Syllabus

LEEGIN CREATIVE LEATHER PRODUCTS, INC. *v.* PSKS, INC., DBA KAY'S KLOSET . . . KAY'S SHOES

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

No. 06–480. Argued March 26, 2007—Decided June 28, 2007

Given its policy of refusing to sell to retailers that discount its goods below suggested prices, petitioner (Leegin) stopped selling to respondent's (PSKS) store. PSKS filed suit, alleging, *inter alia,* that Leegin violated the antitrust laws by entering into vertical agreements with its retailers to set minimum resale prices. The District Court excluded expert testimony about Leegin's pricing policy's procompetitive effects on the ground that *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, makes it *per se* illegal under § 1 of the Sherman Act for a manufacturer and its distributor to agree on the minimum price the distributor can charge for the manufacturer's goods. At trial, PSKS alleged that Leegin and its retailers had agreed to fix prices, but Leegin argued that its pricing policy was lawful under § 1. The jury found for PSKS. On appeal, the Fifth Circuit declined to apply the rule of reason to Leegin's vertical price-fixing agreements and affirmed, finding that *Dr. Miles*' *per se* rule rendered irrelevant any procompetitive justifications for Leegin's policy.

Held: Dr. Miles is overruled, and vertical price restraints are to be judged by the rule of reason. Pp. 885–908.

(a) The accepted standard for testing whether a practice restrains trade in violation of § 1 is the rule of reason, which requires the fact-finder to weigh "all of the circumstances," *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 49, including "specific information about the relevant business" and "the restraint's history, nature, and effect," *State Oil Co.* v. *Khan,* 522 U. S. 3, 10. The rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and those with procompetitive effect that are in the consumer's best interest. However, when a restraint is deemed "unlawful *per se,*" *ibid.*, the need to study an individual restraint's reasonableness in light of real market forces is eliminated, *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 723. Resort to *per se* rules is confined to restraints "that would always or almost always tend to restrict competition and decrease output." *Ibid.* Thus, a *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, see *Broadcast Music, Inc.* v. *Columbia Broadcasting*

System, Inc., 441 U. S. 1, 9, and only if they can predict with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason, see *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332, 344. Pp. 885–887.

(b) Because the reasons upon which *Dr. Miles* relied do not justify a *per se* rule, it is necessary to examine, in the first instance, the economic effects of vertical agreements to fix minimum resale prices and to determine whether the *per se* rule is nonetheless appropriate. Were this Court considering the issue as an original matter, the rule of reason, not a *per se* rule of unlawfulness, would be the appropriate standard to judge vertical price restraints. Pp. 887–899.

(1) Economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance, and the few recent studies on the subject also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule. The justifications for vertical price restraints are similar to those for other vertical restraints. Minimum resale price maintenance can stimulate interbrand competition among manufacturers selling different brands of the same type of product by reducing intrabrand competition among retailers selling the same brand. This is important because the antitrust laws' "primary purpose . . . is to protect interbrand competition," *Khan*, *supra*, at 15. A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance may also give consumers more options to choose among low-price, low-service brands; high-price, high-service brands; and brands falling in between. Absent vertical price restraints, retail services that enhance interbrand competition might be underprovided because discounting retailers can free ride on retailers who furnish services and then capture some of the demand those services generate. Retail price maintenance can also increase interbrand competition by facilitating market entry for new firms and brands and by encouraging retailer services that would not be provided even absent free riding. Pp. 889–892.

(2) Setting minimum resale prices may also have anticompetitive effects; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever-present temptation. Resale price maintenance may, for example, facilitate a manufacturer cartel or be used to organize retail cartels. It can also be abused by a powerful manufacturer or retailer. Thus, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated. Pp. 892–894.

(3) Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that retail price maintenance "al-

ways or almost always tend[s] to restrict competition and decrease output," *Business Electronics*, *supra*, at 723. Vertical retail price agreements have either procompetitive or anticompetitive effects, depending on the circumstances in which they were formed; and the limited empirical evidence available does not suggest efficient uses of the agreements are infrequent or hypothetical. A *per se* rule should not be adopted for administrative convenience alone. Such rules can be counterproductive, increasing the antitrust system's total cost by prohibiting procompetitive conduct the antitrust laws should encourage. And a *per se* rule cannot be justified by the possibility of higher prices absent a further showing of anticompetitive conduct. The antitrust laws primarily are designed to protect interbrand competition from which lower prices can later result. Respondent's argument overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. Resale price maintenance has economic dangers. If the rule of reason were to apply, courts would have to be diligent in eliminating their anticompetitive uses from the market. Factors relevant to the inquiry are the number of manufacturers using the practice, the restraint's source, and a manufacturer's market power. The rule of reason is designed and used to ascertain whether transactions are anticompetitive or procompetitive. This standard principle applies to vertical price restraints. As courts gain experience with these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Pp. 894–899.

(c) *Stare decisis* does not compel continued adherence to the *per se* rule here. Because the Sherman Act is treated as a common-law statute, its prohibition on "restraint[s] of trade" evolves to meet the dynamics of present economic conditions. The rule of reason's case-by-case adjudication implements this common-law approach. Here, respected economics authorities suggest that the *per se* rule is inappropriate. And both the Department of Justice and the Federal Trade Commission recommend replacing the *per se* rule with the rule of reason. In addition, this Court has "overruled [its] precedents when subsequent cases have undermined their doctrinal underpinnings." *Dickerson* v. *United States*, 530 U. S. 428, 443. It is not surprising that the Court has distanced itself from *Dr. Miles'* rationales, for the case was decided not long after the Sherman Act was enacted, when the Court had little experience with antitrust analysis. Only eight years after *Dr. Miles*, the Court reined in the decision, holding that a manufacturer can suggest resale prices and refuse to deal with distributors who do not follow them, *United States* v. *Colgate & Co.*, 250 U. S. 300, 307–308; and more

recently the Court has tempered, limited, or overruled once strict vertical restraint prohibitions, see, *e. g.*, *GTE Sylvania*, 433 U. S., at 57–59. The *Dr. Miles* rule is also inconsistent with a principled framework, for it makes little economic sense when analyzed with the Court's other vertical restraint cases. Deciding that procompetitive effects of resale price maintenance are insufficient to overrule *Dr. Miles* would call into question cases such as *Colgate* and *GTE Sylvania*. Respondent's arguments for reaffirming *Dr. Miles* based on *stare decisis* do not require a different result. Pp. 899–907.

171 Fed. Appx. 464, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 908.

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Deputy Solicitor General Hungar argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Barnett*, *Deputy Assistant Attorney General Masoudi*, *Lisa S. Blatt*, *Catherine G. O'Sullivan*, and *David Seidman*.

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Delaware, *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Thomas Miller* of Iowa, *Paul Morrison* of Kansas, *Greg Stumbo* of Kentucky, *Charles C. Foti, Jr.*, of Louisiana, *G. Steven Rowe* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Mike Cox* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Catherine Cortez Masto* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Stuart Rabner* of New Jersey, *Gary King* of New Mexico, *Roy Cooper* of North Carolina, *Marc Dann* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry McMaster* of South Carolina, *Larry Long* of South Dakota, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Patrick J. Crank* of Wyoming.*

JUSTICE KENNEDY delivered the opinion of the Court.

In *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911), the Court established the rule that it is *per se* illegal under § 1 of the Sherman Act, 15 U. S. C. § 1, for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer's goods. The question presented by the instant case is

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*Briefs of *amici curiae* urging reversal were filed for the American Petroleum Institute by *Robert A. Long, Harry M. Ng*, and *Douglas W. Morris;* for CTIA—The Wireless Association by *Roy T. Englert, Jr., Donald J. Russell*, and *Michael Field Altshul;* for Economists by *Joseph Angland* and *Stephen V. Bomse;* and for PING, Inc., by *Thomas C. Walsh, Lawrence G. Scarborough, Aaron S. Bayer*, and *Robert M. Langer.*

Briefs of *amici curiae* urging affirmance were filed for the American Antitrust Institute by *Albert Foer;* for the Anderson Economic Group, LLC, by *Theodore R. Bolema;* for the Burlington Coat Factory Warehouse Corp. by *Jonathan W. Cuneo, Matthew Wiener*, and *Robert J. Cynkar;* and for the Consumer Federation of America by *Peter A. Barile III.*

Eugene Crew filed a brief for William S. Comanor et al. as *amici curiae.*

whether the Court should overrule the *per se* rule and allow resale price maintenance agreements to be judged by the rule of reason, the usual standard applied to determine if there is a violation of § 1. The Court has abandoned the rule of *per se* illegality for other vertical restraints a manufacturer imposes on its distributors. Respected economic analysts, furthermore, conclude that vertical price restraints can have procompetitive effects. We now hold that *Dr. Miles* should be overruled and that vertical price restraints are to be judged by the rule of reason.

I

Petitioner, Leegin Creative Leather Products, Inc. (Leegin), designs, manufactures, and distributes leather goods and accessories. In 1991, Leegin began to sell belts under the brand name "Brighton." The Brighton brand has now expanded into a variety of women's fashion accessories. It is sold across the United States in over 5,000 retail establishments, for the most part independent, small boutiques and specialty stores. Leegin's president, Jerry Kohl, also has an interest in about 70 stores that sell Brighton products. Leegin asserts that, at least for its products, small retailers treat customers better, provide customers more services, and make their shopping experience more satisfactory than do larger, often impersonal retailers. Kohl explained: "[W]e want the consumers to get a different experience than they get in Sam's Club or in Wal-Mart. And you can't get that kind of experience or support or customer service from a store like Wal-Mart." 5 Record 127.

Respondent, PSKS, Inc. (PSKS), operates Kay's Kloset, a women's apparel store in Lewisville, Texas. Kay's Kloset buys from about 75 different manufacturers and at one time sold the Brighton brand. It first started purchasing Brighton goods from Leegin in 1995. Once it began selling the brand, the store promoted Brighton. For example, it ran Brighton advertisements and had Brighton days in the store.

Kay's Kloset became the destination retailer in the area to buy Brighton products. Brighton was the store's most important brand and once accounted for 40 to 50 percent of its profits.

In 1997, Leegin instituted the "Brighton Retail Pricing and Promotion Policy." 4 *id.*, at 939. Following the policy, Leegin refused to sell to retailers that discounted Brighton goods below suggested prices. The policy contained an exception for products not selling well that the retailer did not plan on reordering. In the letter to retailers establishing the policy, Leegin stated:

> "In this age of mega stores like Macy's, Bloomingdales, May Co. and others, consumers are perplexed by promises of product quality and support of product which we believe is lacking in these large stores. Consumers are further confused by the ever popular sale, sale, sale, etc.
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> "We, at Leegin, choose to break away from the pack by selling [at] specialty stores; specialty stores that can offer the customer great quality merchandise, superb service, and support the Brighton product 365 days a year on a consistent basis.
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> "We realize that half the equation is Leegin producing great Brighton product and the other half is you, our retailer, creating great looking stores selling our products in a quality manner." *Ibid.*

Leegin adopted the policy to give its retailers sufficient margins to provide customers the service central to its distribution strategy. It also expressed concern that discounting harmed Brighton's brand image and reputation.

A year after instituting the pricing policy Leegin introduced a marketing strategy known as the "Heart Store Program." See *id.*, at 962–972. It offered retailers incentives to become Heart Stores, and, in exchange, retailers pledged, among other things, to sell at Leegin's suggested prices. Kay's Kloset became a Heart Store soon after Leegin created

the program. After a Leegin employee visited the store and found it unattractive, the parties appear to have agreed that Kay's Kloset would not be a Heart Store beyond 1998. Despite losing this status, Kay's Kloset continued to increase its Brighton sales.

In December 2002, Leegin discovered Kay's Kloset had been marking down Brighton's entire line by 20 percent. Kay's Kloset contended it placed Brighton products on sale to compete with nearby retailers who also were undercutting Leegin's suggested prices. Leegin, nonetheless, requested that Kay's Kloset cease discounting. Its request refused, Leegin stopped selling to the store. The loss of the Brighton brand had a considerable negative impact on the store's revenue from sales.

PSKS sued Leegin in the United States District Court for the Eastern District of Texas. It alleged, among other claims, that Leegin had violated the antitrust laws by "enter-[ing] into agreements with retailers to charge only those prices fixed by Leegin." *Id.*, at 1236. Leegin planned to introduce expert testimony describing the procompetitive effects of its pricing policy. The District Court excluded the testimony, relying on the *per se* rule established by *Dr. Miles.* At trial PSKS argued that the Heart Store program, among other things, demonstrated Leegin and its retailers had agreed to fix prices. Leegin responded that it had established a unilateral pricing policy lawful under § 1, which applies only to concerted action. See *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919). The jury agreed with PSKS and awarded it $1.2 million. Pursuant to 15 U. S. C. § 15(a), the District Court trebled the damages and reimbursed PSKS for its attorney's fees and costs. It entered judgment against Leegin in the amount of $3,975,000.80.

The Court of Appeals for the Fifth Circuit affirmed. 171 Fed. Appx. 464 (2006) *(per curiam).* On appeal Leegin did not dispute that it had entered into vertical price-fixing agreements with its retailers. Rather, it contended that the

rule of reason should have applied to those agreements. The Court of Appeals rejected this argument. *Id.*, at 466–467. It was correct to explain that it remained bound by *Dr. Miles* "[b]ecause [the Supreme] Court has consistently applied the *per se* rule to [vertical minimum price-fixing] agreements." 171 Fed. Appx., at 466. On this premise the Court of Appeals held that the District Court did not abuse its discretion in excluding the testimony of Leegin's economic expert, for the *per se* rule rendered irrelevant any procompetitive justifications for Leegin's pricing policy. *Id.*, at 467. We granted certiorari to determine whether vertical minimum resale price maintenance agreements should continue to be treated as *per se* unlawful. 549 U. S. 1092 (2006).

II

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." Ch. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1. While § 1 could be interpreted to proscribe all contracts, see, *e. g.*, *Board of Trade of Chicago* v. *United States*, 246 U. S. 231, 238 (1918), the Court has never "taken a literal approach to [its] language," *Texaco Inc.* v. *Dagher*, 547 U. S. 1, 5 (2006). Rather, the Court has repeated time and again that § 1 "outlaw[s] only unreasonable restraints." *State Oil Co.* v. *Khan*, 522 U. S. 3, 10 (1997).

The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1. See *Texaco*, *supra*, at 5. "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 49 (1977). Appropriate factors to take into account include "specific information about the relevant business" and "the restraint's history, nature, and effect." *Khan*, *supra*, at 10. Whether the busi-

nesses involved have market power is a further, significant consideration. See, *e. g.*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 768 (1984) (equating the rule of reason with "an inquiry into market power and market structure designed to assess [a restraint's] actual effect"); see also *Illinois Tool Works Inc.* v. *Independent Ink, Inc.*, 547 U. S. 28, 45–46 (2006). In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

The rule of reason does not govern all restraints. Some types "are deemed unlawful *per se*." *Khan*, *supra*, at 10. The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work, *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 723 (1988); and, it must be acknowledged, the *per se* rule can give clear guidance for certain conduct. Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices, see *Texaco*, *supra*, at 5, or to divide markets, see *Palmer* v. *BRG of Ga., Inc.*, 498 U. S. 46, 49–50 (1990) *(per curiam)*.

Resort to *per se* rules is confined to restraints, like those mentioned, "that would always or almost always tend to restrict competition and decrease output." *Business Electronics*, *supra*, at 723 (internal quotation marks omitted). To justify a *per se* prohibition a restraint must have "manifestly anticompetitive" effects, *GTE Sylvania*, *supra*, at 50, and "lack . . . any redeeming virtue," *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U. S. 284, 289 (1985) (internal quotation marks omitted).

As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, see *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 9 (1979), and only if courts can predict with confidence that it would be invali-

dated in all or almost all instances under the rule of reason, see *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332, 344 (1982). It should come as no surprise, then, that "we have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *Khan*, *supra*, at 10 (internal quotation marks omitted); see also *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963) (refusing to adopt a *per se* rule for a vertical nonprice restraint because of the uncertainty concerning whether this type of restraint satisfied the demanding standards necessary to apply a *per se* rule). And, as we have stated, a "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *GTE Sylvania*, *supra*, at 58–59.

III

The Court has interpreted *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, as establishing a *per se* rule against a vertical agreement between a manufacturer and its distributor to set minimum resale prices. See, *e. g.*, *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 761 (1984). In *Dr. Miles* the plaintiff, a manufacturer of medicines, sold its products only to distributors who agreed to resell them at set prices. The Court found the manufacturer's control of resale prices to be unlawful. It relied on the common-law rule that "a general restraint upon alienation is ordinarily invalid." 220 U. S., at 404–405. The Court then explained that the agreements would advantage the distributors, not the manufacturer, and were analogous to a combination among competing distributors, which the law treated as void. *Id.*, at 407–408.

The reasoning of the Court's more recent jurisprudence has rejected the rationales on which *Dr. Miles* was based. By relying on the common-law rule against restraints on alienation, *id.*, at 404–405, the Court justified its decision

based on "formalistic" legal doctrine rather than "demonstrable economic effect," *GTE Sylvania*, 433 U. S., at 58–59. The Court in *Dr. Miles* relied on a treatise published in 1628, but failed to discuss in detail the business reasons that would motivate a manufacturer situated in 1911 to make use of vertical price restraints. Yet the Sherman Act's use of "restraint of trade" "invokes the common law itself, . . . not merely the static content that the common law had assigned to the term in 1890." *Business Electronics*, *supra*, at 732. The general restraint on alienation, especially in the age when then-Justice Hughes used the term, tended to evoke policy concerns extraneous to the question that controls here. Usually associated with land, not chattels, the rule arose from restrictions removing real property from the stream of commerce for generations. The Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance. We reaffirm that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today." *GTE Sylvania*, *supra*, at 53, n. 21 (internal quotation marks omitted).

Dr. Miles, furthermore, treated vertical agreements a manufacturer makes with its distributors as analogous to a horizontal combination among competing distributors. See 220 U. S., at 407–408. In later cases, however, the Court rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones. See, *e. g.*, *Business Electronics*, *supra*, at 734 (disclaiming the "notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality"); *Maricopa County*, *supra*, at 348, n. 18 (noting that "horizontal restraints are generally less defensible than vertical restraints"). Our recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements, differences the *Dr. Miles* Court failed to consider.

The reasons upon which *Dr. Miles* relied do not justify a *per se* rule. As a consequence, it is necessary to examine, in the first instance, the economic effects of vertical agreements to fix minimum resale prices, and to determine whether the *per se* rule is nonetheless appropriate. See *Business Electronics*, 485 U. S., at 726.

A

Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance. See, *e. g.*, Brief for Economists as *Amici Curiae* 16 ("In the theoretical literature, it is essentially undisputed that minimum [resale price maintenance] can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects"); Brief for United States as *Amicus Curiae* 9 ("[T]here is a widespread consensus that permitting a manufacturer to control the price at which its goods are sold may promote *inter*brand competition and consumer welfare in a variety of ways"); ABA Section of Antitrust Law, Antitrust Law and Economics of Product Distribution 76 (2006) ("[T]he bulk of the economic literature on [resale price maintenance] suggests that [it] is more likely to be used to enhance efficiency than for anticompetitive purposes"); see also H. Hovenkamp, The Antitrust Enterprise: Principle and Execution 184–191 (2005) (hereinafter Hovenkamp); R. Bork, The Antitrust Paradox 288–291 (1978) (hereinafter Bork). Even those more skeptical of resale price maintenance acknowledge it can have procompetitive effects. See, *e. g.*, Brief for William S. Comanor et al. as *Amici Curiae* 3 ("[G]iven [the] diversity of effects [of resale price maintenance], one could reasonably take the position that a *rule of reason* rather than a *per se* approach is warranted"); F. Scherer & D. Ross, Industrial Market Structure and Economic Performance 558 (3d ed. 1990) (hereinafter Scherer & Ross) ("The overall bal-

ance between benefits and costs [of resale price maintenance] is probably close").

The few recent studies documenting the competitive effects of resale price maintenance also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule. See Bureau of Economics Staff Report to the FTC, T. Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence 170 (1983) (hereinafter Overstreet) (noting that "[e]fficient uses of [resale price maintenance] are evidently not unusual or rare"); see also Ippolito, Resale Price Maintenance: Empirical Evidence From Litigation, 34 J. Law & Econ. 263, 292–293 (1991) (hereinafter Ippolito).

The justifications for vertical price restraints are similar to those for other vertical restraints. See *GTE Sylvania*, 433 U. S., at 54–57. Minimum resale price maintenance can stimulate interbrand competition—the competition among manufacturers selling different brands of the same type of product—by reducing intrabrand competition—the competition among retailers selling the same brand. See *id.*, at 51–52. The promotion of interbrand competition is important because "the primary purpose of the antitrust laws is to protect [this type of] competition." *Khan*, 522 U. S., at 15. A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.

Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate. *GTE Sylvania*, *supra*, at 55. Consumers might learn, for example, about

the benefits of a manufacturer's product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees. R. Posner, Antitrust Law 172–173 (2d ed. 2001) (hereinafter Posner). Or consumers might decide to buy the product because they see it in a retail establishment that has a reputation for selling high-quality merchandise. Marvel & McCafferty, Resale Price Maintenance and Quality Certification, 15 Rand J. Econ. 346, 347–349 (1984) (hereinafter Marvel & McCafferty). If the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer. Minimum resale price maintenance alleviates the problem because it prevents the discounter from undercutting the service provider. With price competition decreased, the manufacturer's retailers compete among themselves over services.

Resale price maintenance, in addition, can increase interbrand competition by facilitating market entry for new firms and brands. "[N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer." *GTE Sylvania, supra*, at 55; see Marvel & McCafferty 349 (noting that reliance on a retailer's reputation "will decline as the manufacturer's brand becomes better known, so that [resale price maintenance] may be particularly important as a competitive device for new entrants"). New products and new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect.

Resale price maintenance can also increase interbrand competition by encouraging retailer services that would not

be provided even absent free riding. It may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer specifying the different services the retailer must perform. Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services. See Mathewson & Winter, The Law and Economics of Resale Price Maintenance, 13 Rev. Indus. Org. 57, 74–75 (1998) (hereinafter Mathewson & Winter); Klein & Murphy, Vertical Restraints as Contract Enforcement Mechanisms, 31 J. Law & Econ. 265, 295 (1988); see also Deneckere, Marvel, & Peck, Demand Uncertainty, Inventories, and Resale Price Maintenance, 111 Q. J. Econ. 885, 911 (1996) (noting that resale price maintenance may be beneficial to motivate retailers to stock adequate inventories of a manufacturer's goods in the face of uncertain consumer demand).

B

While vertical agreements setting minimum resale prices can have procompetitive justifications, they may have anticompetitive effects in other cases; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever-present temptation. Resale price maintenance may, for example, facilitate a manufacturer cartel. See *Business Electronics*, 485 U. S., at 725. An unlawful cartel will seek to discover if some manufacturers are undercutting the cartel's fixed prices. Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer. Resale price maintenance, furthermore, could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to consumers. See *ibid.;* see also Posner 172; Overstreet 19–23.

Vertical price restraints also "might be used to organize cartels at the retailer level." *Business Electronics*, *supra*, at 725–726. A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance. In that instance the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement. See Posner 172; Overstreet 13–19. Historical examples suggest this possibility is a legitimate concern. See, *e. g.*, Marvel & McCafferty, The Welfare Effects of Resale Price Maintenance, 28 J. Law & Econ. 363, 373 (1985) (hereinafter Marvel) (providing an example of the power of the National Association of Retail Druggists to compel manufacturers to use resale price maintenance); Hovenkamp 186 (suggesting that the retail druggists in *Dr. Miles* formed a cartel and used manufacturers to enforce it).

A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful. See *Texaco*, 547 U. S., at 5; *GTE Sylvania*, 433 U. S., at 58, n. 28. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.

Resale price maintenance, furthermore, can be abused by a powerful manufacturer or retailer. A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs. A manufacturer might consider it has little choice but to accommodate the retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's

distribution network. See Overstreet 31; 8 P. Areeda & H. Hovenkamp, Antitrust Law 47 (2d ed. 2004) (hereinafter Areeda & Hovenkamp); cf. *Toys "R" Us, Inc.* v. *FTC*, 221 F. 3d 928, 937–938 (CA7 2000). A manufacturer with market power, by comparison, might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants. See, *e. g.*, Marvel 366–368. As should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.

C

Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance "always or almost always tend[s] to restrict competition and decrease output." *Business Electronics*, *supra*, at 723 (internal quotation marks omitted). Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed. And although the empirical evidence on the topic is limited, it does not suggest efficient uses of the agreements are infrequent or hypothetical. See Overstreet 170; see also *id.*, at 80 (noting that for the majority of enforcement actions brought by the Federal Trade Commission between 1965 and 1982, "the use of [resale price maintenance] was not likely motivated by collusive dealers who had successfully coerced their suppliers"); Ippolito 292 (reaching a similar conclusion). As the rule would proscribe a significant amount of procompetitive conduct, these agreements appear ill suited for *per se* condemnation.

Respondent contends, nonetheless, that vertical price restraints should be *per se* unlawful because of the administrative convenience of *per se* rules. See, *e. g.*, *GTE Sylvania*, *supra*, at 50, n. 16 (noting "*per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system"). That argument sug-

gests *per se* illegality is the rule rather than the exception. This misinterprets our antitrust law. *Per se* rules may decrease administrative costs, but that is only part of the equation. Those rules can be counterproductive. They can increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage. See Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L. J. 135, 158 (1984) (hereinafter Easterbrook). They also may increase litigation costs by promoting frivolous suits against legitimate practices. The Court has thus explained that administrative "advantages are not sufficient in themselves to justify the creation of *per se* rules," *GTE Sylvania*, 433 U. S., at 50, n. 16, and has relegated their use to restraints that are "manifestly anticompetitive," *id.*, at 49–50. Were the Court now to conclude that vertical price restraints should be *per se* illegal based on administrative costs, we would undermine, if not overrule, the traditional "demanding standards" for adopting *per se* rules. *Id.*, at 50. Any possible reduction in administrative costs cannot alone justify the *Dr. Miles* rule.

Respondent also argues the *per se* rule is justified because a vertical price restraint can lead to higher prices for the manufacturer's goods. See also Overstreet 160 (noting that "price surveys indicate that [resale price maintenance] in most cases increased the prices of products sold"). Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct. Cf. *id.*, at 106 (explaining that price surveys "do not necessarily tell us anything conclusive about the welfare effects of [resale price maintenance] because the results are generally consistent with both procompetitive and anticompetitive theories"). For, as has been indicated already, the antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result. See *Khan*, 522 U. S., at 15. The Court, moreover, has evaluated other vertical restraints under the rule of reason even though prices can be

increased in the course of promoting procompetitive effects. See, *e. g.*, *Business Electronics*, 485 U. S., at 728. And resale price maintenance may reduce prices if manufacturers have resorted to costlier alternatives of controlling resale prices that are not *per se* unlawful. See *infra*, at 902–904; see also Marvel 371.

Respondent's argument, furthermore, overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. The difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer's cost of distribution, which, like any other cost, the manufacturer usually desires to minimize. See *GTE Sylvania*, 433 U. S., at 56, n. 24; see also *id.*, at 56 ("Economists . . . have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products"). A manufacturer has no incentive to overcompensate retailers with unjustified margins. The retailers, not the manufacturer, gain from higher retail prices. The manufacturer often loses; interbrand competition reduces its competitiveness and market share because consumers will "substitute a different brand of the same product." *Id.*, at 52, n. 19; see *Business Electronics*, *supra*, at 725. As a general matter, therefore, a single manufacturer will desire to set minimum resale prices only if the "increase in demand resulting from enhanced service . . . will more than offset a negative impact on demand of a higher retail price." Mathewson & Winter 67.

The implications of respondent's position are far reaching. Many decisions a manufacturer makes and carries out through concerted action can lead to higher prices. A manufacturer might, for example, contract with different suppliers to obtain better inputs that improve product quality. Or it might hire an advertising agency to promote awareness of its goods. Yet no one would think these actions violate the

Sherman Act because they lead to higher prices. The antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices. The same can hold true for resale price maintenance.

Resale price maintenance, it is true, does have economic dangers. If the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market. This is a realistic objective, and certain factors are relevant to the inquiry. For example, the number of manufacturers that make use of the practice in a given industry can provide important instruction. When only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers. See Overstreet 22; Bork 294. Likewise, a retailer cartel is unlikely when only a single manufacturer in a competitive market uses resale price maintenance. Interbrand competition would divert consumers to lower priced substitutes and eliminate any gains to retailers from their price-fixing agreement over a single brand. See Posner 172; Bork 292. Resale price maintenance should be subject to more careful scrutiny, by contrast, if many competing manufacturers adopt the practice. Cf. Scherer & Ross 558 (noting that "except when [resale price maintenance] spreads to cover the bulk of an industry's output, depriving consumers of a meaningful choice between high-service and low-price outlets, most [resale price maintenance arrangements] are probably innocuous"); Easterbrook 162 (suggesting that "every one of the potentially-anticompetitive outcomes of vertical arrangements depends on the uniformity of the practice").

The source of the restraint may also be an important consideration. If there is evidence retailers were the impetus

for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer. See Brief for William S. Comanor et al. as *Amici Curiae* 7–8. If, by contrast, a manufacturer adopted the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct. Cf. Posner 177 ("It makes all the difference whether minimum retail prices are imposed by the manufacturer in order to evoke point-of-sale services or by the dealers in order to obtain monopoly profits"). A manufacturer also has an incentive to protest inefficient retailer-induced price restraints because they can harm its competitive position.

As a final matter, that a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power. If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers. See also *Business Electronics*, *supra*, at 727, n. 2 (noting "[r]etail market power is rare, because of the usual presence of interbrand competition and other dealers"). And if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets.

The rule of reason is designed and used to eliminate anticompetitive transactions from the market. This standard principle applies to vertical price restraints. A party alleging injury from a vertical agreement setting minimum resale prices will have, as a general matter, the information and resources available to show the existence of the agreement and its scope of operation. As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions

where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.

For all of the foregoing reasons, we think that were the Court considering the issue as an original matter, the rule of reason, not a *per se* rule of unlawfulness, would be the appropriate standard to judge vertical price restraints.

IV

We do not write on a clean slate, for the decision in *Dr. Miles* is almost a century old. So there is an argument for its retention on the basis of *stare decisis* alone. Even if *Dr. Miles* established an erroneous rule, "*[s]tare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Khan*, 522 U. S., at 20 (internal quotation marks omitted). And concerns about maintaining settled law are strong when the question is one of statutory interpretation. See, *e. g.*, *Hohn* v. *United States*, 524 U. S. 236, 251 (1998).

Stare decisis is not as significant in this case, however, because the issue before us is the scope of the Sherman Act. *Khan*, *supra*, at 20 ("[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act"). From the beginning the Court has treated the Sherman Act as a common-law statute. See *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 688 (1978); see also *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 98, n. 42 (1981) ("In antitrust, the federal courts . . . act more as common-law courts than in other areas governed by federal statute"). Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on "restraint[s] of trade" evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach. See *National Soc. of Professional*

Engineers, *supra*, at 688. Likewise, the boundaries of the doctrine of *per se* illegality should not be immovable. For "[i]t would make no sense to create out of the single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstances and new wisdom, but a line of *per se* illegality remains forever fixed where it was." *Business Electronics*, 485 U. S., at 732.

A

Stare decisis, we conclude, does not compel our continued adherence to the *per se* rule against vertical price restraints. As discussed earlier, respected authorities in the economics literature suggest the *per se* rule is inappropriate, and there is now widespread agreement that resale price maintenance can have procompetitive effects. See, *e. g.*, Brief for Economists as *Amici Curiae* 16. It is also significant that both the Department of Justice and the Federal Trade Commission—the antitrust enforcement agencies with the ability to assess the long-term impacts of resale price maintenance—have recommended that this Court replace the *per se* rule with the traditional rule of reason. See Brief for United States as *Amicus Curiae* 6. In the antitrust context the fact that a decision has been "called into serious question" justifies our reevaluation of it. *Khan*, *supra*, at 21.

Other considerations reinforce the conclusion that *Dr. Miles* should be overturned. Of most relevance, "we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings." *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000). The Court's treatment of vertical restraints has progressed away from *Dr. Miles*' strict approach. We have distanced ourselves from the opinion's rationales. See *supra*, at 887–889; see also *Khan*, *supra*, at 21 (overruling a case when "the views underlying [it had been] eroded by this Court's precedent"); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 480–481 (1989) (same). This is unsurprising, for the case was decided not long after enactment of the

Sherman Act when the Court had little experience with antitrust analysis. Only eight years after *Dr. Miles*, moreover, the Court reined in the decision by holding that a manufacturer can announce suggested resale prices and refuse to deal with distributors who do not follow them. *Colgate*, 250 U. S., at 307–308.

In more recent cases the Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints. In 1977, the Court overturned the *per se* rule for vertical nonprice restraints, adopting the rule of reason in its stead. *GTE Sylvania*, 433 U. S., at 57–59 (overruling *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967)); see also 433 U. S., at 58, n. 29 (noting "that the advantages of vertical restrictions should not be limited to the categories of new entrants and failing firms"). While the Court in a footnote in *GTE Sylvania* suggested that differences between vertical price and nonprice restraints could support different legal treatment, see *id.*, at 51, n. 18, the central part of the opinion relied on authorities and arguments that find unequal treatment "difficult to justify," *id.*, at 69–70 (White, J., concurring in judgment).

Continuing in this direction, in two cases in the 1980's the Court defined legal rules to limit the reach of *Dr. Miles* and to accommodate the doctrines enunciated in *GTE Sylvania* and *Colgate*. See *Business Electronics*, *supra*, at 726–728; *Monsanto*, 465 U. S., at 763–764. In *Monsanto*, the Court required that antitrust plaintiffs alleging a § 1 price-fixing conspiracy must present evidence tending to exclude the possibility a manufacturer and its distributors acted in an independent manner. *Id.*, at 764. Unlike Justice Brennan's concurrence, which rejected arguments that *Dr. Miles* should be overruled, see 465 U. S., at 769, the Court "decline[d] to reach the question" whether vertical agreements fixing resale prices always should be unlawful because neither party suggested otherwise, *id.*, at 761–762, n. 7. In

Business Electronics the Court further narrowed the scope of *Dr. Miles.* It held that the *per se* rule applied only to specific agreements over price levels and not to an agreement between a manufacturer and a distributor to terminate a price-cutting distributor. 485 U. S., at 726–727, 735–736.

Most recently, in 1997, after examining the issue of vertical maximum price-fixing agreements in light of commentary and real experience, the Court overruled a 29-year-old precedent treating those agreements as *per se* illegal. *Khan*, 522 U. S., at 22 (overruling *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968)). It held instead that they should be evaluated under the traditional rule of reason. 522 U. S., at 22. Our continued limiting of the reach of the decision in *Dr. Miles* and our recent treatment of other vertical restraints justify the conclusion that *Dr. Miles* should not be retained.

The *Dr. Miles* rule is also inconsistent with a principled framework, for it makes little economic sense when analyzed with our other cases on vertical restraints. If we were to decide the procompetitive effects of resale price maintenance were insufficient to overrule *Dr. Miles*, then cases such as *Colgate* and *GTE Sylvania* themselves would be called into question. These later decisions, while they may result in less intrabrand competition, can be justified because they permit manufacturers to secure the procompetitive benefits associated with vertical price restraints through other methods. The other methods, however, could be less efficient for a particular manufacturer to establish and sustain. The end result hinders competition and consumer welfare because manufacturers are forced to engage in second-best alternatives and because consumers are required to shoulder the increased expense of the inferior practices.

The manufacturer has a number of legitimate options to achieve benefits similar to those provided by vertical price restraints. A manufacturer can exercise its *Colgate* right to refuse to deal with retailers that do not follow its suggested prices. See 250 U. S., at 307. The economic effects of uni-

lateral and concerted price setting are in general the same. See, *e. g.*, *Monsanto*, 465 U. S., at 762–764. The problem for the manufacturer is that a jury might conclude its unilateral policy was really a vertical agreement, subjecting it to treble damages and potential criminal liability. *Ibid.; Business Electronics*, *supra*, at 728. Even with the stringent standards in *Monsanto* and *Business Electronics*, this danger can lead, and has led, rational manufacturers to take wasteful measures. See, *e. g.*, Brief for PING, Inc., as *Amicus Curiae* 9–18. A manufacturer might refuse to discuss its pricing policy with its distributors except through counsel knowledgeable of the subtle intricacies of the law. Or it might terminate longstanding distributors for minor violations without seeking an explanation. See *ibid.* The increased costs these burdensome measures generate flow to consumers in the form of higher prices.

Furthermore, depending on the type of product it sells, a manufacturer might be able to achieve the procompetitive benefits of resale price maintenance by integrating downstream and selling its products directly to consumers. *Dr. Miles* tilts the relative costs of vertical integration and vertical agreement by making the former more attractive based on the *per se* rule, not on real market conditions. See *Business Electronics*, *supra*, at 725; see generally Coase, The Nature of the Firm, 4 Economica, New Series 386 (1937). This distortion might lead to inefficient integration that would not otherwise take place, so that consumers must again suffer the consequences of the suboptimal distribution strategy. And integration, unlike vertical price restraints, eliminates all intrabrand competition. See, *e. g.*, *GTE Sylvania*, *supra*, at 57, n. 26.

There is yet another consideration. A manufacturer can impose territorial restrictions on distributors and allow only one distributor to sell its goods in a given region. Our cases have recognized, and the economics literature confirms, that these vertical nonprice restraints have impacts similar to

those of vertical price restraints; both reduce intrabrand competition and can stimulate retailer services. See, *e. g.*, *Business Electronics*, *supra*, at 728; *Monsanto*, *supra*, at 762–763; see also Brief for Economists as *Amici Curiae* 17–18. Cf. Scherer & Ross 560 (noting that vertical nonprice restraints "can engender inefficiencies at least as serious as those imposed upon the consumer by resale price maintenance"); Steiner, How Manufacturers Deal with the Price-Cutting Retailer: When Are Vertical Restraints Efficient? 65 Antitrust L. J. 407, 446–447 (1997) (indicating that "antitrust law should recognize that the consumer interest is often better served by [resale price maintenance]—contrary to its per se illegality and the rule-of-reason status of vertical nonprice restraints"). The same legal standard (*per se* unlawfulness) applies to horizontal market division and horizontal price fixing because both have similar economic effect. There is likewise little economic justification for the current differential treatment of vertical price and nonprice restraints. Furthermore, vertical nonprice restraints may prove less efficient for inducing desired services, and they reduce intrabrand competition more than vertical price restraints by eliminating both price and service competition. See Brief for Economists as *Amici Curiae* 17–18.

In sum, it is a flawed antitrust doctrine that serves the interests of lawyers—by creating legal distinctions that operate as traps for the unwary—more than the interests of consumers—by requiring manufacturers to choose second-best options to achieve sound business objectives.

B

Respondent's arguments for reaffirming *Dr. Miles* on the basis of *stare decisis* do not require a different result. Respondent looks to congressional action concerning vertical price restraints. In 1937, Congress passed the Miller-Tydings Fair Trade Act, 50 Stat. 693, which made vertical price restraints legal if authorized by a fair trade law

enacted by a State. Fifteen years later, Congress expanded the exemption to permit vertical price-setting agreements between a manufacturer and a distributor to be enforced against other distributors not involved in the agreement. McGuire Act, 66 Stat. 632. In 1975, however, Congress repealed both Acts. Consumer Goods Pricing Act, 89 Stat. 801. That the *Dr. Miles* rule applied to vertical price restraints in 1975, according to respondent, shows Congress ratified the rule.

This is not so. The text of the Consumer Goods Pricing Act did not codify the rule of *per se* illegality for vertical price restraints. It rescinded statutory provisions that made them *per se* legal. Congress once again placed these restraints within the ambit of § 1 of the Sherman Act. And, as has been discussed, Congress intended § 1 to give courts the ability "to develop governing principles of law" in the common-law tradition. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 643 (1981); see *Business Electronics*, 485 U. S., at 731 ("The changing content of the term 'restraint of trade' was well recognized at the time the Sherman Act was enacted"). Congress could have set the *Dr. Miles* rule in stone, but it chose a more flexible option. We respect its decision by analyzing vertical price restraints, like all restraints, in conformance with traditional § 1 principles, including the principle that our antitrust doctrines "evolv[e] with new circumstances and new wisdom." *Business Electronics*, *supra*, at 732; see also Easterbrook 139.

The rule of reason, furthermore, is not inconsistent with the Consumer Goods Pricing Act. Unlike the earlier congressional exemption, it does not treat vertical price restraints as *per se* legal. In this respect, the justifications for the prior exemption are illuminating. Its goal "was to allow the States to protect small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters." *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S.

97, 102 (1980). The state fair trade laws also appear to have been justified on similar grounds. See Areeda & Hovenkamp 298. The rationales for these provisions are foreign to the Sherman Act. Divorced from competition and consumer welfare, they were designed to save inefficient small retailers from their inability to compete. The purpose of the antitrust laws, by contrast, is "the protection of *competition*, not *competitors*." *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U. S. 328, 338 (1990) (internal quotation marks omitted). To the extent Congress repealed the exemption for some vertical price restraints to end its prior practice of encouraging anticompetitive conduct, the rule of reason promotes the same objective.

Respondent also relies on several congressional appropriations in the mid-1980's in which Congress did not permit the Department of Justice or the Federal Trade Commission to use funds to advocate overturning *Dr. Miles*. See, *e. g.*, 97 Stat. 1071. We need not pause long in addressing this argument. The conditions on funding are no longer in place, see, *e. g.*, Brief for United States as *Amicus Curiae* 21, and they were ambiguous at best. As much as they might show congressional approval for *Dr. Miles*, they might demonstrate a different proposition: that Congress could not pass legislation codifying the rule and reached a short-term compromise instead.

Reliance interests do not require us to reaffirm *Dr. Miles*. To be sure, reliance on a judicial opinion is a significant reason to adhere to it, *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), especially "in cases involving property and contract rights," *Khan*, 522 U. S., at 20. The reliance interests here, however, like the reliance interests in *Khan*, cannot justify an inefficient rule, especially because the narrowness of the rule has allowed manufacturers to set minimum resale prices in other ways. And while the *Dr. Miles* rule is longstanding, resale price maintenance was legal under fair trade laws

in a majority of States for a large part of the past century up until 1975.

It is also of note that during this time "when the legal environment in the [United States] was most favorable for [resale price maintenance], no more than a tiny fraction of manufacturers ever employed [resale price maintenance] contracts." Overstreet 6; see also *id.*, at 169 (noting that "no more than one percent of manufacturers, accounting for no more than ten percent of consumer goods purchases, ever employed [resale price maintenance] in any single year in the [United States]"); Scherer & Ross 549 (noting that "[t]he fraction of U. S. retail sales covered by [resale price maintenance] in its heyday has been variously estimated at from 4 to 10 percent"). To the extent consumers demand cheap goods, judging vertical price restraints under the rule of reason will not prevent the market from providing them. Cf. Easterbrook 152–153 (noting that "S.S. Kresge (the old K-Mart) flourished during the days of manufacturers' greatest freedom" because "discount stores offer a combination of price and service that many customers value" and that "[n]othing in restricted dealing threatens the ability of consumers to find low prices"); Scherer & Ross 557 (noting that "for the most part, the effects of the [Consumer Goods Pricing Act] were imperceptible because the forces of competition had already repealed the [previous antitrust exemption] in their own quiet way").

For these reasons the Court's decision in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911), is now overruled. Vertical price restraints are to be judged according to the rule of reason.

V

Noting that Leegin's president has an ownership interest in retail stores that sell Brighton, respondent claims Leegin participated in an unlawful horizontal cartel with competing

retailers. Respondent did not make this allegation in the lower courts, and we do not consider it here.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

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

In *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 394, 408–409 (1911), this Court held that an agreement between a manufacturer of proprietary medicines and its dealers to fix the minimum price at which its medicines could be sold was "invalid . . . under the [Sherman Act, 15 U. S. C. § 1]." This Court has consistently read *Dr. Miles* as establishing a bright-line rule that agreements fixing minimum resale prices are *per se* illegal. See, *e. g.*, *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 399–401 (1927); *NYNEX Corp.* v. *Discon, Inc.*, 525 U. S. 128, 133 (1998). That *per se* rule is one upon which the legal profession, business, and the public have relied for close to a century. Today the Court holds that courts must determine the lawfulness of minimum resale price maintenance by applying, not a bright-line *per se* rule, but a circumstance-specific "rule of reason." *Ante*, at 907. And in doing so it overturns *Dr. Miles*.

The Court justifies its departure from ordinary considerations of *stare decisis* by pointing to a set of arguments well known in the antitrust literature for close to half a century. See *ante*, at 889–892. Congress has repeatedly found in these arguments insufficient grounds for overturning the *per se* rule. See, *e. g.*, Hearings on H. R. 10527 et al. before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., 74–76, 89, 99, 101–102, 192–195, 261–262 (1958). And,

in my view, they do not warrant the Court's now overturning so well-established a legal precedent.

I

The Sherman Act seeks to maintain a marketplace free of anticompetitive practices, in particular those enforced by agreement among private firms. The law assumes that such a marketplace, free of private restrictions, will tend to bring about the lower prices, better products, and more efficient production processes that consumers typically desire. In determining the lawfulness of particular practices, courts often apply a "rule of reason." They examine both a practice's likely anticompetitive effects and its beneficial business justifications. See, *e. g.*, *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 109–110, and n. 39 (1984); *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 688–691 (1978); *Board of Trade of Chicago* v. *United States*, 246 U. S. 231, 238 (1918).

Nonetheless, sometimes the likely anticompetitive consequences of a particular practice are so serious and the potential justifications so few (or, *e. g.*, so difficult to prove) that courts have departed from a pure "rule of reason" approach. And sometimes this Court has imposed a rule of *per se* unlawfulness—a rule that instructs courts to find the practice unlawful all (or nearly all) the time. See, *e. g.*, *NYNEX*, *supra*, at 133; *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332, 343–344, and n. 16 (1982); *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50, n. 16 (1977); *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609–611 (1972); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 213–214 (1940) (citing and quoting *Trenton Potteries*, *supra*, at 397–398).

The case before us asks which kind of approach the courts should follow where minimum resale price maintenance is at issue. Should they apply a *per se* rule (or a variation) that

would make minimum resale price maintenance always (or *almost* always) unlawful? Should they apply a "rule of reason"? Were the Court writing on a blank slate, I would find these questions difficult. But, of course, the Court is not writing on a blank slate, and that fact makes a considerable legal difference.

To best explain why the question would be difficult were we deciding it afresh, I briefly summarize several classical arguments for and against the use of a *per se* rule. The arguments focus on three sets of considerations, those involving: (1) potential anticompetitive effects, (2) potential benefits, and (3) administration. The difficulty arises out of the fact that the different sets of considerations point in different directions. See, *e. g.*, 8 P. Areeda, Antitrust Law ¶¶ 1628–1633, pp. 330–392 (1st ed. 1989) (hereinafter Areeda); 8 P. Areeda & H. Hovenkamp, Antitrust Law ¶¶ 1628–1633, pp. 288–339 (2d ed. 2004) (hereinafter Areeda & Hovenkamp); Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L. J. 135, 146–152 (1984) (hereinafter Easterbrook); Pitofsky, In Defense of Discounters: The No-Frills Case for a *Per Se* Rule Against Vertical Price Fixing, 71 Geo. L. J. 1487 (1983) (hereinafter Pitofsky); Scherer, The Economics of Vertical Restraints, 52 Antitrust L. J. 687, 706–707 (1983) (hereinafter Scherer); Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L. Rev. 6, 22–26 (1981); Brief for William S. Comanor et al. as *Amici Curiae* 7–10.

On the one hand, agreements setting minimum resale prices may have serious anticompetitive consequences. *In respect to dealers:* Resale price maintenance agreements, rather like horizontal price agreements, can diminish or eliminate price competition among dealers of a single brand or (if practiced generally by manufacturers) among multibrand dealers. In doing so, they can prevent dealers from offering customers the lower prices that many customers prefer; they can prevent dealers from responding to changes

in demand, say, falling demand, by cutting prices; they can encourage dealers to substitute service, for price, competition, thereby threatening wastefully to attract too many resources into that portion of the industry; they can inhibit expansion by more efficient dealers whose lower prices might otherwise attract more customers, stifling the development of new, more efficient modes of retailing; and so forth. See, *e. g.*, 8 Areeda & Hovenkamp ¶ 1632c, at 319–321; Steiner, The Evolution and Applications of Dual-Stage Thinking, 49 The Antitrust Bulletin 877, 899–900 (2004); Comanor, Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy, 98 Harv. L. Rev. 983, 990–1000 (1985).

In respect to producers: Resale price maintenance agreements can help to reinforce the competition-inhibiting behavior of firms in concentrated industries. In such industries firms may tacitly collude, *i. e.*, observe each other's pricing behavior, each understanding that price cutting by one firm is likely to trigger price competition by all. See 8 Areeda & Hovenkamp ¶ 1632d, at 321–323; P. Areeda & L. Kaplow, Antitrust Analysis ¶¶ 231–233, pp. 276–283 (4th ed. 1988) (hereinafter Areeda & Kaplow). Cf. *United States* v. *Container Corp. of America*, 393 U. S. 333 (1969); Areeda & Kaplow ¶¶ 247–253, at 327–348. Where that is so, resale price maintenance can make it easier for each producer to identify (by observing retail markets) when a competitor has begun to cut prices. And a producer who cuts wholesale prices *without* lowering the minimum resale price will stand to gain little, if anything, in increased profits, because the dealer will be unable to stimulate increased consumer demand by passing along the producer's price cut to consumers. In either case, resale price maintenance agreements will tend to prevent price competition from "breaking out"; and they will thereby tend to stabilize producer prices. See Pitofsky 1490–1491. Cf., *e. g., Container Corp., supra,* at 336–337.

Those who express concern about the potential anticompetitive effects find empirical support in the behavior of prices before, and then after, Congress in 1975 repealed the Miller-Tydings Fair Trade Act, 50 Stat. 693, and the McGuire Act, 66 Stat. 631. Those Acts had permitted (but not required) individual States to enact "fair trade" laws authorizing minimum resale price maintenance. At the time of repeal minimum resale price maintenance was lawful in 36 States; it was unlawful in 14 States. See Hearings on S. 408 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 173 (1975) (hereinafter Hearings on S. 408) (statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division). Comparing prices in the former States with prices in the latter States, the Department of Justice argued that minimum resale price maintenance had raised prices by 19% to 27%. See Hearings on H. R. 2384 before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 94th Cong., 1st Sess., 122 (1975) (hereinafter Hearings on H. R. 2384) (statement of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division).

After repeal, minimum resale price maintenance agreements were unlawful *per se* in every State. The Federal Trade Commission (FTC) staff, after studying numerous price surveys, wrote that collectively the surveys "indicate[d] that [resale price maintenance] in most cases increased the prices of products sold with [resale price maintenance]." Bureau of Economics Staff Report to the FTC, T. Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence 160 (1983) (hereinafter Overstreet). Most economists today agree that, in the words of a prominent antitrust treatise, "resale price maintenance tends to produce higher consumer prices than would otherwise be the case." 8 Areeda & Hovenkamp ¶ 1604b, at 40 (finding "[t]he evidence . . . persuasive on this point"). See also Brief for William S. Comanor et al. as *Amici Curiae* 4 ("It is uni-

formly acknowledged that [resale price maintenance] and other vertical restraints lead to higher consumer prices").

On the other hand, those favoring resale price maintenance have long argued that resale price maintenance agreements can provide important consumer benefits. The majority lists two: First, such agreements can facilitate new entry. *Ante*, at 891. For example, a newly entering producer wishing to build a product name might be able to convince dealers to help it do so—if, but only if, the producer can assure those dealers that they will later recoup their investment. Without resale price maintenance, late-entering dealers might take advantage of the earlier investment and, through price competition, drive prices down to the point where the early dealers cannot recover what they spent. By assuring the initial dealers that such later price competition will not occur, resale price maintenance can encourage them to carry the new product, thereby helping the new producer succeed. See 8 Areeda & Hovenkamp ¶¶ 1617a, 1631b, at 193–196, 308. The result might be increased competition at the producer level, *i. e.*, greater *inter*-brand competition, that brings with it net consumer benefits.

Second, without resale price maintenance a producer might find its efforts to sell a product undermined by what resale price maintenance advocates call "free riding." *Ante*, at 890–891. Suppose a producer concludes that it can succeed only if dealers provide certain services, say, product demonstrations, high quality shops, advertising that creates a certain product image, and so forth. Without resale price maintenance, some dealers might take a "free ride" on the investment that others make in providing those services. Such a dealer would save money by not paying for those services and could consequently cut its own price and increase its own sales. Under these circumstances, dealers might prove unwilling to invest in the provision of necessary services. See, *e. g.*, 8 Areeda & Hovenkamp ¶¶ 1611–1613,

1631c, at 126–165, 309–313; R. Posner, Antitrust Law 172–173 (2d ed. 2001); R. Bork, The Antitrust Paradox 290–291 (1978) (hereinafter Bork); Easterbrook 146–149.

Moreover, where a producer and not a group of dealers seeks a resale price maintenance agreement, there is a special reason to believe some such benefits exist. That is because, other things being equal, producers should want to encourage price competition among their dealers. By doing so they will often increase profits by selling more of their product. See *Sylvania*, 433 U. S., at 56, n. 24; Bork 290. And that is so, even if the producer possesses sufficient market power to earn a supernormal profit. That is to say, other things being equal, the producer will benefit by charging his dealers a competitive (or even a higher-than-competitive) wholesale price while encouraging price competition among them. Hence, if the producer is the moving force, the producer must have some special reason for wanting resale price maintenance; and in the absence of, say, concentrated producer markets (where that special reason might consist of a desire to stabilize wholesale prices), that special reason may well reflect the special circumstances just described: new entry, "free riding," or variations on those themes.

The upshot is, as many economists suggest, sometimes resale price maintenance can prove harmful; sometimes it can bring benefits. See, *e. g.*, Brief for Economists as *Amici Curiae* 16; 8 Areeda & Hovenkamp ¶¶ 1631–1632, at 306–328; Pitofsky 1495; Scherer 706–707. But before concluding that courts should consequently apply a rule of reason, I would ask such questions as, how often are harms or benefits likely to occur? How easy is it to separate the beneficial sheep from the antitrust goats?

Economic discussion, such as the studies the Court relies upon, can *help* provide answers to these questions, and in doing so, economics can, and should, inform antitrust law. But antitrust law cannot, and should not, precisely replicate

economists' (sometimes conflicting) views. That is because law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. And that fact means that courts will often bring their own administrative judgment to bear, sometimes applying rules of *per se* unlawfulness to business practices even when those practices sometimes produce benefits. See, *e. g.*, F. Scherer & D. Ross, Industrial Market Structure and Economic Performance 335–339 (3d ed. 1990) (hereinafter Scherer & Ross) (describing some circumstances under which price-fixing agreements could be more beneficial than "unfettered competition," but also noting potential costs of moving from a *per se* ban to a rule of reasonableness assessment of such agreements).

I have already described studies and analyses that suggest (though they cannot prove) that resale price maintenance can cause harms with some regularity—and certainly when dealers are the driving force. But what about benefits? How often, for example, will the benefits to which the Court points occur in practice? I can find no economic consensus on this point. There is a consensus in the literature that "free riding" takes place. But "free riding" often takes place in the economy without any legal effort to stop it. Many visitors to California take free rides on the Pacific Coast Highway. We all benefit freely from ideas, such as that of creating the first supermarket. Dealers often take a "free ride" on investments that others have made in building a product's name and reputation. The question is how often the "free riding" problem is serious enough significantly to deter dealer investment.

To be more specific, one can easily *imagine* a dealer who refuses to provide important presale services, say, a detailed explanation of how a product works (or who fails to provide a proper atmosphere in which to sell expensive perfume or alligator billfolds), lest customers use that "free" service (or

enjoy the psychological benefit arising when a high-priced retailer stocks a particular brand of billfold or handbag) and then buy from another dealer at a lower price. Sometimes this must happen in reality. But does it happen often? We do, after all, live in an economy where firms, despite *Dr. Miles*' *per se* rule, still sell complex technical equipment (as well as expensive perfume and alligator billfolds) to consumers.

All this is to say that the ultimate question is not whether, but *how much*, "free riding" of this sort takes place. And, after reading the briefs, I must answer that question with an uncertain "sometimes." See, *e. g.*, Brief for William S. Comanor et al. as *Amici Curiae* 6–7 (noting "skepticism in the economic literature about how often [free riding] actually occurs"); Scherer & Ross 551–555 (explaining the "severe limitations" of the free-rider justification for resale price maintenance); Pitofsky, Why *Dr. Miles* Was Right, 8 Regulation, No. 1, pp. 27, 29–30 (Jan./Feb. 1984) (similar analysis).

How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily.* For one thing, it is often difficult to identify *who*—producer or dealer—is the moving force behind any given resale price maintenance agreement. Suppose, for example, several large multibrand retailers all sell resale-price-maintained products. Suppose further that small producers set retail prices because they fear that, otherwise, the large retailers will favor (say, by allocating better shelf space) the goods of other producers who practice resale price maintenance. Who "initiated" this practice, the retailers hoping for considerable insulation from retail competition, or the producers, who simply seek to deal best with the circumstances they find? For another thing, as I just said, it is difficult to determine just when, and where, the "free riding" problem is serious enough to warrant legal protection.

I recognize that scholars have sought to develop checklists and sets of questions that will help courts separate instances where anticompetitive harms are more likely from instances where only benefits are likely to be found. See, *e. g.*, 8 Areeda & Hovenkamp ¶¶ 1633c–1633e, at 330–339. See also Brief for William S. Comanor et al. as *Amici Curiae* 8–10. But applying these criteria in court is often easier said than done. The Court's invitation to consider the existence of "market power," for example, *ante*, at 898, invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets. And resale price maintenance cases, unlike a major merger or monopoly case, are likely to prove numerous and involve only private parties. One cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs. See, *e. g.*, H. Hovenkamp, The Antitrust Enterprise 105 (2005) (litigating a rule of reason case is "one of the most costly procedures in antitrust practice"). See also Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 238–247 (1960) (describing lengthy FTC efforts to apply complex criteria in a merger case).

Are there special advantages to a bright-line rule? Without such a rule, it is often unfair, and consequently impractical, for enforcement officials to bring criminal proceedings. And since enforcement resources are limited, that loss may tempt some producers or dealers to enter into agreements that are, on balance, anticompetitive.

Given the uncertainties that surround key items in the overall balance sheet, particularly in respect to the "administrative" questions, I can concede to the majority that the problem is difficult. And, if forced to decide now, at most I might agree that the *per se* rule should be slightly modified to allow an exception for the more easily identifiable

and temporary condition of "new entry." See Pitofsky 1495. But I am not now forced to decide this question. The question before us is not what should be the rule, starting from scratch. We here must decide whether to change a clear and simple price-related antitrust rule that the courts have applied for nearly a century.

II

We write, not on a blank slate, but on a slate that begins with *Dr. Miles* and goes on to list a century's worth of similar cases, massive amounts of advice that lawyers have provided their clients, and untold numbers of business decisions those clients have taken in reliance upon that advice. See, *e. g.*, *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 721 (1944); *Sylvania*, 433 U. S., at 51, n. 18 ("The *per se* illegality of [vertical] price restrictions has been established firmly for many years . . . "). Indeed, a Westlaw search shows that *Dr. Miles* itself has been cited dozens of times in this Court and hundreds of times in lower courts. Those who wish this Court to change so well-established a legal precedent bear a heavy burden of proof. See *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 736 (1977) (noting, in declining to overrule an earlier case interpreting § 4 of the Clayton Act, that "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"). I am not aware of any case in which this Court has overturned so well-established a statutory precedent. Regardless, I do not see how the Court can claim that ordinary criteria for overruling an earlier case have been met. See, *e. g.*, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854–855 (1992). See also *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, *ante*, at 500–503 (SCALIA, J., concurring in part and concurring in judgment).

A

I can find no change in circumstances in the past several decades that helps the majority's position. In fact, there has been one important change that argues strongly to the contrary. In 1975, Congress repealed the McGuire and Miller-Tydings Acts. See Consumer Goods Pricing Act of 1975, 89 Stat. 801. And it thereby consciously *extended Dr. Miles*' *per se* rule. Indeed, at that time the Department of Justice and the FTC, then urging application of the *per se* rule, discussed virtually every argument presented now to this Court as well as others not here presented. And they explained to Congress why Congress should reject them. See Hearings on S. 408, at 176–177 (statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division); *id.*, at 170–172 (testimony of Lewis A. Engman, Chairman of the FTC); Hearings on H. R. 2384, at 113–114 (testimony of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division). Congress fully understood, and consequently intended, that the result of its repeal of McGuire and Miller-Tydings would be to make minimum resale price maintenance *per se* unlawful. See, *e. g.*, S. Rep. No. 94–466, pp. 1–3 (1975) ("Without [the exemptions authorized by the Miller-Tydings and McGuire Acts,] the agreements they authorize would violate the antitrust laws. . . . [R]epeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices"). See also *Sylvania*, *supra*, at 51, n. 18 ("Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States").

Congress did not prohibit this Court from reconsidering the *per se* rule. But enacting major legislation premised upon the existence of that rule constitutes important public

reliance upon that rule. And doing so aware of the relevant arguments constitutes even stronger reliance upon the Court's keeping the rule, at least in the absence of some significant change in respect to those arguments.

Have there been any such changes? There have been a few economic studies, described in some of the briefs, that argue, contrary to the testimony of the Justice Department and the FTC to Congress in 1975, that resale price maintenance is not harmful. One study, relying on an analysis of litigated resale price maintenance cases from 1975 to 1982, concludes that resale price maintenance does not ordinarily involve producer or dealer collusion. See Ippolito, Resale Price Maintenance: Empirical Evidence from Litigation, 34 J. Law & Econ. 263, 281–282, 292 (1991). But this study equates the failure of plaintiffs to *allege* collusion with the *absence* of collusion—an equation that overlooks the superfluous nature of allegations of horizontal collusion in a resale price maintenance case and the tacit form that such collusion might take. See H. Hovenkamp, Federal Antitrust Policy § 11.3c, p. 464, n. 19 (3d ed. 2005); *supra*, at 911.

The other study provides a theoretical basis for concluding that resale price maintenance "need not lead to higher retail prices." Marvel & McCafferty, The Political Economy of Resale Price Maintenance, 94 J. Pol. Econ. 1074, 1075 (1986). But this study develops a theoretical model "under the assumption that [resale price maintenance] is efficiency-enhancing." *Ibid.* Its only empirical support is a 1940 study that the authors acknowledge is much criticized. See *id.*, at 1091. And many other economists take a different view. See Brief for William S. Comanor et al. as *Amici Curiae* 4.

Regardless, taken together, these studies at most may offer some mild support for the majority's position. But they cannot constitute a major change in circumstances.

Petitioner and some *amici* have also presented us with newer studies that show that resale price maintenance some-

times brings consumer benefits. Overstreet 119–129 (describing numerous case studies). But the proponents of a *per se* rule have always conceded as much. What is remarkable about the majority's arguments is that *nothing* in this respect *is new.* See *supra,* at 910, 919 (citing articles and congressional testimony going back several decades). The only new feature of these arguments lies in the fact that the most current advocates of overruling *Dr. Miles* have abandoned a host of other not-very-persuasive arguments upon which prior resale price maintenance proponents used to rely. See, *e. g.,* 8 Areeda ¶ 1631a, at 350–352 (listing "'[t]raditional' justifications" for resale price maintenance).

The one arguable exception consists of the majority's claim that "even absent free riding," resale price maintenance "may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services." *Ante,* at 892. I cannot count this as an exception, however, because I do not understand how, in the absence of free riding (and assuming competitiveness), an established producer would need resale price maintenance. Why, on these assumptions, would a dealer not "expand" its "market share" as best that dealer sees fit, obtaining appropriate payment from consumers in the process? There may be an answer to this question. But I have not seen it. And I do not think that we should place significant weight upon justifications that the parties do not explain with sufficient clarity for a generalist judge to understand.

No one claims that the American economy has changed in ways that might support the majority. Concentration in retailing has increased. See, *e. g.,* Brief for Respondent 18 (since minimum resale price maintenance was banned nationwide in 1975, the total number of retailers has dropped while the growth in sales per store has risen); Brief for American Antitrust Institute as *Amicus Curiae* 17, n. 20 (citing private study reporting that the combined sales of the 10 largest

retailers worldwide has grown to nearly 30% of total retail sales of top 250 retailers; also quoting 1999 Organisation for Economic Co-operation and Development report stating that the "'last twenty years have seen momentous changes in retail distribution including significant increases in concentration'"); Mamen, Facing Goliath: Challenging the Impacts of Supermarket Consolidation on our Local Economies, Communities, and Food Security, The Oakland Institute, 1 Policy Brief, No. 3, pp. 1, 2 (Spring 2007), http://www.oaklandinstitute.org/pdfs/facing_goliath.pdf (as visited June 25, 2007, and available in Clerk of Court's case file) (noting that "[f]or many decades, the top five food retail firms in the U. S. controlled less than 20 percent of the market"; from 1997 to 2000, "the top five firms increased their market share from 24 to 42 percent of all retail sales"; and "[b]y 2003, they controlled over half of all grocery sales"). That change, other things being equal, may enable (and motivate) more retailers, accounting for a greater percentage of total retail sales volume, to seek resale price maintenance, thereby making it more difficult for price-cutting competitors (perhaps internet retailers) to obtain market share.

Nor has anyone argued that concentration among manufacturers that might use resale price maintenance has diminished significantly. And as far as I can tell, it has not. Consider household electrical appliances, which a study from the late 1950's suggests constituted a significant portion of those products subject to resale price maintenance at that time. See Hollander, United States of America, in Resale Price Maintenance 67, 80–81 (B. Yamey ed. 1966). Although it is somewhat difficult to compare census data from 2002 with that from several decades ago (because of changes in the classification system), it is clear that at least some subsets of the household electrical appliance industry are *more* concentrated, in terms of manufacturer market power, now than they were then. For instance, the top eight domestic manufacturers of household cooking appliances accounted for 68%

of the domestic market (measured by value of shipments) in 1963 (the earliest date for which I was able to find data), compared with 77% in 2002. See Dept. of Commerce, Bureau of Census, 1972 Census of Manufactures, Special Report Series, Concentration Ratios in Manufacturing, No. MC72(SR)–2, p. SR2–38 (1975) (hereinafter 1972 Census); Dept. of Commerce, Bureau of Census, 2002 Economic Census, Concentration Ratios: 2002, No. EC02–31SR–1, p. 55 (2006) (hereinafter 2002 Census). The top eight domestic manufacturers of household laundry equipment accounted for 95% of the domestic market in 1963 (90% in 1958), compared with 99% in 2002. 1972 Census, at SR2–38; 2002 Census, at 55. And the top eight domestic manufacturers of household refrigerators and freezers accounted for 91% of the domestic market in 1963, compared with 95% in 2002. 1972 Census, at SR2–38; 2002 Census, at 55. Increased concentration among manufacturers increases the likelihood that producer-originated resale price maintenance will prove more prevalent today than in years past, and more harmful. At the very least, the majority has not explained how these, or other changes in the economy, could help support its position.

In sum, there is no relevant change. And without some such change, there is no ground for abandoning a well-established antitrust rule.

B

With the preceding discussion in mind, I would consult the list of factors that our case law indicates are relevant when we consider overruling an earlier case. JUSTICE SCALIA, writing separately in another of our cases this Term, well summarizes that law. See *Wisconsin Right to Life, Inc.*, *ante*, at 500–503 (opinion concurring in part and concurring in judgment). And every relevant factor he mentions argues against overruling *Dr. Miles* here.

First, the Court applies *stare decisis* more "rigidly" in statutory than in constitutional cases. See *Glidden Co.* v.

Zdanok, 370 U. S. 530, 543 (1962); *Illinois Brick Co.*, 431 U. S., at 736. This is a statutory case.

Second, the Court does sometimes overrule cases that it decided wrongly only a reasonably short time ago. As JUSTICE SCALIA put it, "[o]verruling a *constitutional* case decided just a few years earlier is far from unprecedented." *Wisconsin Right to Life*, *ante*, at 501 (emphasis added). We here overrule one *statutory* case, *Dr. Miles*, decided 100 years ago, and we overrule the cases that reaffirmed its *per se* rule in the intervening years. See, *e. g.*, *Trenton Potteries*, 273 U. S., at 399–401; *Bausch & Lomb*, 321 U. S., at 721; *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 45–47 (1960); *Simpson* v. *Union Oil Co. of Cal.*, 377 U. S. 13, 16–17 (1964).

Third, the fact that a decision creates an "unworkable" legal regime argues in favor of overruling. See *Payne* v. *Tennessee*, 501 U. S. 808, 827–828 (1991); *Swift & Co.* v. *Wickham*, 382 U. S. 111, 116 (1965). Implementation of the *per se* rule, even with the complications attendant the exception allowed for in *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919), has proved practical over the course of the last century, particularly when compared with the many complexities of litigating a case under the "rule of reason" regime. No one has shown how moving from the *Dr. Miles* regime to "rule of reason" analysis would make the legal regime governing minimum resale price maintenance more "administrable," *Wisconsin Right to Life*, *ante*, at 501 (opinion of SCALIA, J.), particularly since *Colgate* would remain good law with respect to *unreasonable* price maintenance.

Fourth, the fact that a decision "unsettles" the law may argue in favor of overruling. See *Sylvania*, 433 U. S., at 47; *Wisconsin Right to Life*, *ante*, at 502 (opinion of SCALIA, J.). The *per se* rule is well-settled law, as the Court itself has previously recognized. *Sylvania*, *supra*, at 51, n. 18. It is the majority's change here that will unsettle the law.

Fifth, the fact that a case involves property rights or contract rights, where reliance interests are involved, argues against overruling. *Payne*, *supra*, at 828. This case involves contract rights and perhaps property rights (consider shopping malls). And there has been considerable reliance upon the *per se* rule. As I have said, Congress relied upon the continued vitality of *Dr. Miles* when it repealed Miller-Tydings and McGuire. *Supra*, at 919–920. The Executive Branch argued for repeal on the assumption that *Dr. Miles* stated the law. *Supra*, at 919–920. Moreover, whole sectors of the economy have come to rely upon the *per se* rule. A factory outlet store tells us that the rule "form[s] an essential part of the regulatory background against which [that firm] and many other discount retailers have financed, structured, and operated their businesses." Brief for Burlington Coat Factory Warehouse Corp. as *Amicus Curiae* 5. The Consumer Federation of America tells us that large low-price retailers would not exist without *Dr. Miles;* minimum resale price maintenance, "by stabilizing price levels and preventing low-price competition, erects a potentially insurmountable barrier to entry for such low-price innovators." Brief for Consumer Federation of America as *Amicus Curiae* 5, 7–9 (discussing, *inter alia*, comments by Wal-Mart's founder 25 years ago that relaxation of the *per se* ban on minimum resale price maintenance would be a "'great danger'" to Wal-Mart's then-relatively-nascent business). See also Brief for American Antitrust Institute as *Amicus Curiae* 14–15, and sources cited therein (making the same point). New distributors, including internet distributors, have similarly invested time, money, and labor in an effort to bring yet lower cost goods to Americans.

This Court's overruling of the *per se* rule jeopardizes this reliance, and more. What about malls built on the assumption that a discount distributor will remain an anchor tenant? What about home buyers who have taken a home's distance

from such a mall into account? What about Americans, producers, distributors, and consumers, who have understandably assumed, at least for the last 30 years, that price competition is a legally guaranteed way of life? The majority denies none of this. It simply says that these "reliance interests . . . , like the reliance interests in [*State Oil Co.* v.] *Khan*, [522 U. S. 3 (1997),] cannot justify an inefficient rule." *Ante*, at 906.

The Court minimizes the importance of this reliance, adding that it "is also of note" that at the time resale price maintenance contracts were lawful "'no more than a tiny fraction of manufacturers ever employed'" the practice. *Ante*, at 907 (quoting Overstreet 6). By "tiny" the Court means manufacturers that accounted for up to "'ten percent of consumer goods purchases'" annually. *Ante*, at 907. That figure in today's economy equals just over $300 billion. See Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2007, p. 649 (126th ed.) (over $3 trillion in U. S. retail sales in 2002). Putting the Court's estimate together with the Justice Department's early 1970's study translates a legal regime that permits all resale price maintenance into retail bills that are higher by an average of roughly $750 to $1,000 annually for an American family of four. Just how much higher retail bills will be after the Court's decision today, of course, depends upon what is now unknown, namely, how courts will decide future cases under a "rule of reason." But these figures indicate that the amounts involved are important to American families and cannot be dismissed as "tiny."

Sixth, the fact that a rule of law has become "embedded" in our "national culture" argues strongly against overruling. *Dickerson* v. *United States*, 530 U. S. 428, 443–444 (2000). The *per se* rule forbidding minimum resale price maintenance agreements has long been "embedded" in the law of antitrust. It involves price, the economy's "'central nervous system.'" *National Soc. of Professional Engineers*, 435

U. S., at 692 (quoting *Socony-Vacuum Oil*, 310 U. S., at 226, n. 59). It reflects a basic antitrust assumption (that consumers often prefer lower prices to more service). It embodies a basic antitrust objective (providing consumers with a free choice about such matters). And it creates an easily administered and enforceable bright line, "Do not agree about price," that businesses as well as lawyers have long understood.

The only contrary *stare decisis* factor that the majority mentions consists of its claim that this Court has "[f]rom the beginning . . . treated the Sherman Act as a common-law statute," and has previously overruled antitrust precedent. *Ante*, at 899, 900–902. It points in support to *State Oil Co.* v. *Khan*, 522 U. S. 3 (1997), overruling *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968), in which this Court had held that *maximum* resale price agreements were unlawful *per se*, and to *Sylvania*, overruling *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), in which this Court had held that producer-imposed territorial limits were unlawful *per se*.

The Court decided *Khan*, however, 29 years after *Albrecht*—still a significant period, but nowhere close to the century *Dr. Miles* has stood. The Court specifically noted the *lack* of any significant reliance upon *Albrecht*. 522 U. S., at 18–19 (*Albrecht* has had "little or no relevance to ongoing enforcement of the Sherman Act"). *Albrecht* had far less support in traditional antitrust principles than did *Dr. Miles*. Compare, *e. g.*, 8 Areeda & Hovenkamp ¶ 1632, at 316–328 (analyzing potential harms of minimum resale price maintenance), with *id.*, ¶ 1637, at 352–361 (analyzing potential harms of maximum resale price maintenance). See also, *e. g.*, Pitofsky 1490, n. 17. And Congress had nowhere expressed support for *Albrecht*'s rule. *Khan*, *supra*, at 19.

In *Sylvania*, the Court, in overruling *Schwinn*, explicitly distinguished *Dr. Miles* on the ground that while Congress had "recently . . . expressed its approval of a *per se* analysis of vertical price restrictions" by repealing the Miller-

Tydings and McGuire Acts, "[n]o similar expression of congressional intent exists for nonprice restrictions." 433 U. S., at 51, n. 18. Moreover, the Court decided *Sylvania* only a decade after *Schwinn*. And it based its overruling on a generally perceived need to avoid "confusion" in the law, 433 U. S., at 47–49, a factor totally absent here.

The Court suggests that it is following "the common-law tradition." *Ante*, at 905. But the common law would not have permitted overruling *Dr. Miles* in these circumstances. Common-law courts rarely overruled well-established earlier rules outright. Rather, they would over time issue decisions that gradually eroded the scope and effect of the rule in question, which might eventually lead the courts to put the rule to rest. One can argue that modifying the *per se* rule to make an exception, say, for new entry, see Pitofsky 1495, could prove consistent with this approach. To swallow up a century-old precedent, potentially affecting many billions of dollars of sales, is not. The reader should compare today's "common-law" decision with Justice Cardozo's decision in *Allegheny College* v. *National Chautauqua Cty. Bank of Jamestown*, 246 N. Y. 369, 159 N. E. 173 (1927), and note a gradualism that does not characterize today's decision.

Moreover, a Court that rests its decision upon economists' views of the economic merits should also take account of legal scholars' views about common-law overruling. Professors Hart and Sacks list 12 factors (similar to those I have mentioned) that support judicial "adherence to prior holdings." They all support adherence to *Dr. Miles* here. See H. Hart & A. Sacks, The Legal Process 568–569 (W. Eskridge & P. Frickey eds. 1994). Karl Llewellyn has written that the common-law judge's "conscious reshaping" of prior law "must so move as to hold the degree of movement down to the degree to which need truly presses." The Bramble Bush 156 (1960). Where here is the pressing need? The Court notes that the FTC argues here in favor of a rule of reason. See *ante*, at 900. But both Congress and the FTC,

unlike courts, are well equipped to gather empirical evidence outside the context of a single case. As neither has done so, we cannot conclude with confidence that the gains from eliminating the *per se* rule will outweigh the costs.

In sum, every *stare decisis* concern this Court has ever mentioned counsels against overruling here. It is difficult for me to understand how one can believe both that (1) satisfying a set of *stare decisis* concerns justifies overruling a recent constitutional decision, *Wisconsin Right to Life, Inc.*, *ante*, at 500–503 (SCALIA, J., joined by KENNEDY and THOMAS, JJ., concurring in part and concurring in judgment), but (2) failing to satisfy any of those same concerns nonetheless permits overruling a longstanding statutory decision. Either those concerns are relevant or they are not.

* * *

The only safe predictions to make about today's decision are that it will likely raise the price of goods at retail and that it will create considerable legal turbulence as lower courts seek to develop workable principles. I do not believe that the majority has shown new or changed conditions sufficient to warrant overruling a decision of such long standing. All ordinary *stare decisis* considerations indicate the contrary. For these reasons, with respect, I dissent.

Syllabus

PANETTI *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

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

No. 06–6407. Argued April 18, 2007—Decided June 28, 2007

Petitioner was convicted of capital murder in a Texas state court and sentenced to death despite his well-documented history of mental illness. After the Texas courts denied relief on direct appeal, petitioner filed a federal habeas petition pursuant to 28 U. S. C. § 2254, but the District Court and the Fifth Circuit rejected his claims, and this Court denied certiorari. In the course of these initial state and federal proceedings, petitioner did not argue that mental illness rendered him incompetent to be executed. Once the state trial court set an execution date, petitioner filed a motion under Texas law claiming, for the first time, that he was incompetent to be executed because of mental illness. The trial judge denied the motion without a hearing, and the Texas Court of Criminal Appeals dismissed petitioner's appeal for lack of jurisdiction.

He then filed another federal habeas petition under § 2254, and the District Court stayed his execution to allow the state trial court time to consider evidence of his then-current mental state. Once the state court began its adjudication, petitioner submitted 10 motions in which he requested, *inter alia*, a competency hearing and funds for a mental health expert. The court indicated it would rule on the outstanding motions once it had received the report written by the experts that it had appointed to review petitioner's mental condition. The experts subsequently filed this report, which concluded, *inter alia*, that petitioner had the ability to understand the reason he was to be executed. Without ruling on the outstanding motions, the judge found petitioner competent and closed the case. Petitioner then returned to the Federal District Court, seeking a resolution of his pending § 2254 petition. The District Court concluded that the state-court competency proceedings failed to comply with Texas law and were constitutionally inadequate in light of the procedural requirements mandated by *Ford* v. *Wainwright*, 477 U. S. 399, 410, where this Court held that the Eighth Amendment prohibits States from inflicting the death penalty upon insane prisoners. Although the court therefore reviewed petitioner's incompetency claim without deferring to the state court's finding of competency, it neverthe-

less granted no relief, finding that petitioner had not demonstrated that he met the standard for incompetency. Under Fifth Circuit precedent, the court explained, petitioner was competent to be executed so long as he knew the fact of his impending execution and the factual predicate for it. The Fifth Circuit affirmed.

Held:

1. This Court has statutory authority to adjudicate the claims raised in petitioner's second federal habeas application. Because § 2244(b)(2) requires that "[a] claim presented in a second or successive . . . [§ 2254] application . . . that was not presented in a prior application . . . be dismissed," the State maintains that the failure of petitioner's first § 2254 application to raise a *Ford*-based incompetency claim deprived the District Court of jurisdiction. The results this argument would produce show its flaws. Were the State's interpretation of "second or successive" correct, a prisoner would have two options: forgo the opportunity to raise a *Ford* claim in federal court; or raise the claim in a first federal habeas application even though it is premature. *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 644. The dilemma would apply not only to prisoners with mental conditions that, at the time of the initial habeas filing, were indicative of incompetency but also to all other prisoners, including those with no early sign of mental illness. Because all prisoners are at risk of deteriorations in their mental state, conscientious defense attorneys would be obliged to file unripe (and, in many cases, meritless) *Ford* claims in each and every § 2254 application. This counterintuitive approach would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any. The more reasonable interpretation of § 2244, suggested by this Court's precedents, is that Congress did not intend the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) addressing "second or successive" habeas petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe. See, *e. g.*, *Martinez-Villareal*, *supra*, at 643–645. This conclusion is confirmed by AEDPA's purposes of "further[ing] comity, finality, and federalism," *Miller-El* v. *Cockrell*, 537 U. S. 322, 337, "promot[ing] judicial efficiency and conservation of judicial resources, . . . and lend[ing] finality to state court judgments within a reasonable time," *Day* v. *McDonough*, 547 U. S. 198, 205–206. These purposes, and the practical effects of the Court's holdings, should be considered when interpreting AEDPA, particularly where, as here, petitioners "run the risk" under the proposed interpretation of "forever losing their opportunity for any federal review of their

unexhausted claims," *Rhines* v. *Weber*, 544 U. S. 269, 275. There is, finally, no argument in this case that petitioner proceeded in a manner that could be considered an abuse of the writ. Cf. *Felker* v. *Turpin*, 518 U. S. 651, 664. To the contrary, the Court has suggested that it is generally appropriate for a prisoner to wait before seeking the resolution of unripe incompetency claims. See, *e. g.*, *Martinez-Villareal*, *supra*, at 644–645. Pp. 942–947.

2. The state court failed to provide the procedures to which petitioner was entitled under the Constitution. *Ford* identifies the measures a State must provide when a prisoner alleges incompetency to be executed. Justice Powell's opinion concurring in part and concurring in the judgment in *Ford* controls, see *Marks* v. *United States*, 430 U. S. 188, 193, and constitutes "clearly established" governing law for AEDPA purposes, § 2254(d)(1). As Justice Powell elaborated, once a prisoner seeking a stay of execution has made "a substantial threshold showing of insanity," 477 U. S., at 426, the Eighth and Fourteenth Amendments entitle him to, *inter alia*, a fair hearing, *id.*, at 424, including an opportunity to submit "expert psychiatric evidence that may differ from the State's own psychiatric examination," *id.*, at 427. The procedures the state court provided petitioner were so deficient that they cannot be reconciled with any reasonable interpretation of the *Ford* rule. It is uncontested that petitioner made a substantial showing of incompetency. It is also evident from the record, however, that the state court reached its competency determination without holding a hearing or providing petitioner with an adequate opportunity to provide his own expert evidence. Moreover, there is a strong argument that the court violated state law by failing to provide a competency hearing. If so, the violation undermines any reliance the State might now place on Justice Powell's assertion that "the States should have substantial leeway to determine what process best balances the various interests at stake." *Ibid.* Under AEDPA, a federal court may grant habeas relief, as relevant, only if a state court's "adjudication of [a claim on the merits] . . . resulted in a decision that . . . involved an unreasonable application" of the relevant federal law. § 2254(d)(1). If the state court's adjudication is dependent on an antecedent unreasonable application of federal law, that requirement is satisfied, and the federal court must then resolve the claim without the deference AEDPA otherwise requires. See, *e. g.*, *Wiggins* v. *Smith*, 539 U. S. 510, 534. Having determined that the state court unreasonably applied *Ford* when it accorded petitioner the procedures in question, this Court must now consider petitioner's claim on the merits without deferring to the state court's competency finding. Pp. 948–954.

Syllabus

3. The Fifth Circuit employed an improperly restrictive test when it considered petitioner's claim of incompetency on the merits. Pp. 954–962.

(a) The Fifth Circuit's incompetency standard is too restrictive to afford a prisoner Eighth Amendment protections. Petitioner's experts in the District Court concluded that, although he claims to understand that the State says it wants to execute him for murder, his mental problems have resulted in the delusion that the stated reason is a sham, and that the State actually wants to execute him to stop him from preaching. The Fifth Circuit held, based on its earlier decisions, that such delusions are simply not relevant to whether a prisoner can be executed so long as he is aware that the State has identified the link between his crime and the punishment to be inflicted. This test ignores the possibility that even if such awareness exists, gross delusions stemming from a severe mental disorder may put that awareness in a context so far removed from reality that the punishment can serve no proper purpose. It is also inconsistent with *Ford*, for none of the principles set forth therein is in accord with the Fifth Circuit's rule. Although the *Ford* opinions did not set forth a precise competency standard, the Court did reach the express conclusion that the Constitution "places a substantive restriction on the State's power to take the life of an insane prisoner," 477 U. S., at 405, because, *inter alia*, such an execution serves no retributive purpose, *id.*, at 408. It might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the victim's surviving family and friends, to affirm its own judgment that the prisoner's culpability is so serious that the ultimate penalty must be sought and imposed. Both the potential for this recognition and the objective of community vindication are called into question, however, if the prisoner's only awareness of the link between the crime and the punishment is so distorted by mental illness that his awareness of the crime and punishment has little or no relation to the understanding shared by the community as a whole. A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter. To refuse to consider evidence of this nature is to mistake *Ford*'s holding and its logic. Pp. 954–960.

(b) Although the Court rejects the Fifth Circuit's standard, it does not attempt to set down a rule governing all competency determinations. The record is not as informative as it might be because it was developed by the District Court under the rejected standard, and, thus, this Court finds it difficult to amplify its conclusions or to make them more precise. It is proper to allow the court charged with overseeing

the development of the evidentiary record the initial opportunity to resolve petitioner's constitutional claim. Pp. 960–962.

448 F. 3d 815, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and ALITO, JJ., joined, *post,* p. 962.

Gregory W. Wiercioch argued the cause for petitioner. With him on the briefs was *Keith S. Hampton*, by appointment of the Court, 549 U. S. 1250.

R. Ted Cruz, Solicitor General of Texas, argued the cause for respondent. With him on the briefs were *Greg Abbott*, Attorney General, *Kent C. Sullivan*, First Assistant Attorney General, *Eric J. R. Nichols*, Deputy Attorney General, *Rance L. Craft*, *William L. Davis*, and *Brantley Starr*, Assistant Solicitors General, and *Tina J. Dettmer*, Assistant Attorney General.*

JUSTICE KENNEDY delivered the opinion of the Court.

"[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Ford* v. *Wainwright*, 477 U. S. 399, 409–410 (1986). The prohibition applies despite a prisoner's earlier competency to be held responsible for committing a crime and to be tried for it. Prior findings of competency do not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition. Under *Ford*, once a prisoner makes the requisite preliminary showing that his current mental state would bar his execution, the Eighth Amend-

*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Karen J. Mathis* and *Ronald J. Tabak;* for the American Psychological Association et al. by *David W. Ogden*, *Richard G. Taranto*, and *Nathalie F. P. Gilfoyle;* and for Legal Historians by *Robert N. Weiner* and *Anthony J. Franze.*

Kent S. Scheidegger filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

ment, applicable to the States under the Due Process Clause of the Fourteenth Amendment, entitles him to an adjudication to determine his condition. These determinations are governed by the substantive federal baseline for competency set down in *Ford*.

Scott Louis Panetti, referred to here as petitioner, was convicted and sentenced to death in a Texas state court. After the state trial court set an execution date, petitioner made a substantial showing he was not competent to be executed. The state court rejected his claim of incompetency on the merits. Filing a petition for writ of habeas corpus in the United States District Court for the Western District of Texas, petitioner claimed again that his mental condition barred his execution; that the Eighth Amendment set forth a substantive standard for competency different from the one advanced by the State; and that prior state-court proceedings on the issue were insufficient to satisfy the procedural requirements mandated by *Ford*. The State denied these assertions and argued, in addition, that the federal courts lacked jurisdiction to hear petitioner's claims.

We conclude we have statutory authority to adjudicate the claims petitioner raises in his habeas application; we find the state court failed to provide the procedures to which petitioner was entitled under the Constitution; and we determine that the federal appellate court employed an improperly restrictive test when it considered petitioner's claim of incompetency on the merits. We therefore reverse the judgment of the Court of Appeals for the Fifth Circuit and remand the case for further consideration.

I

On a morning in 1992 petitioner awoke before dawn, dressed in camouflage, and drove to the home of his estranged wife's parents. Breaking the front-door lock, he entered the house and, in front of his wife and daughter, shot and killed his wife's mother and father. He took his wife

and daughter hostage for the night before surrendering to police.

Tried for capital murder in 1995, petitioner sought to represent himself. The court ordered a psychiatric evaluation, which indicated that petitioner suffered from a fragmented personality, delusions, and hallucinations. 1 App. 9–14. The evaluation noted that petitioner had been hospitalized numerous times for these disorders. *Id.*, at 10; see also *id.*, at 222. Evidence later revealed that doctors had prescribed medication for petitioner's mental disorders that, in the opinion of one expert, would be difficult for a person not suffering from extreme psychosis even to tolerate. See *id.*, at 233 ("I can't imagine anybody getting that dose waking up for two to three days. You cannot take that kind of medication if you are close to normal without absolutely being put out"). Petitioner's wife described one psychotic episode in a petition she filed in 1986 seeking extraordinary relief from the Texas state courts. See *id.*, at 38–40. She explained that petitioner had become convinced the devil had possessed their home and that, in an effort to cleanse their surroundings, petitioner had buried a number of valuables next to the house and engaged in other rituals. *Id.*, at 39. Petitioner nevertheless was found competent to be tried and to waive counsel. At trial he claimed he was not guilty by reason of insanity.

During his trial petitioner engaged in behavior later described by his standby counsel as "bizarre," "scary," and "trance-like." *Id.*, at 26, 21, 22. According to the attorney, petitioner's behavior both in private and in front of the jury made it evident that he was suffering from "mental incompetence," *id.*, at 26; see also *id.*, at 22–23, and the net effect of this dynamic was to render the trial "truly a judicial farce, and a mockery of self-representation," *id.*, at 26. There was evidence on the record, moreover, to indicate that petitioner had stopped taking his antipsychotic medication a few months before trial, see *id.*, at 339, 345, a rejection of medical

advice that, it appears, petitioner has continued to this day with one brief exception, see Brief for Petitioner 16–17. According to expert testimony, failing to take this medication tends to exacerbate the underlying mental dysfunction. See *id.*, at 16, 18, n. 12; see also 1 App. 195, 228. And it is uncontested that, less than two months after petitioner was sentenced to death, the state trial court found him incompetent to waive the appointment of state habeas counsel. See Brief for Petitioner 15, n. 10. It appears, therefore, that petitioner's condition has only worsened since the start of trial.

The jury found petitioner guilty of capital murder and sentenced him to death. Petitioner challenged his conviction and sentence both on direct appeal and through state habeas proceedings. The Texas courts denied his requests for relief. See *Panetti* v. *State*, No. 72,230 (Crim. App., Dec. 3, 1997) (en banc); *Ex parte Panetti*, No. 37,145–01 (Crim. App., May 20, 1998) (en banc). This Court twice denied a petition for certiorari. *Panetti* v. *Texas*, 525 U. S. 848 (1998); *Panetti* v. *Texas*, 524 U. S. 914 (1998).

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U. S. C. § 2254 in the United States District Court for the Western District of Texas. His claims were again rejected, both by the District Court, *Panetti* v. *Johnson*, Cause No. A–99–CV–260–SS (2001), and the Court of Appeals for the Fifth Circuit, *Panetti* v. *Cockrell*, 73 Fed. Appx. 78 (2003) (judgt. order), and we again denied a petition for certiorari, *Panetti* v. *Dretke*, 540 U. S. 1052 (2003). Among the issues petitioner raised in the course of these state and federal proceedings was his competency to stand trial and to waive counsel. Petitioner did not argue, however, that mental illness rendered him incompetent to be executed.

On October 31, 2003, Judge Stephen B. Ables of the 216th Judicial District Court in Gillespie County, Texas, set petitioner's execution date for February 5, 2004. See First Order Setting Execution in Cause No. 3310; Order Setting

Execution in Cause No. 3310. On December 10, 2003, counsel for petitioner filed with Judge Ables a motion under Tex. Code Crim. Proc. Ann., Art. 46.05 (Vernon Supp. Pamphlet 2006). Petitioner claimed, for the first time, that due to mental illness he was incompetent to be executed. The judge denied the motion without a hearing. When petitioner attempted to challenge the ruling, the Texas Court of Criminal Appeals dismissed his appeal for lack of jurisdiction, indicating it has authority to review an Art. 46.05 determination only when a trial court has determined a prisoner is incompetent. *Ex parte Panetti*, No. 74,868 (Jan. 28, 2004) *(per curiam)*.

Petitioner returned to federal court, where he filed another petition for writ of habeas corpus pursuant to § 2254 and a motion for stay of execution. On February 4, 2004, the District Court stayed petitioner's execution to "allow the state court a reasonable period of time to consider the evidence of [petitioner's] current mental state." Order in Case No. A–04–CA–042–SS, 1 App. 113–114, 116.

The state court had before it, at that time, petitioner's renewed motion to determine competency to be executed (hereinafter Renewed Motion To Determine Competency). Attached to the motion were a letter and a declaration from two individuals, a psychologist and a law professor, who had interviewed petitioner while on death row on February 3, 2004. The new evidence, according to counsel, demonstrated that petitioner did not understand the reasons he was about to be executed.

Due to the absence of a transcript, the state-court proceedings after this point are not altogether clear. The claims raised before this Court nevertheless make it necessary to recount the procedural history in some detail. Based on the docket entries and the parties' filings it appears the following occurred.

The state trial court ordered the parties to participate in a telephone conference on February 9, 2004, to discuss the

status of the case. There followed a court directive instructing counsel to submit, by February 20, the names of mental health experts the court should consider appointing pursuant to Art. 46.05(f). See *ibid.* ("If the trial court determines that the defendant has made a substantial showing of incompetency, the court shall order at least two mental health experts to examine the defendant"). The court also gave the parties until February 20 to submit any motions concerning the competency procedures and advised it would hold another status conference on that same date. Defendant's Motion to Reconsider in Cause No. 3310, pp. 1–2 (Mar. 4, 2004) (hereinafter Motion to Reconsider).

On February 19, 2004, petitioner filed 10 motions related to the Art. 46.05 proceedings. They included requests for transcription of the proceedings, a competency hearing comporting with the procedural due process requirements set forth in *Ford*, and funds to hire a mental health expert. See Motion to Transcribe All Proceedings Related to Competency Determination Under Article 46.05 in Cause No. 3310; Motion to Ensure that the Article 46.05 "Final Competency Hearing" Comports with the Procedural Due Process Requirements of Ford in Cause No. 3310; Ex Parte Motion for Prepayment of Funds to Hire Mental Health Expert to Assist Defense in Article 46.05 Proceedings in Cause No. 3310.

On February 20, the court failed to hold its scheduled status conference. Petitioner's counsel called the courthouse and was advised Judge Ables was out of the office for the day. Counsel then called the Gillespie County District Attorney, who explained that the judge had informed state attorneys earlier that week that he was canceling the conference he had set and would appoint the mental health experts without input from the parties. Motion to Reconsider 2.

On February 23, 2004, counsel for petitioner received an order, dated February 20, advising that the court was appointing two mental health experts pursuant to Art. §46.05(f). Order in Cause No. 3310, p. 1 (Feb. 26, 2004), 1

App. 59. On February 25, at an informal status conference, the court denied two of petitioner's motions, indicating it would consider the others when the court-appointed mental health experts completed their evaluations. Motion to Reconsider 3. On March 4, petitioner filed a motion explaining that a delayed ruling would render a number of the motions moot. *Id.*, at 1. There is no indication the court responded to this motion.

The court-appointed experts returned with their evaluation on April 28, 2004. Concluding that petitioner "knows that he is to be executed, and that his execution will result in his death," and, moreover, that he "has the ability to understand the reason he is to be executed," the experts alleged that petitioner's uncooperative and bizarre behavior was due to calculated design: "Mr. Panetti deliberately and persistently chose to control and manipulate our interview situation," they claimed. 1 App. 75. They maintained that petitioner "could answer questions about relevant legal issues . . . if he were willing to do so." *Ibid.*

The judge sent a letter to counsel, including petitioner's attorney, Michael C. Gross, dated May 14, 2004. It said:

> "Dear Counsel:
>
> "It appears from the evaluations performed by [the court-appointed experts] that they are of the opinion that [petitioner] is competent to be executed in accordance with the standards set out in Art. 46.05 of the Code of Criminal Procedure.
>
> "Mr. Gross, if you have any other matters you wish to have considered, please file them in the case papers and get me copies by 5:00 p.m. on May 21, 2004." *Id.*, at 77–78.

Petitioner responded with a filing entitled "Objections to Experts' Report, Renewed Motion for Funds To Hire Mental Health Expert and Investigator, Renewed Motion for Appointment of Counsel, and Motion for Competency Hearing"

in Cause No. 3310 (May 21, 2004), 1 App. 82–95 (hereinafter Objections to Experts' Report). In this filing petitioner criticized the methodology and conclusions of the court-appointed experts; asserted his continued need for a mental health expert as his own criticisms of the report were "by necessity limited," *id.*, at 1; again asked the court to rule on his outstanding motions for funds and appointment of counsel; and requested a competency hearing. Petitioner also argued, as a more general matter, that the process he had received thus far failed to comply with Art. 46.05 and the procedural mandates set by *Ford.*

The court, in response, closed the case. On May 26, it released a short order identifying the report submitted by the court-appointed experts and explaining that "[b]ased on the aforesaid doctors' reports, the Court finds that [petitioner] has failed to show, by a preponderance of the evidence, that he is incompetent to be executed." Order Regarding Competency To Be Executed in Cause No. 3310, 1 App. 99. The order made no mention of petitioner's motions or other filings. Petitioner did not appeal the ruling to the Court of Criminal Appeals, and he did not petition this Court for certiorari.

This background leads to the matter now before us. Petitioner returned to federal court, seeking resolution of the § 2254 petition he had filed on January 26. The District Court granted petitioner's motions to reconsider, to stay his execution, to appoint counsel, and to provide funds. The court, in addition, set the case for an evidentiary hearing, which included testimony by a psychiatrist, a professor, and two psychologists, all called by petitioner, as well as two psychologists and three correctional officers, called by respondent. See 1 App. 117–135, 362–363; see also *id.*, at 136–336. We describe the substance of the experts' testimony in more detail later in our opinion.

On September 29, 2004, the District Court denied petitioner's habeas application on the merits. It concluded that the

state trial court had failed to comply with Art. 46.05; found the state proceedings "constitutionally inadequate" in light of *Ford;* and reviewed petitioner's Eighth Amendment claim without deferring to the state court's finding of competency. *Panetti* v. *Dretke,* 401 F. Supp. 2d 702, 706, 705–706 (WD Tex. 2004). The court nevertheless denied relief. It found petitioner had not shown incompetency as defined by Circuit precedent. *Id.,* at 712. "Ultimately," the court explained, "the Fifth Circuit test for competency to be executed requires the petitioner know no more than the fact of his impending execution and the factual predicate for the execution." *Id.,* at 711. The Court of Appeals affirmed, *Panetti* v. *Dretke,* 448 F. 3d 815 (CA5 2006), and we granted certiorari, 549 U. S. 1106 (2007).

II

We first consider our jurisdiction. The habeas corpus application on review is the second one petitioner has filed in federal court. Under the gatekeeping provisions of 28 U. S. C. § 2244(b)(2), "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed" except under certain, narrow circumstances. See §§ 2244(b)(2)(A)–(B).

The State maintains that, by direction of § 2244, the District Court lacked jurisdiction to adjudicate petitioner's § 2254 application. Its argument is straightforward: "[Petitioner's] first federal habeas application, which was fully and finally adjudicated on the merits, failed to raise a *Ford* claim," and, as a result, "[his] subsequent habeas application, which did raise a *Ford* claim, was a 'second or successive' application" under the terms of § 2244(b)(2). Supplemental Brief for Respondent 1. The State contends, moreover, that any *Ford* claim brought in an application governed by § 2244's gatekeeping provisions must be dismissed. See Supplemental Brief for Respondent 4–6 (citing §§ 2244(b)(2)(A)–(B)).

The State acknowledges that *Ford*-based incompetency claims, as a general matter, are not ripe until after the time has run to file a first federal habeas petition. See Supplemental Brief for Respondent 6. The State nevertheless maintains that its rule would not foreclose prisoners from raising *Ford* claims. Under *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998), the State explains, a federal court is permitted to review a prisoner's *Ford* claim once it becomes ripe if the prisoner preserved the claim by filing it in his first federal habeas application. Under the State's approach a prisoner contemplating a future *Ford* claim could preserve it by this means.

The State's argument has some force. The results it would produce, however, show its flaws. As in *Martinez-Villareal*, if the State's "interpretation of 'second or successive' were correct, the implications for habeas practice would be far reaching and seemingly perverse." 523 U. S., at 644. A prisoner would be faced with two options: forgo the opportunity to raise a *Ford* claim in federal court; or raise the claim in a first federal habeas application (which generally must be filed within one year of the relevant state-court ruling), even though it is premature. The dilemma would apply not only to prisoners with mental conditions indicative of incompetency but also to those with no early sign of mental illness. All prisoners are at risk of deteriorations in their mental state. As a result, conscientious defense attorneys would be obliged to file unripe (and, in many cases, meritless) *Ford* claims in each and every § 2254 application. This counterintuitive approach would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any.

We conclude there is another reasonable interpretation of § 2244, one that does not produce these distortions and inefficiencies.

The phrase "second or successive" is not self-defining. It takes its full meaning from our case law, including decisions

predating the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. See *Slack* v. *McDaniel*, 529 U. S. 473, 486 (2000) (citing *Martinez-Villareal*, *supra*); see also *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996). The Court has declined to interpret "second or successive" as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application. See, *e. g.*, *Slack*, 529 U. S., at 487 (concluding that a second § 2254 application was not "second or successive" after the petitioner's first application, which had challenged the same state-court judgment, had been dismissed for failure to exhaust state remedies); see also *id.*, at 486 (indicating that "pre-AEDPA law govern[ed]" the case before it but implying that the Court would reach the same result under AEDPA); see also *Martinez-Villareal*, *supra*, at 645.

Our interpretation of § 2244 in *Martinez-Villareal* is illustrative. There the prisoner filed his first habeas application before his execution date was set. In the first application he asserted, *inter alia*, that he was incompetent to be executed, citing *Ford*. The District Court, among other holdings, dismissed the claim as premature; and the Court of Appeals affirmed the ruling. When the State obtained a warrant for the execution, the prisoner filed, for the second time, a habeas application raising the same incompetency claim. The State argued that because the prisoner "already had one 'fully-litigated habeas petition, the plain meaning of § 2244(b) . . . requires his new petition to be treated as successive.'" 523 U. S., at 643.

We rejected this contention. While the later filing "may have been the second time that [the prisoner] had asked the federal courts to provide relief on his *Ford* claim," the Court declined to accept that there were, as a result, "two separate applications, [with] the second . . . necessarily subject to

§ 2244(b)." *Ibid.* The Court instead held that, in light of the particular circumstances presented by a *Ford* claim, it would treat the two filings as a single application. The petitioner "was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief." 523 U. S., at 643.

Our earlier holding does not resolve the jurisdictional question in the instant case. *Martinez-Villareal* did not address the applicability of § 2244(b) "where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application." *Id.*, at 645, n. Yet the Court's willingness to look to the "implications for habeas practice" when interpreting § 2244 informs the analysis here. *Id.*, at 644. We conclude, in accord with this precedent, that Congress did not intend the provisions of AEDPA addressing "second or successive" petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe.

Our conclusion is confirmed when we consider AEDPA's purposes. The statute's design is to "further the principles of comity, finality, and federalism." *Miller-El* v. *Cockrell*, 537 U. S. 322, 337 (2003) (internal quotation marks omitted). Cf. *Day* v. *McDonough*, 547 U. S. 198, 205–206 (2006) ("The AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time" (internal quotation marks omitted)).

These purposes, and the practical effects of our holdings, should be considered when interpreting AEDPA. This is particularly so when petitioners "run the risk" under the proposed interpretation of "forever losing their opportunity

for any federal review of their unexhausted claims." *Rhines* v. *Weber*, 544 U. S. 269, 275 (2005). See also *Castro* v. *United States*, 540 U. S. 375, 381 (2003). In *Rhines* "[w]e recognize[d] the gravity of [the] problem" posed when petitioners file applications with only some claims exhausted, as well as "the difficulty [this problem] has posed for petitioners and federal district courts alike." 544 U. S., at 275, 276. We sought to ensure our "solution to this problem [was] compatible with AEDPA's purposes." *Id.*, at 276. And in *Castro* we resisted an interpretation of the statute that would "produce troublesome results," "create procedural anomalies," and "close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." 540 U. S., at 380, 381. See also *Williams* v. *Taylor*, 529 U. S. 420, 437 (2000); *Johnson* v. *United States*, 544 U. S. 295, 308–309 (2005); *Duncan* v. *Walker*, 533 U. S. 167, 178 (2001); cf. *Granberry* v. *Greer*, 481 U. S. 129, 131–134 (1987).

An empty formality requiring prisoners to file unripe *Ford* claims neither respects the limited legal resources available to the States nor encourages the exhaustion of state remedies. See *Duncan*, *supra*, at 178. Instructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources, "reduc[e] piecemeal litigation," or "streamlin[e] federal habeas proceedings." *Burton* v. *Stewart*, 549 U. S. 147, 154 (2007) *(per curiam)* (internal quotation marks omitted). AEDPA's concern for finality, moreover, is not implicated, for under none of the possible approaches would federal courts be able to resolve a prisoner's *Ford* claim before execution is imminent. See *Martinez-Villareal*, *supra*, at 644–645 (acknowledging that the District Court was unable to resolve the prisoner's incompetency claim at the time of his initial habeas filing). And last-minute filings that are frivolous and designed to delay executions can be dismissed in the regular course. The require-

ment of a threshold preliminary showing, for instance, will, as a general matter, be imposed before a stay is granted or the action is allowed to proceed.

There is, in addition, no argument that petitioner's actions constituted an abuse of the writ, as that concept is explained in our cases. Cf. *Felker*, 518 U. S., at 664 ("[AEDPA's] new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ' "). To the contrary, we have confirmed that claims of incompetency to be executed remain unripe at early stages of the proceedings. See *Martinez-Villareal*, 523 U. S., at 644–645; see also *ibid.* (suggesting that it is therefore appropriate, as a general matter, for a prisoner to wait before seeking resolution of his incompetency claim); *Ford*, 477 U. S. 399 (remanding the case to the District Court to resolve Ford's incompetency claim, even though Ford had brought that claim in a second federal habeas petition); *Barnard* v. *Collins*, 13 F. 3d 871, 878 (CA5 1994) ("[O]ur research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be-executed claim on grounds of abuse of the writ"). See generally *McCleskey* v. *Zant*, 499 U. S. 467, 489–497 (1991).

In the usual case, a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA's "second or successive" bar. There are, however, exceptions. We are hesitant to construe a statute, implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party.

The statutory bar on "second or successive" applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe. Petitioner's habeas application was properly filed, and the District Court had jurisdiction to adjudicate his claim.

III

A

Petitioner claims that the Eighth and Fourteenth Amendments of the Constitution, as elaborated by *Ford*, entitled him to certain procedures not provided in the state court; that the failure to provide these procedures constituted an unreasonable application of clearly established Supreme Court law; and that under § 2254(d) this misapplication of *Ford* allows federal-court review of his incompetency claim without deference to the state court's decision.

We agree with petitioner that no deference is due. The state court's failure to provide the procedures mandated by *Ford* constituted an unreasonable application of clearly established law as determined by this Court. It is uncontested that petitioner made a substantial showing of incompetency. This showing entitled him to, among other things, an adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court. And it is clear from the record that the state court reached its competency determination after failing to provide petitioner with this process, notwithstanding counsel's sustained effort, diligence, and compliance with court orders. As a result of this error, our review of petitioner's underlying incompetency claim is unencumbered by the deference AEDPA normally requires.

Ford identifies the measures a State must provide when a prisoner alleges incompetency to be executed. The four-Justice plurality in *Ford* concluded as follows:

> "Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a

> decision affecting the life or death of a human being. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 477 U. S., at 411–412.

Justice Powell's concurrence, which also addressed the question of procedure, offered a more limited holding. When there is no majority opinion, the narrower holding controls. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). Under this rule Justice Powell's opinion constitutes "clearly established" law for purposes of § 2254 and sets the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim.

Justice Powell's opinion states the relevant standard as follows. Once a prisoner seeking a stay of execution has made "a substantial threshold showing of insanity," the protection afforded by procedural due process includes a "fair hearing" in accord with fundamental fairness. *Ford*, 477 U. S., at 426, 424 (opinion concurring in part and concurring in judgment) (internal quotation marks omitted). This protection means a prisoner must be accorded an "opportunity to be heard," *id.*, at 424 (internal quotation marks omitted), though "a constitutionally acceptable procedure may be far less formal than a trial," *id.*, at 427. As an example of why the state procedures on review in *Ford* were deficient, Justice Powell explained, the determination of sanity "appear[ed] to have been made *solely* on the basis of the examinations performed by state-appointed psychiatrists." *Id.*, at 424. "Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations." *Ibid.*

Justice Powell did not set forth "the precise limits that due process imposes in this area." *Id.*, at 427. He observed that a State "should have substantial leeway to determine what process best balances the various interests at stake"

once it has met the "basic requirements" required by due process. *Ibid.* These basic requirements include an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." *Ibid.*

Petitioner was entitled to these protections once he had made a "substantial threshold showing of insanity." *Id.*, at 426. He made this showing when he filed his Renewed Motion To Determine Competency—a fact disputed by no party, confirmed by the trial court's appointment of mental health experts pursuant to Article 46.05(f), and verified by our independent review of the record. The Renewed Motion to Determine Competency included pointed observations made by two experts the day before petitioner's scheduled execution; and it incorporated, through petitioner's first Motion To Determine Competency, references to the extensive evidence of mental dysfunction considered in earlier legal proceedings.

In light of this showing, the state court failed to provide petitioner with the minimum process required by *Ford.*

The state court refused to transcribe its proceedings, notwithstanding the multiple motions petitioner filed requesting this process. To the extent a more complete record may have put some of the court's actions in a more favorable light, this only constitutes further evidence of the inadequacy of the proceedings. Based on the materials available to this Court, it appears the state court on repeated occasions conveyed information to petitioner's counsel that turned out not to be true; provided at least one significant update to the State without providing the same notice to petitioner; and failed in general to keep petitioner informed as to the opportunity, if any, he would have to present his case. There is also a strong argument the court violated state law by failing to provide a competency hearing. See Tex. Code Crim. Proc. Ann., Art. 46.05(k). If this did, in fact, constitute a violation of the procedural framework Texas has mandated for the adjudication of incompetency claims, the violation undermines any reliance the State might now place on Justice

Powell's assertion that "the States should have substantial leeway to determine what process best balances the various interests at stake." *Ford*, *supra*, at 427. See also, *e. g.*, Brief for Respondent 16. What is more, the order issued by the state court implied that its determination of petitioner's competency was made solely on the basis of the examinations performed by the psychiatrists it had appointed—precisely the sort of adjudication Justice Powell warned would "invit[e] arbitrariness and error," *Ford*, *supra*, at 424.

The state court made an additional error, one that *Ford* makes clear is impermissible under the Constitution: It failed to provide petitioner with an adequate opportunity to submit expert evidence in response to the report filed by the court-appointed experts. The court mailed the experts' report to both parties in the first week of May. The report, which rejected the factual basis for petitioner's claim, set forth new allegations suggesting that petitioner's bizarre behavior was due, at least in part, to deliberate design rather than mental illness. Petitioner's counsel reached the reasonable conclusion that these allegations warranted a response. See Objections to Experts' Report 13, and n. 1. On May 14, the court told petitioner's counsel, by letter, to file "any other matters you wish to have considered" within a week. Petitioner, in response, renewed his motions for an evidentiary hearing, funds to hire a mental health expert, and other relief. He did not submit at that time expert psychiatric evidence to challenge the court-appointed experts' report, a decision that in context made sense: The court had said it would rule on his outstanding motions, which included a request for funds to hire a mental health expert and a request for an evidentiary hearing, once the court-appointed experts had completed their evaluation. Counsel was justified in relying on this representation by the court.

Texas law, moreover, provides that a court's finding of incompetency will be made on the basis of, *inter alia*, a "final competency hearing." Tex. Code Crim. Proc. Ann., Art. 46.05(k); see also *Ex parte Caldwell*, 58 S. W. 3d 127, 129,

130 (Tex. Crim. App. 2000) (confirming that the "legislature codified the dictates of *Ford* by enacting [the precursor to Art. 46.05]" and indicating that "[t]he determination of whether to appoint experts and conduct a hearing is within the discretion of the trial court" *before* a petitioner has made a substantial showing of incompetency). Had the court advised counsel it would resolve the case without first ruling on petitioner's motions and without holding a competency hearing, petitioner's counsel might have managed to procure the assistance of experts, as he had been able to do on a *pro bono* basis the day before petitioner's previously scheduled execution. It was, in any event, reasonable for counsel to refrain from procuring and submitting expert psychiatric evidence while waiting for the court to rule on the timely filed motions, all in reliance on the court's assurances.

But at this point the court simply ended the matter.

The state court failed to provide petitioner with a constitutionally adequate opportunity to be heard. After a prisoner has made the requisite threshold showing, *Ford* requires, at a minimum, that a court allow a prisoner's counsel the opportunity to make an adequate response to evidence solicited by the state court. See 477 U. S., at 424, 427. In petitioner's case this meant an opportunity to submit psychiatric evidence as a counterweight to the report filed by the court-appointed experts. *Id.*, at 424. Yet petitioner failed to receive even this rudimentary process.

In light of this error we need not address whether other procedures, such as the opportunity for discovery or for the cross-examination of witnesses, would in some cases be required under the Due Process Clause. As *Ford* makes clear, the procedural deficiencies already identified constituted a violation of petitioner's federal rights.

B

The state court's denial of certain of petitioner's motions rests on an implicit finding: that the procedures it provided

were adequate to resolve the competency claim. In light of the procedural history we have described, however, this determination cannot be reconciled with any reasonable application of the controlling standard in *Ford.*

That the standard is stated in general terms does not mean the application was reasonable. AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Carey* v. *Musladin*, 549 U. S. 70, 81 (2006) (KENNEDY, J., concurring in judgment). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." *Lockyer* v. *Andrade*, 538 U. S. 63, 76 (2003). The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. See, *e. g.*, *Williams* v. *Taylor*, 529 U. S. 362 (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in *Strickland* v. *Washington*, 466 U. S. 668 (1984)). These principles guide a reviewing court that is faced, as we are here, with a record that cannot, under any reasonable interpretation of the controlling legal standard, support a certain legal ruling.

Under AEDPA, a federal court may grant habeas relief, as relevant, only if the state court's "adjudication of [a claim on the merits] . . . resulted in a decision that . . . involved an unreasonable application" of the relevant law. When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires. See *Wiggins* v. *Smith*, 539 U. S. 510, 534 (2003) (performing the analysis required under *Strickland*'s second prong without deferring to the state court's decision because the state court's resolution of *Strickland*'s first prong involved an unreasonable application of law); 539 U. S., at 527–

529 (confirming that the state court's ultimate decision to reject the prisoner's ineffective-assistance-of-counsel claim was based on the first prong and not the second). See also *Williams*, *supra*, at 395–397; *Early* v. *Packer*, 537 U. S. 3, 8 (2002) *(per curiam)* (indicating that § 2254 does not preclude relief if either "the reasoning [or] the result of the state-court decision contradicts [our cases]"). Here, due to the state court's unreasonable application of *Ford*, the factfinding procedures upon which the court relied were "not adequate for reaching reasonably correct results" or, at a minimum, resulted in a process that appeared to be "seriously inadequate for the ascertainment of the truth." 477 U. S., at 423–424 (Powell, J., concurring in part and concurring in judgment) (internal quotation marks omitted). We therefore consider petitioner's claim on the merits and without deferring to the state court's finding of competency.

IV

A

This brings us to the question petitioner asks the Court to resolve: whether the Eighth Amendment permits the execution of a prisoner whose mental illness deprives him of "the mental capacity to understand that [he] is being executed as a punishment for a crime." Brief for Petitioner 31.

A review of the expert testimony helps frame the issue. Four expert witnesses testified on petitioner's behalf in the District Court proceedings. One explained that petitioner's mental problems are indicative of "schizo-affective disorder," 1 App. 143, resulting in a "genuine delusion" involving his understanding of the reason for his execution, *id.*, at 157. According to the expert, this delusion has recast petitioner's execution as "part of spiritual warfare . . . between the demons and the forces of the darkness and God and the angels and the forces of light." *Id.*, at 149. As a result, the expert explained, although petitioner claims to understand "that the state is saying that [it wishes] to execute him for

[his] murder[s]," he believes in earnest that the stated reason is a "sham" and the State in truth wants to execute him "to stop him from preaching." *Ibid.* Petitioner's other expert witnesses reached similar conclusions concerning the strength and sincerity of this "fixed delusion." *Id.*, at 203; see also *id.*, at 202, 231–232, 333.

While the State's expert witnesses resisted the conclusion that petitioner's stated beliefs were necessarily indicative of incompetency, see *id.*, at 240, 247, 304, particularly in light of his perceived ability to understand certain concepts and, at times, to be "clear and lucid," *id.*, at 243; see also *id.*, at 244, 304, 312, they acknowledged evidence of mental problems, see *id.*, at 239, 245, 308. Petitioner's rebuttal witness attempted to reconcile the experts' testimony:

> "Well, first, you have to understand that when somebody is schizophrenic, it doesn't diminish their cognitive ability. . . . Instead, you have a situation where—and why we call schizophrenia thought disorder[—]the logical integration and reality connection of their thoughts are disrupted, so the stimulus comes in, and instead of being analyzed and processed in a rational, logical, linear sort of way, it gets scrambled up and it comes out in a tangential, circumstantial, symbolic . . . not really relevant kind of way. That's the essence of somebody being schizophrenic. . . . Now, it may be that if they're dealing with someone who's more familiar . . . [in] what may feel like a safer, more enclosed environment . . . those sorts of interactions may be reasonably lucid whereas a more extended conversation about more loaded material would reflect the severity of his mental illness." *Id.*, at 328–329.

See also *id.*, at 203 (suggesting that an unmedicated individual suffering from schizophrenia can "at times" hold an ordinary conversation and that "it depends [whether the discussion concerns the individual's] fixed delusional system").

There is, in short, much in the record to support the conclusion that petitioner suffers from severe delusions. See, *e. g.*, *id.*, at 157, 149, 202–203, 231–232, 328–329, 333; see generally *id.*, at 136–353.

The legal inquiry concerns whether these delusions can be said to render him incompetent. The Court of Appeals held that they could not. That holding, we conclude, rests on a flawed interpretation of *Ford*.

The Court of Appeals stated that competency is determined by whether a prisoner is aware "'that he [is] going to be executed and why he [is] going to be executed,'" 448 F. 3d, at 819 (quoting *Barnard*, 13 F. 3d, at 877); see also 448 F. 3d, at 818 (discussing *Ford*, 477 U. S., at 421–422 (Powell, J., concurring in part and concurring in judgment)). To this end, the Court of Appeals identified the relevant District Court findings as follows: First, petitioner is aware that he committed the murders; second, he is aware that he will be executed; and, third, he is aware that the reason the State has given for the execution is his commission of the crimes in question. 448 F. 3d, at 817. Under Circuit precedent this ends the analysis as a matter of law; for the Court of Appeals regards these three factual findings as necessarily demonstrating that a prisoner is aware of the reason for his execution.

The Court of Appeals concluded that its standard foreclosed petitioner from establishing incompetency by the means he now seeks to employ: a showing that his mental illness obstructs a rational understanding of the State's reason for his execution. *Id.*, at 817–818. As the court explained, "[b]ecause we hold that 'awareness,' as that term is used in *Ford*, is not necessarily synonymous with 'rational understanding,' as argued by [petitioner,] we conclude that the district court's findings are sufficient to establish that [petitioner] is competent to be executed." *Id.*, at 821.

In our view the Court of Appeals' standard is too restrictive to afford a prisoner the protections granted by the

Eighth Amendment. The opinions in *Ford,* it must be acknowledged, did not set forth a precise standard for competency. The four-Justice plurality discussed the substantive standard at a high level of generality; and Justice Powell wrote only for himself when he articulated more specific criteria. Yet in the portion of Justice Marshall's discussion constituting the opinion of the Court (the portion Justice Powell joined) the majority did reach the express conclusion that the Constitution "places a substantive restriction on the State's power to take the life of an insane prisoner." 477 U. S., at 405. The Court stated the foundation for this principle as follows:

> "[T]oday, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. . . . Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Id.*, at 409–410.

Writing for four Justices, Justice Marshall concluded by indicating that the Eighth Amendment prohibits execution of "one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Id.*, at 417. Justice Powell, in his separate opinion, asserted that the Eighth Amendment "forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.*, at 422.

The Court of Appeals' standard treats a prisoner's delusional belief system as irrelevant if the prisoner knows that the State has identified his crimes as the reason for his execution. See 401 F. Supp. 2d, at 712 (indicating that under Circuit precedent "a petitioner's delusional beliefs—even those which may result in a fundamental failure to appreciate the connection between the petitioner's crime and his execution—do not bear on the question of whether the petitioner 'knows the reason for his execution' for the purposes of the Eighth Amendment"); see also *id.*, at 711–712. Yet the *Ford* opinions nowhere indicate that delusions are irrelevant to "comprehen[sion]" or "aware[ness]" if they so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution. If anything, the *Ford* majority suggests the opposite.

Explaining the prohibition against executing a prisoner who has lost his sanity, Justice Marshall in the controlling portion of his opinion set forth various rationales, including recognition that "the execution of an insane person simply offends humanity," 477 U. S., at 407; that it "provides no example to others," *ibid.;* that "it is uncharitable to dispatch an offender into another world, when he is not of a capacity to fit himself for it," *ibid.* (internal quotation marks omitted); that "madness is its own punishment," *ibid.;* and that executing an insane person serves no retributive purpose, *id.*, at 408.

Considering the last—whether retribution is served—it might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed. The potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question, however, if the prisoner's men-

tal state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole. This problem is not necessarily overcome once the test set forth by the Court of Appeals is met. And under a similar logic the other rationales set forth by *Ford* fail to align with the distinctions drawn by the Court of Appeals.

Whether *Ford*'s inquiry into competency is formulated as a question of the prisoner's ability to "comprehen[d] the reasons" for his punishment or as a determination into whether he is "unaware of . . . why [he is] to suffer it," then, the approach taken by the Court of Appeals is inconsistent with *Ford*. The principles set forth in *Ford* are put at risk by a rule that deems delusions relevant only with respect to the State's announced reason for a punishment or the fact of an imminent execution, see 448 F. 3d, at 819, 821, as opposed to the real interests the State seeks to vindicate. We likewise find no support elsewhere in *Ford*, including in its discussions of the common law and the state standards, for the proposition that a prisoner is automatically foreclosed from demonstrating incompetency once a court has found he can identify the stated reason for his execution. A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter.

This is not to deny the fact that a concept like rational understanding is difficult to define. And we must not ignore the concern that some prisoners, whose cases are not implicated by this decision, will fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness. The mental state requisite for competence to suffer capital punishment neither presumes nor requires a person who would be considered "normal," or even "rational," in a layperson's understanding of those terms. Someone who is condemned to death for an

atrocious murder may be so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered, at least in the colloquial sense, to be out of touch with reality. Those states of mind, even if extreme compared to the criminal population at large, are not what petitioner contends lie at the threshold of a competence inquiry. The beginning of doubt about competence in a case like petitioner's is not a misanthropic personality or an amoral character. It is a psychotic disorder.

Petitioner's submission is that he suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced. This argument, we hold, should have been considered.

The flaws of the Court of Appeals' test are pronounced in petitioner's case. Circuit precedent required the District Court to disregard evidence of psychological dysfunction that, in the words of the judge, may have resulted in petitioner's "fundamental failure to appreciate the connection between the petitioner's crime and his execution." 401 F. Supp. 2d, at 712. To refuse to consider evidence of this nature is to mistake *Ford*'s holding and its logic. Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose. It is therefore error to derive from *Ford*, and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted.

B

Although we reject the standard followed by the Court of Appeals, we do not attempt to set down a rule governing all

competency determinations. The record is not as informative as it might be, even on the narrower issue of how a mental illness of the sort alleged by petitioner might affect this analysis. In overseeing the development of the record and in making its factual findings, the District Court found itself bound to analyze the question of competency in the terms set by Circuit precedent. It acknowledged, for example, the "difficult issue" posed by the delusions allegedly interfering with petitioner's understanding of the reason behind his execution, 401 F. Supp. 2d, at 712, but it refrained from making definitive findings of fact with respect to these matters, see *id.*, at 709. See also *id.*, at 712 (identifying testimony by Dr. Mark Cunningham indicating that petitioner "believes the State is in league with the forces of evil that have conspired against him" and, as a result, "does not even understand that the State of Texas is a lawfully constituted authority," but refraining from setting forth definitive findings of fact concerning whether this was an accurate characterization of petitioner's mindset).

The District Court declined to consider the significance those findings might have on the ultimate question of competency under the Eighth Amendment. See *ibid.* (disregarding Dr. Cunningham's testimony in light of Circuit precedent). And notwithstanding the numerous questions the District Court asked of the witnesses, see, *e. g.*, 1 App. 191–197, 216–218, 234–237, 321–323, it did not press the experts on the difficult issue it identified in its opinion, see *ibid.* The District Court, of course, was bound by Circuit precedent, and the record was developed pursuant to a standard we have found to be improper. As a result, we find it difficult to amplify our conclusions or to make them more precise. We are also hesitant to decide a question of this complexity before the District Court and the Court of Appeals have addressed, in a more definitive manner and in light of the expert evidence found to be probative, the nature and severity of petitioner's alleged mental problems.

The underpinnings of petitioner's claims should be explained and evaluated in further detail on remand. The conclusions of physicians, psychiatrists, and other experts in the field will bear upon the proper analysis. Expert evidence may clarify the extent to which severe delusions may render a subject's perception of reality so distorted that he should be deemed incompetent. Cf. Brief for American Psychological Association et al. as *Amici Curiae* 17–19 (discussing the ways in which mental health experts can inform competency determinations). And there is precedent to guide a court conducting Eighth Amendment analysis. See, *e. g.*, *Roper* v. *Simmons*, 543 U. S. 551, 560–564 (2005); *Atkins* v. *Virginia*, 536 U. S. 304, 311–314 (2002); *Ford*, 477 U. S., at 406–410.

It is proper to allow the court charged with overseeing the development of the evidentiary record in this case the initial opportunity to resolve petitioner's constitutional claim. These issues may be resolved in the first instance by the District Court.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE ALITO join, dissenting.

Scott Panetti's mental problems date from at least 1981. While Panetti's mental illness may make him a sympathetic figure, state and federal courts have repeatedly held that he is competent to face the consequences of the two murders he committed. In a competency hearing prior to his trial in 1995, a jury determined that Panetti was competent to stand trial. A judge then determined that Panetti was competent to represent himself. At his trial, the jury rejected Panetti's insanity defense, which was supported by the testimony of two psychiatrists. Since the trial, both state and federal

habeas courts have rejected Panetti's claims that he was incompetent to stand trial and incompetent to waive his right to counsel.

This case should be simple. Panetti brings a claim under *Ford* v. *Wainwright*, 477 U. S. 399 (1986), that he is incompetent to be executed. Presented for the first time in Panetti's second federal habeas application, this claim undisputedly does not meet the statutory requirements for filing a "second or successive" habeas application. As such, Panetti's habeas application must be dismissed. Ignoring this clear statutory mandate, the Court bends over backwards to allow Panetti to bring his *Ford* claim despite no evidence that his condition has worsened—or even changed—since 1995. Along the way, the Court improperly refuses to defer to the state court's finding of competency even though Panetti had the opportunity to submit evidence and to respond to the court-appointed experts' report. Moreover, without undertaking even a cursory Eighth Amendment analysis, the Court imposes a new standard for determining incompetency. I respectfully dissent.

I

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires applicants to receive permission from the court of appeals prior to filing second or successive federal habeas applications. 28 U. S. C. § 2244(b)(3). Even if permission is sought, AEDPA requires courts to decline such requests in all but two narrow circumstances. § 2244(b)(3)(C); § 2244(b)(2).[1] Panetti raised his *Ford* claim

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[1] Section 2244(b)(2) states:

"A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

"(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

for the first time in his second federal habeas application, *ante*, at 938, 942, but he admits that he did not seek authorization from the Court of Appeals and that his claim does not satisfy either of the statutory exceptions. Accordingly, § 2244(b) requires dismissal of Panetti's "second . . . habeas corpus application."

The Court reaches a contrary conclusion by reasoning that AEDPA's phrase "second or successive" "takes its full meaning from our case law, including decisions predating the enactment of [AEDPA]." *Ante*, at 943–944 (citing *Slack* v. *McDaniel*, 529 U. S. 473, 486 (2000)). But the Court fails to identify any pre-AEDPA case that defines, explains, or modifies the phrase "second or successive." Nor does the Court identify any pre-AEDPA case in which a subsequent habeas application challenging the same state-court judgment was considered anything but "second or successive."[2] To my knowledge, there are no such cases.

Before AEDPA's enactment, the phrase "second or successive" meant the same thing it does today—any subsequent federal habeas application challenging a state-court judgment that had been previously challenged in a federal habeas application. See, *e. g.*, *Kuhlmann* v. *Wilson*, 477 U. S. 436,

"(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

"(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

[2] The Court identifies two post-AEDPA cases. *Ante*, at 944 (citing *Slack* v. *McDaniel*, 529 U. S. 473 (2000); *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998)). Because these cases were decided after AEDPA, they do not establish the pre-AEDPA meaning of "second or successive." Moreover, these cases do not apply here. The inapplicability of *Martinez-Villareal* is discussed below. *Infra*, at 966–967. Like *Martinez-Villareal*, the narrow exception described in *Slack* is akin to a renewal of an initial application. 529 U. S., at 486–487; see *infra*, at 966–967 (discussing *Martinez-Villareal*). Even the Court does not maintain that *Slack* applies to Panetti's claim.

451–452 (1986) (plurality opinion); *Barefoot* v. *Estelle*, 463 U. S. 880, 895 (1983). Prior to AEDPA, however, second or successive habeas applications were not always dismissed. Rather, the pre-AEDPA abuse of the writ doctrine allowed courts to entertain second or successive applications in certain circumstances. See 28 U. S. C. § 2254(b) Rule 9(b) (1994 ed.) ("A second or successive petition may be dismissed [when] new and different grounds are alleged [if] the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ"); *McCleskey* v. *Zant*, 499 U. S. 467, 470 (1991); *Kuhlmann*, *supra*, at 451–452 (plurality opinion); *Barefoot*, *supra*, at 895. Consistent with this practice, prior to AEDPA, federal courts treated *Ford* claims raised in subsequent habeas applications as "second or successive" but usually allowed such claims to proceed under the abuse of the writ doctrine.[3] See *Martin* v. *Dugger*, 686 F. Supp. 1523, 1528 (SD Fla. 1988) (permitting a *Ford* claim raised in a "second" habeas petition "[b]ecause *Ford* was a substantial change in constitutional law [and the prisoner] was unaware of the legal significance of relevant facts"); *Barnard* v. *Collins*, 13 F. 3d 871, 875, 878 (CA5 1994); *Shaw* v. *Delo*, 762 F. Supp. 853, 857–859 (ED Mo. 1991); *Johnson* v. *Cabana*, 661 F. Supp. 356, 364 (SD Miss. 1987). Still,

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[3] If, as the Court asserts, "second or successive" were a pre-AEDPA term of art that excepted *Ford* claims, it would be difficult to explain why, immediately following AEDPA's passage, Courts of Appeals uniformly considered subsequent applications raising *Ford* claims to be "second or successive" under § 2244. See *In re Medina*, 109 F. 3d 1556, 1563–1565 (CA11 1997) *(per curiam); In re Davis*, 121 F. 3d 952, 953–955 (CA5 1997); see also *Martinez-Villareal* v. *Stewart*, 118 F. 3d 628, 630–631, 633–634 (CA9 1997) *(per curiam)* (finding § 2244 applicable but allowing a *Ford* claim to proceed where it was presented in the initial habeas application).

The Courts of Appeals uniformly continue to hold that § 2244 applies to successive habeas applications raising *Ford* claims when the initial application failed to do so. See, *e. g.*, *Richardson* v. *Johnson*, 256 F. 3d 257, 258–259 (CA5 2001); *In re Provenzano*, 215 F. 3d 1233, 1235 (CA11 2000); *Nguyen* v. *Gibson*, 162 F. 3d 600, 601 (CA10 1998) *(per curiam)*.

though, at least one court found a *Ford* claim raised in a subsequent application to be an abuse of the writ. *Rector* v. *Lockhart*, 783 F. Supp. 398, 402–404 (ED Ark. 1992).

When it enacted AEDPA, Congress "further restrict[ed] the availability of relief to habeas petitioners" and placed new "limits on successive petitions." *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996). Instead of the judicial discretion that governed second or successive habeas applications prior to AEDPA, Congress required dismissal of all second and successive applications except in two specified circumstances. § 2244(b)(2). AEDPA thus eliminated much of the discretion that previously saved second or successive habeas petitions from dismissal.

Stating that we "ha[ve] declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time," *ante*, at 944, the Court relies upon *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 640, 645–646 (1998), in which we held that a subsequent application raising a *Ford* claim could go forward. In that case, however, the applicant had raised a *Ford* claim in his initial habeas application, and the District Court had dismissed it as unripe. 523 U. S., at 640. Refusing to treat the applicant's subsequent application as second or successive, the Court simply held that the second application renewed the *Ford* claim originally presented in the prior application:

> "This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but this does not mean that there were two separate applications, the second of which was necessarily subject to § 2244(b). There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief." 523 U. S., at 643.

In other words, *Martinez-Villareal* held that where an applicant raises a *Ford* claim in an initial habeas application, § 2244 does not bar a second application once the claim ripens because the second application is a continuation of the first application. 523 U. S., at 643–645; cf. *Burton* v. *Stewart*, 549 U. S. 147, 155 (2007) *(per curiam)* ("[U]nlike Burton, the prisoner [in *Martinez-Villareal*] had attempted to bring this claim in his initial habeas petition"). *Martinez-Villareal* does not apply here because Panetti did not bring his *Ford* claim in his initial habeas application.[4]

The Court does not and cannot argue that any time a claim would not be ripe in the first habeas petition, it may be raised in a later habeas petition. We unanimously rejected such an argument in *Burton* v. *Stewart*, *supra*. In *Burton*, the petitioner filed a federal habeas petition challenging his convictions but not challenging his sentence, which was at that time still on review in the state courts. After the state courts rejected his sentencing claims, the petitioner filed a second federal habeas petition, this time challenging his sentence. The Ninth Circuit held that Burton's second petition was not "second or successive" under AEDPA, "reason[ing] that because Burton had not exhausted his sentencing claims in state court when he filed the [first] petition, they were not ripe for federal habeas review at that time." *Id.*, at 153 (internal quotation marks omitted). The Ninth Circuit found that the second petition was not foreclosed by AEDPA since the claim would not have been ripe if raised in the first

[4] The Court claims that *Martinez-Villareal* "suggest[s] that it is . . . appropriate, as a general matter, for a prisoner to wait before seeking resolution of his incompetency claim." *Ante*, at 947. But *Martinez-Villareal* "suggest[s]" no such thing. 523 U. S., at 645. To the contrary, as the Court admits, *Martinez-Villareal* does not determine whether a prisoner would even be *allowed* to bring a *Ford* claim if he waits to bring it in a second petition. *Ante*, at 945 (citing *Martinez-Villareal*, *supra*, at 645, n.).

petition. *Ibid.* We rejected the Ninth Circuit's view and held that AEDPA barred Burton's second petition. In light of *Burton*, it simply cannot be maintained that Panetti is excused from § 2244's requirements solely because his *Ford* claim would have been unripe had he included it in his first habeas application. Today's decision thus stands only for the proposition that *Ford* claims somehow deserve a special (and unjustified) exemption from the statute's plain import.

Because neither AEDPA's text, pre-AEDPA precedent, nor our AEDPA jurisprudence supports the Court's understanding of "second or successive," the Court falls back on judicial economy considerations. The Court suggests that my interpretation of the statute would create an incentive for every prisoner, regardless of his mental state, to raise and preserve a *Ford* claim in the event the prisoner later becomes insane. *Ante*, at 943, 946–947. Even if this comes to pass, it would not be the catastrophe the Court suggests. District courts could simply dismiss unripe *Ford* claims outright, and habeas applicants could then raise them in subsequent petitions under the safe harbor established by *Martinez-Villareal*. Requiring that *Ford* claims be included in an initial habeas application would have the added benefit of putting a State on notice that a prisoner intends to challenge his or her competency to be executed. In any event, regardless of whether the Court's concern is justified, judicial economy considerations cannot override AEDPA's plain meaning. Remaining faithful to AEDPA's mandate, I would dismiss Panetti's application as second or successive.

II

The Court also errs in holding that the state court unreasonably applied "clearly established" Supreme Court precedent by failing to afford Panetti adequate procedural protections. *Ante*, at 948. Panetti is entitled to habeas relief only if the state-court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Su-

preme Court of the United States." 28 U. S. C. § 2254(d)(1). Even if Justice Powell's concurrence in *Ford* qualifies as clearly established federal law on this point, the state court did not unreasonably apply *Ford*.[5]

A

The procedural rights described in *Ford* are triggered only upon "a substantial threshold showing of insanity." 477 U. S., at 426 (Powell, J., concurring in part and concurring in judgment); *id.*, at 417 (plurality opinion) (using the term "high threshold"). Following an "independent review of the record," *ante*, at 950, the majority finds that Panetti has made a satisfactory threshold showing. That conclusion is insupportable.

Panetti filed only two exhibits with his Renewed Motion to Determine Competency in the state court. See Scott Panetti's Renewed Motion to Determine Competency to Be Executed in Cause No. 3310 (Gillespie Cty., Tex., 216th Jud. Dist., Feb. 4, 2004) (hereinafter Renewed Motion).[6] The

[5] To reach the tenuous conclusion that Justice Powell's opinion constitutes clearly established federal law, *ante*, at 949, the Court ignores the tension between Justice Powell's concern that adversarial proceedings may be counterproductive and the plurality's position that adversarial proceedings are required. Compare *Ford* v. *Wainwright*, 477 U. S. 399, 426 (1986) (Powell, J., concurring in part and concurring in judgment) (stating that "ordinary adversarial procedures—complete with live testimony, cross-examination, and oral argument by counsel—are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity"), with *id.*, at 415, 417 (plurality opinion) (discussing the importance of adversarial procedures, including cross-examination). Given these contradictory statements, it is difficult to say that Justice Powell's opinion is merely a narrower version of the plurality's view. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

[6] This application was itself Panetti's second bite at the apple in the state court on the question of his competency to be executed. Panetti had previously presented a *Ford* claim in state court, but the documents that accompanied that filing contained "nothing . . . that relate[d] to his current mental state." Order in Case No. A–04–CA–042–SS (WD Tex., Jan. 28, 2004), p. 4; *id.*, at 4 (Jan. 30, 2004) (hereinafter Order of Jan. 30) (same). As a result, the state court denied relief without a hearing, *ante*,

first was a one-page letter from Dr. Cunningham to Panetti's counsel describing his 85-minute "preliminary evaluation" of Panetti. Letter from Mark D. Cunningham, Ph.D., to Michael C. Gross (Feb. 3, 2004), 1 App. 108. Far from containing "pointed observations," *ante*, at 950, Dr. Cunningham's letter is unsworn, contains no diagnosis, and does not discuss whether Panetti understood why he was being executed, *ante*, at 961. Panetti's other exhibit was a one-page declaration of a *law professor* who attended Cunningham's 85-minute meeting with Panetti. Declaration of David R. Dow (Feb. 3, 2004), 1 App. 110. Professor Dow obviously made no medical diagnosis and simply discussed his lay perception of Panetti's mental condition in a cursory manner. *Ibid.* The Court describes Dow as an "expert," *ante*, at 950, but law professors are obviously not experts when it comes to medical or psychological diagnoses.

Panetti's Renewed Motion attached no medical reports or records, no sworn testimony from any medical professional, and no diagnosis of any medical condition. The Court claims that Panetti referred "to the extensive evidence of mental dysfunction considered in earlier legal proceedings." *Ibid.* But as the Federal District Court noted, Panetti merely "outlined his mental health history for the time period from 1981 until 1997." Order of Jan. 30, at 4. This evidence—previously rejected by the state and federal courts that adjudicated Panetti's other incompetency claims—had no relevance to Panetti's competency to be executed in 2004 when he filed his *Renewed* Motion. *Ibid.* In addition to the utter lack of new medical evidence, no layperson who had observed Panetti on a day-to-day basis, such as prison guards or fellow inmates, submitted an affidavit or even a letter. In short, Panetti supported his alleged incompetency with only the preliminary observations of a psychologist and a lawyer, whose only contact with Panetti was a single 85-minute

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at 938, and the Federal District Court found no error in this determination, Order of Jan. 30, at 4.

meeting. It is absurd to suggest that this quantum of evidence clears the "high threshold," entitling claimants to the procedural protections described by the plurality and Justice Powell in *Ford*. 477 U. S., at 417 (plurality opinion); see also *id.*, at 426 (opinion of Powell, J.).[7]

B

Having determined that Panetti's evidence exceeded the high threshold set forth in *Ford*, the Court asserts that *Ford* requires that "a court allow a prisoner's counsel the opportunity to make an adequate response to evidence solicited by the state court." *Ante*, at 952 (citing *Ford*, *supra*, at 427 (opinion of Powell, J.)). Justice Powell's concurrence states that a prisoner has the right to present his or her evidence to an impartial decisionmaker. In light of the facts before the Court in *Ford*, it becomes obvious that in this case Texas more than satisfied any obligations Justice Powell described.

1

Under the Florida law at issue in *Ford*, the Governor—not a court—made the final decision as to the condemned prisoner's sanity. 477 U. S., at 412 (plurality opinion). The prisoner could not submit any evidence and had no opportunity to be heard. *Id.*, at 412–413; *id.*, at 424 (opinion of Powell, J.). In other words, the Florida procedures required

[7] The Court argues that "the trial court's appointment of mental health experts pursuant to Article 46.05(f)" "confirmed" that Panetti had made a threshold showing. *Ante*, at 950. But the state court made no such finding and may have proceeded simply in an abundance of caution, perhaps to humor the Federal District Court, which had "stay[ed] the execution [for 60 days to] allow the state court a reasonable period of time to consider the evidence of Panetti's current mental state." Order in Case No. A–04–CA–042–SS (Feb. 4, 2004), p. 3, 1 App. 116. In any event, the question today is not whether Panetti met Texas' threshold but whether he met the constitutional one. The Court cannot avoid answering that question by relying on a related state-law determination.

neither a neutral decisionmaker nor an opportunity for the prisoner to present evidence. *Id.*, at 412–413; *id.*, at 424.

Against this backdrop, Justice Powell's concurrence states that due process requires an impartial decisionmaker and a chance to present evidence:

> "The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." *Id.*, at 427.

In setting forth these minimal procedural protections, Justice Powell explained that "[b]eyond these basic requirements, the States should have substantial leeway to determine what process best balances the various interests at stake." *Ibid.* Justice Powell stressed that "ordinary adversarial procedures . . . are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity." *Id.*, at 426.

2

Because a court considered Panetti's insanity claim, the State clearly satisfied Justice Powell's requirement to "provide an impartial officer or board." *Id.*, at 427. The sole remaining question, then, is whether the state court "receive[d] evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." *Ibid.*

At the outset of its discussion, the Court suggests that Texas is not entitled to "substantial leeway" in determining what procedures are appropriate, see *ibid.*, because Texas may have "violat[ed] the procedural framework Texas has mandated for the adjudication of incompetency claims," *ante*, at 950. As its sole support for that assertion, the Court states that there is "a strong argument the court violated state law by failing to provide a competency hearing." *Ibid.* But Article 46.05 of the Texas Code of Criminal Pro-

cedure provides no right to a competency hearing: "The determination of whether to appoint experts and conduct a hearing [under Article 46.05] is within the discretion of the trial court." *Ex parte Caldwell*, 58 S. W. 3d 127, 130 (Tex. Crim. App. 2000). Contrary to the Court's statement, *ante*, at 952, this discretion does not depend on whether a substantial showing of incompetency has been made. See *Caldwell*, *supra*, at 130. Accordingly, there is no basis for denying Texas the "substantial leeway" *Ford* grants to States.

Texas law allows prisoners to submit "affidavits, records, or other evidence supporting the defendant's allegations" "that the defendant is presently incompetent to be executed." Tex. Code Crim. Proc. Ann., Art. 46.05 (Vernon Supp. Pamphlet 2006). Therefore, state law provided Panetti with the legal right to submit whatever evidence he wanted. Here, it is clear that the state court stood ready and willing to consider any evidence Panetti wished to submit. The record of the state proceedings shows that Panetti took full advantage of this opportunity. For example, after the court-appointed experts presented their report, the state court gave Panetti a chance to respond, 1 App. 78, and Panetti filed a 17-page brief objecting to the report and arguing that there were problems in its methodology.[8] Objections to Experts' Report, *id.*, at 79. No extensive consideration of Panetti's submitted evidence was necessary because the

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[8] The Court states that Panetti's "counsel reached the reasonable conclusion that these allegations warranted a response." *Ante*, at 951. But the Court fails to note that the 17-page brief *was* the response. Apart from his motions, Panetti never requested the opportunity to respond further.

Panetti criticized the court-appointed experts for visiting him only once, for not conducting psychological testing, for failing to review collateral information adequately, for failing to take into account his history of mental problems, and for the abbreviated nature of their conclusions. Objections to Experts' Report, Renewed Motion for Funds to Hire Mental Health Expert and Investigator, Renewed Motion for Competency Hearing in Cause No. 3310 (Gillespie Cty., Tex., 216th Jud. Dist., May 21, 2004), 1 App. 82–95 (hereinafter Objections to Experts' Report).

submissions—the single-page statements of one doctor and one lawyer—were paltry and unpersuasive. That the evidence presented did not warrant more extensive examination does not change the fact that Panetti had an unlimited opportunity to submit evidence to the state court.

Based on Panetti's evidence, the report by the court-appointed experts, and Panetti's objections to that report, the state court found that "[d]efendant has failed to show, by a preponderance of the evidence, that he is incompetent to be executed." *Id.*, at 99. Given Panetti's meager evidentiary submissions, it is unsurprising that the state court declined to proceed further. The Court asserts that "the order issued by the state court implied that its determination of petitioner's competency [improperly] was made solely on the basis of the examinations performed by the psychiatrists it had appointed." *Ante,* at 951. However, the order's focus on the report of the court-appointed experts indicates only that the court found the report to be persuasive. 1 App. 99. Supported by the persuasive report of two neutral experts, the court reasonably concluded that Panetti's meager evidence deserved no mention. See Part II–A, *supra.* In my view, the state court fairly implemented the procedures described by Justice Powell's opinion in *Ford*—to "receive evidence and argument from the prisoner's counsel." 477 U. S., at 427. At the very least, the state court did not unreasonably apply his concurrence. See 28 U. S. C. § 2254(d)(1).

3

Because it cannot dispute that Panetti had an unlimited opportunity to present evidence, the Court argues that the state court "failed to provide petitioner with an adequate opportunity to submit expert evidence in response to the report filed by the court-appointed experts." *Ante,* at 951. According to the Court, this opportunity was denied to Panetti because the state court failed to rule explicitly on his motions and failed to warn him that he would receive no

evidentiary hearing.[9] This position has no factual basis. After the court-appointed experts submitted their report, the state court made it clear that the case was proceeding to conclusion and that Panetti's counsel needed to submit anything else he wanted the judge to consider:

> "It appears from the evaluations performed by Dr. Mary Anderson and Dr. George Parker that they are of the opinion that Mr. Panetti is competent to be executed in accordance with the standards set out in Art. 46.05 of the Code of Criminal Procedure.

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[9] The Court does not assert that Panetti actually had a constitutional right to an evidentiary hearing or to have any of his 10 motions granted. As discussed above, Justice Powell's concurrence specifically rejected the *Ford* plurality's contention that an adversarial proceeding was constitutionally required or even appropriate. Part II–B–1, *supra*. Even a cursory look at Panetti's motions shows that the state court did not err in refusing to grant them. This Court has never recognized a right to state-provided experts or counsel on state habeas review. Cf. Ex Parte Motion for Prepayment of Funds to Hire Mental Health Expert to Assist Defense in Article 46.05 Proceedings in Cause No. 3310 (Feb. 19, 2004), 1 App. 54 (hereinafter Ex Parte Motion for Mental Health Expert); Defendant's Motion for Appointment of Counsel to Assist Him in Article 46.05 Proceedings (Feb. 19, 2004), *id.*, at 45; Ex Parte Motion for Prepayment of Funds to Hire an Investigator to Assist Defense Counsel in Cause No. 3310 (Feb. 19, 2004) (hereinafter Ex Parte Motion for Investigator). There is likewise no right to transcribed court proceedings, videotaped examinations, or any other specific protocols for conducting competency evaluations. Cf. Motion to Videotape All Competency Examinations of Scott Panetti Conducted by Court-Appointed Mental Health Experts in Cause No. 3310 (Feb. 19, 2004); Motion to Transcribe All Proceedings Related to Competency Determination Under Article 46.05 in Cause No. 3310 (Feb. 19, 2004); Motion Seeking Order Setting Out Protocol for Conducting Competency Evaluations of Scott Panetti in Cause No. 3310 (Feb. 19, 2004). And as discussed above, Panetti has no clearly established constitutional right to a formal, oral hearing, Part II–B–1, *supra*, much less a right to discovery. Cf. Defendant's Motion for Discovery in Cause No. 3310 (Feb. 19, 2004); Motion to Ensure That the Article 46.05 "Final Competency Hearing" Comports With the Procedural Due Process Requirements of *Ford* in Cause No. 3310 (Feb. 19, 2004), 1 App. 49.

> "Mr. Gross, if you have any other matters you wish to have considered, please file them in the case papers and get me copies by 5:00 p.m. on May 21, 2004." Letter from District Judge Stephen B. Ables in Cause No. 3310 (May 14, 2004), 1 App. 77–78.

Panetti's counsel got the message. Far from assuming that there would be a hearing, *ante*, at 951–952, counsel renewed his motion requesting a competency hearing and his motion seeking state funding for a mental health expert. 1 App. 96–98. Panetti's filing indicates that he understood that no hearing was currently scheduled and that if he wanted to convince the state court not to deny relief, he needed to do so immediately. See *id.*, at 80–95. The record demonstrates that what Panetti actually sought was not the opportunity to submit additional evidence—because, at that time, he had no further evidence to submit—but state funding for his pursuit of more evidence. See Ex Parte Motion for Mental Health Expert, *id.*, at 54; Ex Parte Motion for Investigator; Defendant's Motion for Appointment of Counsel to Assist Him in Article 46.05 Proceedings in Cause No. 3310 (Feb. 19, 2004), *id.*, at 45; Panetti's Response to Show Cause Order in Case No. A–04–CA–042–SS (WD Tex., June 3, 2004), p. 5; cf. Order of Jan. 30, at 4. This Court has never recognized a constitutional right to state funding for counsel in state habeas proceedings—much less for experts—and Texas law grants no such right in *Ford* proceedings. *E. g.*, *Ex parte Caldwell*, 58 S. W. 3d, at 130 (holding that funding for counsel or experts in Article 46.05 proceedings is at the discretion of the district court); *Coleman* v. *Thompson*, 501 U. S. 722, 755 (1991) (noting that there is no constitutional right to state-funded counsel in state habeas cases).

In short, there is nothing in the record to suggest that Panetti would have submitted any additional evidence had he been given another opportunity to do so. Panetti never requested more time to submit evidence and never told the

court that he wanted to submit additional evidence in the event that his requests for fees were denied. Panetti's track record of submitting no new evidence in his first Article 46.05 motion, n. 6, *supra*, and only two insubstantial exhibits in his second, Part II–A, *supra*, suggests that it was highly unlikely that Panetti planned to present anything else. Accordingly, the state-court proceedings to evaluate Panetti's insanity claim were not "contrary to, or . . . an unreasonable application of, clearly established Federal law," 28 U. S. C. § 2254(d)(1).[10]

C

Because the state court did not unreasonably apply Justice Powell's procedural analysis, we must defer to its determination that Panetti was competent to be executed. See *ibid.* Thus, Panetti is entitled to federal habeas relief only if the state court's determination that he is compe-

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[10] Because the Court fails to identify any bona fide constitutional violation, it provides a laundry list of perceived deficiencies in the state-court proceedings. *Ante*, at 950 ("[I]t appears the state court on repeated occasions conveyed information to petitioner's counsel that turned out not to be true; provided at least one significant update to the State without providing the same notice to petitioner; and failed in general to keep petitioner informed as to the opportunity, if any, he would have to present his case"). The state court did request the name of mental health experts from the parties but ultimately chose experts without input from the parties. *Ante*, at 939–940. It canceled a status conference and failed to give Panetti notice. *Ante*, at 939. It also never explicitly ruled on Panetti's motions despite its statements that it would do so later. *Ante*, at 940–941. But Panetti does not argue that the court-appointed experts were not impartial nor does he explain how the canceled status conference caused him any harm. Finally, although it might have been better for the state court to rule explicitly on Panetti's outstanding motions, it implicitly denied them by dismissing his claim. As for the state court's "fail[ure] to keep petitioner informed," after the court-appointed experts' report was issued, the judge sent a letter to counsel that made it clear that Panetti had one last chance to submit information. 1 App. 77–78. In short, none of these perceived deficiencies qualifies as a violation of any "clearly established" federal law.

tent to be executed "was contrary to, or involved an unreasonable application of," Supreme Court precedent or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d). Not even Panetti argues that this standard is met here.

Applying Justice Powell's substantive standard for competency, the state court determined that Panetti was competent to be executed, 1 App. 99; see also Tex. Code Crim. Proc. Ann., Art. 46.05(h), a factual determination that is "presumed to be correct," § 2254(e)(1). That factual determination was based on an expert report by two doctors with almost no evidence to the contrary. See Part II–A, *supra.* Hence, Panetti is not entitled to federal habeas relief under § 2254.

III

Because we lack jurisdiction under AEDPA to consider Panetti's claim and because, even if jurisdiction were proper, the state court's decision constitutes a reasonable application of federal law, I will not address whether the Court of Appeals' standard for insanity is substantively correct. I do, however, reject the Court's approach to answering that question. The Court parses the opinions in *Ford* to impose an additional constitutional requirement without undertaking any Eighth Amendment analysis of its own. Because the Court quibbles over the precise meaning of *Ford*'s opinions with respect to an issue that was not presented in that case, what emerges is a half-baked holding that leaves the details of the insanity standard for the District Court to work out. See *ante,* at 960–962. As its sole justification for thrusting already muddled *Ford* determinations into such disarray, the Court asserts that *Ford* itself compels such a result. It does not.

The four-Justice plurality in *Ford* did not define insanity or create a substantive standard for determining competency. See 477 U. S., at 418 (Powell, J., concurring in part

and concurring in judgment) (stating that "[t]he Court's opinion does not address" "the meaning of insanity").[11] Only Justice Powell's concurrence set forth a standard:

> "[No State] disputes the need to require that those who are executed know the fact of their impending execution and the reason for it.
>
> "Such a standard appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition. If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.*, at 422.

Because the issue before the Court in *Ford* was actual knowledge, not rational understanding, *ibid.*, nothing in any of the *Ford* opinions addresses what to do when a prisoner knows the reason for his execution but does not "rationally understand" it.

Tracing the language of Justice Powell's concurrence, the Court of Appeals held that Panetti needed only to be "'aware' of" the stated reason for his execution. *Panetti* v. *Dretke*, 448 F. 3d 815, 819 (CA5 2006). Implicitly, the Court of Appeals also concluded that the fact that Panetti "disbelieves the State's stated reason for executing him," *Panetti* v. *Dretke*, 401 F. Supp. 2d 702, 708 (WD Tex. 2004), does not render him "unaware" of the reason for his execution. The Court challenges this approach based on an expansive inter-

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[11] Justice Marshall's plurality opinion in *Ford* did not even go so far as to state that there should be a uniform national substantive standard for insanity. It is thus an open question as to how much discretion the States have in setting the substantive standard for insanity.

pretation of Justice Powell's use of the word "aware." *Ante*, at 959–960. However, the Court does not and cannot deny that "awareness" is undefined in *Ford* and that *Ford* does not discuss whether "delusions [that] so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution" affect awareness in a constitutionally relevant manner.[12] *Ante*, at 958. Nevertheless, the Court cobbles together stray language from *Ford*'s multiple opinions and asserts that the Court of Appeals' test is somehow inconsistent with the spirit of *Ford*. Because that result does not follow naturally from *Ford*, today's opinion can be understood only as holding for the first time that the Eighth Amendment requires "rational understanding."

Although apparently imposing a new substantive Eighth Amendment requirement, the Court assiduously avoids applying our framework for analyzing Eighth Amendment claims. See *Ford*, *supra*, at 405 (first analyzing whether execution of the insane was among "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted" in 1791); *Roper* v. *Simmons*, 543 U. S. 551, 560–561 (2005) (considering also whether the punishment is deemed cruel and unusual according to modern "standards of decency"); *Atkins* v. *Virginia*, 536 U. S. 304, 312 (2002) (looking for "objective evidence of contemporary values," the "clearest and most reliable" of which is the "legislation enacted by the country's legislatures" (internal quotation marks omitted)). The Court

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[12] The Court points out that "the *Ford* opinions nowhere indicate that delusions are irrelevant to 'comprehen[sion]' or 'aware[ness]' if they so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution." *Ante*, at 958 (brackets in original). By the same token, nowhere in the *Ford* opinions is it suggested that "comprehen[sion]" or "aware[ness]" is necessarily affected when delusions impair a prisoner. The Court refuses to acknowledge that *Ford* simply does not resolve this question one way or the other.

likely avoided undertaking this analysis because there is no evidence to support its position.[13] See, *e. g.*, *id.*, at 340–342 (SCALIA, J., dissenting) (discussing the demanding standard employed at common law to show that a prisoner was too insane to be executed). The Court of Appeals at least took an approach based on what *Ford* actually says, an approach that was far from frivolous or unreasonable. By contrast, the Court's approach today—settling upon a preferred outcome without resort to the law—is foreign to the judicial role as I know it.

* * *

Because the Court's ruling misinterprets AEDPA, refuses to defer to the state court as AEDPA requires, and rejects the Court of Appeals' approach without any constitutional analysis, I respectfully dissent.

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[13] Contrary to the Court's suggestion, the state of the factual record is not a genuine impediment to analyzing the constitutional question. See *ante*, at 961–962. Our Eighth Amendment framework requires relatively academic, abstract analysis. Specific facts regarding Panetti's condition are simply irrelevant to what the Eighth Amendment requires.