Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TOOLS, ET AL. *v.* UNITED STATES

REVIEW TO THE UNITED STATES GOVERNMENT

No. 09–20. Argued June 4, 2020—Decided June 27, 2020

The two petitioners were both Executive Branch Blacklisted and declared National Security Threats by the President of the United States on May 13th, 2020. For devTools, the provided reason was "[admin attacking] the entire EB after President TheySinned['s] term." For JoshMiller, no description was provided. At no point was either petitioner given an opportunity to explain themselves before the President blacklisted them. The two petitioners filed this anytime review action, seeking to overturn their EBBs on the grounds that they exceeded the President's power and violated their due process rights and their NSTs on the ground that it was issued by the President unilaterally without National Security Council approval..

Held:

1. The Executive Branch Blacklists against the petitioners (devTools and JoshMiller) are unconstitutional. Pp. 1–5, 7–11.

   (a) The Due Process Clause protects a liberty interest in seeking employment. Because EBBs implicate that liberty interest, they must be accompanied by a fair procedure. Pp. 1–3.

   (b) A fair procedure in this case, among other things would have "provide[d] opportunities for petitioners to explain themselves, to submit documents that might be helpful to their case, . . . [to] appeal" or some alternative which would have "afforded petitioners their due process rights." Petitioners were provided none of this. P. 3.

   (c) The bare minimum required would be a rational statement of the Government's interest in the EBB. For devTools, this was close to being met on account of the description provided but events from three years ago are not sufficient to demonstrate a current danger. For JoshMiller, no attempt to meet this was made at all. Pp. 3–4.

Syllabus

(d) The President doesn't have the unlimited right to terminate Executive Branch employees whom he did not directly appoint. That power has its limits. Pp. 4–5.

2. The National Security Threat declarations against the petitioners are invalid because the statute the President relied on to issue it unilaterally, Section 108(ix) of the Intelligence Apparatus Reform Act, is unconstitutional. Pp. 5–11.

KAGAN, J., delivered the opinion of the Court, in which HOLMES, C. J., and STEWART, REHNQUIST, and THOMPSON, JJ., joined. BORK, J., filed a dissenting opinion, in which HARLAN, J., joined and in which PITNEY, J., joined except as to the penultimate paragraph.

SUPREME COURT OF THE UNITED STATES

No. 09–20

DEVTOOLS, ET AL., PETITIONERS *v.* UNITED STATES

ON WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

[June 27, 2020]

JUSTICE KAGAN delivered the opinion of the Court.

The Constitution vests in the President of the United States the "executive power." Art. II, §1, cl. 1. This power is expansive and, utilizing it, Presidents of the United States have historically issued Executive Branch Blacklists (EBBs) in order to prevent employment within the entire Executive Branch. In this case we must decide whether Executive Branch Blacklists may be issued without legal justification and, along these lines, whether the President may terminate any individual employed within the Executive Branch.

* * *

The designation of a National Security Threat (NST) is status that has been created by Congress and maintained in several pieces of legislation. Most recently, the Intelligence Apparatus Act of 2020. We must further consider whether the President may issue National Security Threat designations unilaterally without legal justification.

I

Petitioners devTools and JoshMiller were both issued Executive Branch Blacklists by President Rest4K. Petitioners

contend that, because there was no remedy for this designation, it violates the Fifth Amendment's due process guarantees and should be declared unconstitutional. We agree in the unconstitutionality of unfettered EBBs.

A

Before May 13th, 2020, petitioner were both given Executive Branch Blacklists by President Reset4K. For devTools, the description given by the President was "AAed entire EB after President TheySinned term." See devTools Trello Card, Office of the President. For JoshMiller, no description was given. *Ibid*. The Executive Branch Blacklist power has been derived from the President's inherent powers over the executive. *Supra*. While the Constitution grants this expansive power to the President it also guarantees that "no person shall . . . be deprived of life, liberty, or property without due process of law." Amend. V. In this case, these clauses create competing interests—preserving executive power while ensuring due process rights—and it is our responsibility as Justices to reconcile this issue.

B

There is a vast array of liberty interests that exist within our society. In this case, we must consider one: employment. Petitioners argued that Americans should have the constitutional guarantee to seek employment in the Executive Branch without fear of being blacklisted—unless a justified EBB has been issued. We agree.

Arguments have been made by petitioners saying that "[a]ll people in the United States have a right to be employed." Brief for Petitioners 9. We make a subtle yet definitive distinction in this case: that Americans have a fundamental right to *seek* employment.

Petitioners originally presented their questions about EBB's as a question of "lawful justification." Brief for Petitioners 1. Petitioner JoshMiller later argued that simply "good cause" was not enough to satisfy due process. We

agree with the latter sentiment.

We have previously asked the question of "has fair procedure been followed before depriving a person of life, liberty, or property . . . ?" *Trump* v. *United States*, 2 U. S. 10, 57 (2017) (*per curiam*). We referred to the *Mathews* test in that case. Looking at these three prongs, we must determine whether procedural due process was violated in the case of petitioners.

1

We must first identify the "private interest that will be affected by the official action." *Matthews* v. *Eldridge*, 424 U.S. 319 at 335 (1976). As mentioned, *ante*, freedom to seek employment is a strong private interest that must be considered when due process is concerned. The first prong is met.

2

Second, the "risk of an erroneous deprivation of such interest through the procedures used." *Ibid*. This, like the first prong, is quite straightforward in this case. There is *no* procedure to even be considered in the case of Executive Branch Blacklists. The President made no such effort to provide opportunities for petitioners to explain themselves, to submit documents that might be helpful to their case, did not provide any methods for appeal, or any other such process that would have afforded petitioners their due process rights. The second prong is met.

3

Lastly, the "Government's interest" and the "administrative burdens that the additional or substitute procedural requirements would entail." *Ibid.* For devTools, it would seem as if this prong were met. The President's description of his card would indicate that there was at least some semblance of the idea that blacklisting devTools would bring security to the Executive Branch. However, it is important to

note the history of the alleged offense. President TheySinned's administration was over three years ago. The immediate danger that is supposedly present with devTools employment in the Executive Branch would not seem to be as dire or great such that it would supersede the due process that is normally afforded to this nation's citizens. As discussed, *ante*, JoshMiller was given no reasoning for his EBB and thus, the government has not demonstrated the interest that would supersede his due process rights.

C

We must also rule on whether the President may terminate any individual that is employed in the Executive Branch. Simply put, they cannot.

As was discussed, *ante*, the President has a vast executive power. Within this power it is assumed that the President has control over employment within the Executive Branch. However, this power is limited. The President cannot simply terminate any individual that they so choose. The simple idea that "[t]he power of removal is incident to the power of appointment" holds true in this case. *Myers* v. *United States*, 272 U. S. 52, 48 (1926). The Constitution articulates the various offices the President may appoint and additionally that the President may appoint other offices "which shall be established by Law." Art. II, §2, cl. 2. Under *Myers*, it makes perfect sense that the President would be able to fire these specific types of officers—after all, the President was the one that appointed them in the first place.

It has been argued that, since the President appoints, say, a head of an agency, and *that* agency head hires a hypothetical agent, the President would be able to fire said agent. The argument says that, because the President directly appointed that agency head, then there is conjured up some indirect power to then also hold firing jurisdiction over the agent. This argument is inconsistent with *Myers*

and inconsistent with the words that followed the Presidential appointment power: "the Congress may by law vest the appointment of such inferior Officers, as they think proper in the President alone. . . or in the Heads of Departments." *Ibid.* The Constitution makes a distinction that, not only is it possible under the *Myers* framework that the President is excluded from firing certain Executive Branch officials, but it is explicit in some cases. Because department heads would be the individual directly involved with the appointment of certain subordinate officials, *Myers* dictates that the President would be precluded from firing that official.

* * *

The separation of powers is an important principle that must be upheld at all times when considering the review of the other branches of government. However, this review should not be dismissed simply because we may be faced with a difficult case. It is our duty to reconcile the various interests that are created by the constitution and in this case, we are exercising that duty.

For the foregoing reasons, Executive Branch Blacklists must adhere to the due process requirements enumerated by the *Matthews* test from the Fifth Amendment, Executive Branch Blacklists must demonstrate good cause for their issuance, and Executive Branch Blacklists may be reviewed by the District Court (or any lower courts that may arise) for their constitutionality.

For further foregoing reasons, the President of the United States does not have an unlimited right to terminate Executive Branch officials or employees for whom they did not have direct involvement in their appointment.

II

Additionally, petitioners were declared as National Security Threats (NST's) unilaterally by President Reset4K, presumably using Section 108(ix) of the Intelligence Apparatus Reform Act of 2020 (IARA).

A

The Intelligence Apparatus Reform Act of 2020 re-establishes the National Security Council, a decision-making body tasked with various duties. Among them is the declaration of National Security Threats. Unlike Executive Branch Blacklists, there are clear criteria to being designated as a NST, among them being those who are "involved with illegal activities that constitute threats to the national security of the United States," and must be confirmed/approved by a "majority of the [National Security Council]." Intelligence Apparatus Reform Act of 2020 at 7. Furthermore, NST designations may be appealed if "the declaration is ungrounded in federal law or regulation." *Ibid* at 8. The National Security Threat designation process in its current iteration satisfies the Matthews test such that it does not infringe on the due process rights when such declarations are made by the National Security Council. When the President is concerned, that is another story.

B

Under Section 108 (ix) of IARA, the President "may declare and revoke national security threats, without the consent of the Council, for any reason." *Ibid*. This power comes with great cost. As was the same issue with Executive Branch Blacklists, there are great liberty interests to be considered. The difference between this power and that which the National Security Council (NSC) holds is that the NSC must come to a majority consensus on whether to declare an NST. By doing so, they are forced *de facto* to have a clear view and understanding of the facts at-hand. A President acting unilaterally does not.

Furthermore, the President may revoke NST designations at any time—without NSC consent, *ante*. This power directly supersedes that given to the NSC over the appeals process set out in Section 108(viii). In the same way that EBB's do not allow any form of due process to be carried out,

the Presidential power regarding NST's lacks any form of due process.

* * *

As we said previously regarding this law, it is not our duty to determine whether it is good or not—simply whether it is constitutional.

For the foregoing reasons, we declare Section 108(ix) of the IARA unconstitutional and strike it down. We do not pass judgment on any other provision of the IARA.

III

We must now address the arguments made by the dissent—however thoroughly-veiled they may be.

The dissent would have this Court restrain itself from our constitutionally mandated duties simply because we have never issued a decision in this specific regard. If we were to always shy away from new cases, then our functions would have been obsolete since this Court's inception in 1789.

It would make sense that the dissent would assume that petitioners' lack standing on the grounds that they have not suffered an injury in fact. After all, we have all been on this bench long enough to become detached from the struggles of everyday Americans. JUSTICE BORK would have us believe that because petitioners did not actively seek employment whilst under their EBB designation, they were not actually injured. This line of thinking is faulty.

The analogy offered by JUSTICE BORK is that remote closures of opportunity have no tangible effect on those who are seeking separate avenues. However, this rationale forgets an important common-sense argument: Why would someone seek out a position if they know they are bound to fail? It is a complete waste of time for an individual to go out looking for failure. Furthermore, the dissent articulates that for the petitioners to even qualify for standing, they would have had to be denied the employment process on explicit grounds that it was because of a blacklist. Again, it

would seem that JUSTICE BORK'S lack of recent involvement in public sector employment would have shielded him from the knowledge that those who are given EBBs are rarely given interviews in the first place.

The dissent would further contend that, if EBBs were indeed unconstitutional then we would have seen a controversy before this Court concerning them. To that, we can analyze literally all of American history: everything is (widely) assumed to be constitutional until it is judged as not. Separate but equal was enforced as constitutional until this Court's decision in *Brown*. Discrimination on the basis of sex, specifically regarding gay and transgender individuals, was also lawful and Constitutional in several states until the Court's recent ruling in *Bostock*. Indeed, agency administrators should "prioritize constitutional fidelity over the orders of their superiors when the two are at odds." *Post*, at 4. However, it is also the Constitutional duty of the President to ensure that their own orders are constitutional in the first instance. Our government structure relies on the trust that the actions carried out by officials in the highest echelons of power are constitutional and lawful and can be reliably judged as such. Instead of shifting the blame on those whose duties are to carry out the President's orders, we should instead look to the root of this controversy: the powers of the President of the United States.

When looking towards the future effects that our holding will have, the dissent would have us hold back once again because there is no "guarantee a blacklisted individual [would] receive an executive job." *Post*, at 5. This notion goes right to the heart of this case. Petitioners were denied a liberty interest. Liberty is defined as "the quality or state of being free" and, more specifically, "the power to do as one pleases." Merriam Webster's Dictionary. It is the agency's prerogative to decide who is and is not employed within their respective agency. However, it is an infringement of

Americans' constitutional rights to deprive that liberty interest without the due process of law. There cannot be any employment decision liberty if an applicant has been blacklisted from applying in the first place. This case's purpose is indeed, as the dissent notes, to "[remove] the EBB from the scale." *Post*, at 5. This is necessary because, in their current implementation, the EBB process in and of itself is unconstitutional and deprives the liberty of those seeking employment and those whose decisions it is to make employment decisions.

There is an important point of view to consider in this case. The dissent notes about the powers that agency heads have in their hiring powers. More specifically, how they can choose to not hire someone if they so choose. However, what about those who they *do* want to hire and have been blacklisted because of an EBB? The flip side of this argument illustrates the severe injustices that are carried out by unfettered EBB's: Americans are deprived of their liberty to seek employment and agency heads are deprived of their employment choices.

The dissent further notes that mootness should make this Court rule in respondent's favor. However, this idea is wrong. As discussed, *supra*, Presidents have utilized their blacklist power time and time again. President Reset4K was not the first, nor will he be the last. The simple fact that the original case argued before us has now become moot is not a reason to dismiss it in its entirety. To think as such is, quite frankly, shortsighted. Executive Branch Blacklists are a designation of high contention in the United States and the implications of this case will not only affect devTools or JoshMiller but will affect all future individuals who are marked as blacklisted from the Executive Branch.

The Court's holding of employment as a liberty interest has, supposedly, been "made up" and is not "deeply rooted in this Nation's history and tradition." *Post*, at 7–8. It

would seem that JUSTICE BORK has forgotten about a little thing called employment discrimination law. If we look back to the Civil Rights Act of 1964, it mandates that discrimination in employment on the basis of "race, color, religion, sex, [and] national origin" is unlawful. *Ibid.* Is this not in and of itself a preservation of the idea that Americans have a right to seek employment unimpeded by unlawful and unconstitutional outside forces? It has been 56 years since the passing of this piece of legislation and it has yet to be struck down as unconstitutional by this Court.

Our governmental structure is one that comprises of three branches, checking on the powers of each other. The dissent would have this Court refrain from involving ourselves in "constitutionalizing all employment decisions" because it would "effectively give the courts the final say on all policy surrounding employment." *Post*, at 10. If we are not forgetting something, the courts are indeed often the last avenue for rendering decisions in which there is controversy between the Constitution and the actions of the other branches—that is one of our primary duties. Subjecting the branches to judicial review is not an overreach of our power. Whether JUSTICE BORK likes it or not, the anytime review clause of the Constitution explicitly gives us the power to check the other branches. He may think that it is an overreach of our power—to that I say consult the Constitution that gives it to us in the first place.

The dissent additionally alludes to the idea that since private companies can refuse to hire individuals, it should be alright for the federal government to do the same. They are forgetting an important question in this regard: Why? *Why* is the private employer refusing employment? As discussed, *supra*, a private employer cannot refuse employment because of, say, a person's race. This argument from the dissent falls flat on its head when combined with Title VII's provisions.

JUSTICE BORK makes additional arguments against our

holding that the President cannot fire any individual they so choose in the Executive Branch. JUSTICE BORK asks, "who gets to define [who the President can fire]? Us or Congress?" If he had read *Myers*, he would have known that this Court already weighed in on this issue and he would know that it is ultimately the Constitution and Congress who gets to decide. *Myers* held that those individuals for whom the President had direct involvement in their employment are subject to termination from the President themselves. If Congress prescribed an office to be appointed by the President, or say an Executive Order establishes a new office, the President may fire that officeholder. If neither Congress nor another medium prescribed it, then the President doesn't have that unlimited right. It is as simple as that—reading our past precedents and applying them.

When referring to our striking of section 108(ix) of IARA, the dissent fails to make a substantive argument. Its sole attempt is to frame the argument in such a way so that it would appear we are taking away some Constitutional right the President holds. The Constitution did not prescribe the President the power to declare National Security Threats—Congress did. When analyzing this section with the relevant Constitutional provisions, as discussed *supra*, it fails to meet the due process requirements of the Fifth Amendment.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 09–20

DEVTOOLS, ET AL., PETITIONERS *v.* UNITED STATES

ON WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

[June 27, 2020]

JUSTICE BORK, with whom JUSTICE HARLAN joins, and with whom JUSTICE PITNEY joins except as to the penultimate paragraph, dissenting.

If we want to stop rogue agents, we should stop taking away the President's tools to fight them with.

Since 2016, the executive branch has had some form of an "executive branch blacklist," which names every person whom the executive branch has deemed categorically unfit for employment. The issuance of an EBB is no small matter. Rather, for one to issue, it takes the personal approval of the President of the United States himself. When he issues an EBB, the President directs the executive branch's broad discretion over who it chooses to employ.[1] Until now, the Court has never reviewed that type of decision. For our first time, some hesitation would've been normal.

But the majority seems unphased. Casting caution to the wind, the majority proceeds to make three stunningly wrong arguments. The majority begins by saying that an EBB implicates the due process "liberty interes[t]" in the "freedom to seek employment."[2] Of course, in reality, no such generalized "liberty interest" in "seek[ing] employment" actually exists, nor would an EBB even implicate it

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[1]See *Caldwell* v. *United States*, 9 U. S. ___, slip op. 2 (identifying an employment blacklist as a traditional "Executive Branch . . . prerogative").

[2]*Ante*, at 2–3.

if it did. The majority next claims that the President lacks an "unlimited right to terminate Executive Branch [employees]" whom he didn't personally have a hand in appointing.[3] However, given that the President isn't just the *head* of the executive branch, but the constitutional *embodiment* of it—and that all executive branch employees are functionaries of *his* authority—this is clearly wrong.[4] Finally, the majority finds it "lack[ing]" in "due process" for the President—the country's chief national security officer—to be able to "unilaterally" designate threats to national security without the support of his unelected advisors.[5] That, of course, makes no sense.

In the process of making these incorrect arguments, the majority also brushes aside key threshold questions our precedent requires us to ask, such as: did the petitioners have standing to bring this case? If they did, did they lose it when their EBBs were revoked (was their case mooted)? Under our precedents, I'd say they lacked standing in the beginning and, regardless, possess only moot claims now.

Because the majority ignores these threshold questions and then gets the merits wrong, I respectfully dissent.

I

The petitioners lacked standing and, even otherwise, their case is now moot.

A

I've never agreed with our application of standing doctrine to anytime review cases, but if we are to apply it to some anytime review cases, in the interest of fairness, we

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[3] *Ante*, at 5–6.

[4] See Art. II, §1, cl. 1 (vesting the "executive Power" in the "President of the United States of America" alone).

[5] *Ante*, at 7.

must apply it to all of them.[6]

Standing doctrine asks if a petitioner (1) has suffered an injury in fact, (2) if the injury in fact is fairly traceable to the challenged conduct, and (3) if a favorable judgment would likely redress the injury.[7] If all three prongs return "yes," then a petitioner has standing. If even one is a "no," however, their case must be dismissed. In this case, the petitioners strike out on all three counts.

1

The petitioners have not yet suffered an injury in fact.

Being issued an EBB might seem like a bad thing—and it definitely is—but it isn't an injury in fact on its own. To count as one, an injury has to have a tangible impact. It has to mean something more than a risk of "hypothetical" future harm.[8] But that's all an EBB stands for. An EBB just means that when you try and get a job from the executive branch, you'll probably be turned away. But not every person who receives an EBB was actually in the market for an executive branch job, nor (for those that were) was there any guarantee they would've actually received one in the absence of their blacklist.

Being "deprived" of something you didn't want and weren't going to receive isn't an injury in fact because, in practical terms, it doesn't mean anything. Consider an analogy: if you wanted to go cherry picking at an Atlanta farm, would you consider yourself "injured" by the closure of, say, a dragon-hunting ranch in Afghanistan on the same day? Of course not. For starters, you were looking for cherries in Atlanta, not dragons in Afghanistan; and second,

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[6]See *Heave* v. *United States*, 5 U. S. 85, 88 (BORK, J., concurring in judgment) (identifying as a problem with our anytime review jurisprudence the fact that we feel free to selectively apply it).

[7]*Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561.

[8]*Id.*, at 560.

even if dragons were what you were looking for, let's be honest, you weren't going to find them anyways. In the same way, to establish an injury in fact in this case, the petitioners would have to show they made a legitimate attempt to get an executive branch job (whether that be by applying for a job, trying out for one, interviewing, etc.) and were denied *because of* their EBBs. That is, they have to be able to demonstrate that their performance in the hiring process was of the quality that would've actually gotten them the job but for them being blacklisted. Only then have they actually been injured in fact—by being deprived of something they both wanted and were actually going to receive.

The petitioners don't make either of these showings. On the contrary, the petitioners consider being blacklisted an injury in fact itself. As I've shown, that's clearly incorrect.

2

Even if being blacklisted was alone enough to create an injury in fact, the harms which come with that aren't fairly traceable to the issuance of the EBB itself. Instead, they come from the implementation of that blacklist by those who are actually responsible for making employment decisions and who give effect to EBBs: agency administrators.

In our government, every official—high and low—takes an oath to "support the Constitution."[9] This oath creates the expectation that those positioned to make decisions will prioritize constitutional fidelity over the orders of their superiors when the two are at odds.[10] Therefore, if EBBs *are* unconstitutional, an agency administrator would be within their rights to refuse to give effect to one. If they exercise that right and refuse to give effect to an EBB, the petitioners have suffered no harm because they can receive employment uninhibited, but if the administrator chooses to give

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[9]Richard Re, Promising the Constitution, 110 N. W. L. Rev. 299, 301 (2016).

[10]*Id.*, at 306, 308, 313.

effect to an EBB, then it's *their* decision which is the spawn of the harms the petitioners actually experience. Thus, the petitioners cannot show fair traceability when challenging the EBB itself head on. An EBB means nothing unless given tangible effect by agency administrators.

3

There is also no possibility of redress at this time because an order declaring an EBB unconstitutional wouldn't guarantee a blacklisted individual they'd receive an executive branch job; it'd merely provide them the right to *compete* for one more effectively by removing the weight of an EBB from the scale. Remember: the petitioners haven't actually attempted to obtain an executive branch job nor have they tested if an agency administrator would actually deny them employment *because of* their EBBs, meaning the only harm they face is the prospect of unfair competition for an executive branch job. But "freestanding 'competitive injuries' do not constitute legal wrongs traditionally redressable by the courts."[11] Their claim would only be anything more than a competitive injury if they were denied something concrete (like employment) because of their EBBs. That's not the case here.

In this case, the petitioners essentially complain that they face "increased competition" not because of unlawful conduct by their fellow competitors but because of "*government action* that benefits their competitors."[12] In other words, their fellow competitors are engaging in lawful competition but the petitioners face an additional hurdle because of a third party's actions. This Court, however, has consistently held that lawful competition "does not abridge or impair any [legal or equitable] right."[13] It cannot be the

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[11] *In re Trump*, No. 18–2486, Doc. 100, slip op. 32 (Wilkinson, J., dissental).

[12] *Id.*, at slip op. 34.

[13] *New Orleans, M. & T.R. Co.* v. *Ellerman*, 105 U. S. 166, 173–174.

basis for standing.

Additionally, the petitioners do not present a redressable claim because the redress they seek isn't tailored to their injuries. They seek the total invalidation of their EBBs, but haven't suggested that the bulk of that invalidation would mean anything concrete to them. For example, facial invalidation of their EBB might affect their ability to compete for employment at the Department of Transportation, but they haven't produced any evidence that they might wish to compete for such a job.

Under traditional standing principles, this problem is avoided by requiring that the petitioners challenge particular negative acts against them and nothing more. They could properly challenge adverse employment decisions against them based on an EBB, such as their refusal in a specific tryout, interview, or application they otherwise would've been employed through. They can't, however, challenge the EBBs themselves because that would afford them overbroad relief.[14]

B

Regardless, even if the petitioners had standing originally, their case is now moot because the President revoked their EBBs and there isn't a likelihood that he will change his mind the "second our backs are turned."[15]

When a respondent or defendant voluntarily ceases their allegedly unlawful conduct, the burden is on the petitioner or plaintiff to show that it's "likely that there will be a 'resumption of the challenged conduct as soon as the case is dismissed.'"[16] The Court didn't request additional briefing on mootness and, on the record before us, there isn't any indication that a resumption of the challenged conduct is

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[14] Cf. *United States* v. *Sineneng-Smith*, 590 U. S. ___, slip op. 6–9.

[15] *Ultiman* v. *United States*, 6 U. S. 19, 23.

[16] *Ibid*. (quoting *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 174)

likely. Additionally, a considerable amount of time has passed since the revocation of the petitioners' EBBs and no relevant factors have pointed towards resumption. If the President's revocation of the petitioners' blacklists was disingenuous, surely there would've been some indication by now that supported the notion. If there was, the petitioners don't identify it.

II

Although I don't think the petitioners had standing originally and now just have a moot case, for the sake of completeness I address the merits as well. Let's just say that doesn't fare much better.

A

The majority's first argument is that the issuance of an EBB implicates a "liberty interest" in the "freedom to seek employment."[17] So the Due Process Clause's protections apply and a "fair procedure" is required.[18] The first problem is that the "liberty interest" relied on by the majority is entirely made up. The second is that an EBB wouldn't implicate it even if it existed.

1

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." Under our precedents and the Constitution's original understanding, *no* process is due if one is not deprived of "life, liberty, or property."[19] So in order for us to question if the government provided a sufficient process, we must first identify the protected interest at stake. The majority identifies an interest (rather broadly, the "freedom to seek employment") but fails to ground that interest in any analysis of law or tradition.

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[17] *Ante*, at 2–3.

[18] *Ante*, at 3.

[19] *Swarthout* v. *Cooke*, 562 U. S. 216, 219 (*per curiam*).

Our precedent frowns on this approach. As we've explained, "extending constitutional protection to an asserted right or liberty interest . . . place[s] the matter outside the arena of public debate and legislative action."[20] Removing *any* subject from democratic discourse is no light matter. But where we relocate that subject (the judicial arena) accentuates the need for hesitation: the "guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended."[21] Accordingly, "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field."[22]

Thus, before we confer constitutional status upon any new "liberty," we've required a "careful description of the asserted fundamental liberty interest" and a demonstration that the interest is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed."[23]

The majority neither provides a "careful description" of the contours of its newly-created right, nor does it ground the right in the "history and tradition" of our Nation, much less the "concept of ordered liberty." As I will show, the majority is wrong on every point of this checklist.

The Not-So-Careful Description

The majority doesn't carefully describe the contours of its "freedom to seek employment." Most importantly, it fails to meaningfully distinguish this right from other purported rights rejected by our cases.

In *Waters* v. *Churchill*, the Court acknowledged that "the government as employer indeed has far broader powers

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[20] *Washington* v. *Glucksberg*, 521 U. S. 702, 720.

[21] *Collins* v. *Harker Heights*, 503 U. S. 115, 125.

[22] *Ibid.*

[23] *Glucksberg*, *supra*, at 720–721.

than does the government as sovereign."[24] This is so because, in the view of the Court then, there was no constitutional right to government employment.[25] While government interference with the rights of a private citizen was to be scrutinized closely, the government "has considerable leeway in determining the conditions of employment for federal employees."[26] Indeed, "historically . . . it has been almost exclusively the role of the Executive Branch and Legislative Branch to determine what rights to afford employees."[27]

Against this backdrop, one would expect the majority to provide *some* explanation of what has changed, but all the majority manages to provide is a denial that it's adopting the very right rejected by our past cases. The majority declares that it is not adopting a "fundamental right to employment."[28] No, the majority is instead adopting a right to be "*considered in the first place*."[29] Beyond peradventure, this is a distinction without a difference. The result of both is that the government loses its right to make employment decisions "at-will."[30]

This emphasizes the majority's failure to comply with *Glucksberg*. The majority's use of a vague, overarching description of the right allows it to muddy the water and deny it is doing what it is actually doing: constitutionalizing the process of federal employment. From here on out, it will be the courts—not Congress or the President—which will finally determine what "fair" processes are required for employment decisions. That's not how our government is supposed to work.

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[24] 511 U. S. 661, 671.
[25] *Ibid.*
[26] *Benda* v. *United States*, 6 U. S. 24, 32.
[27] *Ibid.*
[28] *Ante*, at 2.
[29] *Ibid.* (emphasis added).
[30] *Benda*, *supra*, at 32.

The Not-So-Historically-Based Right

As I just demonstrated, the right recognized by the majority is not supported (or even supportable) by history. The majority can cite no active precedent of this Court which has established a right to federal employment. This is telling.

When the scope of an open-ended phrase—such as "liberty"—is not "readily apparent from the phase of the Constitution . . . practice should illuminate meaning."[31] This axiom is "especially instructive when one branch claims a novel power against another"—such as the judiciary asserting the authority to determine employment policy for the country.[32] When one branch does so, but "cannot point to a single instance of having used it," the most probable explanation is the power doesn't exist.[33] Phrased differently, "when one branch claims to stumble upon a previously unknown font of authority that would materially affect the separation of powers, chances are it is grasping for something beyond its constitutional bounds."[34] That's the case here.

Constitutionalizing all employment decisions would effectively give the courts the final say on all policy surrounding employment. This would materially affect the separation of powers because it would deprive the President of the ability to control who works for him and it would deprive Congress of the ability to fix the rules binding the executive branch. And there's no precedent to support doing that. On the contrary, as I've documented, all precedent is *against* doing that.

It's clear that this right created by the majority is not

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[31] *Trump*, *supra*, slip op. 40; *Dames & Moore* v. *Regan*, 453 U. S. 654, 686.

[32] *Trump*, *supra*.

[33] *Ibid.*

[34] *Ibid.*

deeply rooted in our history or tradition.

The Not-So-Essential Liberty

The majority's brand new right to employment isn't essential to a system of ordered liberty, such that "neither liberty nor justice would exist if [it was] sacrificed."[35] At least not the way the majority uses it.

All past conceptions of the right to seek employment have been based in contractual liberty (the ability to enter into contracts without undue governmental interference). Think about it: if the government stepped in and ordered *private* companies not to hire you, they'd be preventing a private transaction from taking place—arguably interfering with your "liberty." But when you're looking to be hired by the government itself, it isn't a violation of your "liberty" for the government to turn you down. Would you consider it a violation of your "liberty" for a private company—without any government directive—to refuse to hire you? Of course not. And something that doesn't infringe on your liberty when done by a private actor doesn't automatically become an infringement when the actor becomes the government. If that were so, *everything* the government did would implicate "liberty" and require due process. That's obviously not how government works.

The "liberty" claimed by the petitioners is not the right to enter into an employment relationship *without government interference*, but the right to *force the government* into an employment relationship. Liberty, however, isn't a sword; it's a shield. It enables you to do certain things, but it doesn't let you force others to do certain things. Under *Glucksberg*, this isn't liberty.

2

Regardless, assuming *arguendo* that the majority was

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[35] *Ante*, at 8.

somehow right that there's a right to government employment protected as a due process "liberty interest," EBBs don't violate that interest.

If a government action is "narrowly tailored to serve a compelling state interest," it's constitutional even if it implicates a liberty interest protected by the Due Process Clause.[36] Facially, EBBs comply with this standard. They are often used to prevent government employment of gang members or other national security threats—those who have a propensity to go rogue. There is a compelling state interest in preempting rogue officers and EBBs are a narrowly tailored way of achieving that interest.

Maybe that isn't so for the petitioners—one is a former President and the other is a former White House Chief of Staff—but the petitioners don't present an as-applied challenge. They argue for (and the Court provides) facial relief respecting the EBB system. Application of strict scrutiny shows, however, that the EBB system is facially constitutional.

B

The majority next argues that the President doesn't have the "unlimited right" to fire executive branch employees whom he didn't personally have a hand in appointing.[37] Thus, the majority concludes, the current EBB system must be unconstitutional. This just literally doesn't make an ounce of sense.

If the President is the constitutional embodiment of the executive branch—which, if the founding generation is to be trusted, he is—and executive branch employees are merely extensions of his constitutional power—which, if we are to be honest, they are—then it's completely insane to

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[36] *Reno* v. *Flores*, 507 U. S. 292, 301–302.

[37] *Ante*, at 5–6.

say he can't fire a whole category of them because of something entirely arbitrary like who appointed them on his behalf. And even if his right to fire those employees isn't "unlimited," who gets to define those limits? Congress or us? And if it's us, what's the reason for creating a new limit that invalidates the current EBB system? Unfortunately, the majority doesn't reason through any of these issues on its way to its holding.

1

The President has the absolute right to control any member of the executive branch. This includes the power to fire them. As the sole repository of the Constitution's "executive Power," the President must be allowed to control his functionaries.[38]

The Constitution divided the "powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial."[39] Article II vests "[t]he executive Power" completely "in a President of the United States of America" and charges him with "tak[ing] Care that the Laws be faithfully executed."[40] These are his relevant constitutional responsibilities and they are his alone. But the framers weren't shortsighted. They understood the "impossibility that one man should be able to perform all the great business of the State," so provided Congress with the power to constitute agencies that would "*assist* the supreme Magistrate in discharging the duties of his trust."[41]

What we refer to as the "executive branch"—the executive agencies and their employees—exists only to "assist" the President in "discharging" *his* constitutional functions.[42] Yes, these agencies exist only by Act of Congress,

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[38]Art. II, §1, cl. 1.
[39]*INS* v. *Chadha*, 462 U. S. 919, 951.
[40]Art. II, §1, cl. 1; *id.*, §3.
[41]30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939).
[42]*Ibid.*

but their origin isn't useful in gathering the degree of control the President must *constitutionally* have over those whose only power is his. Under the Constitution, the President can control all executive officials, down to the very last employee. It'd be untenable to say Congress couldn't control the power of legislating or the courts couldn't control the power of judging, so why would it be any different with respect to the President and his constitutional powers? It wouldn't.

It also doesn't matter who appointed a specific employee because the final source of any employee's authority is the President. The majority reaches the opposite result only by calling upon *Myers* v. *United States*[43] to stand against itself. *Myers* didn't limit the President's power of removal. On the contrary, it held that an Act of Congress prohibiting the President from removing his principal officers without Senate approval violated the Constitution because that interfered with the President's control of his constitutional powers. The majority limits *Myers* to that holding and then says anything outside of that area must come out the opposite way. If there was a reason for this, then sure, but the majority blames that result on *Myers* itself and offers no explanation.[44]

Under the original understanding of the Constitution, the President has the unlimited power to fire any employee of the executive branch, no matter who appointed them.

2

Regardless, even if the Constitution did countenance limits on the President's power to remove his subordinates, those limits would have to come from Congress—not the courts. Congress, not us, has the legislative power and that

[43] 272 U. S. 52.

[44] *Ante*, at 5.

means that it, not us, has the power to set policy. Determining what limits *should* exist on the President's power is a policy choice. We have explained that "policy determination[s]" are for the elected branches to make; our role, on the other hand, is to apply—not invent—"judicially discoverable and manageable standards."[45]

So if the President's power to control his employees isn't "unlimited," that can't be just because we disagree with the way he uses his power. It would have to be because *Congress* (the Constitution's repository of "legislative power")[46] has legitimately established limits on the President's power.

3

Finally, even if the Court hadn't been wrong on the previous two points (and this would be a terribly large if), we don't have the luxury of setting up rules just because we think they sound wise. "Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be *principled, rational, and based upon reasoned distinctions*."[47] So for there to be any basis to a new limit declared by us, we must have a principled and rational explanation for it. If one exists, the majority doesn't lay it out for us and, in my view, it'd be a pretty weak case anyways.

EBBs help prevent likely rogue agents from gaining access to executive branch agencies where they can do damage. The majority is wrong if it thinks requiring the President to water down that tool will produce a beneficent result. What the majority mandates is the equivalent of "throwing away your umbrella in a rainstorm because you

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[45] *Baker* v. *Carr*, 369 U. S. 186, 217.

[46] Art. I, §1.

[47] *Vieth* v. *Jubelirer*, 541 U. S. ___, slip op. 8–9.

are not getting wet."[48] That's just not rational.

C

Finally, the majority overturns section 108(ix) on the rationale that allowing the President, our Commander-in-Chief and lead national security officer,[49] to declare national security threats without consulting his unelected advisors violates the Constitution. To state this argument is to refute it. I'm literally not going to say any more about it.

* * *

The majority gets a lot wrong in this case. And the majority's wrongness will have far-reaching impacts for us and for the country. By excusing the lack of standing, the majority signals that if a case is *really* interesting, we'll dispense with the rules we arbitrarily apply to cases we don't want to hear.[50] By glossing over mootness, the majority declares that any who wish for advisory opinions can find them here. By creating a heretofore-unknown liberty interest in federal employment, the majority robs the people's representatives of their control over federal employment policy. By generating "limits" on the President's ability to control his subordinates out of thin air, the majority trashes the "energy in the executive" the framers considered a "leading character in the definition of good government."[51]

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[48] *Shelby County* v. *Holder*, 570 U. S. ___, slip op. 33 (Ginsburg, J., dissenting).

[49] *Caldwell* v. *United States*, 9 U. S. ___, slip op. 14 (holding that "protecting our Nation's national security is among the most important functions of the President.").

[50] It seems that when standing doctrine helps us reach an outcome we want, we use it as window dressing. But when it'd stand in our way, we treat it like spoiled salad dressing. Standing doctrine is not required in the anytime review context and our "prudential" use of it creates a serious (and here proven) potential for abuse. The only way to prevent that abuse is to expressly do away with it. That continues to be my position.

[51] The Federalist No. 70.

By creating a constitutional rule requiring the President to consult with his unelected advisors before he makes national security decisions, the majority erodes democratic rule. And by doing all of this, the majority opens the doors of the executive branch to rogue agents who intend nothing but harm.

I respectfully dissent.