenever it obtains better evidence. Comment *f* was surely not meant to upend this fundamental rule.

What the comment undoubtedly means is far more modest—only that in a few, limited circumstances the development of new material facts should (in the opinion of the ALI) permit relitigation. What are these circumstances? Section 24 includes three illustrative examples in the form of hypothetical cases, and none resembles the present case.

In the first hypothetical case, the subsequent suit is based on new events that provide a basis for relief under a

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different legal theory. Restatement (Second) of Judgments §24, Illustration 10.

In the second case, a father who lost a prior child custody case brings a second action challenging his wife’s fitness as a mother based on “subsequent experience,” which I take to mean subsequent conduct by the mother. *Id.*, Illustration 11. This illustration is expressly linked to a determination of a person’s “status”—and not even status in general, but a particular status, fitness as a parent, that the law recognizes as changeable. See Reporter’s Note, *id.*, §24, Comment *f* (Illustration 11 “exemplifies the effect of changed circumstances in an action relating to status”).

In the final example, the government loses a civil antitrust conspiracy case but then brings a second civil antitrust conspiracy case based on new conspiratorial acts. The illustration does not suggest that the legality of acts predating the end of the first case is actionable in the second case, only that the subsequent acts give rise to a new claim and that proof of earlier acts may be admitted as evidence to explain the significance of the later acts. *Id.*, Illustration 12.

The present claim is not similar to any of these illustrations. It does not involve a claim based on postjudgment acts and a new legal theory. It does not ask us to adjudicate a person’s status. And it does not involve a continuing course of conduct to be proved by the State’s new acts.

The final illustration actually undermines the Court’s holding. The Reporter’s Note links this illustration to a Fifth Circuit case, *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F. 2d 1313 (1970). In that case, the court distinguished between truly postjudgment acts and “acts which have been completed [prior to the previous judgment] except for their consequences.” *Id.*, at 1318. Only postjudgment acts—and not postjudgment consequences—the Fifth Circuit held, can

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give rise to a new cause of action. See *ibid.*⁷

Here, the Court does not rely on any new acts performed by the State of Texas after the end of the first case. Instead, the Court relies solely on what it takes to be new consequences, the closing of additional clinics, that are said to have resulted from the enactment of H. B. 2.

D

For these reasons, what the Court has done here is to create an entirely new exception to the rule that a losing plaintiff cannot relitigate a claim just because it now has new and better evidence. As best I can tell, the Court's new rule must be something like this: If a plaintiff initially loses because it failed to provide adequate proof that a challenged law will have an unconstitutional effect and if subsequent developments tend to show that the law will in fact have those effects, the plaintiff may relitigate the same claim. Such a rule would be unprecedented, and I am unsure of its wisdom, but I am certain of this: There is no possible justification for such a rule unless the plaintiff, at the time of the first case, could not have reasonably shown what the effects of the law would be. And that is not the situation in this case.

1

The Court does not contend that petitioners, at the time

⁷See also *Sutliffe v. Epping School Dist.*, 584 F. 3d 314, 328 (CA1 2009) (“[W]hen a defendant is accused of . . . acts which though occurring over a period of time were substantially of the same sort and similarly motivated, fairness to the defendant as well as the public convenience may require that they be dealt with in the same action, and the events are said to constitute but one transaction” (internal quotation marks omitted)); *Monahan v. New York City Dept. of Corrections*, 214 F. 3d 275, 289 (CA2 2000) (“Plaintiffs’ assertion of new incidents arising from the application of the challenged policy is also insufficient to bar the application of *res judicata*”); *Huck v. Dawson*, 106 F. 3d 45, 49 (CA3 1997) (applying *res judicata* where “the same facts that resulted in the earlier judgment have caused continued damage”).

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of the first case, could not have gathered and provided evidence that was sufficient to show that the admitting privileges requirement *would cause* a sufficient number of clinic closures. Instead, the Court attempts to argue that petitioners could not have shown at that time that a sufficient number of clinics *had already closed*. As I have explained, that is not what petitioners need to show or what they attempted to prove.

Moreover, the Court is also wrong in its understanding of petitioners' proof in the first case. In support of its holding that the admitting privileges requirement now "places a 'substantial obstacle in the path of a woman's choice,'" the Court relies on two facts: "Eight abortion clinics closed in the months leading up to the requirement's effective date" and "[e]leven more closed on the day the admitting-privileges requirement took effect." *Ante*, at 24. But petitioners put on evidence addressing exactly this issue in their first trial. They apparently surveyed 27 of the 36 abortion clinics they identified in the State, including all 24 of the clinics owned by them or their coplaintiffs, to find out what impact the requirement would have on clinic operations. See Appendix, *infra* (App. K to Emergency Application To Vacate Stay in *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, O. T. 2013, No. 13A452, Plaintiffs' Trial Exh. 46).

That survey claimed to show that the admitting privileges requirement would cause 15 clinics to close.⁸ See *ibid*. The Fifth Circuit had that evidence before it, and did not refuse to consider it.⁹ If that evidence was sufficient to

⁸As I explain, *infra*, at 29, and n. 18, some of the closures presumably included in the Court's count of 19 were not attributed to H. B. 2 at the first trial, even by petitioners.

⁹The *Abbott* panel's refusal to consider "developments since the conclusion of the bench trial," 748 F. 3d, at 599, n. 14, was not addressed to the evidence of 15 closures presented at trial. The Court of Appeals in

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show that the admitting privileges rule created an unlawful impediment to abortion access (and the District Court indeed thought it sufficient), then the decision of the Fifth Circuit in the first case was wrong as a matter of law. Petitioners could have asked us to review that decision, but they chose not to do so. A tactical decision of that nature has consequences. While it does not mean that the

fact credited that evidence by *assuming* “some clinics may be required to shut their doors,” but it nevertheless concluded that “there is no showing whatsoever that *any* woman will lack reasonable access to a clinic within Texas.” *Id.*, at 598. The *Abbott* decision therefore accepted the factual premise common to these two actions—namely, that the admitting privileges requirement would cause some clinics to close—but it concluded that petitioners had not proved a burden on access regardless. In rejecting *Abbott*’s conclusion, the Court seems to believe that *Abbott* also must have refused to accept the factual premise. See *ante*, at 13–15.

Instead, *Abbott*’s footnote 14 appears to have addressed the following post-trial developments: (1) the permanent closure of the Lubbock clinic, Brief for Plaintiffs-Appellees in *Abbott* (CA5), at 5, n. 3 (accounted for among the 15 anticipated closures, see Appendix, *infra*); (2) the *resumption* of abortion services in Fort Worth, Brief for Plaintiffs-Appellees, at 5, n. 3; (3) the *acquisition* of admitting privileges by an Austin abortion provider, *id.*, at 6, n. 4; (4) the *acquisition* of privileges by physicians in Dallas and San Antonio, see Letter from J. Crepps to L. Cayce, Clerk of Court in *Abbott* (CA5, Jan. 3, 2014); (5) the *acquisition* of privileges by physicians in El Paso and Killeen, see Letter from J. Crepps to L. Cayce, Clerk of Court in *Abbott* (CA5, Mar. 21, 2014); and (6) the enforcement of the requirement against one Houston provider who lacked privileges, see *ibid.* (citing Texas Medical Board press release). In the five months between the admitting privileges requirement taking effect and the Fifth Circuit’s *Abbott* decision, then, the parties had ample time to inform that court of post-trial developments—and petitioners never identified the 15 closures as new (because the closures were already accounted for in their trial evidence). In fact, the *actual* new developments largely favored the State’s case: In that time, physicians in Austin, Dallas, El Paso, Fort Worth, Killeen, and San Antonio were able to come into compliance, while only one in Houston was not, and one clinic (already identified at trial as expected to close) closed permanently. So *Abbott*’s decision to ignore post-trial developments quite likely favored petitioners.

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admitting privileges requirement is immune to a facial challenge, it does mean that these petitioners and the other plaintiffs in the first case cannot mount such a claim.

2

Even if the Court thinks that petitioners' evidence in the first case was insufficient, the Court does not claim that petitioners, with reasonable effort, could not have gathered sufficient evidence to show with some degree of accuracy what the effects of the admitting privileges requirement would be. As I have just explained, in their first trial petitioners introduced a survey of 27 abortion clinics indicating that 15 would close because of the admitting privileges requirement. The Court does not identify what additional evidence petitioners needed but were unable to gather. There is simply no reason why petitioners should be allowed to relitigate their facial claim.

E

So far, I have discussed only the first of the two sentences in Comment *f*, but the Court also relies on the second sentence. I reiterate what that second sentence says:

“Where important human values—such as the lawfulness of a continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.” Restatement (Second) of Judgments §24, Comment *f*.

The second Restatement offers no judicial support whatsoever for this suggestion, and thus the comment “must be regarded as a proposal for change rather than a restatement of existing doctrine, since the commentary refers to not a single case, of this or any other United States court.” *United States v. Stuart*, 489 U. S. 353, 375 (1989) (Scalia,

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J., concurring in judgment). The sentence also sits in considerable tension with our decisions stating that res judicata must be applied uniformly and without regard to what a court may think is just in a particular case. See, e.g., *Moitie*, 452 U. S., at 401 (“The doctrine of res judicata serves vital public interests beyond any individual judge’s ad hoc determination of the equities in a particular case”). Not only did this sentence seemingly come out of nowhere, but it appears that no subsequent court has relied on this sentence as a ground for decision. And while a few decisions have cited the “important human values” language, those cases invariably involve the relitigation of personal status determinations, as discussed in Comment *f*’s Illustration 11. See, e.g., *People ex rel. Leonard HH. v. Nixon*, 148 App. Div. 2d 75, 79–80, 543 N. Y. S. 2d 998, 1001 (1989) (“[B]y its very nature, litigation concerning the *status* of a person’s mental capacity does not lend itself to strict application of res judicata on a transactional analysis basis”).¹⁰

* * *

In sum, the Court’s holding that petitioners’ second facial challenge to the admitting privileges requirement is not barred by claim preclusion is not supported by any of

¹⁰ See also *In re Marriage of Shaddle*, 317 Ill. App. 3d 428, 430–432, 740 N. E. 2d 525, 528–529 (2000) (child custody); *In re Hope M.*, 1998 ME 170, ¶5, 714 A. 2d 152, 154 (termination of parental rights); *In re Connors*, 255 Ill. App. 3d 781, 784–785, 627 N. E. 2d 1171, 1173–1174 (1994) (civil commitment); *Kent V. v. State*, 233 P. 3d 597, 601, and n. 12 (Alaska 2010) (applying Comment *f* to termination of parental rights); *In re Juvenile Appeal (83–DE)*, 190 Conn. 310, 318–319, 460 A. 2d 1277, 1282 (1983) (same); *In re Strozzi*, 112 N. M. 270, 274, 814 P. 2d 138, 142 (App. 1991) (guardianship and conservatorship); *Andrulonis v. Andrulonis*, 193 Md. App. 601, 617, 998 A. 2d 898, 908 (2010) (modification of alimony); *In re Marriage of Pedersen*, 237 Ill. App. 3d 952, 957, 605 N. E. 2d 629, 633 (1992) (same); *Friederwitzer v. Friederwitzer*, 55 N. Y. 2d 89, 94–95, 432 N. E. 2d 765, 768 (1982) (child custody).

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our cases or any body of lower court precedent; is contrary to the bedrock rule that a party cannot relitigate a claim simply because the party has obtained new and better evidence; is contrary to the first Restatement of Judgments and the actual rules of the second Restatement of Judgment; and is purportedly based largely on a single comment in the second Restatement, but does not even represent a sensible reading of that comment. In a regular case, an attempt by petitioners to relitigate their previously unsuccessful facial challenge to the admitting privileges requirement would have been rejected out of hand—indeed, might have resulted in the imposition of sanctions under Federal Rule of Civil Procedure 11. No court would even think of reviving such a claim on its own. But in this abortion case, ordinary rules of law—and fairness—are suspended.

II A

I now turn to the application of principles of claim preclusion to a claim that petitioners did include in their second complaint, namely, their facial challenge to the requirement in H. B. 2 that abortion clinics comply with the rules that govern ambulatory surgical centers (ASCs). As we have said many times, the doctrine of claim preclusion not only bars the relitigation of previously litigated claims; it can also bar claims that are closely related to the claims unsuccessfully litigated in a prior case. See *Moitie, supra*, at 398; *Montana*, 440 U. S., at 153.

As just discussed, the Court’s holding on the admitting privileges issue is based largely on a comment to §24 of the second Restatement, and therefore one might think that consistency would dictate an examination of what §24 has to say on the question whether the ASC challenge should be barred. But consistency is not the Court’s watchword here.

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Section 24 sets out the general rule regarding the “[s]plitting” of claims. This is the rule that determines when the barring of a claim that was previously litigated unsuccessfully also extinguishes a claim that the plaintiff could have but did not bring in the first case. Section 24(1) states that the new claim is barred if it is “any part of the transaction, or series of connected transactions, out of which the action arose.”

Here, it is evident that petitioners’ challenges to the admitting privileges requirement and the ASC requirement are part of the same transaction or series of connected transactions. If, as I believe, the “transaction” is the enactment of H. B. 2, then the two facial claims are part of the very same transaction. And the same is true even if the likely or actual effects of the two provisions constitute the relevant transactions. Petitioners argue that the admitting privileges requirement and the ASC requirements *combined* have the effect of unconstitutionally restricting access to abortions. Their brief repeatedly refers to the collective effect of the “requirements.” Brief for Petitioners 40, 41, 42, 43, 44. They describe the admitting privileges and ASC requirements as delivering a “one-two punch.” *Id.*, at 40. They make no effort whatsoever to separate the effects of the two provisions.

B

The Court nevertheless holds that there are two “meaningful differences” that justify a departure from the general rule against splitting claims. *Ante*, at 16. Neither has merit.

1

First, pointing to a statement in a pocket part to a treatise, the Court says that “courts normally treat challenges to distinct regulatory requirements as ‘separate claims,’ even when they are part of one overarching ‘[g]overnment

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regulatory scheme.”’ *Ante*, at 16–17 (quoting 18 Wright & Miller §4408, at 54 (2d ed. 2002, Supp. 2016)). As support for this statement, the treatise cites one case, *Hamilton’s Bogarts, Inc. v. Michigan*, 501 F. 3d 644, 650 (CA6 2007). Even if these authorities supported the rule invoked by the Court (and the Court points to no other authorities), they would hardly be sufficient to show that “courts normally” proceed in accordance with the Court’s rule. But in fact neither the treatise nor the Sixth Circuit decision actually supports the Court’s rule.

What the treatise says is the following:

“Government *regulatory schemes* provide regular examples of circumstances in which regulation of a single business by many different provisions *should lead* to recognition of separate claims when the business challenges different regulations.” 18 Wright & Miller §4408, at 54 (emphasis added).

Thus, the treatise expresses a view about what the law “should” be; it does not purport to state what courts “normally” do. And the recommendation of the treatise authors concerns different provisions of a “regulatory scheme,” which often embodies an accumulation of legislative enactments. Petitioners challenge two provisions of one law, not just two provisions of a regulatory scheme.

The Sixth Circuit decision is even further afield. In that case, the plaintiff had previously lost a case challenging one rule of a state liquor control commission. 501 F. 3d, at 649–650. On the question whether the final judgment in that case barred a subsequent claim attacking another rule, the court held that the latter claim was “likely” not barred because, “although [the first rule] was challenged in the first lawsuit, [the other rule] was not,” and “[t]he state has not argued or made any showing that [the party] should also have challenged [the other rule] at the time.” *Id.*, at 650. To say that these authorities provide

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meager support for the Court's reasoning would be an exaggeration.

Beyond these paltry authorities, the Court adds only the argument that we should not "encourage a kitchen-sink approach to any litigation challenging the validity of statutes." *Ante*, at 17. I agree—but that is not the situation in this case. The two claims here are very closely related. They are two parts of the same bill. They both impose new requirements on abortion clinics. They are justified by the State on the same ground, protection of the safety of women seeking abortions. They are both challenged as imposing the same kind of burden (impaired access to clinics) on the same kind of right (the right to abortion, as announced in *Roe v. Wade*, 410 U. S. 113 (1973), and *Casey*, 505 U. S. 833). And petitioners attack the two provisions as a package. According to petitioners, the two provisions were both enacted for the same illegitimate purpose—to close down Texas abortion clinics. See Brief for Petitioners 35–36. And as noted, petitioners rely on the combined effect of the two requirements. Petitioners have made little effort to identify the clinics that closed as a result of each requirement but instead aggregate the two requirements' effects.

For these reasons, the two challenges "form a convenient trial unit." Restatement (Second) of Judgments §24(2). In fact, for a trial court to accurately identify the effect of each provision it would also need to identify the effect of the other provision. Cf. *infra*, at 30.

2

Second, the Court claims that, at the time when petitioners filed their complaint in the first case, they could not have known whether future rules implementing the surgical center requirement would provide an exemption for existing abortion clinics. *Ante*, at 17. This argument is deeply flawed.

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“Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.” *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 143 (1974). And here, there was never any real chance that the Texas Department of State Health Services would exempt existing abortion clinics from all the ASC requirements. As the Court of Appeals wrote, “it is abundantly clear from H. B. 2 that all abortion facilities must meet the standards already promulgated for ASCs.” *Whole Woman’s Health v. Cole*, 790 F. 3d 563, 583 (2015) (*per curiam*) (case below). See Tex. Health & Safety Code Ann. §245.010(a) (West Cum. Supp. 2015) (Rules implementing H. B. 2 “must contain minimum standards . . . for an abortion facility [that are] equivalent to the minimum standards . . . for ambulatory surgical centers”). There is no apparent basis for the argument that H. B. 2 permitted the state health department to grant blanket exemptions.

Whether there was any real likelihood that clinics would be exempted from *particular* ASC requirements is irrelevant because both petitioners and the Court view the ASC requirements as an indivisible whole. Petitioners told the Fifth Circuit in unequivocal terms that they were “challeng[ing] H. B. 2 broadly, with no effort whatsoever to parse out specific aspects of the ASC requirement that they f[ou]nd onerous or otherwise infirm.” 790 F. 3d, at 582. Similarly, the majority views all the ASC provisions as an indivisible whole. See *ante*, at 38 (“The statute was meant to require abortion facilities to meet the integrated surgical-center standards—not some subset thereof”). On this view, petitioners had no reason to wait to see whether the Department of State Health Services might exempt them from some of the ASC rules. Even if exemptions from some of the ASC rules had been granted, petitioners and the majority would still maintain that the provision of

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H. B. 2 making the ASC rules applicable to abortion facilities is facially unconstitutional. Thus, exemption from some of the ASC requirements would be entirely inconsequential. The Court has no response to this point. See *ante*, at 17.

For these reasons, petitioners' facial attack on the ASC requirements, like their facial attack on the admitting privileges rule, is precluded.

III

Even if res judicata did not bar either facial claim, a sweeping, statewide injunction against the enforcement of the admitting privileges and ASC requirements would still be unjustified. Petitioners in this case are abortion clinics and physicians who perform abortions. If they were simply asserting a constitutional right to conduct a business or to practice a profession without unnecessary state regulation, they would have little chance of success. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U. S. 483 (1955). Under our abortion cases, however, they are permitted to rely on the right of the abortion patients they serve. See *Doe v. Bolton*, 410 U. S. 179, 188 (1973); but see *ante*, at 2–5 (THOMAS, J., dissenting).

Thus, what matters for present purposes is not the effect of the H. B. 2 provisions on petitioners but the effect on their patients. Under our cases, petitioners must show that the admitting privileges and ASC requirements impose an “undue burden” on women seeking abortions. *Gonzales v. Carhart*, 550 U. S. 124, 146 (2007). And in order to obtain the sweeping relief they seek—facial invalidation of those provisions—they must show, at a minimum, that these provisions have an unconstitutional impact on at least a “large fraction” of Texas women of reproductive age.¹¹ *Id.*, at 167–168. Such a situation

¹¹The proper standard for facial challenges is unsettled in the abor-

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could result if the clinics able to comply with the new requirements either lacked the requisite overall capacity or were located too far away to serve a “large fraction” of the women in question.

Petitioners did not make that showing. Instead of offering direct evidence, they relied on two crude inferences. First, they pointed to the number of abortion clinics that closed after the enactment of H. B. 2, and asked that it be inferred that all these closures resulted from the two challenged provisions. See Brief for Petitioners 23–24. They made little effort to show why particular clinics closed. Second, they pointed to the number of abortions performed annually at ASCs before H. B. 2 took effect and, because this figure is well below the total number of abortions performed each year in the State, they asked that it be inferred that ASC-compliant clinics could not meet the demands of women in the State. See App. 237–238. Peti-

tion context. See *Gonzales*, 550 U. S., at 167–168 (comparing *Ohio v. Akron Center for Reproductive Health*, 497 U. S. 502, 514 (1990) (“[B]ecause appellees are making a facial challenge to a statute, they must show that no set of circumstances exists under which the Act would be valid” (internal quotation marks omitted)), with *Casey*, 505 U. S., at 895 (opinion of the Court) (indicating a spousal-notification statute would impose an undue burden “in a large fraction of the cases in which [it] is relevant” and holding the statutory provision facially invalid)). Like the Court in *Gonzales*, *supra*, at 167–168, I do not decide the question, and use the more plaintiff-friendly “large fraction” formulation only because petitioners cannot meet even that test.

The Court, by contrast, applies the “large fraction” standard without even acknowledging the open question. *Ante*, at 39. In a similar vein, it holds that the fraction’s “relevant denominator is ‘those [women] for whom [the provision] is an actual rather than an irrelevant restriction.’” *Ibid.* (quoting *Casey*, 505 U. S., at 895). I must confess that I do not understand this holding. The purpose of the large-fraction analysis, presumably, is to compare the number of women *actually* burdened with the number *potentially* burdened. Under the Court’s holding, we are supposed to use the same figure (women actually burdened) as both the numerator and the denominator. By my math, that fraction is always “1,” which is pretty large as fractions go.

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tioners failed to provide any evidence of the actual capacity of the facilities that would be available to perform abortions in compliance with the new law—even though they provided this type of evidence in their first case to the District Court at trial and then to this Court in their application for interim injunctive relief. Appendix, *infra*.

A

I do not dispute the fact that H. B. 2 caused the closure of some clinics. Indeed, it seems clear that H. B. 2 was intended to force unsafe facilities to shut down. The law was one of many enacted by States in the wake of the Kermit Gosnell scandal, in which a physician who ran an abortion clinic in Philadelphia was convicted for the first-degree murder of three infants who were born alive and for the manslaughter of a patient. Gosnell had not been actively supervised by state or local authorities or by his peers, and the Philadelphia grand jury that investigated the case recommended that the Commonwealth adopt a law requiring abortion clinics to comply with the same regulations as ASCs.¹² If Pennsylvania had had such a requirement in force, the Gosnell facility may have been shut down before his crimes. And if there were any similarly unsafe facilities in Texas, H. B. 2 was clearly intended to put them out of business.¹³

¹² Report of Grand Jury in No. 0009901–2008 (1st Jud. Dist. Pa., Jan. 14, 2011), p. 248–249, online at <http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf> (all Internet materials as last visited June 24, 2016).

¹³ See House Research Org., Laubenberg et al., Bill Analysis 10 (July 9, 2013), online at <http://www.hro.house.state.tx.us/pdf/ba832/hb0002.pdf> (“Higher standards could prevent the occurrence of a situation in Texas like the one recently exposed in Philadelphia, in which Dr. Kermit Gosnell was convicted of murder after killing babies who were born alive. A patient also died at that substandard clinic”). The Court attempts to distinguish the Gosnell horror story by pointing

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While there can be no doubt that H. B. 2 caused some clinics to cease operation, the absence of proof regarding the reasons for particular closures is a problem because some clinics have or may have closed for at least four reasons other than the two H. B. 2 requirements at issue here. These are:

1. *H. B. 2's restriction on medication abortion.* In their first case, petitioners challenged the provision of H. B. 2 that regulates medication abortion, but that part of the statute was upheld by the Fifth Circuit and not relitigated in this case. The record in this case indicates that in the first six months after this restriction took effect, the number of medication abortions dropped by 6,957 (compared to the same period the previous year). App. 236.
2. *Withdrawal of Texas family planning funds.* In 2011, Texas passed a law preventing family planning grants to providers that perform abortions and their affiliates. In the first case, petitioners' expert admitted that some clinics closed "as a result of the defunding,"¹⁴ and as discussed below, this withdrawal appears specifically to have caused multiple clinic closures in West Texas. See *infra*, at 29, and n. 18.
3. *The nationwide decline in abortion demand.* Petitioners' expert testimony relies¹⁵ on a study from the Guttmacher Institute which concludes that "[t]he national abortion rate has resumed its decline, and no evidence was found that the overall drop in abortion incidence was related to the decrease in providers or to

to differences between Pennsylvania and Texas law. See *ante*, at 27–28. But Texas did not need to be in Pennsylvania's precise position for the legislature to rationally conclude that a similar law would be helpful.

¹⁴Rebuttal Decl. of Dr. Joseph E. Potter, Doc. 76–2, p. 12, ¶32, in *Abbott* (WD Tex., Oct. 18, 2013) (Potter Rebuttal Decl.).

¹⁵See App. 234, 237, 253.

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restrictions implemented between 2008 and 2011.” App. 1117 (direct testimony of Dr. Peter Uhlenberg) (quoting R. Jones & J. Jerman, Abortion Incidence and Service Availability In the United States, 2011, 46 Perspectives on Sexual and Reproductive Health 3 (2014); emphasis in testimony). Consistent with that trend, “[t]he number of abortions to residents of Texas declined by 4,956 between 2010 and 2011 and by 3,905 between 2011 and 2012.” App. 1118.

4. *Physician retirement (or other localized factors).* Like everyone else, most physicians eventually retire, and the retirement of a physician who performs abortions can cause the closing of a clinic or a reduction in the number of abortions that a clinic can perform. When this happens, the closure of the clinic or the reduction in capacity cannot be attributed to H. B. 2 unless it is shown that the retirement was caused by the admitting privileges or surgical center requirements as opposed to age or some other factor.

At least nine Texas clinics may have ceased performing abortions (or reduced capacity) for one or more of the reasons having nothing to do with the provisions challenged here. For example, in their first case, petitioners alleged that the medication-abortion restriction would cause at least three medication-only abortion clinics to cease performing abortions,¹⁶ and they predicted that “[o]ther facilities that offer both surgical and medication abortion will be unable to offer medication abortion,”¹⁷ presumably reducing their capacity. It also appears that several clinics (including most of the clinics operating in West Texas, apart from El Paso) closed in response to the

¹⁶Complaint and Application for Preliminary and Permanent Injunction in *Abbott* (WD Tex.), ¶¶10, 11 (listing one clinic in Stafford and two in San Antonio).

¹⁷*Id.*, ¶88.

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unrelated law restricting the provision of family planning funds.¹⁸ And there is reason to question whether at least two closures (one in Corpus Christi and one in Houston) may have been prompted by physician retirements.¹⁹

Neither petitioners nor the District Court properly addressed these complexities in assessing causation—and for no good reason. The total number of abortion clinics in the State was not large. Petitioners could have put on evidence (as they did for 27 individual clinics in their first case, see Appendix, *infra*) about the challenged provisions' role in causing the closure of each clinic,²⁰ and the court could have made a factual finding as to the cause of each

¹⁸In the first case, petitioners apparently did not even believe that the abortion clinics in Abilene, Bryan, Midland, and San Angelo were made to close because of H. B. 2. In that case, petitioners submitted a list of 15 clinics they believed would close (or have severely limited capacity) because of the admitting privileges requirement—and those four West Texas clinics are *not* on the list. See Appendix, *infra*. And at trial, a Planned Parenthood executive specifically testified that the Midland clinic closed because of the funding cuts and because the clinic's medical director retired. See 1 Tr. 91, 93, in *Abbott* (WD Tex., Oct. 21, 2013). Petitioners' list and Planned Parenthood's testimony both fit with petitioners' expert's admission in the first case that some clinics closed "as a result of the defunding." Potter Rebuttal Decl. ¶32.

¹⁹See Stoeleje, Abortion Clinic Closes in Corpus Christi, San Antonio Express-News (June 10, 2014), online at <http://www.mysanantonio.com/news/local/article/Abortion-clinic-closes-in-Corpus-Christi-5543125.php> (provider "retiring for medical reasons"); 1 Plaintiffs' Exh. 18, p. 2, in *Whole Woman's Health v. Lakey*, No. 1:14-cv-284 (WD Tex., admitted into evidence Aug. 4, 2014) (e-mail stating Houston clinic owner "is retiring his practice"). Petitioners should have been required to put on proof about the reason for the closure of particular clinics. I cite the extrarecord Corpus Christi story only to highlight the need for such proof.

²⁰This kind of evidence was readily available; in fact, petitioners deposed at least one nonparty clinic owner about the burden posed by H. B. 2. See App. 1474. And recall that in their first case, petitioners put on evidence purporting to show how the admitting privileges requirement would (or would not) affect 27 clinics. See Appendix, *infra* (petitioners' chart of clinics).

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closure.

Precise findings are important because the key issue here is not the number or percentage of clinics affected, but the effect of the closures on women seeking abortions, *i.e.*, on the capacity and geographic distribution of clinics used by those women. To the extent that clinics closed (or experienced a reduction in capacity) for any reason unrelated to the challenged provisions of H. B. 2, the corresponding burden on abortion access may not be factored into the access analysis. Because there was ample reason to believe that some closures were caused by these other factors, the District Court's failure to ascertain the reasons for clinic closures means that, on the record before us, there is no way to tell which closures actually count. Petitioners—who, as plaintiffs, bore the burden of proof—cannot simply point to temporal correlation and call it causation.

B

Even if the District Court had properly filtered out immaterial closures, its analysis would have been incomplete for a second reason. Petitioners offered scant evidence on the capacity of the clinics that are able to comply with the admitting privileges and ASC requirements, or on those clinics' geographic distribution. Reviewing the evidence in the record, it is far from clear that there has been a material impact on access to abortion.

On clinic capacity, the Court relies on petitioners' expert Dr. Grossman, who compared the number of abortions performed at Texas ASCs before the enactment of H. B. 2 (about 14,000 per year) with the total number of abortions per year in the State (between 60,000–70,000 per year). *Ante*, at 32–33.²¹ Applying what the Court terms “common

²¹In the first case, petitioners submitted a report that Dr. Grossman coauthored with their testifying expert, Dr. Potter. 1 Tr. 38 in *Lakey* (Aug. 4, 2014) (*Lakey* Tr.). That report predicted that “the shortfall in

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sense,” the Court infers that the ASCs that performed abortions at the time of H. B. 2’s enactment lacked the capacity to perform all the abortions sought by women in Texas.

The Court’s inference has obvious limitations. First, it is not unassailable “common sense” to hold that current utilization equals capacity; if all we know about a grocery store is that it currently serves 200 customers per week, *ante*, at 33, that fact alone does not tell us whether it is an

capacity due to the admitting privileges requirement will prevent at least 22,286 women” from accessing abortion. Decl. of Dr. Joseph E. Potter, Doc. 9–8, p. 4, in *Abbott* (WD Tex., Oct. 1, 2013). The methodology used was questionable. See Potter Rebuttal Decl. ¶18. As Dr. Potter admitted: “There’s no science there. It’s just evidence.” 2 Tr. 23 in *Abbott* (WD Tex., Oct. 22, 2013). And in this case, in fact, Dr. Grossman admitted that their prediction turned out to be wildly inaccurate. Specifically, he provided a new figure (approximately 9,200) that was less than half of his earlier prediction. 1 *Lakey* Tr. 41. And he then admitted that he had not proven any causal link between the admitting privileges requirement and that smaller decline. *Id.*, at 54 (quoting Grossman et al., Change in Abortion Services After Implementation of a Restrictive Law in Texas, 90 *Contraception* 496, 500 (2014)).

Dr. Grossman’s testimony in this case, furthermore, suggested that H. B. 2’s restriction on medication abortion (whose impact on clinics cannot be attributed to the provisions challenged in this case) was a major cause in the decline in the abortion rate. After the medication abortion restriction and admitting privileges requirement took effect, over the next six months the number of medication abortions dropped by 6,957 compared to the same period in the previous year. See App. 236. The corresponding number of surgical abortions rose by 2,343. See *ibid.* If that net decline of 4,614 in six months is doubled to approximate the annual trend (which is apparently the methodology Dr. Grossman used to arrive at his 9,200 figure, see 90 *Contraception*, *supra*, at 500), then the year’s drop of 9,228 abortions seems to be *entirely* the product of the medication abortion restriction. Taken together, these figures make it difficult to conclude that the admitting privileges requirement actually depressed the abortion rate *at all*.

In light of all this, it is unclear why the Court takes Dr. Grossman’s testimony at face value.

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overcrowded minimart or a practically empty supermarket. Faced with increased demand, ASCs could potentially increase the number of abortions performed without prohibitively expensive changes. Among other things, they might hire more physicians who perform abortions,²² utilize their facilities more intensively or efficiently, or shift the mix of services provided. Second, what matters for present purposes is not the capacity of just those ASCs that performed abortions prior to the enactment of H. B. 2 but the capacity of those that would be available to perform abortions after the statute took effect. And since the enactment of H. B. 2, the number of ASCs performing abortions has increased by 50%—from six in 2012 to nine today.²³

The most serious problem with the Court's reasoning is that its conclusion is belied by petitioners' own submissions to this Court. In the first case, when petitioners asked this Court to vacate the Fifth Circuit's stay of the District Court's injunction of the admitting privileges

²²The Court asserts that the admitting privileges requirement is a bottleneck on capacity, *ante*, at 34, but it musters no evidence and does not even dispute petitioners' own evidence that the admitting privileges requirement may have had *zero* impact on the Texas abortion rate, n. 21, *supra*.

²³See Brief for Petitioners 23–24 (six centers in 2012, compared with nine today). Two of the three new surgical centers opened since this case was filed are operated by Planned Parenthood (which now owns five of the nine surgical centers in the State). See App. 182–183, 1436. Planned Parenthood is obviously able to comply with the challenged H. B. 2 requirements. The president of petitioner Whole Woman's Health, a much smaller entity, has complained that Planned Parenthood “put[s] local independent businesses in a tough situation.” Simon, Planned Parenthood Hits Suburbia, Wall Street Journal Online (June 23, 2008) (cited in Brief for CitizenLink et al. as *Amici Curiae* 15–16, and n. 23). But as noted, petitioners in this case are not asserting their own rights but those of women who wish to obtain an abortion, see *supra*, at 24, and thus the effect of the H. B. 2 requirements on petitioners' business and professional interests are not relevant.

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requirement pending appeal, they submitted a chart previously provided in the District Court that detailed the capacity of abortion clinics after the admitting privileges requirement was to take effect.²⁴ This chart is included as an Appendix to this opinion.²⁵ Three of the facilities listed on the chart were ASCs, and their capacity was shown as follows:

- Southwestern Women’s Surgery Center in Dallas was said to have the capacity for 5,720 abortions a year (110 per week);
- Planned Parenthood Surgical Health Services Center in Dallas was said to have the capacity for 6,240 abortions a year (120 per week); and

²⁴See Appendix, *infra*. The Court apparently brushes off this evidence as “outside the record,” *ante*, at 35, but it was filed with this Court by the same petitioners in litigation closely related to this case. And “we may properly take judicial notice of the record in that litigation between the same parties who are now before us.” *Shuttlesworth v. Birmingham*, 394 U. S. 147, 157 (1969); see also, e.g., *United States v. Pink*, 315 U. S. 203, 216 (1942); *Freshman v. Atkins*, 269 U. S. 121, 124 (1925).

²⁵The chart lists the 36 abortion clinics apparently open at the time of trial, and identifies the “Capacity after Privileges Requirement” for 27 of those clinics. Of those 27 clinics, 24 were owned by plaintiffs in the first case, and 3 (Coastal Birth Control Center, Hill Top Women’s Reproductive Health Services, and Harlingen Reproductive Services) were owned by nonparties. It is unclear why petitioners’ chart did not include capacity figures for the other nine clinics (also owned by non-parties). Under Federal Rule of Civil Procedure 30(b)(6), petitioners should have been able to depose representatives of those clinics to determine those clinics’ capacity and their physicians’ access to admitting privileges. In the present case, petitioners in fact deposed at least one such nonparty clinic owner, whose testimony revealed that he was able to comply with the admitting privileges requirement. See App. 1474 (testimony of El Paso abortion clinic owner, confirming that he possesses admitting privileges “at every hospital in El Paso” (filed under seal)). The chart states that 14 of those clinics would not be able to perform abortions if the requirement took effect, and that another clinic would have “severely limited” capacity. See Appendix, *infra*.

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- Planned Parenthood Center for Choice in Houston was said to have the capacity for 9,100 abortions a year (175 per week).²⁶ See Appendix, *infra*.

The average capacity of these three ASCs was 7,020 abortions per year.²⁷ If the nine ASCs now performing abortions in Texas have the same average capacity, they have a total capacity of 63,180. Add in the assumed capacity for two other clinics that are operating pursuant to the judgment of the Fifth Circuit (over 3,100 abortions per year),²⁸ and the total for the State is 66,280 abortions per year. That is comparable to the 68,298 total abortions performed in Texas in 2012, the year before H. B. 2 was enacted, App. 236,²⁹ and well in excess of the abortion rate

²⁶The Court nakedly asserts that this clinic “does not represent most facilities.” *Ante*, at 35. Given that in this case petitioners did not introduce evidence on “most facilities,” I have no idea how the Court arrives at this conclusion.

²⁷The Court chides me, *ante*, at 35, for omitting the Whole Woman’s Health ASC in San Antonio from this average. As of the *Abbott* trial in 2013, that ASC’s capacity was (allegedly) to be “severely limited” by the admitting privileges requirement. See Appendix, *infra* (listing “Capacity after Privileges Requirement”). But that facility came into compliance with that requirement a few months later, see Letter from J. Crepps to L. Cayce, Clerk of Court in *Abbott* (CA5, Jan. 3, 2014), so its precompliance capacity is irrelevant here.

²⁸Petitioner Whole Woman’s Health performed over 14,000 abortions over 10 years in McAllen. App. 128. Petitioner Nova Health Systems performed over 17,000 abortions over 10 years in El Paso. *Id.*, at 129. (And as I explain at n. 33, *infra*, either Nova Health Systems or another abortion provider will be open in the El Paso area however this case is decided.)

²⁹This conclusion is consistent with public health statistics offered by petitioners. These statistics suggest that ASCs have a much higher capacity than other abortion facilities. In 2012, there were 14,361 abortions performed by six surgical centers, meaning there were 2,394 abortions per center. See Brief for Petitioners 23; App. 236. In 2012, there were approximately 35 other abortion clinics operating in Texas, see *id.*, at 228 (41 total clinics as of Nov. 1, 2012), which performed 53,937 abortions, *id.*, at 236 (68,298 total minus 14,361 performed in surgical centers). On average, those other clinics each performed

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one would expect—59,070—if subtracting the apparent impact of the medication abortion restriction, see n. 21, *supra*.

To be clear, I do not vouch for the accuracy of this calculation. It might be too high or too low. The important point is that petitioners put on evidence of actual clinic capacity in their earlier case, and there is no apparent reason why they could not have done the same here. Indeed, the Court asserts that, after the admitting privileges requirement took effect, clinics “were not able to accommodate increased demand,” *ante*, at 35, but petitioners’ own evidence suggested that the requirement had *no* effect on capacity, see n. 21, *supra*. On this point, like the question of the reason for clinic closures, petitioners did not discharge their burden, and the District Court did not engage in the type of analysis that should have been conducted before enjoining an important state law.

So much for capacity. The other³⁰ potential obstacle to abortion access is the distribution of facilities throughout the State. This might occur if the two challenged H. B. 2 requirements, by causing the closure of clinics in some rural areas, led to a situation in which a “large fraction”³¹ of women of reproductive age live too far away from any open clinic. Based on the Court’s holding in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, it appears that the need to travel up to 150 miles is not an undue burden,³² and the evidence in this case shows that

53,937÷35=1,541 abortions per year. So surgical centers in 2012 performed 55% more abortions per facility (2,394 abortions) than the average (1,541) for other clinics.

³⁰The Court also gives weight to supposed reductions in “individualized attention, serious conversation, and emotional support” in its undue-burden analysis. *Ante*, at 36. But those “facts” are not in the record, so I have no way of addressing them.

³¹See n. 11, *supra*.

³²The District Court in *Casey* found that 42% of Pennsylvania women “must travel for at least one hour, and sometimes longer than three

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if the only clinics in the State were those that would have remained open if the judgment of the Fifth Circuit had not been enjoined, roughly 95% of the women of reproductive age in the State would live within 150 miles of an open facility (or lived outside that range before H. B. 2).³³ Because the record does not show why particular facilities closed, the real figure may be even higher than 95%.

We should decline to hold that these statistics justify the facial invalidation of the H. B. 2 requirements. The

hours, to obtain an abortion from the *nearest* provider.” 744 F. Supp. 1323, 1352 (ED Pa. 1990), aff’d in part, rev’d in part, 947 F. 2d 682 (CA3 1991), aff’d in part, rev’d in part, 505 U. S. 833 (1992). In that case, this Court recognized that the challenged 24-hour waiting period would require some women to make that trip twice, and yet upheld the law regardless. See *id.*, at 886–887.

³³Petitioners’ expert testified that 82.5% of Texas women of reproductive age live within 150 miles of a Texas surgical center that provides abortions. See App. 242 (930,000 women living more than 150 miles away), 244 (5,326,162 women total). The State’s expert further testified, without contradiction, that an additional 6.2% live within 150 miles of the McAllen facility, and another 3.3% within 150 miles of an El Paso-area facility. *Id.*, at 921–922. (If the Court did not award statewide relief, I assume it would instead either conclude that the availability of abortion on the New Mexico side of the El Paso metropolitan area satisfies the Constitution, or it would award as-applied relief allowing petitioner Nova Health Systems to remain open in El Paso. Either way, the 3.3% figure would remain the same, because Nova’s clinic and the New Mexico facility are so close to each other. See *id.*, at 913, 916, 921 (only six women of reproductive age live within 150 miles of Nova’s clinic but not New Mexico clinic).) Together, these percentages add up to 92.0% of Texas women of reproductive age.

Separately, the State’s expert also testified that 2.9% of women of reproductive age lived more than 150 miles from an abortion clinic before H. B. 2 took effect. *Id.*, at 916.

So, at most, H. B. 2 affects no more than $(100\%-2.9\%)-92.0\% = 5.1\%$ of women of reproductive age. Also recall that many rural clinic closures appear to have been caused by other developments—indeed, petitioners seemed to believe that themselves—and have certainly not been shown to be caused by the provisions challenged here. See *supra*, at 29, and n. 18. So the true impact is almost certainly smaller than 5.1%.

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possibility that the admitting privileges requirement *might* have caused a closure in Lubbock is no reason to issue a facial injunction exempting Houston clinics from that requirement. I do not dismiss the situation of those women who would no longer live within 150 miles of a clinic as a result of H. B. 2. But under current doctrine such localized problems can be addressed by narrow as-applied challenges.

IV

Even if the Court were right to hold that res judicata does not bar this suit and that H. B. 2 imposes an undue burden on abortion access—it is, in fact, wrong on both counts—it is still wrong to conclude that the admitting privileges and surgical center provisions must be enjoined in their entirety. H. B. 2 has an extraordinarily broad severability clause that must be considered before enjoining any portion or application of the law. Both challenged provisions should survive in substantial part if the Court faithfully applies that clause. Regrettably, it enjoins both in full, heedless of the (controlling) intent of the state legislature. Cf. *Leavitt v. Jane L.*, 518 U. S. 137, 139 (1996) (*per curiam*) (“Severability is of course a matter of state law”).

A

Applying H. B. 2’s severability clause to the admitting privileges requirement is easy. Simply put, the requirement must be upheld in every city in which its application does not pose an undue burden. It surely does not pose that burden anywhere in the eastern half of the State, where most Texans live and where virtually no woman of reproductive age lives more than 150 miles from an open clinic. See App. 242, 244 (petitioners’ expert testimony that 82.5% of Texas women of reproductive age live within 150 miles of open clinics in Austin, Dallas, Fort Worth,

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Houston, and San Antonio). (Unfortunately, the Court does not address the State's argument to this effect. See Brief for Respondents 51.) And petitioners would need to show that the requirement caused specific West Texas clinics to close (but see *supra*, at 29, and n. 18) before they could be entitled to an injunction tailored to address those closures.

B

Applying severability to the surgical center requirement calls for the identification of the particular provisions of the ASC regulations that result in the imposition of an undue burden. These regulations are lengthy and detailed, and while compliance with some might be expensive, compliance with many others would not. And many serve important health and safety purposes. Thus, the surgical center requirements cannot be judged as a package. But the District Court nevertheless held that all the surgical center requirements are unconstitutional in all cases, and the Court sustains this holding on grounds that are hard to take seriously.

When the Texas Legislature passed H. B. 2, it left no doubt about its intent on the question of severability. It included a provision mandating the greatest degree of severability possible. The full provision is reproduced below,³⁴ but it is enough to note that under this provision

³⁴The severability provision states:

"(a) If some or all of the provisions of this Act are ever temporarily or permanently restrained or enjoined by judicial order, all other provisions of Texas law regulating or restricting abortion shall be enforced as though the restrained or enjoined provisions had not been adopted; provided, however, that whenever the temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, the provisions shall have full force and effect.

"(b) Mindful of *Leavitt v. Jane L.*, 518 U. S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit state-

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“every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act, are severable from each other.” H. B. 2, §10(b), App. to Pet. for Cert. 200a. And to drive home the point about the severability of applications of the law, the provision adds:

“If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this Act shall be sev-

ment of legislative intent is controlling, it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act, are severable from each other. If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature’s intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this Act to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining provisions and shall remain in force, and shall be treated as if the legislature had enacted a statute limited to the persons, group of persons, or circumstances for which the statute’s application does not present an undue burden. The legislature further declares that it would have passed this Act, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this Act, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this Act, were to be declared unconstitutional or to represent an undue burden.

“(c) [omitted—applies to late-term abortion ban only]

“(d) If any provision of this Act is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force.” H. B. 2, §10, App. to Pet. for Cert. 199a–201a.

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ered from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone." *Ibid.*

This provision indisputably requires that all surgical center regulations that are not themselves unconstitutional be left standing. Requiring an abortion facility to comply with any provision of the regulations applicable to surgical centers is an "application of the provision" of H. B. 2 that requires abortion clinics to meet surgical center standards. Therefore, if some such applications are unconstitutional, the severability clause plainly requires that those applications be severed and that the rest be left intact.

How can the Court possibly escape this painfully obvious conclusion? Its main argument is that it need not honor the severability provision because doing so would be too burdensome. See *ante*, at 38. This is a remarkable argument.

Under the Supremacy Clause, federal courts may strike down state laws that violate the Constitution or conflict with federal statutes, Art. VI, cl. 2, but in exercising this power, federal courts must take great care. The power to invalidate a state law implicates sensitive federal-state relations. Federal courts have no authority to carpet-bomb state laws, knocking out provisions that are perfectly consistent with federal law, just because it would be too much bother to separate them from unconstitutional provisions.

In any event, it should not have been hard in this case for the District Court to separate any bad provisions from the good. Petitioners should have identified the particular provisions that would entail what they regard as an undue expense, and the District Court could have then concentrated its analysis on those provisions. In fact, petitioners

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did do this in their trial brief, Doc. 185, p. 8 in *Lakey* (Aug. 12, 2014) (“It is the construction and nursing requirements that form the basis of Plaintiffs’ challenge”), but they changed their position once the District Court awarded blanket relief, see 790 F. 3d, at 582 (petitioners told the Fifth Circuit that they “challenge H. B. 2 broadly, with no effort whatsoever to parse out specific aspects of the ASC requirement that they find onerous or otherwise infirm”). In its own review of the ASC requirement, in fact, the Court follows petitioners’ original playbook and focuses on the construction and nursing requirements as well. See *ante*, at 28–29 (detailed walkthrough of Tex. Admin. Code, tit. 25, §§135.15 (2016) (nursing), 135.52 (construction)). I do not see how it “would inflict enormous costs on both courts and litigants,” *ante*, at 38, to single out the ASC regulations that this Court and petitioners have both targeted as the core of the challenge.

By forgoing severability, the Court strikes down numerous provisions that could not plausibly impose an undue burden. For example, surgical center patients must “be treated with respect, consideration, and dignity.” Tex. Admin. Code, tit. 25, §135.5(a). That’s now enjoined. Patients may not be given misleading “advertising regarding the competence and/or capabilities of the organization.” §135.5(g). Enjoined. Centers must maintain fire alarm and emergency communications systems, §§135.41(d), 135.42(e), and eliminate “[h]azards that might lead to slipping, falling, electrical shock, burns, poisoning, or other trauma,” §135.10(b). Enjoined and enjoined. When a center is being remodeled while still in use, “[t]emporary sound barriers shall be provided where intense, prolonged construction noises will disturb patients or staff in the occupied portions of the building.” §135.51(b)(3)(B)(vi). Enjoined. Centers must develop and enforce policies concerning teaching and publishing by staff. §§135.16(a), (c). Enjoined. They must obtain in-

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formed consent before doing research on patients. §135.17(e). Enjoined. And each center “shall develop, implement[,] and maintain an effective, ongoing, organization-wide, data driven patient safety program.” §135.27(b). Also enjoined. These are but a few of the innocuous requirements that the Court invalidates with nary a wave of the hand.

Any responsible application of the H. B. 2 severability provision would leave much of the law intact. At a minimum, both of the requirements challenged here should be held constitutional as applied to clinics in any Texas city that will have a surgical center providing abortions (*i.e.*, those areas in which there cannot possibly have been an undue burden on abortion access). Moreover, as even the District Court found, the surgical center requirement is clearly constitutional as to new abortion facilities and facilities already licensed as surgical centers. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 676 (WD Tex. 2014). And we should uphold every application of every surgical center regulation that does not pose an undue burden—at the very least, all of the regulations as to which petitioners have never made a specific complaint supported by specific evidence. The Court’s wholesale refusal to engage in the required severability analysis here revives the “antagonistic ‘canon of construction under which in cases involving abortion, a permissible reading of a statute is to be avoided at all costs.’” *Gonzales*, 550 U. S., at 153–154 (quoting *Stenberg v. Carhart*, 530 U. S. 914, 977 (2000) (KENNEDY, J., dissenting); some internal quotation marks omitted).

If the Court is unwilling to undertake the careful severability analysis required, that is no reason to strike down all applications of the challenged provisions. The proper course would be to remand to the lower courts for a remedy tailored to the specific facts shown in this case, to “try to limit the solution to the problem.” *Ayotte v. Planned*

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Parenthood of Northern New Eng., 546 U. S. 320, 328 (2006).

V

When we decide cases on particularly controversial issues, we should take special care to apply settled procedural rules in a neutral manner. The Court has not done that here.

I therefore respectfully dissent.

Appendix to opinion of ALITO, J.

APPENDIX

App. K to Emergency Application To Vacate Stay in O. T.
2013, No. 13A452, Plaintiffs' Trial Exh. 46

Clinic Name	Clinic Location	Capacity after Privileges Requirement	Notes	ASC
Austin Women's Health Center	Austin, TX	100% of prior capacity		
International Healthcare Solutions	Austin, TX			
South Austin Health Center (PP)	Austin, TX	none		X
Whole Women's Health Austin	Austin, TX	100% of prior capacity		
Whole Women's Health Beaumont	Beaumont, TX	100% of prior capacity		
Coastal Birth Control Center	Corpus Christi, TX	prob. 100% of prior capacity		
Abortion Advantage	Dallas, TX	none		
Northpark Medical Group	Dallas, TX			
Dallas Surgical Health Services Center	Dallas, TX	120 per week		X
Routh Street Women's Clinic	Dallas, TX	20 per week	Down from ~60 per week	
Southwestern Women's	Dallas, TX	110 per week		
Hill Top Women's Reproductive Health Services	El Paso, TX	prob. 100% of prior capacity		
Reproductive Services	El Paso, TX	none		
Southwest Fort Worth Health Center (PP)	Fort Worth, TX	none		
West Side Clinic	Fort Worth, TX	none		
Whole Woman's Health Fort Worth	Fort Worth, TX	none		
Harlingen Reproductive Services	Harlingen, TX	none		
Affordable Women's Health Center	Houston, TX			
AAA Concerned Women's Center	Houston, TX			
Aaron Women's Clinic	Houston, TX			
Texas Ambulatory Surgical Center	Houston, TX			X
Alto Women's Center	Houston, TX			
Houston Women's Clinic	Houston, TX	130 per week		
Planned Parenthood Center for Choice	Houston, TX	175 per week		X
Suburban Women's Clinic (SW)	Houston, TX			
Suburban Women's Clinic (NW)	Houston, TX			
Planned Parenthood Center for Choice Stafford	Stafford (not in county)	none		
Killeen Women's Health Center	Killeen, TX	none		
Planned Parenthood Women's Health Center	Lubbock, TX	none		
Whole Women's Health of McAllen	McAllen, TX	none		
Dr. Braid (Alamo Women's Reproductive Services)	San Antonio, TX	100% of prior capacity		
Planned Parenthood Babcock Sexual Healthcare	San Antonio, TX	40/week for ALL San Antonio PP locations		
Planned Parenthood Bandera Rd Sexual Healthcare	San Antonio, TX	none		
Planned Parenthood Northeast Sexual Healthcare	San Antonio, TX	none		
Whole Woman's Health San Antonio	San Antonio, TX	severely limited		X
Audre Rapoport Women's Health Center (PP)	Waco, TX	none		