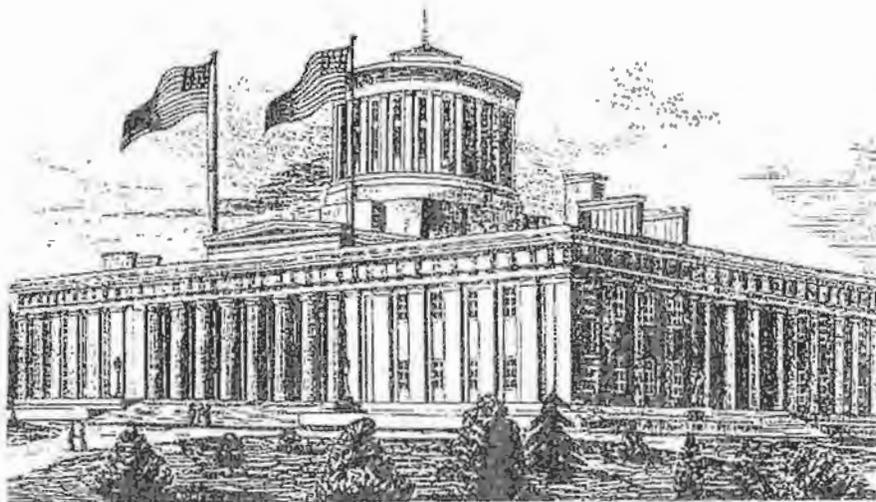


*CLE Seminar*

## **Recent Supreme Court Cases**



Friday, October 23, 2015  
ODOT Auditorium  
1980 West Broad St.  
Columbus, OH

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**Recent Supreme Court  
Cases**

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**Registrants must attend the entire seminar  
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This course has been approved by the Supreme Court of Ohio Commission on Continuing Legal Education for 3.0 total CLE hours of instruction.

## The Speakers

**Professor Ruth Colker** is a Distinguished University Professor and Heck Faust Memorial Chair in Constitutional Law at The Ohio State University Moritz College of Law. A graduate of Harvard University and Harvard Law School, she is one of the leading scholars in the country in the areas of constitutional law and disability discrimination.

**Judge David A. Hejmanowski** is a judge of the Delaware County Probate/Juvenile Court. He received his undergraduate degree, with honors, from Hiram College in 1996 and his J.D. from The Ohio State University Moritz College of Law in 1999. He was elected to a six-year term as Judge in November of 2014.

**David J. Owsiany** has been the executive director of the Ohio Dental Association since 2002. He is a past president of the Buckeye Institute for Public Policy Solutions and previously served as chief of policy for the Ohio Department of Insurance. He received his J.D. from Washington University School of Law in St. Louis and his B.A. from the University of Michigan in Ann Arbor.

# AGENDA

### Registration

8:00 am - 8:25 am

### Welcome and Introduction

8:25 am - 8:30 am

### *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project*

8:30 am - 9:00 am

*Professor Ruth Colker*

### *Obergefell v. Hodges*

9:00 am - 9:45 am

*Judge David A. Hejmanowski*

### *North Carolina Board of Dental Examiners v. Federal Trade Commission*

9:45 am - 10:15 am

*David J. Owsiany*

### BREAK

10:15 am - 10:30 am

### *Arizona State Legislature v. Arizona Independent Redistricting Commission*

10:30 am - 10:45 am

*Lynda Jacobsen*

### *Young v. United Parcel Service, Inc.*

10:45 am - 11:15 am

*Pat Dull*

### *EEOC v. Abercrombie & Fitch Stores, Inc.*

11:15 am - 11:45 am

*Megan Hudson*

### Closing Remarks

11:45 am - 11:50 am

## The Speakers

**Lynda Jacobsen** is the Division Chief for the Judiciary and Elections Division of the LSC. Before becoming a Division Chief, she was a staff attorney working primarily in the areas of elections, campaign finance, and redistricting. She is a graduate of The Ohio State University Moritz College of Law and received her B.A. in Political Science from Hiram College.

**Pat Dull** is an Assistant Attorney General in the Civil Rights Section of the Attorney General's Office. As an Assistant Attorney General, he advises the Ohio Civil Rights Commission on unlawful discrimination in employment, housing, and public accommodations. He is a graduate of The Ohio State University Moritz College of Law.

**Megan Hudson** is an Associate Assistant Attorney General in the Civil Rights Section of the Attorney General's office. She represents the Ohio Civil Rights Commission and prosecutes allegations of employment discrimination, fair housing violations, and discrimination in places of public accommodation. She is a graduate of the University of Cincinnati College of Law.

***Texas Dept. of Housing and Community Affairs v.  
Inclusive Communities Project***

Professor Ruth Colker  
The Ohio State University Moritz College of Law

Professor Ruth Colker is a Distinguished University Professor and Heck Faust Memorial Chair in Constitutional Law at The Ohio State University Moritz College of Law. A graduate of Harvard University (A.B. 1978) and Harvard Law School (J.D. 1981), Professor Colker is one of the leading scholars in the country in the areas of Constitutional Law and Disability Discrimination. Professor Colker was designated a Distinguished University Professor in 2009, the Ohio State University's highest academic honor. The Distinguished University Professor title is awarded permanently to no more than three exceptional faculty members a year. The title recognizes accomplishments in research, scholarly or creative work, teaching, and service that are both distinguished and distinctive. Professor Colker was also a recipient of the University's Distinguished Lecturer Award in 2001, the University's Distinguished Diversity Enhancement Award in 2002, and the University Distinguished Scholar Award in 2003.

Texas Dept of Housing and Community Affairs  
v.  
Inclusive Communities Project  
  
Professor Ruth Colker  
October 23, 2015

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Topics for Discussion



- Background on decision
- Holding in Texas Dept of Housing case
- Implications for other civil rights cases
- And Time for QUESTIONS!

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Factual Background

- Federal government provides low-income tax credits that are distributed through state agencies.
- Federal law favors the distribution of these tax credits for the development of housing units in low-income areas.

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### Legal Challenge

- The Inclusive Communities Project (ICP) is a nonprofit that assists low-income families obtain affordable housing.
- ICP sued Texas Housing Dept claiming that its selection criteria continued segregated housing patterns by its disproportionate allocation of tax credits to predominantly black inner-city areas in comparison with predominantly white suburban neighborhoods.

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### Trial Court: Disparate Impact Theory

- ICP established a prima facie case of disparate impact through statistical evidence.
- BOP shifted to Dept to prove "that there are no other less discriminatory alternatives to advancing their proffered interests."
- Because Dept could not meet its BOP, District Court entered a remedial order requiring the addition of new selection criteria for the tax credits such as:
  - Points for units built in neighborhoods with good schools
  - Disqualifying sites near hazardous conditions such high crime or landfills

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### HUD Regulation

- HUD promulgated a disparate impact regulation after trial court decision.
  - If plaintiff establishes a prima facie case through statistical evidence, then defendant must "prove that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."
  - If defendant establishes that burden than a plaintiff may prevail "upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."

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### Court of Appeals

- Found that disparate impact claims are cognizable under FHA but reversed and remanded to district court to apply the HUD regulations.
- Dept filed a petition for a writ of certiorari on the question whether disparate impact claims are cognizable under FHA.

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### Precedent from Other Civil Rights Statutes

- Relationship of FHA to two other civil rights statutes:
  - Supreme Court found that Title VII of Civil Rights Act of 1964 prohibited disparate impact in *Griggs v. Duke Power Co.* (1971) relying on language in section 703(a)(2) prohibiting employment actions that would "otherwise adversely affect" the status of an employee.
    - Defense in such cases was a "business necessity defense"
  - Supreme Court found that Age Discrimination in Employment Act of 1967 prohibited disparate impact in *Smith v. City of Jackson* (2005).
- Before rejecting the government's defense, a court must determine that a plaintiff has shown there is an "available alternative practice that has less disparate impact and serves the entity's legitimate needs."

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### Comparable Language in FHA

- Section 3604(a) prohibits practices that would make housing "otherwise unavailable"
  - That language found to focus on the consequences of an action rather than the actor's intent.
  - Similar to "otherwise adversely affect" language found in Title VII and ADEA.

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### Further Considerations

- o Congress was aware that all nine circuits had interpreted FHA as permitting disparate impact claims when it amended the statute in 1988 and left intact the existing statutory framework.
  - o Congress also adopted three amendments in 1988 that presumed availability of disparate impact theory.
- o Disparate impact theory is consistent with FHA's central purpose.
  - o Sought to bar zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods.

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### Limitations of Disparate Impact Theory

- o "Has always been properly limited in key respects that avoid the serious constitutional questions that might arise" otherwise.
  - o Cannot make a legal claim based on statistics alone.
  - o Disparate impact theory can be used to remove "artificial, arbitrary, and unnecessary barriers," not the displacement of "valid governmental policies."
  - o Aims to ensure that Housing Authorities' priorities "can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation."

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### Outline of Disparate Impact Framework: Step One

- Plaintiff must allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection because the challenged policy of the covered entity and the racial impact.
  - "If the ICP cannot show a causal connection between the Department's policy and a disparate impact - for instance, because federal law substantially limits the Department's discretion - that should result in dismissal of this case."
  - "Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision."
    - Court doesn't want entities to consider race defensively to avoid good policies merely because they might cause racial disparate impact.

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### Disparate Impact Framework: Step Two

- Governmental entities “must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes”
- Disparate-impact liability should solely remove “artificial, arbitrary, and unnecessary barriers” rather than displace “valid governmental and private priorities.”

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### Proper Remedial Orders

- Remedial orders should concentrate on the elimination of the offending practice that arbitrarily operates invidiously to discrimination on the basis of race.
- Courts should seek to eliminate racial disparities through race-neutral means.
- “Remedial orders that impose racial targets or quotas will raise more difficult constitutional questions.”

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### What Can Housing Authorities Do in the Future?

- “When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.”

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### Remand?

- Supreme Court cited Judge Jones' dissent with approval when she observed that the ICP must show a causal connection between the Department's policy and disparate impact.
  - Department may now argue that the disparate impact was caused by its compliance with federal law rather than by its own discretionary rules.
- If Fifth Circuit continues to rule for plaintiffs, it may have to impose a simpler remedy - eliminate a challenged policy rather than impose new policies.
- Will case come back to Supreme Court again?

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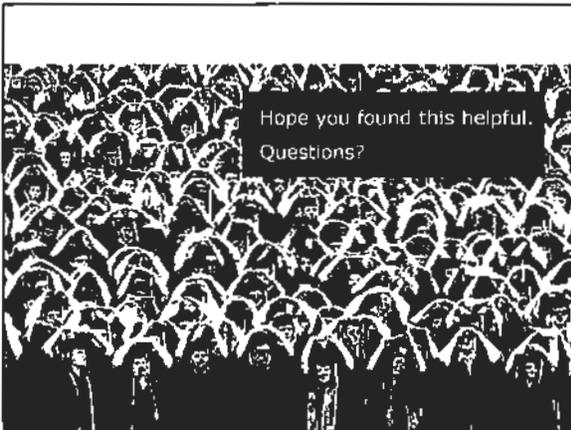
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## Syllabus

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

**SUPREME COURT OF THE UNITED STATES**

## Syllabus

**TEXAS DEPARTMENT OF HOUSING AND  
COMMUNITY AFFAIRS ET AL. v. INCLUSIVE  
COMMUNITIES PROJECT, INC., ET AL.**

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

No. 13–1371. Argued January 21, 2015—Decided June 25, 2015

The Federal Government provides low-income housing tax credits that are distributed to developers by designated state agencies. In Texas, the Department of Housing and Community Affairs (Department) distributes the credits. The Inclusive Communities Project, Inc. (ICP), a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing, brought a disparate-impact claim under §§804(a) and 805(a) of the Fair Housing Act (FHA), alleging that the Department and its officers had caused continued segregated housing patterns by allocating too many tax credits to housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. Relying on statistical evidence, the District Court concluded that the ICP had established a prima facie showing of disparate impact. After assuming the Department's proffered non-discriminatory interests were valid, it found that the Department failed to meet its burden to show that there were no less discriminatory alternatives for allocating the tax credits. While the Department's appeal was pending, the Secretary of Housing and Urban Development issued a regulation interpreting the FHA to encompass disparate-impact liability and establishing a burden-shifting framework for adjudicating such claims. The Fifth Circuit held that disparate-impact claims are cognizable under the FHA, but reversed and remanded on the merits, concluding that, in light of the new regulation, the District Court had improperly required the Department to prove less discriminatory alternatives.

The FHA was adopted shortly after the assassination of Dr. Martin Luther King, Jr. Recognizing that persistent racial segregation had

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INCLUSIVE COMMUNITIES PROJECT, INC.

Syllabus

left predominantly black inner cities surrounded by mostly white suburbs, the Act addresses the denial of housing opportunities on the basis of “race, color, religion, or national origin.” In 1988, Congress amended the FHA, and, as relevant here, created certain exemptions from liability.

*Held:* Disparate-impact claims are cognizable under the Fair Housing Act. Pp. 7–24.

(a) Two antidiscrimination statutes that preceded the FHA are relevant to its interpretation. Both §703(a)(2) of Title VII of the Civil Rights Act of 1964 and §4(a)(2) of the Age Discrimination in Employment Act of 1967 (ADEA) authorize disparate-impact claims. Under *Griggs v. Duke Power Co.*, 401 U. S. 424, and *Smith v. City of Jackson*, 544 U. S. 228, the cases announcing the rule for Title VII and for the ADEA, respectively, antidiscrimination laws should be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. Disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain the free-enterprise system. Before rejecting a business justification—or a governmental entity’s analogous public interest—a court must determine that a plaintiff has shown that there is “an available alternative . . . practice that has less disparate impact and serves the [entity’s] legitimate needs.” *Ricci v. DeStefano*, 557 U. S. 557, 578. These cases provide essential background and instruction in the case at issue. Pp. 7–10.

(b) Under the FHA it is unlawful to “refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to a person because of race” or other protected characteristic, §804(a), or “to discriminate against any person in” making certain real-estate transactions “because of race” or other protected characteristic, §805(a). The logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. The results-oriented phrase “otherwise make unavailable” refers to the consequences of an action rather than the actor’s intent. See *United States v. Giles*, 300 U. S. 41, 48. And this phrase is equivalent in function and purpose to Title VII’s and the ADEA’s “otherwise adversely affect” language. In all three statutes the operative text looks to results and plays an identical role: as a catchall phrase, located at the end of a lengthy sentence that begins with prohibitions on disparate treatment. The introductory word “otherwise” also signals a shift in emphasis from an actor’s intent to the consequences of his actions. This similarity in text and structure is even more compelling because Congress passed the FHA only four years after Title VII and four months after the

## Syllabus

ADEA. Although the FHA does not reiterate Title VII's exact language, Congress chose words that serve the same purpose and bear the same basic meaning but are consistent with the FHA's structure and objectives. The FHA contains the phrase "because of race," but Title VII and the ADEA also contain that wording and this Court nonetheless held that those statutes impose disparate-impact liability.

The 1988 amendments signal that Congress ratified such liability. Congress knew that all nine Courts of Appeals to have addressed the question had concluded the FHA encompassed disparate-impact claims, and three exemptions from liability in the 1988 amendments would have been superfluous had Congress assumed that disparate-impact liability did not exist under the FHA.

Recognition of disparate-impact claims is also consistent with the central purpose of the FHA, which, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of the Nation's economy. Suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability. See, e.g., *Huntington v. Huntington Branch, NAACP*, 488 U. S. 15, 16–18. Recognition of disparate-impact liability under the FHA plays an important role in uncovering discriminatory intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.

But disparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions that might arise under the FHA, e.g., if such liability were imposed based solely on a showing of a statistical disparity. Here, the underlying dispute involves a novel theory of liability that may, on remand, be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in allocating tax credits for low-income housing. An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest their policies serve, an analysis that is analogous to Title VII's business necessity standard. It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in the Nation's cities merely because some other priority might seem preferable. A disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas. Courts must

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INCLUSIVE COMMUNITIES PROJECT, INC.

Syllabus

therefore examine with care whether a plaintiff has made out a prima facie showing of disparate impact, and prompt resolution of these cases is important. Policies, whether governmental or private, are not contrary to the disparate-impact requirement unless they are “artificial, arbitrary, and unnecessary barriers.” *Griggs*, 401 U. S., at 431. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision. These limitations are also necessary to protect defendants against abusive disparate-impact claims.

And when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice, and courts should strive to design race-neutral remedies. Remedial orders that impose racial targets or quotas might raise difficult constitutional questions.

While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, race may be considered in certain circumstances and in a proper fashion. This Court does not impugn local housing authorities’ race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. These authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset. Pp. 10–23.

747 F. 3d 275, affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

No. 13–1371

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, ET AL., PETITIONERS *v.* THE INCLUSIVE COMMUNITIES PROJECT, INC., ET AL.

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

[June 25, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

The underlying dispute in this case concerns where housing for low-income persons should be constructed in Dallas, Texas—that is, whether the housing should be built in the inner city or in the suburbs. This dispute comes to the Court on a disparate-impact theory of liability. In contrast to a disparate-treatment case, where a “plaintiff must establish that the defendant had a discriminatory intent or motive,” a plaintiff bringing a disparate-impact claim challenges practices that have a “disproportionately adverse effect on minorities” and are otherwise unjustified by a legitimate rationale. *Ricci v. DeStefano*, 557 U. S. 557, 577 (2009) (internal quotation marks omitted). The question presented for the Court’s determination is whether disparate-impact claims are cognizable under the Fair Housing Act (or FHA), 82 Stat. 81, as amended, 42 U. S. C. §3601 *et seq.*

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Before turning to the question presented, it is necessary

Opinion of the Court

to discuss a different federal statute that gives rise to this dispute. The Federal Government provides low-income housing tax credits that are distributed to developers through designated state agencies. 26 U. S. C. §42. Congress has directed States to develop plans identifying selection criteria for distributing the credits. §42(m)(1). Those plans must include certain criteria, such as public housing waiting lists, §42(m)(1)(C), as well as certain preferences, including that low-income housing units “contribut[e] to a concerted community revitalization plan” and be built in census tracts populated predominantly by low-income residents. §§42(m)(1)(B)(ii)(III), 42(d)(5)(ii)(I). Federal law thus favors the distribution of these tax credits for the development of housing units in low-income areas.

In the State of Texas these federal credits are distributed by the Texas Department of Housing and Community Affairs (Department). Under Texas law, a developer’s application for the tax credits is scored under a point system that gives priority to statutory criteria, such as the financial feasibility of the development project and the income level of tenants. Tex. Govt. Code Ann. §§2306.6710(a)–(b) (West 2008). The Texas Attorney General has interpreted state law to permit the consideration of additional criteria, such as whether the housing units will be built in a neighborhood with good schools. Those criteria cannot be awarded more points than statutorily mandated criteria. Tex. Op. Atty. Gen. No. GA–0208, pp. 2–6 (2004), 2004 WL 1434796, \*4–\*6.

The Inclusive Communities Project, Inc. (ICP), is a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing. In 2008, the ICP brought this suit against the Department and its officers in the United States District Court for the Northern District of Texas. As relevant here, it brought a disparate-impact claim under §§804(a) and 805(a) of the FHA. The

## Opinion of the Court

ICP alleged the Department has caused continued segregated housing patterns by its disproportionate allocation of the tax credits, granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. The ICP contended that the Department must modify its selection criteria in order to encourage the construction of low-income housing in suburban communities.

The District Court concluded that the ICP had established a *prima facie* case of disparate impact. It relied on two pieces of statistical evidence. First, it found “from 1999–2008, [the Department] approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas.” 749 F. Supp. 2d 486, 499 (ND Tex. 2010) (footnote omitted). Second, it found “92.29% of [low-income housing tax credit] units in the city of Dallas were located in census tracts with less than 50% Caucasian residents.” *Ibid.*

The District Court then placed the burden on the Department to rebut the ICP’s *prima facie* showing of disparate impact. 860 F. Supp. 2d 312, 322–323 (2012). After assuming the Department’s proffered interests were legitimate, *id.*, at 326, the District Court held that a defendant—here the Department—must prove “that there are no other less discriminatory alternatives to advancing their proffered interests,” *ibid.* Because, in its view, the Department “failed to meet [its] burden of proving that there are no less discriminatory alternatives,” the District Court ruled for the ICP. *Id.*, at 331.

The District Court’s remedial order required the addition of new selection criteria for the tax credits. For instance, it awarded points for units built in neighborhoods with good schools and disqualified sites that are located adjacent to or near hazardous conditions, such as high crime areas or landfills. See 2012 WL 3201401 (Aug. 7,

Opinion of the Court

2012). The remedial order contained no explicit racial targets or quotas.

While the Department's appeal was pending, the Secretary of Housing and Urban Development (HUD) issued a regulation interpreting the FHA to encompass disparate-impact liability. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (2013). The regulation also established a burden-shifting framework for adjudicating disparate-impact claims. Under the regulation, a plaintiff first must make a prima facie showing of disparate impact. That is, the plaintiff "has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect." 24 CFR §100.500(c)(1) (2014). If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability. After a plaintiff does establish a prima facie showing of disparate impact, the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, non-discriminatory interests." §100.500(c)(2). HUD has clarified that this step of the analysis "is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related." 78 Fed. Reg. 11470. Once a defendant has satisfied its burden at step two, a plaintiff may "prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." §100.500(c)(3).

The Court of Appeals for the Fifth Circuit held, consistent with its precedent, that disparate-impact claims are cognizable under the FHA. 747 F.3d 275, 280 (2014). On the merits, however, the Court of Appeals reversed and remanded. Relying on HUD's regulation, the Court of Appeals held that it was improper for the District Court to

## Opinion of the Court

have placed the burden on the Department to prove there were no less discriminatory alternatives for allocating low-income housing tax credits. *Id.*, at 282–283. In a concurring opinion, Judge Jones stated that on remand the District Court should reexamine whether the ICP had made out a *prima facie* case of disparate impact. She suggested the District Court incorrectly relied on bare statistical evidence without engaging in any analysis about causation. She further observed that, if the federal law providing for the distribution of low-income housing tax credits ties the Department’s hands to such an extent that it lacks a meaningful choice, then there is no disparate-impact liability. See *id.*, at 283–284 (specially concurring opinion).

The Department filed a petition for a writ of certiorari on the question whether disparate-impact claims are cognizable under the FHA. The question was one of first impression, see *Huntington v. Huntington Branch, NAACP*, 488 U. S. 15 (1988) (*per curiam*), and certiorari followed, 573 U. S. \_\_\_\_ (2014). It is now appropriate to provide a brief history of the FHA’s enactment and its later amendment.

## B

*De jure* residential segregation by race was declared unconstitutional almost a century ago, *Buchanan v. Warley*, 245 U. S. 60 (1917), but its vestiges remain today, intertwined with the country’s economic and social life. Some segregated housing patterns can be traced to conditions that arose in the mid-20th century. Rapid urbanization, concomitant with the rise of suburban developments accessible by car, led many white families to leave the inner cities. This often left minority families concentrated in the center of the Nation’s cities. During this time, various practices were followed, sometimes with governmental support, to encourage and maintain the separation

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of the races: Racially restrictive covenants prevented the conveyance of property to minorities, see *Shelley v. Kraemer*, 334 U. S. 1 (1948); steering by real-estate agents led potential buyers to consider homes in racially homogenous areas; and discriminatory lending practices, often referred to as redlining, precluded minority families from purchasing homes in affluent areas. See, e.g., M. Klarman, *Unfinished Business: Racial Equality in American History* 140–141 (2007); Brief for Housing Scholars as *Amici Curiae* 22–23. By the 1960’s, these policies, practices, and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs. See K. Clark, *Dark Ghetto: Dilemmas of Social Power* 11, 21–26 (1965).

The mid-1960’s was a period of considerable social unrest; and, in response, President Lyndon Johnson established the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission. Exec. Order No. 11365, 3 CFR 674 (1966–1970 Comp.). After extensive factfinding the Commission identified residential segregation and unequal housing and economic conditions in the inner cities as significant, underlying causes of the social unrest. See Report of the National Advisory Commission on Civil Disorders 91 (1968) (Kerner Commission Report). The Commission found that “[n]early two-thirds of all nonwhite families living in the central cities today live in neighborhoods marked by substandard housing and general urban blight.” *Id.*, at 13. The Commission further found that both open and covert racial discrimination prevented black families from obtaining better housing and moving to integrated communities. *Ibid.* The Commission concluded that “[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.” *Id.*, at 1. To reverse “[t]his deepening racial division,” *ibid.*, it recommended enactment of “a comprehensive and enforceable open-occupancy law making it an offense to discriminate in the sale or rental of

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any housing . . . on the basis of race, creed, color, or national origin.” *Id.*, at 263.

In April 1968, Dr. Martin Luther King, Jr., was assassinated in Memphis, Tennessee, and the Nation faced a new urgency to resolve the social unrest in the inner cities. Congress responded by adopting the Kerner Commission’s recommendation and passing the Fair Housing Act. The statute addressed the denial of housing opportunities on the basis of “race, color, religion, or national origin.” Civil Rights Act of 1968, §804, 82 Stat. 83. Then, in 1988, Congress amended the FHA. Among other provisions, it created certain exemptions from liability and added “familial status” as a protected characteristic. See Fair Housing Amendments Act of 1988, 102 Stat. 1619.

## II

The issue here is whether, under a proper interpretation of the FHA, housing decisions with a disparate impact are prohibited. Before turning to the FHA, however, it is necessary to consider two other antidiscrimination statutes that preceded it.

The first relevant statute is §703(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255. The Court addressed the concept of disparate impact under this statute in *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971). There, the employer had a policy requiring its manual laborers to possess a high school diploma and to obtain satisfactory scores on two intelligence tests. The Court of Appeals held the employer had not adopted these job requirements for a racially discriminatory purpose, and the plaintiffs did not challenge that holding in this Court. Instead, the plaintiffs argued §703(a)(2) covers the discriminatory effect of a practice as well as the motivation behind the practice. Section 703(a), as amended, provides as follows:

“It shall be an unlawful employer practice for an employer—

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“(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

“(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U. S. C. §2000e-2(a).

The Court did not quote or cite the full statute, but rather relied solely on §703(a)(2). *Griggs*, 401 U. S., at 426, n. 1.

In interpreting §703(a)(2), the Court reasoned that disparate-impact liability furthered the purpose and design of the statute. The Court explained that, in §703(a)(2), Congress “proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” *Id.*, at 431. For that reason, as the Court noted, “Congress directed the thrust of [§703(a)(2)] to the consequences of employment practices, not simply the motivation.” *Id.*, at 432. In light of the statute’s goal of achieving “equality of employment opportunities and remov[ing] barriers that have operated in the past” to favor some races over others, the Court held §703(a)(2) of Title VII must be interpreted to allow disparate-impact claims. *Id.*, at 429–430.

The Court put important limits on its holding: namely, not all employment practices causing a disparate impact impose liability under §703(a)(2). In this respect, the Court held that “business necessity” constitutes a defense to disparate-impact claims. *Id.*, at 431. This rule provides, for example, that in a disparate-impact case,

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§703(a)(2) does not prohibit hiring criteria with a “manifest relationship” to job performance. *Id.*, at 432; see also *Ricci*, 557 U. S., at 587–589 (emphasizing the importance of the business necessity defense to disparate-impact liability). On the facts before it, the Court in *Griggs* found a violation of Title VII because the employer could not establish that high school diplomas and general intelligence tests were related to the job performance of its manual laborers. See 401 U. S., at 431–432.

The second relevant statute that bears on the proper interpretation of the FHA is the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602 *et seq.*, as amended. Section 4(a) of the ADEA provides:

“It shall be unlawful for an employer—

“(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;

“(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age; or

“(3) to reduce the wage rate of any employee in order to comply with this chapter.” 29 U. S. C. §623(a).

The Court first addressed whether this provision allows disparate-impact claims in *Smith v. City of Jackson*, 544 U. S. 228 (2005). There, a group of older employees challenged their employer’s decision to give proportionately greater raises to employees with less than five years of experience.

Explaining that *Griggs* “represented the better reading of [Title VII’s] statutory text,” 544 U. S., at 235, a plurality of the Court concluded that the same reasoning pertained

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to §4(a)(2) of the ADEA. The *Smith* plurality emphasized that both §703(a)(2) of Title VII and §4(a)(2) of the ADEA contain language “prohibit[ing] such actions that ‘deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race or age.’” 544 U. S., at 235. As the plurality observed, the text of these provisions “focuses on the effects of the action on the employee rather than the motivation for the action of the employer” and therefore compels recognition of disparate-impact liability. *Id.*, at 236. In a separate opinion, JUSTICE SCALIA found the ADEA’s text ambiguous and thus deferred under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), to an Equal Employment Opportunity Commission regulation interpreting the ADEA to impose disparate-impact liability, see 544 U. S., at 243–247 (opinion concurring in part and concurring in judgment).

Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. These cases also teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system. And before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is “an available alternative . . . practice that has less disparate impact and serves the [entity’s] legitimate needs.” *Ricci, supra*, at 578. The cases interpreting Title VII and the ADEA provide essential background and instruction in the case now before the Court.

Turning to the FHA, the ICP relies on two provisions.

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Section 804(a) provides that it shall be unlawful:

“To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” 42 U. S. C. §3604(a).

Here, the phrase “otherwise make unavailable” is of central importance to the analysis that follows.

Section 805(a), in turn, provides:

“It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.” §3605(a).

Applied here, the logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. Congress’ use of the phrase “otherwise make unavailable” refers to the consequences of an action rather than the actor’s intent. See *United States v. Giles*, 300 U. S. 41, 48 (1937) (explaining that the “word ‘make’ has many meanings, among them ‘[t]o cause to exist, appear or occur’” (quoting Webster’s New International Dictionary 1485 (2d ed. 1934))). This results-oriented language counsels in favor of recognizing disparate-impact liability. See *Smith, supra*, at 236. The Court has construed statutory language similar to §805(a) to include disparate-impact liability. See, e.g., *Board of Ed. of City School Dist. of New York v. Harris*, 444 U. S. 130, 140–141 (1979) (holding the term “discriminat[e]” encompassed disparate-impact liability in the context of a statute’s text, history, purpose, and structure).

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A comparison to the antidiscrimination statutes examined in *Griggs* and *Smith* is useful. Title VII's and the ADEA's "otherwise adversely affect" language is equivalent in function and purpose to the FHA's "otherwise make unavailable" language. In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent. And all three statutes use the word "otherwise" to introduce the results-oriented phrase. "Otherwise" means "in a different way or manner," thus signaling a shift in emphasis from an actor's intent to the consequences of his actions. Webster's Third New International Dictionary 1598 (1971). This similarity in text and structure is all the more compelling given that Congress passed the FHA in 1968—only four years after passing Title VII and only four months after enacting the ADEA.

It is true that Congress did not reiterate Title VII's exact language in the FHA, but that is because to do so would have made the relevant sentence awkward and unclear. A provision making it unlawful to "refuse to sell[,] . . . or otherwise [adversely affect], a dwelling to any person" because of a protected trait would be grammatically obtuse, difficult to interpret, and far more expansive in scope than Congress likely intended. Congress thus chose words that serve the same purpose and bear the same basic meaning but are consistent with the structure and objectives of the FHA.

Emphasizing that the FHA uses the phrase "because of race," the Department argues this language forecloses disparate-impact liability since "[a]n action is not taken 'because of race' unless race is a *reason* for the action." Brief for Petitioners 26. *Griggs* and *Smith*, however,

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dispose of this argument. Both Title VII and the ADEA contain identical “because of” language, see 42 U. S. C. §2000e–2(a)(2); 29 U. S. C. §623(a)(2), and the Court nonetheless held those statutes impose disparate-impact liability.

In addition, it is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988. By that time, all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims. See *Huntington Branch, NAACP v. Huntington*, 844 F. 2d 926, 935–936 (CA2 1988); *Resident Advisory Bd. v. Rizzo*, 564 F. 2d 126, 146 (CA3 1977); *Smith v. Clarkton*, 682 F. 2d 1055, 1065 (CA4 1982); *Hanson v. Veterans Administration*, 800 F. 2d 1381, 1386 (CA5 1986); *Arthur v. Toledo*, 782 F. 2d 565, 574–575 (CA6 1986); *Metropolitan Housing Development Corp. v. Arlington Heights*, 558 F. 2d 1283, 1290 (CA7 1977); *United States v. Black Jack*, 508 F. 2d 1179, 1184–1185 (CA8 1974); *Halet v. Wend Investment Co.*, 672 F. 2d 1305, 1311 (CA9 1982); *United States v. Marengo Cty. Comm’n*, 731 F. 2d 1546, 1559, n. 20 (CA11 1984).

When it amended the FHA, Congress was aware of this unanimous precedent. And with that understanding, it made a considered judgment to retain the relevant statutory text. See H. R. Rep. No. 100–711, p. 21, n. 52 (1988) (H. R. Rep.) (discussing suits premised on disparate-impact claims and related judicial precedent); 134 Cong. Rec. 23711 (1988) (statement of Sen. Kennedy) (noting unanimity of Federal Courts of Appeals concerning disparate impact); Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 100th Cong., 1st Sess., 529 (1987) (testimony of Professor Robert Schwemm) (describing consensus judicial view that the FHA imposed disparate-impact liability). Indeed, Con-

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gress rejected a proposed amendment that would have eliminated disparate-impact liability for certain zoning decisions. See H. R. Rep., at 89–93.

Against this background understanding in the legal and regulatory system, Congress' decision in 1988 to amend the FHA while still adhering to the operative language in §§804(a) and 805(a) is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability. “If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.” A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012); see also *Forest Grove School Dist. v. T. A.*, 557 U. S. 230, 244, n. 11 (2009) (“When Congress amended [the Act] without altering the text of [the relevant provision], it implicitly adopted [this Court’s] construction of the statute”); *Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U. S. 320, 336 (1934) (explaining, where the Courts of Appeals had reached a consensus interpretation of the Bankruptcy Act and Congress had amended the Act without changing the relevant provision, “[t]his is persuasive that the construction adopted by the [lower federal] courts has been acceptable to the legislative arm of the government”).

Further and convincing confirmation of Congress' understanding that disparate-impact liability exists under the FHA is revealed by the substance of the 1988 amendments. The amendments included three exemptions from liability that assume the existence of disparate-impact claims. The most logical conclusion is that the three amendments were deemed necessary because Congress presupposed disparate impact under the FHA as it had been enacted in 1968.

The relevant 1988 amendments were as follows. First,

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Congress added a clarifying provision: “Nothing in [the FHA] prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.” 42 U. S. C. §3605(c). Second, Congress provided: “Nothing in [the FHA] prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance.” §3607(b)(4). And finally, Congress specified: “Nothing in [the FHA] limits the applicability of any reasonable . . . restrictions regarding the maximum number of occupants permitted to occupy a dwelling.” §3607(b)(1).

The exemptions embodied in these amendments would be superfluous if Congress had assumed that disparate-impact liability did not exist under the FHA. See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (“[T]he Court will avoid a reading which renders some words altogether redundant”). Indeed, none of these amendments would make sense if the FHA encompassed only disparate-treatment claims. If that were the sole ground for liability, the amendments merely restate black-letter law. If an actor makes a decision based on reasons other than a protected category, there is no disparate-treatment liability. See, e.g., *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). But the amendments do constrain disparate-impact liability. For instance, certain criminal convictions are correlated with sex and race. See, e.g., *Kimbrough v. United States*, 552 U.S. 85, 98 (2007) (discussing the racial disparity in convictions for crack cocaine offenses). By adding an exemption from liability for exclusionary practices aimed at individuals with drug convictions, Congress ensured disparate-impact liability would not lie if a landlord excluded tenants with such convictions. The same is true of the provision allowing for reasonable restrictions on occupancy. And the

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exemption from liability for real-estate appraisers is in the same section as §805(a)'s prohibition of discriminatory practices in real-estate transactions, thus indicating Congress' recognition that disparate-impact liability arose under §805(a). In short, the 1988 amendments signal that Congress ratified disparate-impact liability.

A comparison to *Smith's* discussion of the ADEA further demonstrates why the Department's interpretation would render the 1988 amendments superfluous. Under the ADEA's reasonable-factor-other-than-age (RFOA) provision, an employer is permitted to take an otherwise prohibited action where "the differentiation is based on reasonable factors other than age." 29 U. S. C. §623(f)(1). In other words, if an employer makes a decision based on a reasonable factor other than age, it cannot be said to have made a decision on the basis of an employee's age. According to the *Smith* plurality, the RFOA provision "plays its principal role" "in cases involving disparate-impact claims" "by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'" 544 U. S., at 239. The plurality thus reasoned that the RFOA provision would be "simply unnecessary to avoid liability under the ADEA" if liability were limited to disparate-treatment claims. *Id.*, at 238.

A similar logic applies here. If a real-estate appraiser took into account a neighborhood's schools, one could not say the appraiser acted because of race. And by embedding 42 U. S. C. §3605(c)'s exemption in the statutory text, Congress ensured that disparate-impact liability would not be allowed either. Indeed, the inference of disparate-impact liability is even stronger here than it was in *Smith*. As originally enacted, the ADEA included the RFOA provision, see §4(f)(1), 81 Stat. 603, whereas here Congress added the relevant exemptions in the 1988 amendments against the backdrop of the uniform view of the Courts of Appeals that the FHA imposed disparate-impact liability.

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Recognition of disparate-impact claims is consistent with the FHA's central purpose. See *Smith, supra*, at 235 (plurality opinion); *Griggs*, 401 U. S., at 432. The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy. See 42 U. S. C. §3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States"); H. R. Rep., at 15 (explaining the FHA "provides a clear national policy against discrimination in housing").

These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability. See, e.g., *Huntington*, 488 U. S., at 16–18 (invalidating zoning law preventing construction of multifamily rental units); *Black Jack*, 508 F. 2d, at 1182–1188 (invalidating ordinance prohibiting construction of new multifamily dwellings); *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, 641 F. Supp. 2d 563, 569, 577–578 (E.D. La. 2009) (invalidating post-Hurricane Katrina ordinance restricting the rental of housing units to only "blood relative[s]" in an area of the city that was 88.3% white and 7.6% black); see also Tr. of Oral Arg. 52–53 (discussing these cases). The availability of disparate-impact liability, furthermore, has allowed private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units. See, e.g., *Huntington, supra*, at 18. Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this

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way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.

But disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity. Disparate-impact liability mandates the “removal of artificial, arbitrary, and unnecessary barriers,” not the displacement of valid governmental policies. *Griggs, supra*, at 431. The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.

Unlike the heartland of disparate-impact suits targeting artificial barriers to housing, the underlying dispute in this case involves a novel theory of liability. See Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 360–363 (2013) (noting the rarity of this type of claim). This case, on remand, may be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion in allocating tax credits for low-income housing.

An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability. See 78 Fed. Reg. 11470 (explaining that HUD did not use the phrase “business necessity” because that “phrase may not be easily under-

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stood to cover the full scope of practices covered by the Fair Housing Act, which applies to individuals, businesses, nonprofit organizations, and public entities”). As the Court explained in *Ricci*, an entity “could be liable for disparate-impact discrimination only if the [challenged practices] were not job related and consistent with business necessity.” 557 U. S., at 587. Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a “reasonable measure[ment] of job performance,” *Griggs, supra*, at 436, so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest. To be sure, the Title VII framework may not transfer exactly to the fair-housing context, but the comparison suffices for present purposes.

It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation’s cities merely because some other priority might seem preferable. Entrepreneurs must be given latitude to consider market factors. Zoning officials, moreover, must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community’s quality of life and are legitimate concerns for housing authorities. The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities. As HUD itself recognized in its recent rulemaking, disparate-impact liability “does not mandate that affordable housing be located in neighborhoods with any particular characteristic.” 78 Fed. Reg. 11476.

In a similar vein, a disparate-impact claim that relies on

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a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co. v. Atonio*, 490 U. S. 642, 653 (1989), superseded by statute on other grounds, 42 U. S. C. §2000e-2(k). Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and "would almost inexorably lead" governmental or private entities to use "numerical quotas," and serious constitutional questions then could arise. 490 U. S., at 653.

The litigation at issue here provides an example. From the standpoint of determining advantage or disadvantage to racial minorities, it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa. If those sorts of judgments are subject to challenge without adequate safeguards, then there is a danger that potential defendants may adopt racial quotas—a circumstance that itself raises serious constitutional concerns.

Courts must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important. A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact. For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all. It may also be difficult to establish causation because of the mul-

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multiple factors that go into investment decisions about where to construct or renovate housing units. And as Judge Jones observed below, if the ICP cannot show a causal connection between the Department's policy and a disparate impact—for instance, because federal law substantially limits the Department's discretion—that should result in dismissal of this case. 747 F. 3d, at 283–284 (specially concurring opinion).

The FHA imposes a command with respect to disparate-impact liability. Here, that command goes to a state entity. In other cases, the command will go to a private person or entity. Governmental or private policies are not contrary to the disparate-impact requirement unless they are “artificial, arbitrary, and unnecessary barriers.” *Griggs*, 401 U. S., at 431. Difficult questions might arise if disparate-impact liability under the FHA caused race to be used and considered in a pervasive and explicit manner to justify governmental or private actions that, in fact, tend to perpetuate race-based considerations rather than move beyond them. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.

The limitations on disparate-impact liability discussed here are also necessary to protect potential defendants against abusive disparate-impact claims. If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system. And as to governmental entities, they must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes. The Department's *amici*, in addition to the well-stated principal dissenting opinion in this case, see *post*, at 1–2, 29–30 (opinion of ALITO, J.), call attention to the decision by the Court of Appeals for the Eighth Circuit in *Gallagher v. Magner*,

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619 F. 3d 823 (2010). Although the Court is reluctant to approve or disapprove a case that is not pending, it should be noted that *Magner* was decided without the cautionary standards announced in this opinion and, in all events, the case was settled by the parties before an ultimate determination of disparate-impact liability.

Were standards for proceeding with disparate-impact suits not to incorporate at least the safeguards discussed here, then disparate-impact liability might displace valid governmental and private priorities, rather than solely “remov[ing] . . . artificial, arbitrary, and unnecessary barriers.” *Griggs*, 401 U. S., at 431. And that, in turn, would set our Nation back in its quest to reduce the salience of race in our social and economic system.

It must be noted further that, even when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that “arbitrar[ily] . . . operate[s] invidiously to discriminate on the basis of race.” *Ibid.* If additional measures are adopted, courts should strive to design them to eliminate racial disparities through race-neutral means. See *Richmond v. J. A. Croson Co.*, 488 U. S. 469, 510 (1989) (plurality opinion) (“[T]he city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races”). Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions.

While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, it is also true that race may be considered in certain circumstances and in a proper fashion. Cf. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U. S. 701, 789 (2007) (KENNEDY, J., concurring in part and concurring in judgment) (“School

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boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; [and] drawing attendance zones with general recognition of the demographics of neighborhoods”). Just as this Court has not “question[ed] an employer’s affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the [promotion] process,” *Ricci*, 557 U. S., at 585, it likewise does not impugn housing authorities’ race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.

The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court’s interpretation of similar language in Title VII and the ADEA, Congress’ ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.

## III

In light of the longstanding judicial interpretation of the FHA to encompass disparate-impact claims and congressional reaffirmation of that result, residents and policymakers have come to rely on the availability of disparate-impact claims. See Brief for Massachusetts et al. as *Amici Curiae* 2 (“Without disparate impact claims, States and others will be left with fewer crucial tools to combat the kinds of systemic discrimination that the FHA was intended to address”). Indeed, many of our Nation’s largest cities—entities that are potential defendants in disparate-

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impact suits—have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA. See Brief for City of San Francisco et al. as *Amici Curiae* 3–6. The existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades “has not given rise to . . . dire consequences.” *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U. S. \_\_\_, \_\_\_ (2012) (slip op., at 21).

Much progress remains to be made in our Nation’s continuing struggle against racial isolation. In striving to achieve our “historic commitment to creating an integrated society,” *Parents Involved, supra*, at 797 (KENNEDY, J., concurring in part and concurring in judgment), we must remain wary of policies that reduce homeowners to nothing more than their race. But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission’s grim prophecy that “[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.” Kerner Commission Report 1. The Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.

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

*It is so ordered.*

***Texas Dept. of Housing and Community Affairs v.  
Inclusive Communities Project***

To view this opinion in full, please go to  
[http://www.supremecourt.gov/opinions/14pdf/13-1371\\_8m58.pdf](http://www.supremecourt.gov/opinions/14pdf/13-1371_8m58.pdf)

## ***Obergefell v. Hodges***

Judge David A. Hejmanowski  
Delaware County Probate/Juvenile Court

Judge David A. Hejmanowski is a judge of the Delaware County Probate/Juvenile Court. He received his undergraduate degree, with honors, from Hiram College in 1996 and his Juris Doctor from The Ohio State University Moritz College of Law in 1999, where he graduated as a Public Service Fellow and received the Joseph M. Harter Memorial Award for trial advocacy. From 1999 to 2003 he served as an Assistant Prosecuting Attorney in Delaware County, handling more than 400 felony cases. In January of 2003 he began his work as a Magistrate for the Delaware County Probate/Juvenile Court. In September of 2008 he took on the additional responsibilities of serving as Juvenile Court Administrator. He was elected to a six-year term as Judge in November of 2014. Judge Hejmanowski is active in judicial and professional organizations.

## 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

OBERGEFELL ET AL. *v.* HODGES, DIRECTOR, OHIO  
DEPARTMENT OF HEALTH, ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT

No. 14–556. Argued April 28, 2015—Decided June 26, 2015\*

Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

*Held:* The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. Pp. 3–28.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. Pp. 3–10.

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution if marriage were extended to same-sex couples. But the petitioners, far from seeking to devalue marriage, seek it for themselves because of their respect—and need—for its privileges and responsibilities, as illustrated by the pe-

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\*Together with No. 14–562, *Tanco et al. v. Haslam, Governor of Tennessee, et al.*, No. 14–571, *DeBoer et al. v. Snyder, Governor of Michigan, et al.*, and No. 14–574, *Bourke et al. v. Beshear, Governor of Kentucky*, also on certiorari to the same court.

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titioners' own experiences. Pp. 3–6.

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation's experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2003, this Court overruled its 1986 decision in *Bowers v. Hardwick*, 478 U. S. 186, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime “demea[n] the lives of homosexual persons.” *Lawrence v. Texas*, 539 U. S. 558, 575. In 2012, the federal Defense of Marriage Act was also struck down. *United States v. Windsor*, 570 U. S. \_\_\_\_\_. Numerous same-sex marriage cases reaching the federal courts and state supreme courts have added to the dialogue. Pp. 6–10.

(b) The Fourteenth Amendment requires a State to license a marriage between two people of the same sex. Pp. 10–27.

(1) The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*, 405 U. S. 438, 453; *Griswold v. Connecticut*, 381 U. S. 479, 484–486. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, *Loving v. Virginia*, 388 U. S. 1, 12, invalidated bans on interracial unions, and *Turner v. Safley*, 482 U. S. 78, 95, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship in-

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volving opposite-sex partners, as did *Baker v. Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. But other, more instructive precedents have expressed broader principles. See, e.g., *Lawrence, supra*, at 574. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, e.g., *Eisenstadt, supra*, at 453–454. This analysis compels the conclusion that same-sex couples may exercise the right to marry. Pp. 10–12.

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence, supra*, at 574. This is true for all persons, whatever their sexual orientation.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception, 381 U. S., at 485, and was acknowledged in *Turner, supra*, at 95. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See *Lawrence, supra*, at 567.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, e.g., *Pierce v. Society of Sisters*, 268 U. S. 510. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. See *Windsor, supra*, at \_\_\_\_\_. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

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Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. See *Maynard v. Hill*, 125 U. S. 190, 211. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. Pp. 12–18.

(3) The right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving*, where the Court invoked both the Equal Protection Clause and the Due Process Clause; and in *Zablocki v. Redhail*, 434 U. S. 374, where the Court invalidated a law barring fathers delinquent on child-support payments from marrying. Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, e.g., *Kirchberg v. Feenstra*, 450 U. S. 455, 460–461, and confirmed the relation between liberty and equality, see, e.g., *M. L. B. v. S. L. J.*, 519 U. S. 102, 120–121.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence*, 539 U. S., at 575. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians. Pp. 18–22.

(4) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protec-

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tion Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker v. Nelson* is overruled. The State laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. Pp. 22–23.

(5) There may be an initial inclination to await further legislation, litigation, and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are barred need not await legislative action before asserting a fundamental right. *Bowers*, in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after *Bowers* was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the Fourteenth Amendment. The petitioners' stories show the urgency of the issue they present to the Court, which has a duty to address these claims and answer these questions. Respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the First Amendment ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. Pp. 23–27.

(c) The Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. Pp. 27–28.

772 F. 3d 388, reversed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

Nos. 14–556, 14–562, 14–571 and 14–574

14–556 JAMES OBERGEFELL, ET AL., PETITIONERS  
v.  
RICHARD HODGES, DIRECTOR, OHIO  
DEPARTMENT OF HEALTH, ET AL.;

14–562 VALERIA TANCO, ET AL., PETITIONERS  
v.  
BILL HASLAM, GOVERNOR OF  
TENNESSEE, ET AL.;

14–571 APRIL DEBOER, ET AL., PETITIONERS  
v.  
RICK SNYDER, GOVERNOR OF MICHIGAN,  
ET AL.; AND

14–574 GREGORY BOURKE, ET AL., PETITIONERS  
v.  
STEVE BESHEAR, GOVERNOR OF  
KENTUCKY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[June 26, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow

## Opinion of the Court

persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

## I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. See, e.g., Mich. Const., Art. I, §25; Ky. Const. §233A; Ohio Rev. Code Ann. §3101.01 (Lexis 2008); Tenn. Const., Art. XI, §18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, *infra*. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. *DeBoer v. Snyder*, 772 F. 3d 388 (2014). The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U. S. \_\_\_ (2015). The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio,

## Opinion of the Court

Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

## II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

## A

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 *Li Chi: Book of Rites* 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, “The first bond of society is marriage; next, children; and then the family.” See *De Officiis* 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures,

## Opinion of the Court

and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from

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Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time." App. in No. 14-556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two

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settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

## B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. See N. Cott, *Public Vows: A History of Marriage and the Nation* 9–17 (2000); S. Coontz, *Marriage, A History* 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, *Commentaries on the Laws of England* 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as *Amici Curiae* 16–19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes.

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Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, *Public Vows*; S. Coontz, *Marriage*; H. Hartog, *Man & Wife in America: A History* (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil

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Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as *Amici Curiae* 7–17.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick*, 478 U. S. 186 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans*, 517 U. S. 620 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence v. Texas*, 539 U. S. 558, 575.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*, 74 Haw. 530, 852 P. 2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is

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defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as “only a legal union between one man and one woman as husband and wife.” 1 U. S. C. §7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State’s Constitution guaranteed same-sex couples the right to marry. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*. Two Terms ago, in *United States v. Windsor*, 570 U. S. \_\_\_\_ (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples “who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.” *Id.*, at \_\_\_\_ (slip op., at 14).

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see *Citizens for Equal Protection v. Bruning*, 455 F. 3d 859, 864–868 (CA8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many

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thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, *infra*.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, *The State of Marriage Equality in America, State-by-State Supp.* (2015).

## III

Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.” The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan v. Louisiana*, 391 U. S. 145, 147–149 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*, 405 U. S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U. S. 479, 484–486 (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, “has not been reduced to any formula.” *Poe v. Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradi-

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tion guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence, supra*, at 572. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, 388 U. S. 1, 12 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki v. Redhail*, 434 U. S. 374, 384 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner v. Safley*, 482 U. S. 78, 95 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, e.g., *M. L. B. v. S. L. J.*, 519 U. S. 102, 116 (1996); *Cleveland Bd. of Ed. v. LaFleur*, 414 U. S. 632, 639–640 (1974); *Griswold, supra*, at 486; *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions,

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has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, e.g., *Lawrence*, 539 U. S., at 574; *Turner*, *supra*, at 95; *Zablocki*, *supra*, at 384; *Loving*, *supra*, at 12; *Griswold*, *supra*, at 486. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, e.g., *Eisenstadt*, *supra*, at 453–454; *Poe*, *supra*, at 542–553 (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12; see also *Zablocki*, *supra*, at 384 (observing *Loving* held “the right to marry is of fundamental importance for all individuals”). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. Indeed, the Court has noted it would

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be contradictory “to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.” *Zablocki, supra*, at 386.

Choices about marriage shape an individual’s destiny. As the Supreme Judicial Court of Massachusetts has explained, because “it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.” *Goodridge*, 440 Mass., at 322, 798 N. E. 2d, at 955.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor*, 570 U. S., at \_\_\_– \_\_\_ (slip op., at 22–23). There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. *Loving, supra*, at 12 (“[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State”).

A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold v. Connecticut*, which held the Constitution protects the right of married couples to use contraception. 381 U. S., at 485. Suggesting that marriage is a right “older than the Bill of Rights,” *Griswold* described marriage this way:

“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social

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projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.*, at 486.

And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See 482 U. S., at 95–96. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor*, *supra*, at \_\_\_ (slip op., at 14). Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 539 U. S., at 567. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); *Meyer*, 262 U. S., at 399. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki*, 434 U. S., at 384

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(quoting *Meyer, supra*, at 399). Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor, supra*, at \_\_\_\_ (slip op., at 23). Marriage also affords the permanency and stability important to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22–27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as *Amicus Curiae* 4. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see *id.*, at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. See *Windsor, supra*, at \_\_\_\_ (slip op., at 23).

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of

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precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

"There is certainly no country in the world where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace . . . [H]e afterwards carries [that image] with him into public affairs." 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

In *Maynard v. Hill*, 125 U. S. 190, 211 (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been "a great public institution, giving character to our whole civil polity." *Id.*, at 213. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally N. Cott, *Public Vows*. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the

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basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae* 6–9; Brief for American Bar Association as *Amicus Curiae* 8–29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor*, 570 U. S., at \_\_\_ – \_\_\_ (slip op., at 15–16). The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come

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the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997), which called for a “careful description” of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent “right to same-sex marriage.” Brief for Respondent in No. 14–556, p. 8. *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a “right to interracial marriage”; *Turner* did not ask about a “right of inmates to marry”; and *Zablocki* did not ask about a “right of fathers with unpaid child support duties to marry.” Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also *Glucksberg*, 521 U. S., at 752–773 (Souter, J., concurring in judgment); *id.*, at 789–792 (BREYER, J., concurring in judgments).

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving* 388 U. S., at 12; *Lawrence*, 539 U. S., at 566–567.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources

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alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See *M. L. B.*, 519 U. S., at 120–121; *id.*, at 128–129 (KENNEDY, J., concurring in judgment); *Bearden v. Georgia*, 461 U. S. 660, 665 (1983). This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court

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first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U. S., at 12. With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Ibid.* The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." 434 U. S., at 383. It was the essential nature of the marriage right, discussed at length in *Zablocki*, see *id.*, at 383–387, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of cover-

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ture, see *supra*, at 6, invidious sex-based classifications in marriage remained common through the mid-20th century. See App. to Brief for Appellant in *Reed v. Reed*, O. T. 1971, No. 70–4, pp. 69–88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State’s law, for example, provided in 1971 that “the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit.” Ga. Code Ann. §53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, e.g., *Kirchberg v. Feenstra*, 450 U. S. 455 (1981); *Wengler v. Druggists Mut. Ins. Co.*, 446 U. S. 142 (1980); *Califano v. Westcott*, 443 U. S. 76 (1979); *Orr v. Orr*, 440 U. S. 268 (1979); *Califano v. Goldfarb*, 430 U. S. 199 (1977) (plurality opinion); *Weinberger v. Wiesenfeld*, 420 U. S. 636 (1975); *Frontiero v. Richardson*, 411 U. S. 677 (1973). Like *Loving* and *Zablocki*, these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M. L. B. v. S. L. J.*, the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See 519 U. S., at 119–124. In *Eisenstadt v. Baird*, the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See 405 U. S., at 446–454. And in *Skinner v. Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed steriliza-

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tion of habitual criminals. See 316 U. S., at 538–543.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See 539 U. S., at 575. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. See *ibid.* *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State “cannot demean their existence or control their destiny by making their private sexual conduct a crime.” *Id.*, at 578.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, e.g., *Zablocki, supra*, at 383–388; *Skinner*, 316 U. S., at 541.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No

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longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

## IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages. See *DeBoer*, 772 F. 3d, at 409.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, *infra*. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented

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for resolution as a matter of constitutional law.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette v. BAMN*, 572 U. S. \_\_\_\_ (2014), noting the “right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.” *Id.*, at \_\_\_\_ – \_\_\_\_ (slip op., at 15–16). Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, “[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.” *Id.*, at \_\_\_\_ (slip op., at 15). Thus, when the rights of persons are violated, “the Constitution requires redress by the courts,” notwithstanding the more general value of democratic decisionmaking. *Id.*, at \_\_\_\_ (slip op., at 17). This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 638 (1943). This is why “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.” *Ibid.*

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It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing same-sex intimacy. See 478 U. S., at 186, 190–195. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. See *id.*, at 199 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *id.*, at 214 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was “not correct when it was decided.” 539 U. S., at 578. Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the Fourteenth Amendment. The petitioners’ stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and

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Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners' cases, the Court has a duty to address these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See *Kitchen v. Herbert*, 755 F. 3d 1193, 1223 (CA10 2014) (“[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples”). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they

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describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

## V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of *Obergefell and Arthur*, and by that of *DeKoe and Kostura*, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid marriage denied in another is one of “the most perplexing and distressing complication[s]” in the law of domestic relations. *Williams v. North Carolina*, 317 U. S. 287, 299 (1942) (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and pro-

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mote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

\* \* \*

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

*It is so ordered.*

## Appendix A to opinion of the Court

## APPENDICES

## A

State and Federal Judicial Decisions  
Addressing Same-Sex Marriage**United States Courts of Appeals Decisions**

*Adams v. Howerton*, 673 F. 2d 1036 (CA9 1982)  
*Smelt v. County of Orange*, 447 F. 3d 673 (CA9 2006)  
*Citizens for Equal Protection v. Bruning*, 455 F. 3d 859  
(CA8 2006)  
*Windsor v. United States*, 699 F. 3d 169 (CA2 2012)  
*Massachusetts v. Department of Health and Human  
Services*, 682 F. 3d 1 (CA1 2012)  
*Perry v. Brown*, 671 F. 3d 1052 (CA9 2012)  
*Latta v. Otter*, 771 F. 3d 456 (CA9 2014)  
*Baskin v. Bogan*, 766 F. 3d 648 (CA7 2014)  
*Bishop v. Smith*, 760 F. 3d 1070 (CA10 2014)  
*Bostic v. Schaefer*, 760 F. 3d 352 (CA4 2014)  
*Kitchen v. Herbert*, 755 F. 3d 1193 (CA10 2014)  
*DeBoer v. Snyder*, 772 F. 3d 388 (CA6 2014)  
*Latta v. Otter*, 779 F. 3d 902 (CA9 2015) (O’Scannlain,  
J., dissenting from the denial of rehearing en banc)

**United States District Court Decisions**

*Adams v. Howerton*, 486 F. Supp. 1119 (CD Cal. 1980)  
*Citizens for Equal Protection, Inc. v. Bruning*, 290  
F. Supp. 2d 1004 (Neb. 2003)  
*Citizens for Equal Protection v. Bruning*, 368 F. Supp.  
2d 980 (Neb. 2005)  
*Wilson v. Ake*, 354 F. Supp. 2d 1298 (MD Fla. 2005)  
*Smelt v. County of Orange*, 374 F. Supp. 2d 861 (CD Cal.  
2005)  
*Bishop v. Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d  
1239 (ND Okla. 2006)

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*Massachusetts v. Department of Health and Human Services*, 698 F. Supp. 2d 234 (Mass. 2010)

*Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (Mass. 2010)

*Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (ND Cal. 2010)

*Dragovich v. Department of Treasury*, 764 F. Supp. 2d 1178 (ND Cal. 2011)

*Golinski v. Office of Personnel Management*, 824 F. Supp. 2d 968 (ND Cal. 2012)

*Dragovich v. Department of Treasury*, 872 F. Supp. 2d 944 (ND Cal. 2012)

*Windsor v. United States*, 833 F. Supp. 2d 394 (SDNY 2012)

*Pedersen v. Office of Personnel Management*, 881 F. Supp. 2d 294 (Conn. 2012)

*Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (Haw. 2012)

*Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (Nev. 2012)

*Merritt v. Attorney General*, 2013 WL 6044329 (MD La., Nov. 14, 2013)

*Gray v. Orr*, 4 F. Supp. 3d 984 (ND Ill. 2013)

*Lee v. Orr*, 2013 WL 6490577 (ND Ill., Dec. 10, 2013)

*Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (Utah 2013)

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*Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (ND Okla. 2014)

*Bourke v. Beshear*, 996 F. Supp. 2d 542 (WD Ky. 2014)

*Lee v. Orr*, 2014 WL 683680 (ND Ill., Feb. 21, 2014)

*Bostic v. Rainey*, 970 F. Supp. 2d 456 (ED Va. 2014)

*De Leon v. Perry*, 975 F. Supp. 2d 632 (WD Tex. 2014)

*Tanco v. Haslam*, 7 F. Supp. 3d 759 (MD Tenn. 2014)

*DeBoer v. Snyder*, 973 F. Supp. 2d 757 (ED Mich. 2014)

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*Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (Ore. 2014)  
*Evans v. Utah*, 21 F. Supp. 3d 1192 (Utah 2014)  
*Whitewood v. Wolf*, 992 F. Supp. 2d 410 (MD Pa. 2014)  
*Wolf v. Walker*, 986 F. Supp. 2d 982 (WD Wis. 2014)  
*Baskin v. Bogan*, 12 F. Supp. 3d 1144 (SD Ind. 2014)  
*Love v. Beshear*, 989 F. Supp. 2d 536 (WD Ky. 2014)  
*Burns v. Hickenlooper*, 2014 WL 3634834 (Colo., July 23, 2014)  
*Bowling v. Pence*, 39 F. Supp. 3d 1025 (SD Ind. 2014)  
*Brenner v. Scott*, 999 F. Supp. 2d 1278 (ND Fla. 2014)  
*Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (ED La. 2014)  
*General Synod of the United Church of Christ v. Resinger*, 12 F. Supp. 3d 790 (WDNC 2014)  
*Hamby v. Parnell*, 56 F. Supp. 3d 1056 (Alaska 2014)  
*Fisher-Borne v. Smith*, 14 F. Supp. 3d 695 (MDNC 2014)  
*Majors v. Horne*, 14 F. Supp. 3d 1313 (Ariz. 2014)  
*Connolly v. Jeanes*, \_\_\_\_ F. Supp. 3d \_\_\_\_, 2014 WL 5320642 (Ariz., Oct. 17, 2014)  
*Guzzo v. Mead*, 2014 WL 5317797 (Wyo., Oct. 17, 2014)  
*Conde-Vidal v. Garcia-Padilla*, 54 F. Supp. 3d 157 (PR 2014)  
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*Lawson v. Kelly*, 58 F. Supp. 3d 923 (WD Mo. 2014)  
*McGee v. Cole*, \_\_\_\_ F. Supp. 3d \_\_\_\_, 2014 WL 5802665 (SD W. Va., Nov. 7, 2014)  
*Condon v. Haley*, 21 F. Supp. 3d 572 (S.C. 2014)  
*Bradacs v. Haley*, 58 F. Supp. 3d 514 (S.C. 2014)  
*Rolando v. Fox*, 23 F. Supp. 3d 1227 (Mont. 2014)  
*Jernigan v. Crane*, \_\_\_\_ F. Supp. 3d \_\_\_\_, 2014 WL 6685391 (ED Ark., Nov. 25, 2014)  
*Campaign for Southern Equality v. Bryant*, \_\_\_\_ F. Supp. 3d \_\_\_\_, 2014 WL 6680570 (SD Miss., Nov. 25, 2014)  
*Inniss v. Aderhold*, \_\_\_\_ F. Supp. 3d \_\_\_\_, 2015 WL 300593 (ND Ga., Jan. 8, 2015)

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*Rosenbrahn v. Daugaard*, 61 F. Supp. 3d 862 (S. D., 2015)

*Caspar v. Snyder*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 224741 (ED Mich., Jan. 15, 2015)

*Searcey v. Strange*, 2015 U. S. Dist. LEXIS 7776 (SD Ala., Jan. 23, 2015)

*Strawser v. Strange*, 44 F. Supp. 3d 1206 (SD Ala. 2015)

*Waters v. Ricketts*, 48 F. Supp. 3d 1271 (Neb. 2015)

**State Highest Court Decisions**

*Baker v. Nelson*, 291 Minn. 310, 191 N. W. 2d 185 (1971)

*Jones v. Hallahan*, 501 S. W. 2d 588 (Ky. 1973)

*Baehr v. Lewin*, 74 Haw. 530, 852 P. 2d 44 (1993)

*Dean v. District of Columbia*, 653 A. 2d 307 (D. C. 1995)

*Baker v. State*, 170 Vt. 194, 744 A. 2d 864 (1999)

*Brause v. State*, 21 P. 3d 357 (Alaska 2001) (ripeness)

*Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003)

*In re Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N. E. 2d 565 (2004)

*Li v. State*, 338 Or. 376, 110 P. 3d 91 (2005)

*Cote-Whitacre v. Department of Public Health*, 446 Mass. 350, 844 N. E. 2d 623 (2006)

*Lewis v. Harris*, 188 N. J. 415, 908 A. 2d 196 (2006)

*Andersen v. King County*, 158 Wash. 2d 1, 138 P. 3d 963 (2006)

*Hernandez v. Robles*, 7 N. Y. 3d 338, 855 N. E. 2d 1 (2006)

*Conaway v. Deane*, 401 Md. 219, 932 A. 2d 571 (2007)

*In re Marriage Cases*, 43 Cal. 4th 757, 183 P. 3d 384 (2008)

*Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 957 A. 2d 407 (2008)

*Strauss v. Horton*, 46 Cal. 4th 364, 207 P. 3d 48 (2009)

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*Varnum v. Brien*, 763 N. W. 2d 862 (Iowa 2009)

*Griego v. Oliver*, 2014–NMSC–003, \_\_\_\_ N. M. \_\_\_\_, 316 P. 3d 865 (2013)

*Garden State Equality v. Dow*, 216 N. J. 314, 79 A. 3d 1036 (2013)

*Ex parte State ex rel. Alabama Policy Institute*, \_\_\_\_ So. 3d \_\_\_\_, 2015 WL 892752 (Ala., Mar. 3, 2015)

## Appendix B to opinion of the Court

## B

State Legislation and Judicial Decisions  
Legalizing Same-Sex Marriage**Legislation**

Del. Code Ann., Tit. 13, §129 (Cum. Supp. 2014)  
D. C. Act No. 18–248, 57 D. C. Reg. 27 (2010)  
Haw. Rev. Stat. §572 –1 (2006) and 2013 Cum. Supp.)  
Ill. Pub. Act No. 98–597  
Me. Rev. Stat. Ann., Tit. 19, §650–A (Cum. Supp. 2014)  
2012 Md. Laws p. 9  
2013 Minn Laws p. 404  
2009 N. H. Laws p. 60  
2011 N. Y Laws p. 749  
2013 R. I. Laws p. 7  
2009 Vt. Acts & Resolves p. 33  
2012 Wash. Sess. Laws p. 199

**Judicial Decisions**

*Goodridge v. Department of Public Health*, 440 Mass.  
309, 798 N. E. 2d 941 (2003)  
*Kerrigan v. Commissioner of Public Health*, 289 Conn.  
135, 957 A. 2d 407 (2008)  
*Varnum v. Brien*, 763 N. W. 2d 862 (Iowa 2009)  
*Griego v. Oliver*, 2014–NMSC–003, \_\_\_ N. M. \_\_\_, 316  
P. 3d 865 (2013)  
*Garden State Equality v. Dow*, 216 N. J. 314, 79 A. 3d  
1036 (2013)

## ***Obergefell v. Hodges***

To view this opinion in full, please go to  
[http://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf)

***North Carolina Board of Dental Examiners v.  
Federal Trade Commission***

David J. Owsiany  
Ohio Dental Association

David J. Owsiany has been the executive director of the Ohio Dental Association since 2002. He is a past president of the Buckeye Institute for Public Policy Solutions and previously served as chief of policy for the Ohio Department of Insurance. Before coming to Columbus, Mr. Owsiany worked on the staff of the U.S. Senate Judiciary Committee in Washington, D.C., and clerked for Justice Robert W. Cook of the Illinois Appellate Court. David has written dozens of articles on legal and public policy issues, including health care reform, civil liability reform and risk management. His work has appeared in various journals, including the University of Toledo Law Review and the Journal of the American College of Dentists, and in various newspapers, including the Columbus Dispatch, Cincinnati Enquirer, and Akron Beacon Journal. He received his J.D. from Washington University School of Law in St. Louis and his B.A. from the University of Michigan in Ann Arbor.

*An overview of North Carolina State Board of Dental Examiners v. FTC and what it means for state licensing boards*

Continuing Legal Education Seminar  
Ohio Legislative Services Commission  
Friday, October 23, 2015

David J. Owsiany, J.D.  
Executive Director  
Ohio Dental Association

DA

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North Carolina State Board of Dental Examiners v. FTC

- Decided on February 25, 2015
- Holding: Because the NC Dental Board consisted of a controlling number of market participants, active state supervision was necessary for state-action anti-trust immunity to apply to the board's anticompetitive actions.

DA

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North Carolina State Board of Dental Examiners v. FTC

- In 2006, NC Dental Board issued cease and desist letters to non-dentist teeth whiteners for practicing dentistry without a license
- In 2010, FTC issued an administrative complaint against NC Dental Board for unlawful restraint of trade under Sherman Act and FTC Act
- NC Dental Board filed motion to dismiss invoking state action doctrine
- FTC argued no state action immunity

DA

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North Carolina State Board of Dental Examiners v. FTC

- In 2011, Administrative Law Judge found in favor of FTC
- In 2011, FTC issued final order ruling against the NC Dental Board
- NC Dental Board appealed to Fourth Circuit arguing state action immunity. In 2013, Fourth Circuit ruled in favor of FTC. N.C. State Bd. Of Dental Examiners v. FTC, 717 F.3d 359 (4th Cir. 2013)

CPA

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North Carolina State Board of Dental Examiners v. FTC

- Professional Licensing Background
- U.S. Supreme Court has long recognized the states' authority to license and regulate professionals
- "Due consideration ... for the protection of society may well induce the State to exclude from (medical) practice those who have not such a license, or who are found upon examination not to be fully qualified." Dent v. West Virginia, 129 U.S. 114 (1889)
- States may "prescribe that only persons possessing the reasonably necessary qualifications shall practice dentistry" and state legislatures may "confer upon an administrative board the power to determine whether an applicant possesses the qualifications which the legislature has declared as necessary." - Douglas v. Noble, 261 U.S., 195 (1923)
- "It is well settled that a state may, consistently with the Fourteenth Amendment, prescribe that only persons possessing the reasonably necessary qualifications of learning and skill shall practice medicine or dentistry." Graves v. Minnesota 272 U.S. 425 (1926)

CPA

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North Carolina State Board of Dental Examiners v. FTC

- Sherman Antitrust Act - prohibits anti-competitive activity - break up trusts - 1890
- FTC Act - created FTC - promote competition - 1914

CPA

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**North Carolina State Board of Dental Examiners v. FTC**

- Professional Licensing – State Authority to License Professions vs Federal Antitrust Law
- Supreme Court - State action immunity doctrine
- "In a dual system of government, the states are "sovereign" and there is "nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Parker v. Brown*, 317 U.S. 341 (1943)
- State action gets immunity from antitrust prohibitions – professional licensing
- Private parties can receive state action immunity if (1) they act pursuant to a clearly articulated state policy to displace competition with regulation or monopoly public service, and (2) the policy is actively supervised by the state itself. *Cal. Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)

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**North Carolina State Board of Dental Examiners v. FTC**

- Majority opinion written by Justice Anthony Kennedy – joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, Kagan
- Majority – NC Dental Board NOT a state agency entitled to immunity because a "controlling number" of its members are practicing dentists -AKA "market participants"
- NC Dental Board: six licensed dentists, one licensed dental hygienist, one public member.
- Majority: "while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a non-sovereign actor."

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**North Carolina State Board of Dental Examiners v. FTC**

- Majority: "state agencies composed of active market participants" pose a risk of "self-dealing" - active state supervision is required as a check on that self-dealing.
- Majority: Board with controlling number of market participants is more like a private actor than a state actor - "hybrid"

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### North Carolina State Board of Dental Examiners v. FTC

• Bottom line: State licensing board with a controlling number of market participants engaged in an anticompetitive activity may only get state action antitrust immunity if:

- 1 Acting pursuant to a clearly articulated policy to displace competition, and
- 2 Active state supervision.

PSA

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### North Carolina State Board of Dental Examiners v. FTC

• Dissent - Justice Alito, joined by Justices Scalia, Thomas

• Dissent: "Under *Parker*, the Sherman Act does not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter."

• Dissent: State decision – when regulating technical professions - makes more sense to have dentists on dental boards vs CPAs on the dental boards

PSA

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### North Carolina State Board of Dental Examiners v. FTC

• Dissent: "Headed into a morass." – unanswered questions

- What is a controlling number?

- Who is an active market participant?

- What is an anticompetitive action?

- What is active state supervision?

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North Carolina State Board of Dental Examiners v. FTC

- Implications for state licensing boards?
- Narrow vs Broad
- Who will serve on boards with possibility of antitrust liability as private actors?
- Majority: "states may defend and indemnify those officials in the event of litigation"
- Replace market participants on licensing boards? Probably not

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North Carolina State Board of Dental Examiners v. FTC

- Majority: "If a state wants to rely on active market participants as regulators, it must provide active supervision" for state action antitrust immunity
- What is active state supervision?
- Majority:
  - supervisor must review substance of anticompetitive decision, not just process
  - supervisor must have power to veto or modify
  - supervisor may not be a market participant

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North Carolina State Board of Dental Examiners v. FTC

- FTC Commissioner Maureen K. Ohlhausen to Heritage Foundation on March 31, 2015
- "Most states have established schemes to supervise some or all of the conduct of self interested" boards – i.e., legislative rules review commissions
- "Case did not have to happen" NC Dental Board could have sought injunctions vs teeth whiteners from the NC courts - Noerr-Pennington doctrine – no antitrust application
- Promulgate rule defining teeth whitening as the practice of dentistry – Rule Review Commission = state action supervision

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### North Carolina State Board of Dental Examiners v. FTC

- What does it mean for Ohio?
- Change Boards' compositions? Fewer market participants? Difficult for technical professions
- Active state supervision? Who will have veto authority?
- JCARR
- Dissent: difficult questions remain for states
- "Diminishes our traditional respect for federalism and state sovereignty and it will be difficult" for the states to apply.

QA

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### Contact

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QA

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## Syllabus

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

**SUPREME COURT OF THE UNITED STATES**

## Syllabus

**NORTH CAROLINA STATE BOARD OF DENTAL  
EXAMINERS v. FEDERAL TRADE COMMISSION****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT**

No. 13–534. Argued October 14, 2014—Decided February 25, 2015

North Carolina’s Dental Practice Act (Act) provides that the North Carolina State Board of Dental Examiners (Board) is “the agency of the State for the regulation of the practice of dentistry.” The Board’s principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists.

The Act does not specify that teeth whitening is “the practice of dentistry.” Nonetheless, after dentists complained to the Board that nondentists were charging lower prices for such services than dentists did, the Board issued at least 47 official cease-and-desist letters to nondentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This and other related Board actions led nondentists to cease offering teeth whitening services in North Carolina.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board’s concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the Board’s motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which it was not. After a hearing on the merits, the ALJ determined that the Board had unreasonably restrained trade in violation of antitrust law. The FTC again sustained the ALJ, and the Fourth Circuit affirmed the FTC in

## Syllabus

all respects.

*Held:* Because a controlling number of the Board's decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met. Pp. 5–18.

(a) Federal antitrust law is a central safeguard for the Nation's free market structures. However, requiring States to conform to the mandates of the Sherman Act at the expense of other values a State may deem fundamental would impose an impermissible burden on the States' power to regulate. Therefore, beginning with *Parker v. Brown*, 317 U. S. 341, this Court interpreted the antitrust laws to confer immunity on the anticompetitive conduct of States acting in their sovereign capacity. Pp. 5–6.

(b) The Board's actions are not cloaked with *Parker* immunity. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if “the challenged restraint . . . [is] clearly articulated and affirmatively expressed as state policy,” and . . . “the policy . . . [is] actively supervised by the State.” *FTC v. Phoebe Putney Health System, Inc.*, 568 U. S. \_\_\_, \_\_\_ (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U. S. 97, 105). Here, the Board did not receive active supervision of its anticompetitive conduct. Pp. 6–17.

(1) An entity may not invoke *Parker* immunity unless its actions are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 374. Thus, where a State delegates control over a market to a nonsovereign actor the Sherman Act confers immunity only if the State accepts political accountability for the anticompetitive conduct it permits and controls. Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. Accordingly, *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. *Midcal's* two-part test provides a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for entities purporting to act under state authority might diverge from the State's considered definition of the public good and engage in private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this

## Syllabus

harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity. Pp. 6–10.

(2) There are instances in which an actor can be excused from *Midcal's* active supervision requirement. Municipalities, which are electorally accountable, have general regulatory powers, and have no private price-fixing agenda, are subject exclusively to the clear articulation requirement. See *Hallie v. Eau Claire*, 471 U. S. 34, 35. That *Hallie* excused municipalities from *Midcal's* supervision rule for these reasons, however, all but confirms the rule's applicability to actors controlled by active market participants. Further, in light of *Omni's* holding that an otherwise immune entity will not lose immunity based on ad hoc and *ex post* questioning of its motives for making particular decisions, 499 U. S., at 374, it is all the more necessary to ensure the conditions for granting immunity are met in the first place, see *FTC v. Ticor Title Ins. Co.*, 504 U. S. 621, 633, and *Phoebe Putney, supra*, at \_\_\_\_\_. The clear lesson of precedent is that *Midcal's* active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants. Pp. 10–12.

(3) The Board's argument that entities designated by the States as agencies are exempt from *Midcal's* second requirement cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. State agencies controlled by active market participants pose the very risk of self-dealing *Midcal's* supervision requirement was created to address. See *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 791. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, 471 U. S., at 46, n. 10, the entity there was more like prototypical state agencies, not specialized boards dominated by active market participants. The latter are similar to private trade associations vested by States with regulatory authority, which must satisfy *Midcal's* active supervision standard. 445 U. S., at 105–106. The similarities between agencies controlled by active market participants and such associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie, supra*, at 39. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. Thus,

NORTH CAROLINA STATE BD. OF DENTAL  
EXAMINERS *v.* FTC

## Syllabus

the Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal's* active supervision requirement in order to invoke state-action antitrust immunity. Pp. 12–14.

(4) The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. But this holding is not inconsistent with the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State. Further, this case does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. Of course, States may provide for the defense and indemnification of agency members in the event of litigation, and they can also ensure *Parker* immunity is available by adopting clear policies to displace competition and providing active supervision. Arguments against the wisdom of applying the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity must be rejected, see *Patrick v. Burget*, 486 U. S. 94, 105–106, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. Pp. 14–16.

(5) The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis. The Act delegates control over the practice of dentistry to the Board, but says nothing about teeth whitening. In acting to expel the dentists' competitors from the market, the Board relied on cease-and-desist letters threatening criminal liability, instead of other powers at its disposal that would have invoked oversight by a politically accountable official. Whether or not the Board exceeded its powers under North Carolina law, there is no evidence of any decision by the State to initiate or concur with the Board's actions against the nondentists. P. 17.

(c) Here, where there are no specific supervisory systems to be reviewed, it suffices to note that the inquiry regarding active supervision is flexible and context-dependent. The question is whether the State's review mechanisms provide "realistic assurance" that a non-sovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick*, 486 U. S., 100–101. The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, see *id.*, at 102–103; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state

Syllabus

supervision is not an adequate substitute for a decision by the State,” *Ticor, supra*, at 638. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. Pp. 17–18.

717 F. 3d 359, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

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No. 13–534

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**NORTH CAROLINA STATE BOARD OF DENTAL  
EXAMINERS, PETITIONER *v.* FEDERAL  
TRADE COMMISSION**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

[February 25, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

This case arises from an antitrust challenge to the actions of a state regulatory board. A majority of the board’s members are engaged in the active practice of the profession it regulates. The question is whether the board’s actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in this Court’s decisions beginning with *Parker v. Brown*, 317 U. S. 341 (1943).

I  
A

In its Dental Practice Act (Act), North Carolina has declared the practice of dentistry to be a matter of public concern requiring regulation. N. C. Gen. Stat. Ann. §90–22(a) (2013). Under the Act, the North Carolina State Board of Dental Examiners (Board) is “the agency of the State for the regulation of the practice of dentistry.” §90–22(b).

The Board’s principal duty is to create, administer, and enforce a licensing system for dentists. See §§90–29 to

90-41. To perform that function it has broad authority over licensees. See §90-41. The Board's authority with respect to unlicensed persons, however, is more restricted: like "any resident citizen," the Board may file suit to "perpetually enjoin any person from . . . unlawfully practicing dentistry." §90-40.1.

The Act provides that six of the Board's eight members must be licensed dentists engaged in the active practice of dentistry. §90-22. They are elected by other licensed dentists in North Carolina, who cast their ballots in elections conducted by the Board. *Ibid.* The seventh member must be a licensed and practicing dental hygienist, and he or she is elected by other licensed hygienists. *Ibid.* The final member is referred to by the Act as a "consumer" and is appointed by the Governor. *Ibid.* All members serve 3-year terms, and no person may serve more than two consecutive terms. *Ibid.* The Act does not create any mechanism for the removal of an elected member of the Board by a public official. See *ibid.*

Board members swear an oath of office, §138A-22(a), and the Board must comply with the State's Administrative Procedure Act, §150B-1 *et seq.*, Public Records Act, §132-1 *et seq.*, and open-meetings law, §143-318.9 *et seq.* The Board may promulgate rules and regulations governing the practice of dentistry within the State, provided those mandates are not inconsistent with the Act and are approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. See §§90-48, 143B-30.1, 150B-21.9(a).

## B

In the 1990's, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board's 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower

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prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.

Responding to these filings, the Board opened an investigation into nondentist teeth whitening. A dentist member was placed in charge of the inquiry. Neither the Board's hygienist member nor its consumer member participated in this undertaking. The Board's chief operations officer remarked that the Board was "going forth to do battle" with nondentists. App. to Pet. for Cert. 103a. The Board's concern did not result in a formal rule or regulation reviewable by the independent Rules Review Commission, even though the Act does not, by its terms, specify that teeth whitening is "the practice of dentistry."

Starting in 2006, the Board issued at least 47 cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers and product manufacturers. Many of those letters directed the recipient to cease "all activity constituting the practice of dentistry"; warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes "the practice of dentistry." App. 13, 15. In early 2007, the Board persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists against providing teeth whitening services. Later that year, the Board sent letters to mall operators, stating that kiosk teeth whiteners were violating the Dental Practice Act and advising that the malls consider expelling violators from their premises.

These actions had the intended result. Nondentists ceased offering teeth whitening services in North Carolina.

## C

In 2010, the Federal Trade Commission (FTC) filed an

administrative complaint charging the Board with violating §5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. §45. The FTC alleged that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition. The Board moved to dismiss, alleging state-action immunity. An Administrative Law Judge (ALJ) denied the motion. On appeal, the FTC sustained the ALJ's ruling. It reasoned that, even assuming the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board is a "public/private hybrid" that must be actively supervised by the State to claim immunity. App. to Pet. for Cert. 49a. The FTC further concluded the Board could not make that showing.

Following other proceedings not relevant here, the ALJ conducted a hearing on the merits and determined the Board had unreasonably restrained trade in violation of antitrust law. On appeal, the FTC again sustained the ALJ. The FTC rejected the Board's public safety justification, noting, *inter alia*, "a wealth of evidence . . . suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure." *Id.*, at 123a.

The FTC ordered the Board to stop sending the cease-and-desist letters or other communications that stated nondentists may not offer teeth whitening services and products. It further ordered the Board to issue notices to all earlier recipients of the Board's cease-and-desist orders advising them of the Board's proper sphere of authority and saying, among other options, that the notice recipients had a right to seek declaratory rulings in state court.

On petition for review, the Court of Appeals for the Fourth Circuit affirmed the FTC in all respects. 717 F. 3d 359, 370 (2013). This Court granted certiorari. 571 U. S. \_\_\_ (2014).

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## II

Federal antitrust law is a central safeguard for the Nation's free market structures. In this regard it is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U. S. 596, 610 (1972). The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.

The Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §1 *et seq.*, serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public's welfare. See *FTC v. Ticor Title Ins. Co.*, 504 U. S. 621, 632 (1992). The States, however, when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition. While "the States regulate their economies in many ways not inconsistent with the antitrust laws," *id.*, at 635–636, in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate. See *Exxon Corp. v. Governor of Maryland*, 437 U. S. 117, 133 (1978); see also Easterbrook, *Antitrust and the Economics of Federalism*, 26 *J. Law & Econ.* 23, 24 (1983).

For these reasons, the Court in *Parker v. Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. See 317 U. S., at 350–351. That ruling

recognized Congress' purpose to respect the federal balance and to "embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Community Communications Co. v. Boulder*, 455 U. S. 40, 53 (1982). Since 1943, the Court has reaffirmed the importance of *Parker's* central holding. See, e.g., *Ticor, supra*, at 632–637; *Hoover v. Ronwin*, 466 U. S. 558, 568 (1984); *Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 394–400 (1978).

### III

In this case the Board argues its members were invested by North Carolina with the power of the State and that, as a result, the Board's actions are cloaked with *Parker* immunity. This argument fails, however. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if it satisfies two requirements: "first that 'the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy . . . be actively supervised by the State.'" *FTC v. Phoebe Putney Health System, Inc.*, 568 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 7) (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U. S. 97, 105 (1980)). The parties have assumed that the clear articulation requirement is satisfied, and we do the same. While North Carolina prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

### A

Although state-action immunity exists to avoid conflicts

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between state sovereignty and the Nation's commitment to a policy of robust competition, *Parker* immunity is not unbounded. “[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, ‘state action immunity is disfavored, much as are repeals by implication.’” *Phoebe Putney, supra*, at \_\_\_\_ (slip op., at 7) (quoting *Ticor, supra*, at 636).

An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 374 (1991). State legislation and “decision[s] of a state supreme court, acting legislatively rather than judicially,” will satisfy this standard, and “*ipso facto* are exempt from the operation of the antitrust laws” because they are an undoubted exercise of state sovereign authority. *Hoover, supra*, at 567–568.

But while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a non-sovereign actor. See *Parker, supra*, at 351 (“[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful”). For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. See *Hoover, supra*, at 567–568. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. See *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 791 (1975) (“The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members”). Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of

*Parker's* rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control. See *Ticor*, 504 U. S., at 636.

Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. See *Midcal*, *supra*, at 106 (“The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement”). Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U. S. 492, 501 (1988); *Hoover*, *supra*, at 584 (Stevens, J., dissenting) (“The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of . . . our antitrust jurisprudence”); see also Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 672 (1991). So it follows that, under *Parker* and the Supremacy Clause, the States’ greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants. See Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L. J. 486, 500 (1986).

*Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State’s own.

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See *Goldfarb, supra*, at 790; see also 1A P. Areeda & H. Hovencamp, *Antitrust Law* ¶226, p. 180 (4th ed. 2013) (Areeda & Hovencamp). The question is not whether the challenged conduct is efficient, well-functioning, or wise. See *Ticor, supra*, at 634–635. Rather, it is “whether anti-competitive conduct engaged in by [nonsovereign actors] should be deemed state action and thus shielded from the antitrust laws.” *Patrick v. Burget*, 486 U. S. 94, 100 (1988).

To answer this question, the Court applies the two-part test set forth in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U. S. 97, a case arising from California’s delegation of price-fixing authority to wine merchants. Under *Midcal*, “[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct.” *Ticor, supra*, at 631 (citing *Midcal, supra*, at 105).

*Midcal*’s clear articulation requirement is satisfied “where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.” *Phoebe Putney*, 568 U. S., at \_\_\_\_ (slip op., at 11). The active supervision requirement demands, *inter alia*, “that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.” *Patrick, supra*, U. S., at 101.

The two requirements set forth in *Midcal* provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may

satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. See *Ticor*, *supra*, at 636–637. Entities purporting to act under state authority might diverge from the State’s considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.

*Midcal*’s supervision rule “stems from the recognition that [w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.” *Patrick*, *supra*, at 100. Concern about the private incentives of active market participants animates *Midcal*’s supervision mandate, which demands “realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.” *Patrick*, *supra*, at 101.

## B

In determining whether anticompetitive policies and conduct are indeed the action of a State in its sovereign capacity, there are instances in which an actor can be excused from *Midcal*’s active supervision requirement. In *Hallie v. Eau Claire*, 471 U. S. 34, 45 (1985), the Court held municipalities are subject exclusively to *Midcal*’s “‘clear articulation’” requirement. That rule, the Court observed, is consistent with the objective of ensuring that the policy at issue be one enacted by the State itself. *Hallie* explained that “[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the

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expense of more overriding state goals.” 471 U. S., at 47. *Hallie* further observed that municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. See *id.*, at 45, n. 9. Critically, the municipality in *Hallie* exercised a wide range of governmental powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. See *ibid.* That *Hallie* excused municipalities from *Midcal*’s supervision rule for these reasons all but confirms the rule’s applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception *Hallie* identified. See 471 U. S., at 45.

Following *Goldfarb*, *Midcal*, and *Hallie*, which clarified the conditions under which *Parker* immunity attaches to the conduct of a nonsovereign actor, the Court in *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U. S. 365, addressed whether an otherwise immune entity could lose immunity for conspiring with private parties. In *Omni*, an aspiring billboard merchant argued that the city of Columbia, South Carolina, had violated the Sherman Act—and forfeited its *Parker* immunity—by anticompetitively conspiring with an established local company in passing an ordinance restricting new billboard construction. 499 U. S., at 367–368. The Court disagreed, holding there is no “conspiracy exception” to *Parker*. *Omni, supra*, at 374.

*Omni*, like the cases before it, recognized the importance of drawing a line “relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest.” 499 U. S., at 378. In the context of a municipal actor which, as in *Hallie*, exercised substantial governmental powers, *Omni* rejected a conspiracy exception for “corruption” as vague and unworkable, since “virtually all regulation benefits some

segments of the society and harms others” and may in that sense be seen as “‘corrupt.’” 499 U. S., at 377. *Omni* also rejected subjective tests for corruption that would force a “deconstruction of the governmental process and probing of the official ‘intent’ that we have consistently sought to avoid.” *Ibid.* Thus, whereas the cases preceding it addressed the preconditions of *Parker* immunity and engaged in an objective, *ex ante* inquiry into nonsovereign actors’ structure and incentives, *Omni* made clear that recipients of immunity will not lose it on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions.

*Omni*’s holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place. The Court’s two state-action immunity cases decided after *Omni* reinforce this point. In *Ticor* the Court affirmed that *Midcal*’s limits on delegation must ensure that “[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law.” 504 U. S., at 633. And in *Phoebe Putney* the Court observed that *Midcal*’s active supervision requirement, in particular, is an essential condition of state-action immunity when a nonsovereign actor has “an incentive to pursue [its] own self-interest under the guise of implementing state policies.” 568 U. S., at \_\_\_ (slip op., at 8) (quoting *Hallie*, *supra*, at 46–47). The lesson is clear: *Midcal*’s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants.

### C

The Board argues entities designated by the States as agencies are exempt from *Midcal*’s second requirement. That premise, however, cannot be reconciled with the Court’s repeated conclusion that the need for supervision

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turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.

State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal's* supervision requirement was created to address. See *Areeda & Hovencamp* ¶227, at 226. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. See *Patrick*, 486 U. S., at 100–101.

The Court applied this reasoning to a state agency in *Goldfarb*. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had “joined in what is essentially a private anticompetitive activity” for “the benefit of its members.” 421 U. S., at 791, 792. This emphasis on the Bar's private interests explains why *Goldfarb*, though it predates *Midcal*, considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. See 421 U. S., at 791; see also *Hoover*, 466 U. S., at 569 (emphasizing lack of active supervision in *Goldfarb*); *Bates v. State Bar of Ariz.*, 433 U. S. 350, 361–362 (1977) (granting the Arizona Bar state-action immunity partly because its “rules are subject to pointed re-examination by the policymaker”).

While *Hallie* stated “it is likely that active state supervision would also not be required” for agencies, 471 U. S., at 46, n. 10, the entity there, as was later the case in *Omni*, was an electorally accountable municipality with general regulatory powers and no private price-fixing agenda. In that and other respects the municipality was more like prototypical state agencies, not specialized boards dominated by active market participants. In important regards, agencies controlled by market partici-

pants are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie* considered. And as the Court observed three years after *Hallie*, “[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.” *Allied Tube*, 486 U. S., at 500. For that reason, those associations must satisfy *Midcal*’s active supervision standard. See *Midcal*, 445 U. S., at 105–106.

The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie*, *supra*, at 39 (rejecting “purely formalistic” analysis). *Parker* immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. See *Areeda & Hovencamp* ¶227, at 226. The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*’s active supervision requirement in order to invoke state-action antitrust immunity.

#### D

The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. If this were so—and, for reasons to be noted, it need not be so—there would be some cause for concern. The States have a sovereign interest in structuring their governments, see *Gregory v. Ashcroft*, 501 U. S. 452, 460 (1991), and may conclude there are substantial benefits to staffing their

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agencies with experts in complex and technical subjects, see *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U. S. 48, 64 (1985). There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling.

Adherence to the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State reaches back at least to the Hippocratic Oath. See generally S. Miles, *The Hippocratic Oath and the Ethics of Medicine* (2004). In the United States, there is a strong tradition of professional self-regulation, particularly with respect to the development of ethical rules. See generally R. Rotunda & J. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (2014); R. Baker, *Before Bioethics: A History of American Medical Ethics From the Colonial Period to the Bioethics Revolution* (2013). Dentists are no exception. The American Dental Association, for example, in an exercise of “the privilege and obligation of self-government,” has “call[ed] upon dentists to follow high ethical standards,” including “honesty, compassion, kindness, integrity, fairness and charity.” American Dental Association, *Principles of Ethics and Code of Professional Conduct* 3–4 (2012). State laws and institutions are sustained by this tradition when they draw upon the expertise and commitment of professionals.

Today's holding is not inconsistent with that idea. The Board argues, however, that the potential for money damages will discourage members of regulated occupations from participating in state government. Cf. *Filarsky v. Delia*, 566 U. S. \_\_\_, \_\_\_ (2012) (slip op., at 12) (warning in the context of civil rights suits that the “the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts”). But this case, which does not

present a claim for money damages, does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. See *Goldfarb*, 421 U. S., at 792, n. 22; see also Brief for Respondent 56. And, of course, the States may provide for the defense and indemnification of agency members in the event of litigation.

States, furthermore, can ensure *Parker* immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision. Precedent confirms this principle. The Court has rejected the argument that it would be unwise to apply the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity:

“[Respondents] contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own.” *Patrick*, 486 U. S. at 105–106 (footnote omitted).

The reasoning of *Patrick v. Burget* applies to this case with full force, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. See generally Edlin & Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?* 162 U. Pa. L. Rev. 1093 (2014).

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## E

The Board does not contend in this Court that its anti-competitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis.

By statute, North Carolina delegates control over the practice of dentistry to the Board. The Act, however, says nothing about teeth whitening, a practice that did not exist when it was passed. After receiving complaints from other dentists about the nondentists' cheaper services, the Board's dentist members—some of whom offered whitening services—acted to expel the dentists' competitors from the market. In so doing the Board relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official. With no active supervision by the State, North Carolina officials may well have been unaware that the Board had decided teeth whitening constitutes “the practice of dentistry” and sought to prohibit those who competed against dentists from participating in the teeth whitening market. Whether or not the Board exceeded its powers under North Carolina law, cf. *Omni*, 499 U. S., at 371–372, there is no evidence here of any decision by the State to initiate or concur with the Board's actions against the nondentists.

## IV

The Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here. It suffices to note that the inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide “realistic assurance” that a nonsovereign actor's anticom-

petitive conduct “promotes state policy, rather than merely the party’s individual interests.” *Patrick, supra*, at 100–101; see also *Ticor*, 504 U. S., at 639–640.

The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it, see *Patrick*, 486 U. S., at 102–103; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the “mere potential for state supervision is not an adequate substitute for a decision by the State,” *Ticor, supra*, at 638. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

\* \* \*

The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.

The judgment of the Court of Appeals for the Fourth Circuit is affirmed.

*It is so ordered.*

***North Carolina Board of Dental Examiners v.  
Federal Trade Commission***

To view this opinion in full, please go to  
[http://www.supremecourt.gov/opinions/14pdf/13-534\\_19m2.pdf](http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf)

***Arizona State Legislature v. Arizona Independent  
Redistricting Commission***

Lynda Jacobsen  
Legislative Service Commission

Lynda Jacobsen is the Division Chief for the Judiciary and Elections Division of LSC. Before becoming a Division Chief, Ms. Jacobsen was a staff attorney working primarily in the areas of elections, campaign finance, and redistricting. She has been with LSC since 1999. She is a graduate of The Ohio State University Moritz College of Law and received her Bachelor of Arts in Political Science from Hiram College.

WHO DRAWS THE LINES?

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TYPES OF REDISTRICTING

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| <ul style="list-style-type: none"><li>• <b>State legislative</b></li><li>• Governed by state constitutional standards</li><li>• Equal protection</li><li>• Voting Rights Act</li><li>• Ohio Apportionment Board</li></ul> | <ul style="list-style-type: none"><li>• <b>Congressional</b></li><li>• Governed by U.S. constitutional requirements</li><li>• Equal protection</li><li>• Voting Rights Act</li><li>• Ohio General Assembly</li></ul> |
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HISTORICAL ARIZONA PROCESS



- Arizona Legislature adopts congressional district maps

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### PROP 106

- Initiated constitutional amendment
- Arizona Independent Redistricting Commission (AIRC) draws state legislative and congressional district maps
- AIRC adopted congressional district maps in 2012



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### CASE

- Arizona State Legislature vs. Arizona Independent Redistricting Commission, 576 U.S. \_\_\_\_ (2015)
- 
- Arizona Legislature challenged the AIRC's authority to draw congressional district maps
  - Requested permanent injunction against AIRC map

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### THE QUESTION

- Does the Elections Clause of the U.S. Constitution mean that state legislatures must establish congressional districts?

The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof...

-Elections Clause (Article I, Section 4)

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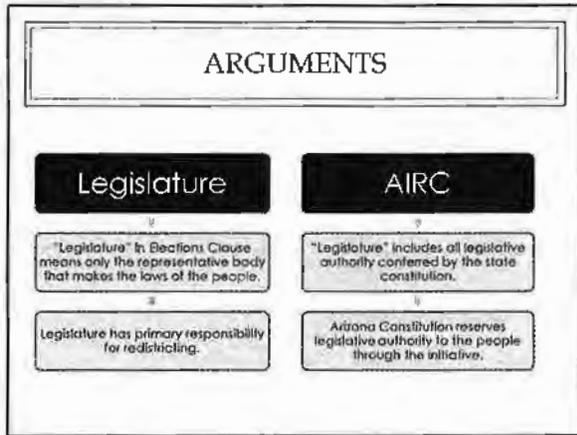
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**ARIZONA CONSTITUTION**

- The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature...
- Arizona Constitution, Article I, Section 1

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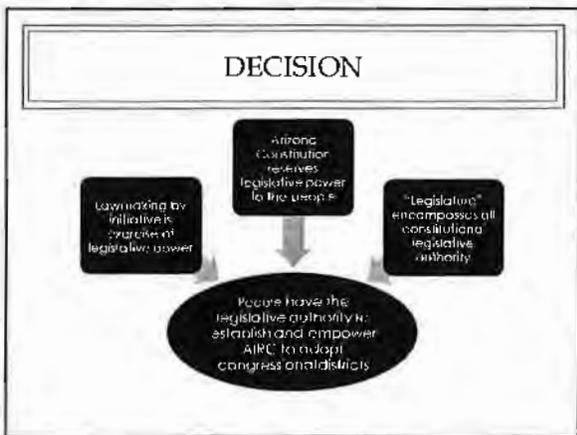
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**IMPACT ON OHIO**

- Issue 1
  - Proposes new commission only for state legislative districts
  - No application to congressional districts
  
- Ohio Constitution
  - Silent on the topic of congressional redistricting
  - Expressly reserves legislative power to the people
  
- Initiative or legislative sponsored constitutional amendment could establish an independent commission to adopt congressional districts

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## Syllabus

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

**SUPREME COURT OF THE UNITED STATES**

## Syllabus

**ARIZONA STATE LEGISLATURE v. ARIZONA  
INDEPENDENT REDISTRICTING COMMISSION ET AL.****APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF ARIZONA**

No. 13–1314. Argued March 2, 2015—Decided June 29, 2015

Under Arizona’s Constitution, the electorate shares lawmaking authority on equal footing with the Arizona Legislature. The voters may adopt laws and constitutional amendments by ballot initiative, and they may approve or disapprove, by referendum, measures passed by the Legislature. *Ariz. Const.*, Art. IV, pt. 1, §1. “Any law which may be enacted by the Legislature . . . may be enacted by the people under the Initiative.” Art. XXII, §14.

In 2000, Arizona voters adopted Proposition 106, an initiative aimed at the problem of gerrymandering. Proposition 106 amended Arizona’s Constitution, removing redistricting authority from the Arizona Legislature and vesting it in an independent commission, the Arizona Independent Redistricting Commission (AIRC). After the 2010 census, as after the 2000 census, the AIRC adopted redistricting maps for congressional as well as state legislative districts. The Arizona Legislature challenged the map the Commission adopted in 2012 for congressional districts, arguing that the AIRC and its map violated the “Elections Clause” of the U. S. Constitution, which provides: “The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.” Because “Legislature” means the State’s representative assembly, the Arizona Legislature contended, the Clause precludes resort to an independent commission, created by initiative, to accomplish redistricting. A three-judge District Court held that the Arizona Legislature had standing to sue, but rejected its complaint on the merits.

*Held:*

ARIZONA STATE LEGISLATURE v. ARIZONA  
INDEPENDENT REDISTRICTING COMM'N

Syllabus

1. The Arizona Legislature has standing to bring this suit. In claiming that Proposition 106 stripped it of its alleged constitutional prerogative to engage in redistricting and that its injury would be remedied by a court order enjoining the proposition's enforcement, the Legislature has shown injury that is 'concrete and particularized' and 'actual or imminent,' *Arizonans for Official English v. Arizona*, 520 U. S. 43, 64, "fairly traceable to the challenged action," and "redressable by a favorable ruling," *Clapper v. Amnesty Int'l USA*, 568 U. S. \_\_\_, \_\_\_. Specifically, Proposition 106, together with the Arizona Constitution's ban on efforts by the Arizona Legislature to undermine the purposes of an initiative, would "completely nullif[y]" any vote by the Legislature, now or "in the future," purporting to adopt a redistricting plan. *Raines v. Byrd*, 521 U. S. 811, 823–824. Pp. 9–15.

2. The Elections Clause and 2 U. S. C. §2a(c) permit Arizona's use of a commission to adopt congressional districts. Pp. 15–35.

(a) Redistricting is a legislative function to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum, *Ohio ex rel. Davis v. Hildebrant*, 241 U. S. 565, 567, and the Governor's veto, *Smiley v. Holm*, 285 U. S. 355, 369. While exercise of the initiative was not at issue in this Court's prior decisions, there is no constitutional barrier to a State's empowerment of its people by embracing that form of lawmaking. Pp. 15–19.

(b) Title 2 U. S. C. §2a(c)—which provides that, "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment," it must follow federally prescribed redistricting procedures—permits redistricting in accord with Arizona's initiative. From 1862 through 1901, apportionment Acts required a State to follow federal procedures unless "the [state] legislature" drew district lines. In 1911, Congress, recognizing that States had supplemented the representative legislature mode of lawmaking with a direct lawmaking role for the people, replaced the reference to redistricting by the state "legislature" with a reference to redistricting of a State "in the manner provided by the laws thereof." §4, 37 Stat. 14. The Act's legislative history "leaves no . . . doubt," *Hildebrant*, 241 U. S., at 568, that the change was made to safeguard to "each state full authority to employ in the creation of congressional districts its own laws and regulations." 47 Cong. Rec. 3437. "If they include the initiative, it is included." *Id.*, at 3508. Congress used virtually identical language in enacting §2a(c) in 1941. This provision also accords full respect to the redistricting procedures adopted by the States. Thus, so long as a State has "redistricted in the manner provided by the law thereof"—as Arizona did by utilizing the independent commission procedure in its Constitution—the resulting redistricting plan becomes the presumptively governing map.

## Syllabus

Though four of §2a(c)'s five default redistricting procedures—operative only when a State is not “redistricted in the manner provided by [state] law”—have become obsolete as a result of this Court’s decisions embracing the one-person, one-vote principle, this infirmity does not bear on the question whether a State has been “redistricted in the manner provided by [state] law.” Pp. 19–23.

(c) The Elections Clause permits the people of Arizona to provide for redistricting by independent commission. The history and purpose of the Clause weigh heavily against precluding the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts. Such preclusion would also run up against the Constitution’s animating principle that the people themselves are the originating source of all the powers of government. Pp. 24–35.

(1) The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation. See *Inter Tribal Council of Ariz.*, 570 U. S., at \_\_\_\_ . Ratification arguments in support of congressional oversight focused on potential abuses by state politicians, but the legislative processes by which the States could exercise their initiating role in regulating congressional elections occasioned no debate. Pp. 25–27.

(2) There is no suggestion that the Election Clause, by specifying “the Legislature thereof,” required assignment of congressional redistricting authority to the State’s representative body. It is characteristic of the federal system that States retain autonomy to establish their own governmental processes free from incursion by the Federal Government. See, e.g., *Alden v. Maine*, 527 U. S. 706, 752. “Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.” *Gregory v. Ashcroft*, 501 U. S. 452, 460. Arizona engaged in definition of that kind when its people placed both the initiative power and the AIRC’s redistricting authority in the portion of the Arizona Constitution delineating the State’s legislative authority, Ariz. Const., Art. IV. The Elections Clause should not be read to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process. And reading the Clause to permit the use of the initiative to control state and local elections but not federal elections would “deprive several States of the convenience of having the elections for their own governments and for the national government” held at the same times and places, and in the same manner. *The Federalist* No. 61, p. 374 (Hamilton). Pp. 27–30.

(3) The Framers may not have imagined the modern initiative

ARIZONA STATE LEGISLATURE *v.* ARIZONA  
INDEPENDENT REDISTRICTING COMM'N

## Syllabus

process in which the people's legislative power is coextensive with the state legislature's authority, but the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power. It would thus be perverse to interpret "Legislature" in the Elections Clause to exclude lawmaking by the people, particularly when such lawmaking is intended to advance the prospect that Members of Congress will in fact be "chosen . . . by the People of the several States," Art. I, §2. Pp. 30–33.

(4) Banning lawmaking by initiative to direct a State's method of apportioning congressional districts would not just stymie attempts to curb gerrymandering. It would also cast doubt on numerous other time, place, and manner regulations governing federal elections that States have adopted by the initiative method. As well, it could endanger election provisions in state constitutions adopted by conventions and ratified by voters at the ballot box, without involvement or approval by "the Legislature." Pp. 33–35.

997 F. Supp. 2d 1047, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined.

## Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

No. 13–1314

**ARIZONA STATE LEGISLATURE, APPELLANT v.  
ARIZONA INDEPENDENT REDISTRICTING  
COMMISSION ET AL.**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF ARIZONA

[June 29, 2015]

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns an endeavor by Arizona voters to address the problem of partisan gerrymandering—the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.<sup>1</sup> “[P]artisan gerrymanders,” this Court has recognized, “[are incompatible] with democratic principles.” *Vieth v. Jubelirer*, 541 U. S. 267, 292 (2004) (plurality opinion); *id.*, at 316 (KENNEDY, J., concurring in judgment). Even so, the Court in *Vieth* did not grant relief on the plaintiffs’ partisan gerrymander claim. The plurality held the matter nonjusticiable. *Id.*, at 281. JUSTICE KENNEDY found no standard workable in that case, but left open the possibility that a suitable standard might be identified in later litigation. *Id.*, at 317.

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<sup>1</sup>The term “gerrymander” is a portmanteau of the last name of Elbridge Gerry, the eighth Governor of Massachusetts, and the shape of the electoral map he famously contorted for partisan gain, which included one district shaped like a salamander. See E. Griffith, *The Rise and Development of the Gerrymander* 16–19 (Arno ed. 1974).

In 2000, Arizona voters adopted an initiative, Proposition 106, aimed at “ending the practice of gerrymandering and improving voter and candidate participation in elections.” App. 50. Proposition 106 amended Arizona’s Constitution to remove redistricting authority from the Arizona Legislature and vest that authority in an independent commission, the Arizona Independent Redistricting Commission (AIRC or Commission). After the 2010 census, as after the 2000 census, the AIRC adopted redistricting maps for congressional as well as state legislative districts.

The Arizona Legislature challenged the map the Commission adopted in January 2012 for congressional districts. Recognizing that the voters could control redistricting for state legislators, Brief for Appellant 42, 47; Tr. of Oral Arg. 3–4, the Arizona Legislature sued the AIRC in federal court seeking a declaration that the Commission and its map for congressional districts violated the “Elections Clause” of the U. S. Constitution. That Clause, critical to the resolution of this case, provides:

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .” Art. I, §4, cl. 1.

The Arizona Legislature’s complaint alleged that “[t]he word ‘Legislature’ in the Elections Clause means [specifically and only] the representative body which makes the laws of the people,” App. 21, ¶37; so read, the Legislature urges, the Clause precludes resort to an independent commission, created by initiative, to accomplish redistricting. The AIRC responded that, for Elections Clause purposes, “the Legislature” is not confined to the elected representatives; rather, the term encompasses all legislative authority conferred by the State Constitution, includ-

## Opinion of the Court

ing initiatives adopted by the people themselves.

A three-judge District Court held, unanimously, that the Arizona Legislature had standing to sue; dividing two to one, the Court rejected the Legislature's complaint on the merits. We postponed jurisdiction and instructed the parties to address two questions: (1) Does the Arizona Legislature have standing to bring this suit? (2) Do the Elections Clause of the United States Constitution and 2 U. S. C. §2a(c) permit Arizona's use of a commission to adopt congressional districts? 573 U. S. \_\_\_\_ (2014).

We now affirm the District Court's judgment. We hold, first, that the Arizona Legislature, having lost authority to draw congressional districts, has standing to contest the constitutionality of Proposition 106. Next, we hold that lawmaking power in Arizona includes the initiative process, and that both §2a(c) and the Elections Clause permit use of the AIRC in congressional districting in the same way the Commission is used in districting for Arizona's own Legislature.

I  
A

Direct lawmaking by the people was "virtually unknown when the Constitution of 1787 was drafted." Donovan & Bowler, *An Overview of Direct Democracy in the American States*, in *Citizens as Legislators 1* (S. Bowler, T. Donovan, & C. Tolbert eds. 1998). There were obvious precursors or analogues to the direct lawmaking operative today in several States, notably, New England's town hall meetings and the submission of early state constitutions to the people for ratification. See Lowell, *The Referendum in the United States*, in *The Initiative, Referendum and Recall 126, 127* (W. Munro ed. 1912) (hereinafter IRR); W. Dodd, *The Revision and Amendment of State Constitu-*

tions 64–67 (1910).<sup>2</sup> But it was not until the turn of the 20th century, as part of the Progressive agenda of the era, that direct lawmaking by the electorate gained a foothold, largely in Western States. See generally Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 *Mich L. & Pol’y Rev.* 11 (1997).

The two main “agencies of direct legislation” are the initiative and the referendum. Munro, *Introductory*, in IRR 8. The initiative operates entirely outside the States’ representative assemblies; it allows “voters [to] petition to propose statutes or constitutional amendments to be adopted or rejected by the voters at the polls.” D. Magleby, *Direct Legislation* 1 (1984). While the initiative allows the electorate to adopt positive legislation, the referendum serves as a negative check. It allows “voters [to] petition to refer a legislative action to the voters [for approval or disapproval] at the polls.” *Ibid.* “The initiative [thus] corrects sins of omission” by representative bodies, while the “referendum corrects sins of commission.” Johnson, *Direct Legislation as an Ally of Representative Government*, in IRR 139, 142.

In 1898, South Dakota took the pathmarking step of affirming in its Constitution the people’s power “directly [to] control the making of all ordinary laws” by initiative and referendum. *Introductory, id.*, at 9. In 1902, Oregon became the first State to adopt the initiative as a means,

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<sup>2</sup>The Massachusetts Constitution of 1780 is illustrative of the understanding that the people’s authority could trump the state legislature’s. Framed by a separate convention, it was submitted to the people for ratification. That occurred after the legislature attempted to promulgate a Constitution it had written, an endeavor that drew opposition from many Massachusetts towns. See J. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 96–101 (1996); G. Wood, *The Creation of the American Republic, 1776–1787*, pp. 339–341 (1969).

## Opinion of the Court

not only to enact ordinary laws, but also to amend the State's Constitution. J. Dinan, *The American State Constitutional Tradition* 62 (2006). By 1920, the people in 19 States had reserved for themselves the power to initiate ordinary lawmaking, and, in 13 States, the power to initiate amendments to the State's Constitution. *Id.*, at 62, and n. 132, 94, and n. 151. Those numbers increased to 21 and 18, respectively, by the close of the 20th century. *Ibid.*<sup>3</sup>

## B

For the delegates to Arizona's constitutional convention, direct lawmaking was a "principal issu[e]." J. Leshy, *The Arizona State Constitution* 8–9 (2d ed. 2013) (hereinafter Leshy). By a margin of more than three to one, the people of Arizona ratified the State's Constitution, which included, among lawmaking means, initiative and referendum provisions. *Id.*, at 14–16, 22. In the runup to Arizona's admission to the Union in 1912, those provisions generated no controversy. *Id.*, at 22.

In particular, the Arizona Constitution "establishes the electorate [of Arizona] as a coordinate source of legislation" on equal footing with the representative legislative body. *Queen Creek Land & Cattle Corp. v. Yavapai Cty. Bd. of Supervisors*, 108 Ariz. 449, 451, 501 P. 2d 391, 393 (1972); *Cave Creek Unified School Dist. v. Ducey*, 233 Ariz. 1, 4, 308 P. 3d 1152, 1155 (2013) ("The legislature and

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<sup>3</sup>The people's sovereign right to incorporate themselves into a State's lawmaking apparatus, by reserving for themselves the power to adopt laws and to veto measures passed by elected representatives, is one this Court has ranked a nonjusticiable political matter. *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U. S. 118 (1912) (rejecting challenge to referendum mounted under Article IV, §4's undertaking by the United States to "guarantee to every State in th[e] Union a Republican Form of Government"). But see *New York v. United States*, 505 U. S. 144, 185 (1992) ("[P]erhaps not all claims under the Guarantee Clause present nonjusticiable political questions.").

electorate share lawmaking power under Arizona's system of government." (internal quotation marks omitted). The initiative, housed under the article of the Arizona Constitution concerning the "Legislative Department" and the section defining the State's "legislative authority," reserves for the people "the power to propose laws and amendments to the constitution." Art. IV, pt. 1, §1. The Arizona Constitution further states that "[a]ny law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative." Art. XXII, §14. Accordingly, "[g]eneral references to the power of the 'legislature'" in the Arizona Constitution "include the people's right (specified in Article IV, part 1) to bypass their elected representatives and make laws directly through the initiative." Leshy xxii.

## C

Proposition 106, vesting redistricting authority in the AIRC, was adopted by citizen initiative in 2000 against a "background of recurring redistricting turmoil" in Arizona. Cain, *Redistricting Commissions: A Better Political Buffer?* 121 *Yale L. J.* 1808, 1831 (2012). Redistricting plans adopted by the Arizona Legislature sparked controversy in every redistricting cycle since the 1970's, and several of those plans were rejected by a federal court or refused preclearance by the Department of Justice under the Voting Rights Act of 1965. See *id.*, at 1830–1832.<sup>4</sup>

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<sup>4</sup>From Arizona's admission to the Union in 1912 to 1940, no congressional districting occurred because Arizona had only one Member of Congress. K. Martis, *The Historical Atlas of United States Congressional Districts, 1789–1983*, p. 3 (1982) (Table 1). Court-ordered congressional districting plans were in place from 1966 to 1970, and from 1982 through 2000. See *Klahr v. Williams*, 313 F. Supp. 148 (Ariz. 1970); *Goddard v. Babbitt*, 536 F. Supp. 538 (Ariz. 1982); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684 (Ariz. 1992); Norrander & Wendland, *Redistricting in Arizona*, in *Reapportionment and Redistricting in the West* 177, 178–179 (G. Moncrief ed.

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Aimed at “ending the practice of gerrymandering and improving voter and candidate participation in elections,” App. 50, Proposition 106 amended the Arizona Constitution to remove congressional redistricting authority from the state legislature, lodging that authority, instead, in a new entity, the AIRC. Ariz. Const., Art. IV, pt. 2, §1, ¶¶3–23. The AIRC convenes after each census, establishes final district boundaries, and certifies the new districts to the Arizona Secretary of State. ¶¶16–17. The legislature may submit nonbinding recommendations to the AIRC, ¶16, and is required to make necessary appropriations for its operation, ¶18. The highest ranking officer and minority leader of each chamber of the legislature each select one member of the AIRC from a list compiled by Arizona’s Commission on Appellate Court Appointments. ¶¶4–7. The four appointed members of the AIRC then choose, from the same list, the fifth member, who chairs the Commission. ¶8. A Commission’s tenure is confined to one redistricting cycle; each member’s time in office “expire[s] upon the appointment of the first member of the next redistricting commission.” ¶23.

Holders of, or candidates for, public office may not serve on the AIRC, except candidates for or members of a school board. ¶3. No more than two members of the Commission may be members of the same political party, *ibid.*, and the presiding fifth member cannot be registered with any party already represented on the Commission, ¶8. Subject to the concurrence of two-thirds of the Arizona Senate, AIRC members may be removed by the Arizona Governor for gross misconduct, substantial neglect of duty, or inability to discharge the duties of office. ¶10.<sup>5</sup>

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2011).

<sup>5</sup>In the current climate of heightened partisanship, the AIRC has encountered interference with its operations. In particular, its dependence on the Arizona Legislature for funding, and the removal provision have proved problematic. In 2011, when the AIRC proposed boundaries

Several other States, as a means to curtail partisan gerrymandering, have also provided for the participation of commissions in redistricting. Some States, in common with Arizona, have given nonpartisan or bipartisan commissions binding authority over redistricting.<sup>6</sup> The California Redistricting Commission, established by popular initiative, develops redistricting plans which can be halted by public referendum.<sup>7</sup> Still other States have given commissions an auxiliary role, advising the legislatures on redistricting,<sup>8</sup> or serving as a “backup” in the event the State’s representative body fails to complete redistricting.<sup>9</sup> Studies report that nonpartisan and bipartisan commissions generally draw their maps in a timely fashion and create districts both more competitive and more likely to survive legal challenge. See Miller & Grofman, *Redistricting Commissions in the Western United States*, 3 U. C. Irvine L. Rev. 637, 661, 663–664, 666 (2013).

## D

On January 17, 2012, the AIRC approved final congressional and state legislative maps based on the 2010 census. See *Arizona Independent Redistricting, Final Maps*,

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the majority party did not like, the Governor of Arizona attempted to remove the Commission’s independent chair. Her attempt was stopped by the Arizona Supreme Court. See Cain, *Redistricting Commissions: A Better Political Buffer?* 121 Yale L. J. 1808, 1835–1836 (2012) (citing *Mathis v. Brewer*, No. CV–11–0313–SA (Ariz. 2011)); *Arizona Independent Redistricting Comm’n v. Brewer*, 229 Ariz. 347, 275 P. 3d 1267 (2012).

<sup>6</sup>See Haw. Const., Art. IV, §2, and Haw. Rev. Stat. §§25–1 to 25–9 (2009 and 2013 Cum. Supp.); Idaho Const., Art. III, §2; Mont. Const., Art. V, §14; N. J. Const., Art. II, §2; Wash Const., Art. II, §43.

<sup>7</sup>See Cal. Const., Art. XXI, §2; Cal. Govt. Code Ann. §§8251–8253.6 (West Supp. 2015).

<sup>8</sup>See Iowa Code §§42.1–42.6 (2013); Ohio Rev. Code Ann. §103.51 (Lexis 2014); Me. Const., Art. IV, pt. 3, §1–A.

<sup>9</sup>See Conn. Const., Art. III, §6; Ind. Code §3–3–2–2 (2014).

## Opinion of the Court

<http://azredistricting.org/Maps/Final-Maps/default.asp> (all Internet materials as visited June 25, 2015, and included in Clerk of Court’s case file). Less than four months later, on June 6, 2012, the Arizona Legislature filed suit in the United States District Court for the District of Arizona, naming as defendants the AIRC, its five members, and the Arizona Secretary of State. The Legislature sought both a declaration that Proposition 106 and congressional maps adopted by the AIRC are unconstitutional, and, as affirmative relief, an injunction against use of AIRC maps for any congressional election after the 2012 general election.

A three-judge District Court, convened pursuant to 28 U. S. C. §2284(a), unanimously denied a motion by the AIRC to dismiss the suit for lack of standing. The Arizona Legislature, the court determined, had “demonstrated that its loss of redistricting power constitute[d] a [sufficiently] concrete injury.” 997 F. Supp. 2d 1047, 1050 (2014). On the merits, dividing two to one, the District Court granted the AIRC’s motion to dismiss the complaint for failure to state a claim. Decisions of this Court, the majority concluded, “demonstrate that the word ‘Legislature’ in the Elections Clause refers to the legislative process used in [a] state, determined by that state’s own constitution and laws.” *Id.*, at 1054. As the “lawmaking power” in Arizona “plainly includes the power to enact laws through initiative,” the District Court held, the “Elections Clause permits [Arizona’s] establishment and use” of the Commission. *Id.*, at 1056. Judge Rosenblatt dissented in part. Proposition 106, in his view, unconstitutionally denied “the Legislature” of Arizona the “ability to have any outcome-defining effect on the congressional redistricting process.” *Id.*, at 1058.

We postponed jurisdiction, and now affirm.

## II

We turn first to the threshold question: Does the Ari-

zona Legislature have standing to bring this suit? Trained on “whether the plaintiff is [a] proper party to bring [a particular lawsuit,]” standing is “[o]ne element” of the Constitution’s case-or-controversy limitation on federal judicial authority, expressed in Article III of the Constitution. *Raines v. Byrd*, 521 U. S. 811, 818 (1997). “To qualify as a party with standing to litigate,” the Arizona Legislature “must show, first and foremost,” injury in the form of “‘invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent.’” *Arizonaans for Official English v. Arizona*, 520 U. S. 43, 64 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560 (1992)). The Legislature’s injury also must be “fairly traceable to the challenged action” and “redressable by a favorable ruling.” *Clapper v. Amnesty Int’l USA*, 568 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 10) (internal quotation marks omitted).

The Arizona Legislature maintains that the Elections Clause vests in it “primary responsibility” for redistricting. Brief for Appellant 51, 53. To exercise that responsibility, the Legislature urges, it must have at least the opportunity to engage (or decline to engage) in redistricting before the State may involve other actors in the redistricting process. See *id.*, at 51–53. Proposition 106, which gives the AIRC binding authority over redistricting, regardless of the Legislature’s action or inaction, strips the Legislature of its alleged prerogative to initiate redistricting. That asserted deprivation would be remedied by a court order enjoining the enforcement of Proposition 106. Although we conclude that the Arizona Legislature does not have the exclusive, constitutionally guarded role it asserts, see *infra*, at 24–35, one must not “confus[e] weakness on the merits with absence of Article III standing.” *Davis v. United States*, 564 U. S. \_\_\_, \_\_\_, n. 10 (2011) (slip op., at 19, n. 10); see *Warth v. Seldin*, 422 U. S. 490, 500 (1975) (standing “often turns on the nature and source of the

## Opinion of the Court

claim asserted,” but it “in no way depends on the merits” of the claim).

The AIRC argues that the Legislature’s alleged injury is insufficiently concrete to meet the standing requirement absent some “specific legislative act that would have taken effect but for Proposition 106.” Brief for Appellees 20. The United States, as *amicus curiae*, urges that even more is needed: the Legislature’s injury will remain speculative, the United States contends, unless and until the Arizona Secretary of State refuses to implement a competing redistricting plan passed by the Legislature. Brief for United States 14–17. In our view, the Arizona Legislature’s suit is not premature, nor is its alleged injury too “conjectural” or “hypothetical” to establish standing. *Defenders of Wildlife*, 504 U. S., at 560 (internal quotation marks omitted).

Two prescriptions of Arizona’s Constitution would render the Legislature’s passage of a competing plan and submission of that plan to the Secretary of State unavailing. Indeed, those actions would directly and immediately conflict with the regime Arizona’s Constitution establishes. Cf. *Sporhase v. Nebraska ex rel. Douglas*, 458 U. S. 941, 944, n. 2 (1982) (failure to apply for permit which “would not have been granted” under existing law did not deprive plaintiffs of standing to challenge permitting regime). First, the Arizona Constitution instructs that the Legislature “shall not have the power to adopt any measure that supersedes [an initiative], in whole or in part, . . . unless the superseding measure furthers the purposes” of the initiative. Art. IV, pt. 1, §1(14). Any redistricting map passed by the Legislature in an effort to supersede the AIRC’s map surely would not “furthe[r] the purposes” of Proposition 106. Second, once the AIRC certifies its redistricting plan to the Secretary of State, Arizona’s Constitution requires the Secretary to implement that plan and no other. See Art. IV, pt. 2, §1(17); *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redis-*

*tricting Comm'n*, 211 Ariz. 337, 351, 121 P. 3d 843, 857 (App. 2005) (*per curiam*) (“Once the Commission certifies [its] maps, the secretary of state must use them in conducting the next election.”). To establish standing, the Legislature need not violate the Arizona Constitution and show that the Secretary of State would similarly disregard the State’s fundamental instrument of government.

*Raines v. Byrd*, 521 U.S. 811 (1997), does not aid AIRC’s argument that there is no standing here. In *Raines*, this Court held that six *individual Members* of Congress lacked standing to challenge the Line Item Veto Act. *Id.*, at 813–814, 829–830 (holding specifically and only that “individual members of Congress [lack] Article III standing”). The Act, which gave the President authority to cancel certain spending and tax benefit measures after signing them into law, allegedly diluted the efficacy of the Congressmembers’ votes. *Id.*, at 815–817. The “institutional injury” at issue, we reasoned, scarcely zeroed in on any individual Member. *Id.*, at 821. “[W]idely dispersed,” the alleged injury “necessarily [impacted] all Members of Congress and both Houses . . . equally.” *Id.*, at 829, 821. None of the plaintiffs, therefore, could tenably claim a “personal stake” in the suit. *Id.*, at 830.

In concluding that the individual Members lacked standing, the Court “attach[ed] some importance to the fact that [the *Raines* plaintiffs had] not been authorized to represent their respective Houses of Congress.” *Id.*, at 829. “[I]ndeed,” the Court observed, “both houses actively oppose[d] their suit.” *Ibid.* Having failed to prevail in their own Houses, the suitors could not repair to the Judiciary to complain. The Arizona Legislature, in contrast, is an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers, App. 26–27, 46. That “different . . . circumstanc[e],” 521 U.S., at 830, was not *sub judice* in

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*Raines*.<sup>10</sup>

Closer to the mark is this Court's decision in *Coleman v. Miller*, 307 U. S. 433 (1939). There, plaintiffs were 20 (of 40) Kansas State Senators, whose votes "would have been sufficient to defeat [a] resolution ratifying [a] proposed [federal] constitutional amendment." *Id.*, at 446.<sup>11</sup> We held they had standing to challenge, as impermissible under Article V of the Federal Constitution, the State Lieutenant Governor's tie-breaking vote for the amend-

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<sup>10</sup>*Massachusetts v. Mellon*, 262 U. S. 447 (1923), featured in JUSTICE SCALIA's dissent, *post*, at 4, bears little resemblance to this case. There, the Court unanimously found that Massachusetts lacked standing to sue the Secretary of the Treasury on a claim that a federal grant program exceeded Congress' Article I powers and thus violated the Tenth Amendment. *Id.*, at 480. If suing on its own behalf, the Court reasoned, Massachusetts' claim involved no "quasi-sovereign rights actually invaded or threatened." *Id.*, at 485. As *parens patriae*, the Court stated: "[I]t is no part of [Massachusetts'] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*." *Id.*, at 485–486. As astutely observed, moreover: "The cases on the standing of states to sue the federal government seem to depend on the kind of claim that the state advances. The decisions . . . are hard to reconcile." R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 263–266 (6th ed. 2009) (comparing *Mellon* with *South Carolina v. Katzenbach*, 383 U. S. 301, 308 (1966) (rejecting on the merits the claim that the Voting Rights Act of 1965 invaded reserved powers of the States to determine voter qualifications and regulate elections), *Nebraska v. Wyoming*, 515 U. S. 1, 20 (1995) (recognizing that Wyoming could bring suit to vindicate the State's "quasi-sovereign" interests in the physical environment within its domain (emphasis deleted; internal quotation marks omitted)), and *Massachusetts v. EPA*, 549 U. S. 497, 520 (2007) (maintaining that Massachusetts "is entitled to special solicitude in our standing analysis").

<sup>11</sup>*Coleman* concerned the proposed Child Labor Amendment, which provided that "Congress shall have power to limit, regulate, and prohibit the lahor of persons under eighteen years of age." 307 U. S., at 435, n. 1 (internal quotation marks omitted).

ment. *Ibid.* *Coleman*, as we later explained in *Raines*, stood “for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.” 521 U. S., at 823.<sup>12</sup> Our conclusion that the Arizona Legislature has standing fits that bill. Proposition 106, together with the Arizona Constitution’s ban on efforts to undermine the purposes of an initiative, see *supra*, at 11, would “completely nullif[y]” any vote by the Legislature, now or “in the future,” purporting to adopt a redistricting plan. *Raines*, 521 U. S., at 823–824.<sup>13</sup>

This dispute, in short, “will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982).<sup>14</sup> Accordingly, we

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<sup>12</sup>The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona’s initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here. The Court’s standing analysis, we have noted, has been “especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.” *Raines v. Byrd*, 521 U. S. 811, 819–820 (1997).

<sup>13</sup>In an endeavor to wish away *Coleman*, JUSTICE SCALIA, in dissent, suggests the case may have been “a 4-to-4 standoff.” *Post*, at 5. He overlooks that Chief Justice Hughes’ opinion, announced by Justice Stone, was styled “Opinion of the Court.” 307 U. S., at 435. Describing *Coleman*, the Court wrote in *Raines*: “By a vote of 5–4, we held that [the 20 Kansas Senators who voted against ratification of a proposed federal constitutional amendment] had standing.” 521 U. S., at 822. For opinions recognizing the precedential weight of *Coleman*, see *Baker v. Carr*, 369 U. S. 186, 208 (1962); *United States v. Windsor*, 570 U. S. \_\_\_, \_\_\_ (2013) (ALITO, J., dissenting) (slip op., at 4–5).

<sup>14</sup>Curiously, JUSTICE SCALIA, dissenting on standing, berates the Court for “treading upon the powers of state legislatures.” *Post*, at 6.

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proceed to the merits.<sup>15</sup>

## III

On the merits, we instructed the parties to address this question: Do the Elections Clause of the United States Constitution and 2 U. S. C. §2a(c) permit Arizona's use of a commission to adopt congressional districts? The Elections Clause is set out at the start of this opinion, *supra*, at 2. Section 2a(c) provides:

“Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: [setting out five federally prescribed redistricting procedures].”

Before focusing directly on the statute and constitutional prescriptions in point, we summarize this Court's precedent relating to appropriate state decisionmakers for redistricting purposes. Three decisions compose the relevant case law: *Ohio ex rel. Davis v. Hildebrant*, 241 U. S. 565 (1916); *Hawke v. Smith (No. 1)*, 253 U. S. 221 (1920); and *Smiley v. Holm*, 285 U. S. 355 (1932).

## A

*Davis v. Hildebrant* involved an amendment to the Constitution of Ohio vesting in the people the right, exercisable by referendum, to approve or disapprove by popular vote any law enacted by the State's legislature. A 1915 Act redistricting the State for the purpose of congressional

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He forgets that the party invoking federal-court jurisdiction in this case, and inviting our review, is the Arizona State Legislature.

<sup>15</sup>JUSTICE THOMAS, on the way to deciding that the Arizona Legislature lacks standing, first addresses the merits. In so doing, he overlooks that, in the cases he features, it was entirely immaterial whether the law involved was adopted by a representative body or by the people, through exercise of the initiative.

elections had been submitted to a popular vote, resulting in disapproval of the legislature's measure. State election officials asked the State's Supreme Court to declare the referendum void. That court rejected the request, holding that the referendum authorized by Ohio's Constitution, "was a part of the legislative power of the State," and "nothing in [federal statutory law] or in [the Elections Clause] operated to the contrary." 241 U. S., at 567. This Court affirmed the Ohio Supreme Court's judgment. In upholding the state court's decision, we recognized that the referendum was "part of the legislative power" in Ohio, *ibid.*, legitimately exercised by the people to disapprove the legislation creating congressional districts. For redistricting purposes, *Hildebrant* thus established, "the Legislature" did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people. See *id.*, at 569 (Elections Clause does not bar "treating the referendum as part of the legislative power for the purpose of apportionment, where so ordained by the state constitutions and laws").

*Hawke v. Smith* involved the Eighteenth Amendment to the Federal Constitution. Ohio's Legislature had ratified the Amendment, and a referendum on that ratification was at issue. Reversing the Ohio Supreme Court's decision upholding the referendum, we held that "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word." 253 U. S., at 229. Instead, Article V governing ratification had lodged in "the legislatures of three-fourths of the several States" sole authority to assent to a proposed amendment. *Id.*, at 226. The Court contrasted the ratifying function, exercisable exclusively by a State's legislature, with "the ordinary business of legislation." *Id.*, at 229. *Davis v. Hildebrant*, the Court explained, involved the enactment of legislation, *i.e.*, a redistricting plan, and properly held that "the referendum [was] part of the legislative author-

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ity of the State for [that] purpose.” 253 U. S., at 230.

*Smiley v. Holm* raised the question whether legislation purporting to redistrict Minnesota for congressional elections was subject to the Governor’s veto. The Minnesota Supreme Court had held that the Elections Clause placed redistricting authority exclusively in the hands of the State’s legislature, leaving no role for the Governor. We reversed that determination and held, for the purpose at hand, Minnesota’s legislative authority includes not just the two houses of the legislature; it includes, in addition, a make-or-break role for the Governor. In holding that the Governor’s veto counted, we distinguished instances in which the Constitution calls upon state legislatures to exercise a function other than lawmaking. State legislatures, we pointed out, performed an “electoral” function “in the choice of United States Senators under Article I, section 3, prior to the adoption of the Seventeenth Amendment,”<sup>16</sup> a “ratifying” function for “proposed amendments to the Constitution under Article V,” as explained in *Hawke v. Smith*, and a “consenting” function “in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17.” 285 U. S., at 365–366.

In contrast to those other functions, we observed, redistricting “involves lawmaking in its essential features and most important aspect.” *Id.*, at 366. Lawmaking, we further noted, ordinarily “must be in accordance with the method which the State has prescribed for legislative enactments.” *Id.*, at 367. In Minnesota, the State’s Constitution had made the Governor “part of the legislative process.” *Id.*, at 369. And the Elections Clause, we explained, respected the State’s choice to include the Governor in that process, although the Governor could play no part when the Constitution assigned to “the Legislature” a

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<sup>16</sup>The Seventeenth Amendment provided for election of Senators “by the people” of each State.

ratifying, electoral, or consenting function. Nothing in the Elections Clause, we said, “attempt[ed] to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State ha[d] provided that laws shall be enacted.” *Id.*, at 368.

THE CHIEF JUSTICE, in dissent, features, indeed trumpets repeatedly, the pre-Seventeenth Amendment regime in which Senators were “chosen [in each State] by the Legislature thereof.” Art. I, §3; see *post*, at 1, 8–9, 19. If we are right, he asks, why did popular election proponents resort to the amending process instead of simply interpreting “the Legislature” to mean “the people”? *Post*, at 1. *Smiley*, as just indicated, answers that question. Article I, §3, gave state legislatures “a function different from that of lawgiver,” 285 U. S., at 365; it made each of them “an electoral body” charged to perform that function to the exclusion of other participants, *ibid.* So too, of the ratifying function. As we explained in *Hawke*, “the power to legislate in the enactment of the laws of a State is derived from the people of the State.” 253 U. S., at 230. Ratification, however, “has its source in the Federal Constitution” and is not “an act of legislation within the proper sense of the word.” *Id.*, at 229–230.

Constantly resisted by THE CHIEF JUSTICE, but well understood in opinions that speak for the Court: “[T]he meaning of the word ‘legislature,’ used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise.” *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U. S. 427, 434 (1932) (citing *Smiley*, 285 U. S. 355). Thus “the Legislature” comprises the referendum and the Governor’s veto in the context of regulating congressional elections. *Hildebrant*, see *supra*, at 15–16; *Smiley*, see *supra*, at 17–18. In the context of ratifying

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constitutional amendments, in contrast, “the Legislature” has a different identity, one that excludes the referendum and the Governor’s veto. *Hawke*, see *supra*, at 16.<sup>17</sup>

In sum, our precedent teaches that redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking, which may include the referendum and the Governor’s veto. The exercise of the initiative, we acknowledge, was not at issue in our prior decisions. But as developed below, we see no constitutional barrier to a State’s empowerment of its people by embracing that form of lawmaking.

## B

We take up next the statute the Court asked the parties to address, 2 U. S. C. §2a(c), a measure modeled on the Reapportionment Act Congress passed in 1911, Act of Aug. 8 (1911 Act), ch. 5, §4, 37 Stat. 14. Section 2a(c), we hold, permits use of a commission to adopt Arizona’s congressional districts. See *supra*, at 15.<sup>18</sup>

From 1862 through 1901, the decennial congressional apportionment Acts provided that a State would be re-

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<sup>17</sup>The list of constitutional provisions in which the word “legislature” appears, appended to THE CHIEF JUSTICE’s opinion, *post*, at 28–32, is illustrative of the variety of functions state legislatures can be called upon to exercise. For example, Art. I, §2, cl. 1, superseded by the Seventeenth Amendment, assigned an “electoral” function. See *Smiley*, 285 U. S., at 365. Article I, §3, cl. 2, assigns an “appointive” function. Article I, §8, cl. 17, assigns a “consenting” function, see *Smiley*, 285 U. S., at 366, as does Art. IV, §3, cl. 1. “[R]atifying” functions are assigned in Art. V, Amdt. 18, §3, Amdt. 20, §6, and Amdt. 22, §2. See *Hawke*, 253 U. S., at 229. But Art. I, §4, cl. 1, unquestionably calls for the exercise of lawmaking authority. That authority can be carried out by a representative body, but if a State so chooses, legislative authority can also be lodged in the people themselves. See *infra*, at 24–35.

<sup>18</sup>The AIRC referenced §2a(c) in briefing below, see Motion to Dismiss 8–9, and Response to Plaintiff’s Motion for Preliminary Injunction 12–14, in No. 12–1211 (D Ariz.), and in its motion to dismiss or affirm in this Court, see Motion to Dismiss or Affirm 28–31.

quired to follow federally prescribed procedures for redistricting unless “the legislature” of the State drew district lines. *E.g.*, Act of July 14, 1862, ch. 170, 12 Stat. 572; Act of Jan. 16, 1901, ch. 93, §4, 31 Stat. 734. In drafting the 1911 Act, Congress focused on the fact that several States had supplemented the representative legislature mode of lawmaking with a direct lawmaking role for the people, through the processes of initiative (positive legislation by the electorate) and referendum (approval or disapproval of legislation by the electorate). 47 Cong. Rec. 3508 (statement of Sen. Burton); see *supra*, at 3–5. To accommodate that development, the 1911 Act eliminated the statutory reference to redistricting by the state “legislature” and instead directed that, if a State’s apportionment of Representatives increased, the State should use the Act’s default procedures for redistricting “until such State shall be redistricted *in the manner provided by the laws thereof.*” Ch. 5, §4, 37 Stat. 14 (emphasis added).<sup>19</sup>

Some Members of Congress questioned whether the language change was needed. In their view, existing apportionment legislation (referring to redistricting by a State’s “legislature”) “suffic[ed] to allow, whatever the law of the State may be, the people of that State to control [redistricting].” 47 Cong. Rec. 3507 (statement of Sen.

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<sup>19</sup>The 1911 Act also required States to comply with certain federally prescribed districting rules—namely, that Representatives be elected “by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants,” and that the districts “be equal to the number of Representatives to which [the] State may be entitled in Congress, no district electing more than one Representative.” Act of Aug. 8, 1911, ch. 5, §§3–4, 37 Stat. 14. When a State’s apportionment of Representatives remained constant, the Act directed the State to continue using its pre-existing districts “until [the] State shall be redistricted as herein prescribed.” See §4, *ibid.* The 1911 Act did not address redistricting in the event a State’s apportionment of Representatives decreased, likely because no State faced a decrease following the 1910 census.

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Shively); cf. *Shiel v. Thayer*, Bartlett Contested Election Cases, H. R. Misc. Doc. No. 57, 38th Cong., 2d Sess., 351 (1861) (view of House Committee of Elections Member Dawes that Art. I, §4's reference to "the Legislature" meant simply the "constituted authorities, through whom [the State] choose[s] to speak," prime among them, the State's Constitution, "which rises above . . . all legislative action"). Others anticipated that retaining the reference to "the legislature" would "condem[n] . . . any [redistricting] legislation by referendum or by initiative." 47 Cong. Rec. 3436 (statement of Sen. Burton). In any event, proponents of the change maintained, "[i]n view of the very serious evils arising from gerrymanders," Congress should not "take any chances in [the] matter." *Id.*, at 3508 (same). "[D]ue respect to the rights, to the established methods, and to the laws of the respective States," they urged, required Congress "to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes." *Id.*, at 3436; see *id.*, at 3508 (statement of Sen. Works).

As this Court observed in *Hildebrant*, "the legislative history of th[e] [1911 Act] leaves no room for doubt [about why] the prior words were stricken out and the new words inserted." 241 U. S., at 568. The change was made to safeguard to "each State full authority to employ in the creation of congressional districts its own laws and regulations." 47 Cong. Rec. 3437 (statement of Sen. Burton). The 1911 Act, in short, left the question of redistricting "to the laws and methods of the States. If they include initiative, it is included." *Id.*, at 3508.

While the 1911 Act applied only to reapportionment following the 1910 census, see *Wood v. Broom*, 287 U. S. 1, 6–7 (1932), Congress used virtually identical language when it enacted §2a(c) in 1941. See Act of Nov. 15, 1941, ch. 470, 55 Stat. 761–762. Section 2a(c) sets forth congressional-redistricting procedures operative only if the

State, “after any apportionment,” had not redistricted “in the manner provided by the law thereof.” The 1941 provision, like the 1911 Act, thus accorded full respect to the redistricting procedures adopted by the States. So long as a State has “redistricted in the manner provided by the law thereof”—as Arizona did by utilizing the independent commission procedure called for by its Constitution—the resulting redistricting plan becomes the presumptively governing map.<sup>20</sup>

The Arizona Legislature characterizes §2a(c) as an “obscure provision, narrowed by subsequent developments to the brink of irrelevance.” Brief for Appellant 56. True, four of the five default redistricting procedures—operative only when a State is *not* “redistricted in the manner provided by [state] law”—had “become (because of postenactment decisions of this Court) in virtually all situations plainly unconstitutional.” *Branch v. Smith*, 538 U. S. 254, 273–274 (2003) (plurality opinion). Concretely, the default procedures specified in §2a(c)(1)–(4) contemplate that a State would continue to use pre-existing districts following a new census. The one-person, one-vote principle announced in *Wesberry v. Sanders*, 376 U. S. 1 (1964), however, would bar those procedures, except in the “unlikely” event that “the decennial census makes no districting change constitutionally necessary,” *Branch*, 538 U. S., at 273 (plurality opinion).

Constitutional infirmity in §2a(c)(1)–(4)’s default procedures, however, does not bear on the question whether a State has been “redistricted in the manner provided by [state] law.”<sup>21</sup> As just observed, Congress expressly di-

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<sup>20</sup>Because a State is required to comply with the Federal Constitution, the Voting Rights Act, and other federal laws when it draws and implements its district map, nothing in §2a(c) affects a challenge to a state district map on the ground that it violates one or more of those federal requirements.

<sup>21</sup>The plurality in *Branch v. Smith*, 538 U. S. 254, 273 (2003), consid-

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rected that when a State has been “redistricted in the manner provided by [state] law”—whether by the legislature, court decree (see *id.*, at 274), or a commission established by the people’s exercise of the initiative—the resulting districts are the ones that presumptively will be used to elect Representatives.<sup>22</sup>

There can be no dispute that Congress itself may draw a State’s congressional-district boundaries. See *Vieth*, 541 U. S., at 275 (plurality opinion) (stating that the Elections Clause “permit[s] Congress to ‘make or alter’” the “districts for federal elections”). The Arizona Legislature urges that the first part of the Elections Clause, vesting power to regulate congressional elections in State “Legislature[s],” precludes Congress from allowing a State to redistrict without the involvement of its representative body, even if Congress independently could enact the same redistricting plan under its plenary authority to “make or alter” the State’s plan. See Brief for Appellant 56–57; Reply Brief 17. In other words, the Arizona Legislature regards §2a(c) as a futile exercise. The Congresses that passed §2a(c) and its forerunner, the 1911 Act, did not share that wooden interpretation of the Clause, nor do we. Any uncertainty about the import of §2a(c), however, is resolved by our holding that the Elections Clause permits regulation of congressional elections by initiative, see *infra*, at 24–35, leaving no arguable conflict between §2a(c) and the first part of the Clause.

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ered the question whether §2a(c) had been repealed by implication and stated, “where what it prescribes is constitutional,” the provision “continues to apply.”

<sup>22</sup>THE CHIEF JUSTICE, in dissent, insists that §2a(c) and its precursor, the 1911 Act, have nothing to do with this case. *Post*, at 20–21, 23. Undeniably, however, it was the very purpose of the measures to recognize the legislative authority each State has to determine its own redistricting regime.

## C

In accord with the District Court, see *supra*, at 9, we hold that the Elections Clause permits the people of Arizona to provide for redistricting by independent commission. To restate the key question in this case, the issue centrally debated by the parties: Absent congressional authorization, does the Elections Clause preclude the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts? The history and purpose of the Clause weigh heavily against such preclusion, as does the animating principle of our Constitution that the people themselves are the originating source of all the powers of government.

We note, preliminarily, that dictionaries, even those in circulation during the founding era, capaciously define the word “legislature.” Samuel Johnson defined “legislature” simply as “[t]he power that makes laws.” 2 A Dictionary of the English Language (1st ed. 1755); *ibid.* (6th ed. 1785); *ibid.* (10th ed. 1792); *ibid.* (12th ed. 1802). Thomas Sheridan’s dictionary defined “legislature” exactly as Dr. Johnson did: “The power that makes laws.” 2 A Complete Dictionary of the English Language (4th ed. 1797). Noah Webster defined the term precisely that way as well. Compendious Dictionary of the English Language 174 (1806). And Nathan Bailey similarly defined “legislature” as “the Authority of making Laws, or Power which makes them.” An Universal Etymological English Dictionary (20th ed. 1763).<sup>23</sup>

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<sup>23</sup>Illustrative of an embrative comprehension of the word “legislature,” Charles Pinckney explained at South Carolina’s ratifying convention that America is “[a] republic, where the people at large, either collectively or by representation, form the legislature.” 4 Debates on the Federal Constitution 328 (J. Elliot 2d ed. 1863). Participants in the debates over the Elections Clause used the word “legislature” interchangeably with “state” and “state government.” See Brief for Brennan

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As to the “power that makes laws” in Arizona, initiatives adopted by the voters legislate for the State just as measures passed by the representative body do. See Ariz. Const., Art. IV, pt. 1, §1 (“The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature.”). See also *Eastlake v. Forest City Enterprises, Inc.*, 426 U. S. 668, 672 (1976) (“In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.”). As well in Arizona, the people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do. See Tr. of Oral Arg. 15–16 (answering the Court’s question, may the Arizona Legislature itself establish a commission to attend to redistricting, counsel for appellant responded yes, state legislatures may delegate their authority to a commission, subject to their prerogative to reclaim the authority for themselves).

## 1

The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation. As this Court explained in *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U. S. 1 (2013), the Clause “was the Framers’ insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.” *Id.*, at \_\_\_\_ (slip op., at 5) (citing *The Federalist* No. 59, pp. 362–363 (C. Rossiter ed. 1961) (A. Hamilton)).

The Clause was also intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate. As Madison urged, without the Elections Clause, “[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.” 2 Records of the Federal Convention 241 (M. Farrand rev. 1966). Madison spoke in response to a motion by South Carolina’s delegates to strike out the federal power. Those delegates so moved because South Carolina’s coastal elite had malapportioned their legislature, and wanted to retain the ability to do so. See J. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 223–224 (1996). The problem Madison identified has hardly lessened over time. Conflict of interest is inherent when “legislators dra[w] district lines that they ultimately have to run in.” Cain, 121 Yale L. J., at 1817.

Arguments in support of congressional control under the Elections Clause were reiterated in the public debate over ratification. Theophilus Parsons, a delegate at the Massachusetts ratifying convention, warned that “when faction and party spirit run high,” a legislature might take actions like “mak[ing] an unequal and partial division of the states into districts for the election of representatives.” Debate in Massachusetts Ratifying Convention (16–17, 21 Jan. 1788), in 2 *The Founders’ Constitution* 256 (P. Kurland & R. Lerner eds. 1987). Timothy Pickering of Massachusetts similarly urged that the Clause was necessary because “the State governments *may* abuse their power, and regulate . . . elections in such manner as would be highly inconvenient to the people.” Letter to Charles Tillinghast (24 Dec. 1787), in *id.*, at 253. He described the Clause as a way to “ensure to the *people* their rights of election.” *Ibid.*

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While attention focused on potential abuses by state-level politicians, and the consequent need for congressional oversight, the legislative processes by which the States could exercise their initiating role in regulating congressional elections occasioned no debate. That is hardly surprising. Recall that when the Constitution was composed in Philadelphia and later ratified, the people's legislative prerogatives—the initiative and the referendum—were not yet in our democracy's arsenal. See *supra*, at 3–5. The Elections Clause, however, is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands.<sup>24</sup>

## 2

The Arizona Legislature maintains that, by specifying “the Legislature thereof,” the Elections Clause renders the State's representative body the sole “component of state government authorized to prescribe . . . regulations . . . for congressional redistricting.” Brief for Appellant 30. THE CHIEF JUSTICE, in dissent, agrees. But it is characteristic of our federal system that States retain autonomy to establish their own governmental processes. See *Alden v. Maine*, 527 U. S. 706, 752 (1999) (“A State is entitled to order the processes of its own governance.”); The Federalist No. 43, at 272 (J. Madison) (“Whenever the States may choose to substitute other republican forms, they have a

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<sup>24</sup>THE CHIEF JUSTICE, in dissent, cites *U. S. Term Limits, Inc. v. Thornton*, 514 U. S. 779 (1995), as an important precedent we overlook. *Post*, at 24–25. There, we held that state-imposed term limits on candidates for the House and Senate violated the Clauses of the Constitution setting forth qualifications for membership in Congress, Art. I, §2, cl. 2, and Art. I, §3, cl. 3. We did so for a reason entirely harmonious with today's decision. Adding state-imposed limits to the qualifications set forth in the Constitution, the Court wrote, would be “contrary to the ‘fundamental principle of our representative democracy,’ . . . that ‘the people should choose whom they please to govern them.’” 514 U. S., at 783 (quoting *Powell v. McCormack*, 395 U. S. 486, 547 (1969)).

right to do so.”). “Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.” *Gregory v. Ashcroft*, 501 U. S. 452, 460 (1991). Arizona engaged in definition of that kind when its people placed both the initiative power and the AIRC’s redistricting authority in the portion of the Arizona Constitution delineating the State’s legislative authority. See Ariz. Const., Art. IV; *supra*, at 5–6.

This Court has “long recognized the role of the States as laboratories for devising solutions to difficult legal problems.” *Oregon v. Ice*, 555 U. S. 160, 171 (2009); see *United States v. Lopez*, 514 U. S. 549, 581 (1995) (KENNEDY, J., concurring) (“[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”); *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). Deference to state lawmaking “allows local policies ‘more sensitive to the diverse needs of a heterogeneous society,’ permits ‘innovation and experimentation,’ enables greater citizen ‘involvement in democratic processes,’ and makes government ‘more responsive by putting the States in competition for a mobile citizenry.’” *Bond v. United States*, 564 U. S. \_\_\_, \_\_\_ (2011) (slip op., at 9) (quoting *Gregory*, 501 U. S., at 458).

We resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process. Nothing in that Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State’s constitution. See

## Opinion of the Court

*Shiel*, H. R. Misc. Doc. No. 57, at 349–352 (concluding that Oregon’s Constitution prevailed over any conflicting legislative measure setting the date for a congressional election).

THE CHIEF JUSTICE, in dissent, maintains that, under the Elections Clause, the state legislature can trump any initiative-introduced constitutional provision regulating federal elections. He extracts support for this position from *Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H. R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46–47 (1866). See *post*, at 15–16. There, Michigan voters had amended the State Constitution to require votes to be cast within a resident’s township or ward. The Michigan Legislature, however, passed a law permitting soldiers to vote in other locations. One candidate would win if the State Constitution’s requirement controlled; his opponent would prevail under the Michigan Legislature’s prescription. The House Elections Committee, in a divided vote, ruled that, under the Elections Clause, the Michigan Legislature had the paramount power.

As the minority report in *Baldwin* pointed out, however, the Supreme Court of Michigan had reached the opposite conclusion, holding, as courts generally do, that state legislation in direct conflict with the State’s constitution is void. *Baldwin*, H. R. Misc. Doc. No. 152, at 50. The *Baldwin* majority’s ruling, furthermore, appears in tension with the Election Committee’s unanimous decision in *Shiel* just five years earlier. (The Committee, we repeat, “ha[d] no doubt that the constitution of the State ha[d] fixed, beyond the control of the legislature, the time for holding [a congressional] election.” *Shiel*, H. R. Misc. Doc. No. 57, at 351.) Finally, it was perhaps not entirely accidental that the candidate the Committee declared winner in *Baldwin* belonged to the same political party as all but one member of the House Committee majority responsible for the decision. See U. S. House of Representatives Con-

## Opinion of the Court

gress Profiles: 39th Congress (1865–1867), <http://history.house.gov/Congressional-Overview/Profiles/39th/>; Biographical Directory of the United States Congress: Trowbridge, Rowland Ebenezer (1821–1881). Cf. Cain, 121 Yale L. J., at 1817 (identifying legislative conflict of interest as the problem independent redistricting commissions aimed to check). In short, *Baldwin* is not a disposition that should attract this Court's reliance.

We add, furthermore, that the Arizona Legislature does not question, nor could it, employment of the initiative to control state and local elections. In considering whether Article I, §4, really says “No” to similar control of federal elections, we have looked to, and borrow from, Alexander Hamilton's counsel: “[I]t would have been hardly advisable . . . to establish, as a fundamental point, what would deprive several States of the convenience of having the elections for their own governments and for the national government” held at the same times and places, and in the same manner. The Federalist No. 61, at 374. The Elections Clause is not sensibly read to subject States to that deprivation.<sup>25</sup>

## 3

The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power. As Madison put it: “The genius of republican liberty seems to demand . . . not only that all power should be derived from the people,

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<sup>25</sup>A State may choose to regulate state and national elections differently, which is its prerogative under the Clause. *E.g.*, Ind. Code §3-3-2-2 (creating backup commission for congressional but not state legislative districts).

## Opinion of the Court

but that those intrusted with it should be kept in dependence on the people.” *Id.*, No. 37, at 223.

The people’s ultimate sovereignty had been expressed by John Locke in 1690, a near century before the Constitution’s formation:

“[T]he Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them. For all Power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the Power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.” *Two Treatises of Government* §149, p. 385 (P. Laslett ed. 1964).

Our Declaration of Independence, ¶2, drew from Locke in stating: “Governments are instituted among Men, deriving their just powers from the consent of the governed.” And our fundamental instrument of government derives its authority from “We the People.” U. S. Const., Preamble. As this Court stated, quoting Hamilton: “[T]he true principle of a republic is, that the people should choose whom they please to govern them.” *Powell v. McCormack*, 395 U. S. 486, 540–541 (1969) (quoting 2 *Debates on the Federal Constitution* 257 (J. Elliot ed. 1876)). In this light, it would be perverse to interpret the term “Legislature” in the Elections Clause so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators’ ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be “chosen . . . by the People of the several States,” Art. I, §2. See Cain, 121 *Yale L. J.*, at 1817.

THE CHIEF JUSTICE, in dissent, suggests that independent commissions established by initiative are a high-minded experiment that has failed. *Post*, at 26–27. For this assessment, THE CHIEF JUSTICE cites a three-judge Federal District Court opinion, *Harris v. Arizona Independent Redistricting Comm'n*, 993 F. Supp. 2d 1042 (Ariz. 2014). That opinion, he asserts, “detail[s] the partisanship that has affected the Commission.” *Post*, at 26. No careful reader could so conclude.

The report of the decision in *Harris* comprises a *per curiam* opinion, an opinion concurring in the judgment by Judge Silver, and a dissenting opinion by Judge Wake. The *per curiam* opinion found “in favor of the Commission.” 993 F. Supp. 2d, at 1080. Deviations from the one-person, one-vote principle, the *per curiam* opinion explained at length, were “small” and, in the main, could not be attributed to partisanship. *Ibid.* While partisanship “may have played some role,” the *per curiam* opinion stated, deviations were “predominantly a result of the Commission’s good-faith efforts to achieve preclearance under the Voting Rights Act.” *Id.*, at 1060. Judge Silver, although she joined the *per curiam* opinion, made clear at the very outset of that opinion her finding that “partisanship did not play a role.” *Id.*, at 1046, n. 1. In her concurring opinion, she repeated her finding that the evidence did not show partisanship at work, *id.*, at 1087; instead, she found, the evidence “[was] overwhelming [that] the final map was a product of the commissioners’s consideration of appropriate redistricting criteria.” *Id.*, at 1088. To describe *Harris* as a decision criticizing the Commission for pervasive partisanship, *post*, at 26, THE CHIEF JUSTICE could rely only upon the dissenting opinion, which expressed views the majority roundly rejected.

Independent redistricting commissions, it is true, “have not eliminated the inevitable partisan suspicions associated with political line-drawing.” Cain, 121 Yale L. J., at

## Opinion of the Court

1808. But “they have succeeded to a great degree [in limiting the conflict of interest implicit in legislative control over redistricting].” *Ibid.* They thus impede legislators from choosing their voters instead of facilitating the voters’ choice of their representatives.

## 4

Banning lawmaking by initiative to direct a State’s method of apportioning congressional districts would do more than stymie attempts to curb partisan gerrymandering, by which the majority in the legislature draws district lines to their party’s advantage. It would also cast doubt on numerous other election laws adopted by the initiative method of legislating.

The people, in several States, functioning as the lawmaking body for the purpose at hand, have used the initiative to install a host of regulations governing the “Times, Places and Manner” of holding federal elections. Art. I, §4. For example, the people of California provided for permanent voter registration, specifying that “no amendment by the Legislature shall provide for a general biennial or other periodic reregistration of voters.” Cal. Elec. Code Ann. §2123 (West 2003). The people of Ohio banned ballots providing for straight-ticket voting along party lines. Ohio Const., Art. V, §2a. The people of Oregon shortened the deadline for voter registration to 20 days prior to an election. Ore. Const., Art. II, §2. None of those measures permit the state legislatures to override the people’s prescriptions. The Arizona Legislature’s theory—that the lead role in regulating federal elections cannot be wrested from “the Legislature,” and vested in commissions initiated by the people—would endanger all of them.

The list of endangered state elections laws, were we to sustain the position of the Arizona Legislature, would not stop with popular initiatives. Almost all state constitutions were adopted by conventions and ratified by voters

at the ballot box, without involvement or approval by “the Legislature.”<sup>26</sup> Core aspects of the electoral process regulated by state constitutions include voting by “ballot” or “secret ballot,”<sup>27</sup> voter registration,<sup>28</sup> absentee voting,<sup>29</sup> vote counting,<sup>30</sup> and victory thresholds.<sup>31</sup> Again, the States’ legislatures had no hand in making these laws and may not alter or amend them.

The importance of direct democracy as a means to control election regulations extends beyond the particular statutes and constitutional provisions installed by the people rather than the States’ legislatures. The very prospect of lawmaking by the people may influence the legislature when it considers (or fails to consider) election-related measures. See Persily & Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legis-*

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<sup>26</sup> See App. to Brief for Appellees 11a–29a (collecting state constitutional provisions governing elections). States’ constitutional conventions are not simply past history predating the first election of state legislatures. Louisiana, for example, held the most recent of its 12 constitutional conventions in 1992. J. Dinan, *The American State Constitutional Tradition* 8–9 (2006) (Table 1–1). The State’s provision for voting by “secret ballot” may be traced to the constitutional convention held by the State in 1812, see La. Const., Art. VI, §13, but was most recently reenacted at the State’s 1974 constitutional convention, see Art. XI, §2.

<sup>27</sup> Madison called the decision “[w]hether the electors should vote by ballot or vivâ voce” a quintessential subject of regulation under the Elections Clause. 2 *Records of the Federal Convention* 240–241 (M. Farrand rev. 1966).

<sup>28</sup> Miss. Const., Art. XII, §249; N. C. Const., Art. VI, §3; Va. Const., Art. II, §2; W. Va. Const., Art. IV, §12; Wash. Const., Art. VI, §7.

<sup>29</sup> *E.g.*, Haw. Const., Art. II, §4; La. Const., Art. XI, §2; N. D. Const., Art. II, §1; Pa. Const., Art. VII, §14.

<sup>30</sup> *E.g.*, Ark. Const., Art. III, §11 (ballots unlawfully not counted in the first instance must be counted after election); La. Const., Art. XI, §2 (all ballots must be counted publicly).

<sup>31</sup> *E.g.*, Ariz. Const., Art. VII, §7 (setting plurality of votes as the standard for victory in all elections, excluding runoffs); Mont. Const., Art. IV, §5 (same); Ore. Const., Art. II, §16 (same).

## Opinion of the Court

lation in Election Law Reform, 78 S. Cal. L. Rev. 997, 1006–1008 (2005) (describing cases in which “indirect pressure of the initiative process . . . was sufficient to spur [state] legislature[s] to action”). Turning the coin, the legislature’s responsiveness to the people its members represent is hardly heightened when the representative body can be confident that what it does will not be overturned or modified by the voters themselves.

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Invoking the Elections Clause, the Arizona Legislature instituted this lawsuit to disempower the State’s voters from serving as the legislative power for redistricting purposes. But the Clause surely was not adopted to diminish a State’s authority to determine its own lawmaking processes. Article I, §4, stems from a different view. Both parts of the Elections Clause are in line with the fundamental premise that all political power flows from the people. *McCulloch v. Maryland*, 4 Wheat. 316, 404–405 (1819). So comprehended, the Clause doubly empowers the people. They may control the State’s lawmaking processes in the first instance, as Arizona voters have done, and they may seek Congress’ correction of regulations prescribed by state legislatures.

The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have “an habitual recollection of their dependence on the people.” *The Federalist* No. 57, at 350 (J. Madison). In so acting, Arizona voters sought to restore “the core principle of republican government,” namely, “that the voters should choose their representatives, not the other way around.” Berman, *Managing Gerrymandering*, 83 Texas L. Rev. 781 (2005). The Elections Clause does not hinder that endeavor.

For the reasons stated, the judgment of the United States District Court for the District of Arizona is

*Affirmed.*

***Arizona State Legislature v. Arizona Independent  
Redistricting Commission***

To view this opinion in full, please go to  
[http://www.supremecourt.gov/opinions/14pdf/13-1314\\_3ea4.pdf](http://www.supremecourt.gov/opinions/14pdf/13-1314_3ea4.pdf)

***Young v. United Parcel Service, Inc.***

Pat Dull

Assistant Attorney General in the  
Civil Rights Section of the Attorney General's Office

Pat Dull is an Assistant Attorney General in the Civil Rights Section of the Attorney General's Office. Mr. Dull attended law school at The Ohio State University, where he specialized in employment law. As an Assistant Attorney General, Mr. Dull advises the Ohio Civil Rights Commission on unlawful discrimination in employment, housing, and public accommodations.

Pregnancy Discrimination  
after *Young v. UPS* (2015)  
Patrick Dull



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**Agenda**

You will meet: Howard W. Smith  
Martha Gilbert  
Tiffany McFee  
Peggy Young  
& a whole mess of fish



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**1.**  
Congressman Howard W. Smith



“sex”



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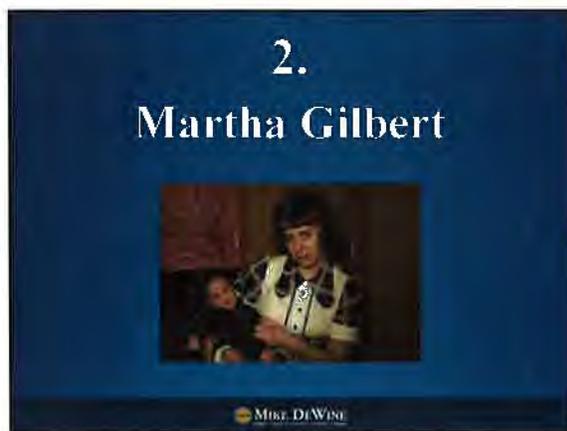
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***General Electric v. Gilbert***  
97 S.Ct. 401 (1976)



Paid absence benefits for all employees,  
“excepting therefrom absences due to pregnancy  
or resulting childbirth.”

MIKE DeWINE

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***Gilbert’s holding:***

**Discrimination based on pregnancy is  
NOT discrimination based on sex.**

MIKE DeWINE

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***Gilbert’s reasoning:***

There is no discrimination because...



***...all men and all women  
get identical benefits***

MIKE DeWINE

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The *Gilbert* decision led directly to passage of the...

## Pregnancy Discrimination Act

(1978)

Mike DiWise

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The PDA explicitly rejected both the holding and reasoning of *Gilbert*:

- 1) "Sex" includes pregnancy, childbirth, or related medical conditions, *and*
- 2) Pregnant women shall be treated:
  - "the same" for all employment benefits...
  - as "other persons" who are...
  - "similar in their ability" to work.

Mike DiWise

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### Graphic illustration of *Gilbert*



The PDA requires pregnant fish to be treated "the same" as non-pregnant fish

Mike DiWise

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...to treat "the same" when ALL non-pregnant employees get the benefit

...when SOME get it and SOME don't

MIKE DeWINE

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Graphic illustration of this question



Here, pregnant fish are treated "the same" as some – but not all – non-pregnant fish

MIKE DeWINE

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3.

Tiffany McFee



MIKE DeWINE

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*McFee v. Nursing Care Mgmt.*

126 Ohio St. 3d 183 (2010)



Policy provided no leave to anyone until after the first year of employment

Miss DeWine

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*McFee v. Nursing Care Mgmt.*

"[The] policy is 'pregnancy-blind' in that it does not treat employees affected by pregnancy differently from employees not so affected but similar in their ability or inability to work." *McFee*, ¶35  
i.e., all employees treated "the same" based upon length of service



Miss DeWine

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*McFee cont.*

...but...

"...when a woman qualifies for leave, the leave provided for childbearing must be reasonable."

*McFee*, at ¶33

This no longer seems like "pregnancy-blind" treatment

Miss DeWine

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*Graphic illustration of McFee*



Pregnant fish are treated "the same" as non-pregnant fish

MICHAEL DEWINE

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4.  
**Peggy Young**



MICHAEL DEWINE

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*Young v. UPS*  
135 S.Ct. 1338 (2015)

Reasonable Accommodation in the workplace



Pregnancy-blind policy provides light duty accommodations for many situations  
→ but not for pregnancy ←

MICHAEL DEWINE

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*“treat the same”*  
+  
the **rejection** of *Gilbert*  
(both **holding** and **reasoning**)  
\_\_\_\_\_  
(equals)  
\_\_\_\_\_  
*Young v. UPS*  
MIKE DeWINE

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**holding in *Young v. UPS***  
Despite a “pregnancy-blind” policy,  
an employee can prove  
**intentional discrimination**  
by convincing the Judge that  
– in light of the accommodation of a **large percentage** of non-pregnant employees –  
the refusal to accommodate a **large percentage** of pregnant employees  
is **intentional**.  
MIKE DeWINE

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**Graphic illustration of Young**



**F  
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S  
H  
Y**

A large percentage of pregnant fish treated differently than a large percentage of non-pregnant fish is...

Mike DeWise

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**Gilbert after Young?**

policy specifically excluded absences related to pregnancy



Gilbert policy was not pregnancy-blind so, per the PDA, it is sex discrimination

Mike DeWise

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**McFee after Young?**

pregnancy-blind policy;  
no one gets leave until after 1<sup>st</sup> year



2/6  
(33%)

5/7  
(71%)

→ Large % of non-pregnant fish getting leave?  
→ Large % of pregnant fish not getting leave?

Mike DeWise

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### Young after Young?

pregnancy-blind policy:  
lots of accommodations; none for pregnancy



5/5 (100%)      6/7 (86%)

→ Large % of non-pregnant fish getting leave?  
→ Large % of pregnant fish not getting leave?

MIKE DeWINE

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### Questions?

MIKE DeWINE

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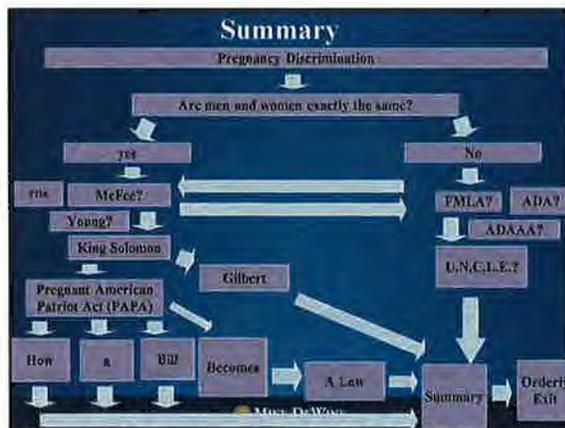
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## Real Summary

1. **Howard W. Smith** (*added "sex" to Title VII*)
2. **Martha Gilbert** (*excluded from paid benefits*)  
Supreme Court = "pregnancy is not sex"  
PDA = "pregnancy is sex": treat "the same"
3. **Tiffany McFee** (*no leave for 1<sup>st</sup> year*)  
"the same" = pregnancy-blind
4. **Peggy Young** (*work accommodations for most*)  
"the same" = "a large %" = *may be intentional*

 Mike DeWine

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## Syllabus

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

## SUPREME COURT OF THE UNITED STATES

## Syllabus

YOUNG *v.* UNITED PARCEL SERVICE, INC.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT

No. 12–1226. Argued December 3, 2014—Decided March 25, 2015

The Pregnancy Discrimination Act added new language to the definitions subsection of Title VII of the Civil Rights Act of 1964. The first clause of the Pregnancy Discrimination Act specifies that Title VII’s prohibition against sex discrimination applies to discrimination “because of or on the basis of pregnancy, childbirth, or related medical conditions.” 42 U. S. C §2000e(k). The Act’s second clause says that employers must treat “women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.” *Ibid.* This case asks the Court to determine how the latter provision applies in the context of an employer’s policy that accommodates many, but not all, workers with nonpregnancy-related disabilities.

Petitioner Young was a part-time driver for respondent United Parcel Service (UPS). When she became pregnant, her doctor advised her that she should not lift more than 20 pounds. UPS, however, required drivers like Young to be able to lift up to 70 pounds. UPS told Young that she could not work while under a lifting restriction. Young subsequently filed this federal lawsuit, claiming that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. She brought only a disparate-treatment claim of discrimination, which a plaintiff can prove either by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or by using the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792. Under that framework, the plaintiff has “the initial burden” of “establishing a prima facie case” of discrimination. *Id.*, at 802. If she carries her burden, the employer must have an opportunity “to articulate some legitimate, non-discriminatory reason[s] for” the difference in treat-

## Syllabus

ment. *Ibid.* If the employer articulates such reasons, the plaintiff then has “an opportunity to prove by a preponderance of the evidence that the reasons . . . were a pretext for discrimination.” *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 253.

After discovery, UPS sought summary judgment. In reply, Young presented several favorable facts that she believed she could prove. In particular, she pointed to UPS policies that accommodated workers who were injured on the job, had disabilities covered by the Americans with Disabilities Act of 1990 (ADA), or had lost Department of Transportation (DOT) certifications. Pursuant to these policies, Young contended, UPS had accommodated several individuals whose disabilities created work restrictions similar to hers. She argued that these policies showed that UPS discriminated against its pregnant employees because it had a light-duty-for-injury policy for numerous “other persons,” but not for pregnant workers. UPS responded that, since Young did not fall within the on-the-job injury, ADA, or DOT categories, it had not discriminated against Young on the basis of pregnancy, but had treated her just as it treated all “other” relevant “persons.”

The District Court granted UPS summary judgment, concluding, *inter alia*, that Young could not make out a *prima facie* case of discrimination under *McDonnell Douglas*. The court found that those with whom Young had compared herself—those falling within the on-the-job, DOT, or ADA categories—were too different to qualify as “similarly situated comparator[s].” The Fourth Circuit affirmed.

## Held:

1. An individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework. Pp. 10–23.

(a) The parties’ interpretations of the Pregnancy Discrimination Act’s second clause are unpersuasive. Pp. 12–20.

(i) Young claims that as long as “an employer accommodates only a subset of workers with disabling conditions,” “pregnant workers who are similar in the ability to work [must] receive the same treatment even if still other nonpregnant workers do not receive accommodations.” Brief for Petitioner 28. Her reading proves too much. The Court doubts that Congress intended to grant pregnant workers an unconditional “most-favored-nation” status, such that employers who provide one or two workers with an accommodation must provide similar accommodations to *all* pregnant workers, irrespective of any other criteria. After all, the second clause of the Act, when referring to nonpregnant persons with similar disabilities, uses the open-ended term “other persons.” It does not say that the employer must treat pregnant employees the “same” as “*any* other per-

## Syllabus

sons” who are similar in their ability or inability to work, nor does it specify the particular “other persons” Congress had in mind as appropriate comparators for pregnant workers. Moreover, disparate-treatment law normally allows an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonpretextual reason for doing so. See, e.g., *Burdine*, *supra*, at 252–258. There is no reason to think Congress intended its language in the Pregnancy Discrimination Act to deviate from that approach. Pp. 12–14.

(ii) The Solicitor General argues that the Court should give special, if not controlling, weight to a 2014 Equal Employment Opportunity Commission guideline concerning the application of Title VII and the ADA to pregnant employees. But that guideline lacks the timing, “consistency,” and “thoroughness” of “consideration” necessary to “give it power to persuade.” *Skidmore v. Swift & Co.*, 323 U. S. 134, 140. The guideline was promulgated after certiorari was granted here; it takes a position on which previous EEOC guidelines were silent; it is inconsistent with positions long advocated by the Government; and the EEOC does not explain the basis for its latest guidance. Pp. 14–17.

(iii) UPS claims that the Act’s second clause simply defines sex discrimination to include pregnancy discrimination. But that cannot be right, as the first clause of the Act accomplishes that objective. Reading the Act’s second clause as UPS proposes would thus render the first clause superfluous. It would also fail to carry out a key congressional objective in passing the Act. The Act was intended to overturn the holding and the reasoning of *General Elec. Co. v. Gilbert*, 429 U. S. 125, which upheld against a Title VII challenge a company plan that provided nonoccupational sickness and accident benefits to all employees but did not provide disability-benefit payments for any absence due to pregnancy. Pp. 17–20.

(b) An individual pregnant worker who seeks to show disparate treatment may make out a prima facie case under the *McDonnell Douglas* framework by showing that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others “similar in their ability or inability to work.” The employer may then seek to justify its refusal to accommodate the plaintiff by relying on “legitimate, nondiscriminatory” reasons for denying accommodation. That reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those whom the employer accommodates. If the employer offers a “legitimate, nondiscriminatory” reason, the plaintiff may show that it

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is in fact pretextual. The plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination. The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. This approach is consistent with the longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons, see *Burdine, supra*, at 255, n. 10, and with Congress' intent to overrule *Gilbert*. Pp. 20–23.

2. Under this interpretation of the Act, the Fourth Circuit's judgment must be vacated. Summary judgment is appropriate when there is "no genuine dispute as to any material fact." Fed. Rule Civ. Proc. 56(a). The record here shows that Young created a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from hers. It is left to the Fourth Circuit to determine on remand whether Young also created a genuine issue of material fact as to whether UPS' reasons for having treated Young less favorably than these other nonpregnant employees were pretextual. Pp. 23–24. 707 F. 3d 437, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment. SCALIA, J., filed a dissenting opinion, in which KENNEDY and THOMAS, JJ., joined. KENNEDY, J., filed a dissenting opinion.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

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No. 12–1226

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PEGGY YOUNG, PETITIONER *v.* UNITED PARCEL  
SERVICE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

[March 25, 2015]

JUSTICE BREYER delivered the opinion of the Court.

The Pregnancy Discrimination Act makes clear that Title VII’s prohibition against sex discrimination applies to discrimination based on pregnancy. It also says that employers must treat “women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.” 42 U. S. C. §2000e(k). We must decide how this latter provision applies in the context of an employer’s policy that accommodates many, but not all, workers with nonpregnancy-related disabilities.

In our view, the Act requires courts to consider the extent to which an employer’s policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work. And here—as in all cases in which an individual plaintiff seeks to show disparate treatment through indirect evidence—it requires courts to consider any legitimate, nondiscriminatory, nonpretextual justification for these differences in treatment. See *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802 (1973). Ultimately the court must deter-

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mine whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination. The Court of Appeals here affirmed a grant of summary judgment in favor of the employer. Given our view of the law, we must vacate that court's judgment.

I  
A

We begin with a summary of the facts. The petitioner, Peggy Young, worked as a part-time driver for the respondent, United Parcel Service (UPS). Her responsibilities included pickup and delivery of packages that had arrived by air carrier the previous night. In 2006, after suffering several miscarriages, she became pregnant. Her doctor told her that she should not lift more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter. App. 580. UPS required drivers like Young to be able to lift parcels weighing up to 70 pounds (and up to 150 pounds with assistance). *Id.*, at 578. UPS told Young she could not work while under a lifting restriction. Young consequently stayed home without pay during most of the time she was pregnant and eventually lost her employee medical coverage.

Young subsequently brought this federal lawsuit. We focus here on her claim that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. Young said that her co-workers were willing to help her with heavy packages. She also said that UPS accommodated other drivers who were "similar in their . . . inability to work." She accordingly concluded that UPS must accommodate her as well. See Brief for Petitioner 30–31.

UPS responded that the "other persons" whom it had accommodated were (1) drivers who had become disabled on the job, (2) those who had lost their Department of

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Transportation (DOT) certifications, and (3) those who suffered from a disability covered by the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U. S. C. §12101 *et seq.* UPS said that, since Young did not fall within any of those categories, it had not discriminated against Young on the basis of pregnancy but had treated her just as it treated all “other” relevant “persons.” See Brief for Respondent 34.

## B

Title VII of the Civil Rights Act of 1964 forbids a covered employer to “discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual’s . . . sex.” 78 Stat. 253, 42 U. S. C. §2000e–2(a)(1). In 1978, Congress enacted the Pregnancy Discrimination Act, 92 Stat. 2076, which added new language to Title VII’s definitions subsection. The first clause of the 1978 Act specifies that Title VII’s “ter[m] ‘because of sex’ . . . include[s] . . . because of or on the basis of pregnancy, childbirth, or related medical conditions.” §2000e(k). The second clause says that

“women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . .” *Ibid.*

This case requires us to consider the application of the second clause to a “disparate-treatment” claim—a claim that an employer intentionally treated a complainant less favorably than employees with the “complainant’s qualifications” but outside the complainant’s protected class. *McDonnell Douglas, supra*, at 802. We have said that “[l]iability in a disparate-treatment case depends on whether the protected trait actually motivated the employer’s decision.” *Raytheon Co. v. Hernandez*, 540 U. S.

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44, 52 (2003) (ellipsis and internal quotation marks omitted). We have also made clear that a plaintiff can prove disparate treatment either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in *McDonnell Douglas*. See *Trans World Airlines, Inc. v. Thurston*, 469 U. S. 111, 121 (1985).

In *McDonnell Douglas*, we considered a claim of discriminatory hiring. We said that, to prove disparate treatment, an individual plaintiff must “carry the initial burden” of “establishing a prima facie case” of discrimination by showing

“(i) that he belongs to a . . . minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” 411 U. S., at 802.

If a plaintiff makes this showing, then the employer must have an opportunity “to articulate some legitimate, non-discriminatory reason for” treating employees outside the protected class better than employees within the protected class. *Ibid.* If the employer articulates such a reason, the plaintiff then has “an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant [*i.e.*, the employer] were not its true reasons, but were a pretext for discrimination.” *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 253 (1981).

We note that employment discrimination law also creates what is called a “disparate-impact” claim. In evaluating a disparate-impact claim, courts focus on the *effects* of an employment practice, determining whether they are

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unlawful irrespective of motivation or intent. See *Raytheon, supra*, at 52–53; see also *Ricci v. DeStefano*, 557 U. S. 557, 578 (2009). But Young has not alleged a disparate-impact claim.

Nor has she asserted what we have called a “pattern-or-practice” claim. See *Teamsters v. United States*, 431 U. S. 324, 359 (1977) (explaining that Title VII plaintiffs who allege a “pattern or practice” of discrimination may establish a prima facie case by “another means”); see also *id.*, at 357 (rejecting contention that the “burden of proof in a pattern-or-practice case must be equivalent to that outlined in *McDonnell Douglas*”).

## C

In July 2007, Young filed a pregnancy discrimination charge with the Equal Employment Opportunity Commission (EEOC). In September 2008, the EEOC provided her with a right-to-sue letter. See 29 CFR §1601.28 (2014). Young then filed this complaint in Federal District Court. She argued, among other things, that she could show by direct evidence that UPS had intended to discriminate against her because of her pregnancy and that, in any event, she could establish a prima facie case of disparate treatment under the *McDonnell Douglas* framework. See App. 60–62.

After discovery, UPS filed a motion for summary judgment. See Fed. Rule Civ. Proc. 56(a). In reply, Young pointed to favorable facts that she believed were either undisputed or that, while disputed, she could prove. They include the following:

1. Young worked as a UPS driver, picking up and delivering packages carried by air. Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment in No. 08–cv–02586 (D Md.), pp. 3–4 (hereinafter Memorandum).
2. Young was pregnant in the fall of 2006. *Id.*, at 15–16.

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3. Young's doctor recommended that she "not be required to lift greater than 20 pounds for the first 20 weeks of pregnancy and no greater than 10 pounds thereafter." App. 580; see also Memorandum 17.
4. UPS required drivers such as Young to be able to "[l]ift, lower, push, pull, leverage and manipulate . . . packages weighing up to 70 pounds" and to "[a]ssist in moving packages weighing up to 150 pounds." App. 578; see also Memorandum 5.
5. UPS' occupational health manager, the official "responsible for most issues relating to employee health and ability to work" at Young's UPS facility, App. 568–569, told Young that she could not return to work during her pregnancy because she could not satisfy UPS' lifting requirements, see Memorandum 17–18; 2011 WL 665321, \*5 (D Md., Feb. 14, 2011).
6. The manager also determined that Young did not qualify for a temporary alternative work assignment. *Ibid.*; see also Memorandum 19–20.
7. UPS, in a collective-bargaining agreement, had promised to provide temporary alternative work assignments to employees "unable to perform their normal work assignments due to an *on-the-job* injury." App. 547 (emphasis added); see also Memorandum 8, 45–46.
8. The collective-bargaining agreement also provided that UPS would "make a good faith effort to comply . . . with requests for a reasonable accommodation because of a permanent disability" under the ADA. App. 548; see also Memorandum 7.
9. The agreement further stated that UPS would give "inside" jobs to drivers who had lost their DOT certifications because of a failed medical exam, a lost driver's license, or involvement in a motor vehicle accident. See App. 563–565; Memorandum 8.

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10. When Young later asked UPS' Capital Division Manager to accommodate her disability, he replied that, while she was pregnant, she was "too much of a liability" and could "not come back" until she "was no longer pregnant." *Id.*, at 20.
11. Young remained on a leave of absence (without pay) for much of her pregnancy. *Id.*, at 49.
12. Young returned to work as a driver in June 2007, about two months after her baby was born. *Id.*, at 21, 61.

As direct evidence of intentional discrimination, Young relied, in significant part, on the statement of the Capital Division Manager (10 above). As evidence that she had made out a prima facie case under *McDonnell Douglas*, Young relied, in significant part, on evidence showing that UPS would accommodate workers injured on the job (7), those suffering from ADA disabilities (8), and those who had lost their DOT certifications (9). That evidence, she said, showed that UPS had a light-duty-for-injury policy with respect to numerous "other persons," but not with respect to pregnant workers. See Memorandum 29.

Young introduced further evidence indicating that UPS had accommodated several individuals when they suffered disabilities that created work restrictions similar to hers. UPS contests the correctness of some of these facts and the relevance of others. See Brief for Respondent 5, 6, 57. But because we are at the summary judgment stage, and because there is a genuine dispute as to these facts, we view this evidence in the light most favorable to Young, the nonmoving party, see *Scott v. Harris*, 550 U. S. 372, 380 (2007):

13. Several employees received accommodations while suffering various similar or more serious disabilities incurred on the job. See App. 400–401 (10–pound lifting limitation); *id.*, at 635 (foot injury);

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*id.*, at 637 (arm injury).

14. Several employees received accommodations following injury, where the record is unclear as to whether the injury was incurred on or off the job. See *id.*, at 381 (recurring knee injury); *id.*, at 655 (ankle injury); *id.*, at 655 (knee injury); *id.*, at 394–398 (stroke); *id.*, at 425, 636–637 (leg injury).
15. Several employees received “inside” jobs after losing their DOT certifications. See *id.*, at 372 (DOT certification suspended after conviction for driving under the influence); *id.*, at 636, 647 (failed DOT test due to high blood pressure); *id.*, at 640–641 (DOT certification lost due to sleep apnea diagnosis).
16. Some employees were accommodated despite the fact that their disabilities had been incurred off the job. See *id.*, at 446 (ankle injury); *id.*, at 433, 635–636 (cancer).
17. According to a deposition of a UPS shop steward who had worked for UPS for roughly a decade, *id.*, at 461, 463, “the only light duty requested [due to physical] restrictions that became an issue” at UPS “were with women who were pregnant,” *id.*, at 504.

The District Court granted UPS’ motion for summary judgment. It concluded that Young could not show intentional discrimination through direct evidence. 2011 WL 665321, \*10–\*12. Nor could she make out a prima facie case of discrimination under *McDonnell Douglas*. The court wrote that those with whom Young compared herself—those falling within the on-the-job, DOT, or ADA categories—were too different to qualify as “similarly situated comparator[s].” 2011 WL 665321, \*14. The court added that, in any event, UPS had offered a legitimate, nondiscriminatory reason for failing to accommodate pregnant women, and Young had not created a genuine

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issue of material fact as to whether that reason was pretextual. *Id.*, at \*15.

On appeal, the Fourth Circuit affirmed. It wrote that “UPS has crafted a pregnancy-blind policy” that is “at least facially a ‘neutral and legitimate business practice,’ and not evidence of UPS’s discriminatory animus toward pregnant workers.” 707 F. 3d 437, 446 (2013). It also agreed with the District Court that Young could not show that “similarly-situated employees outside the protected class received more favorable treatment than Young.” *Id.*, at 450. Specifically, it believed that Young was different from those workers who were “disabled under the ADA” (which then protected only those with permanent disabilities) because Young was “not disabled”; her lifting limitation was only “temporary and not a significant restriction on her ability to perform major life activities.” *Ibid.* Young was also different from those workers who had lost their DOT certifications because “no legal obstacle stands between her and her work” and because many with lost DOT certifications retained physical (*i.e.*, lifting) capacity that Young lacked. *Ibid.* And Young was different from those “injured on the job because, quite simply, her inability to work [did] not arise from an on-the-job injury.” *Id.*, at 450–451. Rather, Young more closely resembled “an employee who injured his back while picking up his infant child or . . . an employee whose lifting limitation arose from her off-the-job work as a volunteer firefighter,” neither of whom would have been eligible for accommodation under UPS’ policies. *Id.*, at 448.

Young filed a petition for certiorari essentially asking us to review the Fourth Circuit’s interpretation of the Pregnancy Discrimination Act. In light of lower-court uncertainty about the interpretation of the Act, we granted the petition. Compare *Ensley-Gaines v. Runyon*, 100 F. 3d 1220, 1226 (CA6 1996), with *Urbano v. Continental Airlines, Inc.*, 138 F. 3d 204, 206–208 (CA5 1998); *Reeves v.*

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*Swift Transp. Co.*, 446 F. 3d 637, 640–643 (CA6 2006); *Serednyj v. Beverly Healthcare, LLC*, 656 F. 3d 540, 547–552 (CA7 2011); *Spivey v. Beverly Enterprises, Inc.*, 196 F. 3d 1309, 1312–1314 (CA11 1999).

## D

We note that statutory changes made after the time of Young’s pregnancy may limit the future significance of our interpretation of the Act. In 2008, Congress expanded the definition of “disability” under the ADA to make clear that “physical or mental impairment[s] that substantially limi[t]” an individual’s ability to lift, stand, or bend are ADA-covered disabilities. ADA Amendments Act of 2008, 122 Stat. 3555, codified at 42 U. S. C. §§12102(1)–(2). As interpreted by the EEOC, the new statutory definition requires employers to accommodate employees whose temporary lifting restrictions originate off the job. See 29 CFR pt. 1630, App., §1630.2(j)(1)(ix). We express no view on these statutory and regulatory changes.

## II

The parties disagree about the interpretation of the Pregnancy Discrimination Act’s second clause. As we have said, see Part I–B, *supra*, the Act’s first clause specifies that discrimination “because of sex” includes discrimination “because of . . . pregnancy.” But the meaning of the second clause is less clear; it adds: “[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as *other persons* not so affected but *similar in their ability or inability to work*.” 42 U. S. C. §2000e(k) (emphasis added). Does this clause mean that courts must compare workers *only* in respect to the work limitations that they suffer? Does it mean that courts must ignore all other similarities or differences between pregnant and nonpregnant workers? Or does it mean that courts, when

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deciding who the relevant “other persons” are, may consider other similarities and differences as well? If so, which ones?

The differences between these possible interpretations come to the fore when a court, as here, must consider a workplace policy that distinguishes between pregnant and nonpregnant workers in light of characteristics not related to pregnancy. Young poses the problem directly in her reply brief when she says that the Act requires giving “the same accommodations to an employee with a pregnancy-related work limitation as it would give *that employee* if her work limitation stemmed from a different cause but had a similar effect on her inability to work.” Reply Brief 15. Suppose the employer would not give “*that [pregnant] employee*” the “same accommodations” as another employee, but the employer’s reason for the difference in treatment is that the pregnant worker falls within a facially neutral category (for example, individuals with off-the-job injuries). What is a court then to do?

The parties propose very different answers to this question. Young and the United States believe that the second clause of the Pregnancy Discrimination Act “requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work.” Brief for Petitioner 23. In other words, Young contends that the second clause means that whenever “an employer accommodates only a subset of workers with disabling conditions,” a court should find a Title VII violation if “pregnant workers who are similar in the ability to work” do not “receive the same [accommodation] even if still other non-pregnant workers do not receive accommodations.” *Id.*, at 28.

UPS takes an almost polar opposite view. It contends that the second clause does no more than define sex discrimination to include pregnancy discrimination. See

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Brief for Respondent 25. Under this view, courts would compare the accommodations an employer provides to pregnant women with the accommodations it provides to others *within* a facially neutral category (such as those with off-the-job injuries) to determine whether the employer has violated Title VII. Cf. *post*, at 4 (SCALIA, J., dissenting) (hereinafter the dissent) (the clause “does not prohibit denying pregnant women accommodations . . . on the basis of an evenhanded policy”).

## A

We cannot accept either of these interpretations. Young asks us to interpret the second clause broadly and, in her view, literally. As just noted, she argues that, as long as “an employer accommodates only a subset of workers with disabling conditions,” “pregnant workers who are similar in the ability to work [must] receive the same treatment even if still other nonpregnant workers do not receive accommodations.” Brief for Petitioner 28. She adds that, because the record here contains “evidence that pregnant and nonpregnant workers were not treated the same,” that is the end of the matter, she must win; there is no need to refer to *McDonnell Douglas*. Brief for Petitioner 47.

The problem with Young’s approach is that it proves too much. It seems to say that the statute grants pregnant workers a “most-favored-nation” status. As long as an employer provides one or two workers with an accommodation—say, those with particularly hazardous jobs, or those whose workplace presence is particularly needed, or those who have worked at the company for many years, or those who are over the age of 55—then it must provide similar accommodations to *all* pregnant workers (with comparable physical limitations), irrespective of the nature of their jobs, the employer’s need to keep them working, their ages, or any other criteria.

Lower courts have concluded that this could not have

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been Congress' intent in passing the Pregnancy Discrimination Act. See, e.g., *Urbano*, 138 F. 3d, at 206–208; *Reeves*, 466 F. 3d, at 641; *Serednyj*, 656 F. 3d, at 548–549; *Spivey*, 196 F. 3d, at 1312–1313. And Young partially agrees, for she writes that “the statute does not require employers to give” to “pregnant workers all of the benefits and privileges it extends to other” similarly disabled “employees when those benefits and privileges are . . . based on the employee’s tenure or position within the company.” Reply Brief 15–16; see also Tr. of Oral Arg. 22 (“[S]eniority, full-time work, different job classifications, all of those things would be permissible distinctions for an employer to make to differentiate among who gets benefits”).

Young’s last-mentioned concession works well with respect to seniority, for Title VII itself contains a seniority defense, see 42 U. S. C. §2000e–2(h). Hence, seniority is not part of the problem. But otherwise the most-favored-nation problem remains, and Young’s concession does not solve it. How, for example, should a court treat special benefits attached to injuries arising out of, say, extrahazardous duty? If Congress intended to allow differences in treatment arising out of special duties, special service, or special needs, why would it not also have wanted courts to take account of differences arising out of special “causes”—for example, benefits for those who drive (and are injured) in extrahazardous conditions?

We agree with UPS to this extent: We doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status. The language of the statute does not require that unqualified reading. The second clause, when referring to nonpregnant persons with similar disabilities, uses the open-ended term “other persons.” It does not say that the employer must treat pregnant employees the “same” as “any other persons” (who are similar in their ability or inability to work), nor does it

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otherwise specify *which* other persons Congress had in mind.

Moreover, disparate-treatment law normally permits an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonpretextual reason for doing so. See, e.g., *Raytheon*, 540 U. S., at 51–55; *Burdine*, 450 U. S., at 252–258; *McDonnell Douglas*, 411 U. S., at 802. There is no reason to believe Congress intended its language in the Pregnancy Discrimination Act to embody a significant deviation from this approach. Indeed, the relevant House Report specifies that the Act “reflect[s] no new legislative mandate.” H. R. Rep. No. 95–948, pp. 3–4 (1978) (hereinafter H. R. Rep.). And the Senate Report states that the Act was designed to “reestablis[h] the law as it was understood prior to” this Court’s decision in *General Electric Co. v. Gilbert*, 429 U. S. 125 (1976). S. Rep. No. 95–331, p. 8 (1978) (hereinafter S. Rep.). See *Gilbert*, *supra*, at 147 (Brennan, J., dissenting) (lower courts had held that a disability plan that compensates employees for temporary disabilities but not pregnancy violates Title VII); see also *AT&T Corp. v. Hulteen*, 556 U. S. 701, 717, n. 2 (2009) (GINSBURG, J., dissenting).

## B

Before Congress passed the Pregnancy Discrimination Act, the EEOC issued guidance stating that “[d]isabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities” and that “the availability of . . . benefits and privileges . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.” 29 CFR §1604.10(b) (1975). Indeed, as early as 1972, EEOC guidelines provided:

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“Disabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.” 37 Fed. Reg. 6837 (1972) (codified in 29 CFR §1604.10(b) (1973)).

Soon after the Act was passed, the EEOC issued guidance consistent with its pre-Act statements. The EEOC explained: “Disabilities caused or contributed to by pregnancy . . . for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions.” See §1604.10(b) (1979). Moreover, the EEOC stated that “[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.” 29 CFR pt. 1604, App., p. 918.

This post-Act guidance, however, does not resolve the ambiguity of the term “other persons” in the Act’s second clause. Rather, it simply tells employers to treat pregnancy-related disabilities like nonpregnancy-related disabilities, without clarifying how that instruction should be implemented when an employer does not treat all nonpregnancy-related disabilities alike.

More recently—in July 2014—the EEOC promulgated an additional guideline apparently designed to address this ambiguity. That guideline says that “[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee’s limitations (e.g., a policy of providing light duty only to workers injured on the job).” 2 EEOC Compliance Manual §626–I(A)(5), p. 626:0009 (July 2014). The EEOC also provided an example of disparate treatment that would violate the Act:

“An employer has a policy or practice of providing

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light duty, subject to availability, for any employee who cannot perform one or more job duties for up to 90 days due to injury, illness, or a condition that would be a disability under the ADA. An employee requests a light duty assignment for a 20-pound lifting restriction related to her pregnancy. The employer denies the light duty request.” *Id.*, at 626:0013, Example 10.

The EEOC further added that “an employer may not deny light duty to a pregnant employee based on a policy that limits light duty to employees with on-the-job injuries.” *Id.*, at 626:0028.

The Solicitor General argues that we should give special, if not controlling, weight to this guideline. He points out that we have long held that “the rulings, interpretations and opinions” of an agency charged with the mission of enforcing a particular statute, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944). See Brief for United States as *Amicus Curiae* 26.

But we have also held that the “weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control.” *Skidmore, supra*, at 140. These qualifications are relevant here and severely limit the EEOC’s July 2014 guidance’s special power to persuade.

We come to this conclusion not because of any agency lack of “experience” or “informed judgment.” Rather, the difficulties are those of timing, “consistency,” and “thoroughness” of “consideration.” The EEOC promulgated its 2014 guidelines only recently, after this Court had granted

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certiorari in this case. In these circumstances, it is fair to say that the EEOC's current guidelines take a position about which the EEOC's previous guidelines were silent. And that position is inconsistent with positions for which the Government has long advocated. See Brief for Defendant-Appellee in *Ensley-Gaines v. Runyon*, No. 95–1038 (CA6 1996), pp. 26–27 (explaining that a reading of the Act like Young's was “simply incorrect” and “runs counter” to this Court's precedents). See also Brief for United States as *Amicus Curiae* 16, n. 2 (“The Department of Justice, on behalf of the United States Postal Service, has previously taken the position that pregnant employees with work limitations are not similarly situated to employees with similar limitations caused by on-the-job injuries”). Nor does the EEOC explain the basis of its latest guidance. Does it read the statute, for example, as embodying a most-favored-nation status? Why has it now taken a position contrary to the litigation position the Government previously took? Without further explanation, we cannot rely significantly on the EEOC's determination.

## C

We find it similarly difficult to accept the opposite interpretation of the Act's second clause. UPS says that the second clause simply defines sex discrimination to include pregnancy discrimination. See Brief for Respondent 25. But that cannot be so.

The first clause accomplishes that objective when it expressly amends Title VII's definitional provision to make clear that Title VII's words “because of sex” and “on the basis of sex” “include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.” 42 U. S. C. §2000e(k). We have long held that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause” is rendered “superflu-

## Opinion of the Court

ous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U. S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U. S. 167, 174 (2001)). But that is what UPS’ interpretation of the second clause would do.

The dissent, basically accepting UPS’ interpretation, says that the second clause is not “superfluous” because it adds “clarity.” *Post*, at 4–5 (internal quotation marks omitted). It makes “plain,” the dissent adds, that unlawful discrimination “includes disfavoring pregnant women relative to other workers of similar inability to work.” *Post*, at 5. Perhaps we fail to understand. *McDonnell Douglas* itself makes clear that courts normally consider how a plaintiff was treated relative to other “persons of [the plaintiff’s] qualifications” (which here include disabilities). 411 U. S., at 802. If the second clause of the Act did not exist, we would still say that an employer who disfavored pregnant women relative to other workers of similar ability or inability to work had engaged in pregnancy discrimination. In a word, there is no need for the “clarification” that the dissent suggests the second sentence provides.

Moreover, the interpretation espoused by UPS and the dissent would fail to carry out an important congressional objective. As we have noted, Congress’ “unambiguou[s]” intent in passing the Act was to overturn “both the holding and the reasoning of the Court in the *Gilbert* decision.” *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U. S. 669, 678 (1983); see also *post*, at 6 (recognizing that “the object of the Pregnancy Discrimination Act is to displace this Court’s conclusion in [*Gilbert*]”). In *Gilbert*, the Court considered a company plan that provided “nonoccupational sickness and accident benefits to all employees” without providing “disability-benefit payments for any absence due to pregnancy.” 429 U. S., at 128, 129. The Court held that the plan did not violate Title VII; it did not discriminate on the basis of sex because there was “no

## Opinion of the Court

risk from which men are protected and women are not.” *Id.*, at 138 (internal quotation marks omitted). Although pregnancy is “confined to women,” the majority believed it was not “comparable in all other respects to [the] diseases or disabilities” that the plan covered. *Id.*, at 136. Specifically, the majority explained that pregnancy “is not a ‘disease’ at all,” nor is it necessarily a result of accident. *Ibid.* Neither did the majority see the distinction the plan drew as “a subterfuge” or a “pretext” for engaging in gender-based discrimination. *Ibid.* In short, the *Gilbert* majority reasoned in part just as the dissent reasons here. The employer did “not distinguish between pregnant women and others of similar ability or inability *because of pregnancy.*” *Post*, at 2. It distinguished between them on a neutral ground—*i.e.*, it accommodated only sicknesses and accidents, and pregnancy was neither of those. See 429 U. S., at 136.

Simply including pregnancy among Title VII’s protected traits (*i.e.*, accepting UPS’ interpretation) would not overturn *Gilbert* in full—in particular, it would not respond to *Gilbert*’s determination that an employer can treat pregnancy less favorably than diseases or disabilities resulting in a similar inability to work. As we explained in *California Fed. Sav. & Loan Assn. v. Guerra*, 479 U. S. 272 (1987), “the first clause of the [Act] reflects Congress’ disapproval of the reasoning in *Gilbert*” by “adding pregnancy to the definition of sex discrimination prohibited by Title VII.” *Id.*, at 284. But the second clause was intended to do more than that—it “was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied.” *Id.*, at 285. The dissent’s view, like that of UPS’, ignores this precedent.

## III

The statute lends itself to an interpretation other than those that the parties advocate and that the dissent sets

## Opinion of the Court

forth. Our interpretation minimizes the problems we have discussed, responds directly to *Gilbert*, and is consistent with longstanding interpretations of Title VII.

In our view, an individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework. That framework requires a plaintiff to make out a prima facie case of discrimination. But it is “not intended to be an inflexible rule.” *Furnco Constr. Corp. v. Waters*, 438 U. S. 567, 575 (1978). Rather, an individual plaintiff may establish a prima facie case by “showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under” Title VII. *Id.*, at 576 (internal quotation marks omitted). The burden of making this showing is “not onerous.” *Burdine*, 450 U. S., at 253. In particular, making this showing is not as burdensome as succeeding on “an ultimate finding of fact as to” a discriminatory employment action. *Furnco, supra*, at 576. Neither does it require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways. See *McDonnell Douglas*, 411 U. S., at 802 (burden met where plaintiff showed that employer hired other “qualified” individuals outside the protected class); *Furnco, supra*, at 575–577 (same); *Burdine, supra*, at 253 (same). Cf. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 142 (2000) (similar).

Thus, a plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act’s second clause may make out a prima facie case by showing, as in *McDonnell Douglas*, that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others “simi-

## Opinion of the Court

lar in their ability or inability to work.”

The employer may then seek to justify its refusal to accommodate the plaintiff by relying on “legitimate, non-discriminatory” reasons for denying her accommodation. 411 U. S., at 802. But, consistent with the Act’s basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those (“similar in their ability or inability to work”) whom the employer accommodates. After all, the employer in *Gilbert* could in all likelihood have made just such a claim.

If the employer offers an apparently “legitimate, non-discriminatory” reason for its actions, the plaintiff may in turn show that the employer’s proffered reasons are in fact pretextual. We believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer’s policies impose a significant burden on pregnant workers, and that the employer’s “legitimate, nondiscriminatory” reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.

The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. Here, for example, if the facts are as Young says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations. Young might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could

## Opinion of the Court

find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.

This approach, though limited to the Pregnancy Discrimination Act context, is consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons for treating individuals within a protected class differently than those outside the protected class. See *Burdine, supra*, at 255, n. 10. In particular, it is hardly anomalous (as the dissent makes it out to be, see *post*, at 8–9) that a plaintiff may rebut an employer's proffered justifications by showing how a policy operates in practice. In *McDonnell Douglas* itself, we noted that an employer's "general policy and practice with respect to minority employment"—including "statistics as to" that policy and practice—could be evidence of pretext. 411 U. S., at 804–805. Moreover, the continued focus on whether the plaintiff has introduced sufficient evidence to give rise to an inference of *intentional* discrimination avoids confusing the disparate-treatment and disparate-impact doctrines, cf. *post*, at 8–10.

Our interpretation of the Act is also, unlike the dissent's, consistent with Congress' intent to overrule *Gilbert's* reasoning and result. The dissent says that "[i]f a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she has been 'treated the same' as everyone else." *Post*, at 2. This logic would have found no problem with the employer plan in *Gilbert*, which "denied an accommodation" to pregnant women on the same basis as it denied accommodations to other employees—*i.e.*, it accommodated only sicknesses and accidents, and pregnancy was neither of those. See Part II–C, *supra*. In arguing to the contrary, the dissent's discussion of *Gilbert* relies exclusively on the opinions of the dissenting Justices in that case. See *post*,

## Opinion of the Court

at 6–7. But Congress’ intent in passing the Act was to overrule the *Gilbert majority* opinion, which viewed the employer’s disability plan as denying coverage to pregnant employees on a neutral basis.

## IV

Under this interpretation of the Act, the judgment of the Fourth Circuit must be vacated. A party is entitled to summary judgment if there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. Rule Civ. Proc. 56(a). We have already outlined the evidence Young introduced. See Part I–C, *supra*. Viewing the record in the light most favorable to Young, there is a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young’s. In other words, Young created a genuine dispute of material fact as to the fourth prong of the *McDonnell Douglas* analysis.

Young also introduced evidence that UPS had three separate accommodation policies (on-the-job, ADA, DOT). Taken together, Young argued, these policies significantly burdened pregnant women. See App. 504 (shop steward’s testimony that “the only light duty requested [due to physical] restrictions that became an issue” at UPS “were with women who were pregnant”). The Fourth Circuit did not consider the combined effects of these policies, nor did it consider the strength of UPS’ justifications for each when combined. That is, why, when the employer accommodated so many, could it not accommodate pregnant women as well?

We do not determine whether Young created a genuine issue of material fact as to whether UPS’ reasons for having treated Young less favorably than it treated these other nonpregnant employees were pretextual. We leave a final determination of that question for the Fourth Circuit

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to make on remand, in light of the interpretation of the Pregnancy Discrimination Act that we have set out above.

\* \* \*

For the reasons above, we vacate the judgment of the Fourth Circuit and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

***Young v. United Parcel Service, Inc.***

To view this opinion in full, please go to  
[http://www.supremecourt.gov/opinions/14pdf/12-1226\\_k5fl.pdf](http://www.supremecourt.gov/opinions/14pdf/12-1226_k5fl.pdf)

***EEOC v. Abercrombie & Fitch Stores, Inc.***

Megan Hudson  
Associate Assistant Attorney General in the  
Civil Rights Section of the Attorney General's Office

Megan Hudson is an Associate Assistant Attorney General in the Civil Rights Section of the Office of the Attorney General. She represents the Ohio Civil Rights Commission and prosecutes allegations of employment discrimination, fair housing violations, and discrimination in places of public accommodation. Prior to joining the Attorney General's Office, Ms. Hudson interned at the Equal Employment Opportunity Commission in Washington, D.C. and was a judicial extern for former Ohio Supreme Court Chief Justice Thomas J. Moyer. Ms. Hudson serves as the treasurer for the Downtown Residents' Association of Columbus as well as the Chair of the Greater Columbus Rowing Association's Code of Conduct committee.

**EEOC v. Abercrombie**  
Megan M. Hudson, AAG Civil Rights Section



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1. Introduction
2. Circuit, Guilt, Knowledge
3. EEOC v. Abercrombie Case Analysis
4. Post-Abercrombie Cases
5. Questions?
6. Where to Next? Best Practices



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**Religious Accommodations in Employment**



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**Circuit Split: What Knowledge is Required?**



MIKE DeWINE

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**EEOC v. Abercrombie: Background**

- Look Policy
- Complainant wears a headscarf and is a practicing Muslim
- Given a "qualified" rating
- District Manager decision to not hire

MIKE DeWINE

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**EEOC v. Abercrombie: District Court**

- *McDonnell Douglas* burden shifting
- Focus on what notice given to employer
- Explicit, direct notice not required
- Granted summary judgment to EEOC

MIKE DeWINE

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**EEOC v. Abercrombie: Tenth Circuit**

- 10<sup>th</sup> Circuit reversed district court, ordered summary judgment in favor of Abercrombie
- Particularized, actual knowledge requirement
- A correct assumption ≠ actual knowledge

Mike DeWise

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**EEOC v. Abercrombie: Supreme Court**

- Reversed and remanded
- Holding: To prevail in a disparate-treatment claim, an applicant need show only that his need for an accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of his need.

Mike DeWise

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**Post EEOC v. Abercrombie Cases**

- Fifth Circuit - *Nobach v. Woodland Village Nursing Center, Inc.*
- D. Colorado - *EEOC v. Jetstream Ground Services, Inc.*

Mike DeWise

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## Syllabus

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

## SUPREME COURT OF THE UNITED STATES

## Syllabus

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
v. ABERCROMBIE & FITCH STORES, INC.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT

No. 14–86. Argued February 25, 2015—Decided June 1, 2015

Respondent (Abercrombie) refused to hire Samantha Elauf, a practicing Muslim, because the headscarf that she wore pursuant to her religious obligations conflicted with Abercrombie’s employee dress policy. The Equal Employment Opportunity Commission (EEOC) filed suit on Elauf’s behalf, alleging a violation of Title VII of the Civil Rights Act of 1964, which, *inter alia*, prohibits a prospective employer from refusing to hire an applicant because of the applicant’s religious practice when the practice could be accommodated without undue hardship. The EEOC prevailed in the District Court, but the Tenth Circuit reversed, awarding Abercrombie summary judgment on the ground that failure-to-accommodate liability attaches only when the applicant provides the employer with actual knowledge of his need for an accommodation.

*Held:* To prevail in a disparate-treatment claim, an applicant need show only that his need for an accommodation was a motivating factor in the employer’s decision, not that the employer had knowledge of his need. Title VII’s disparate-treatment provision requires Elauf to show that Abercrombie (1) “fail[ed] . . . to hire” her (2) “because of” (3) “[her] religion” (including a religious practice). 42 U. S. C. §2000e–2(a)(1). And its “because of” standard is understood to mean that the protected characteristic cannot be a “motivating factor” in an employment decision. §2000e–2(m). Thus, rather than imposing a knowledge standard, §2000e–2(a)(1) prohibits certain *motives*, regardless of the state of the actor’s knowledge: An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions. Title VII contains no knowledge requirement. Furthermore, Title VII’s definition of religion clearly in-

## Syllabus

dicates that failure-to-accommodate challenges can be brought as disparate-treatment claims. And Title VII gives favored treatment to religious practices, rather than demanding that religious practices be treated no worse than other practices. Pp. 2–7.

731 F. 3d 1106, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment. THOMAS, J., filed an opinion concurring in part and dissenting in part.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

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No. 14–86

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**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,  
PETITIONER *v.* ABERCROMBIE & FITCH  
STORES, INC.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE TENTH CIRCUIT

[June 1, 2015]

JUSTICE SCALIA delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship. The question presented is whether this prohibition applies only where an applicant has informed the employer of his need for an accommodation.

I

We summarize the facts in the light most favorable to the Equal Employment Opportunity Commission (EEOC), against whom the Tenth Circuit granted summary judgment. Respondent Abercrombie & Fitch Stores, Inc., operates several lines of clothing stores, each with its own “style.” Consistent with the image Abercrombie seeks to project for each store, the company imposes a Look Policy that governs its employees’ dress. The Look Policy prohibits “caps”—a term the Policy does not define—as too informal for Abercrombie’s desired image.

Samantha Elauf is a practicing Muslim who, consistent

## Opinion of the Court

with her understanding of her religion's requirements, wears a headscarf. She applied for a position in an Abercrombie store, and was interviewed by Heather Cooke, the store's assistant manager. Using Abercrombie's ordinary system for evaluating applicants, Cooke gave Elauf a rating that qualified her to be hired; Cooke was concerned, however, that Elauf's headscarf would conflict with the store's Look Policy.

Cooke sought the store manager's guidance to clarify whether the headscarf was a forbidden "cap." When this yielded no answer, Cooke turned to Randall Johnson, the district manager. Cooke informed Johnson that she believed Elauf wore her headscarf because of her faith. Johnson told Cooke that Elauf's headscarf would violate the Look Policy, as would all other headwear, religious or otherwise, and directed Cooke not to hire Elauf.

The EEOC sued Abercrombie on Elauf's behalf, claiming that its refusal to hire Elauf violated Title VII. The District Court granted the EEOC summary judgment on the issue of liability, 798 F. Supp. 2d 1272 (ND Okla. 2011), held a trial on damages, and awarded \$20,000. The Tenth Circuit reversed and awarded Abercrombie summary judgment. 731 F. 3d 1106 (2013). It concluded that ordinarily an employer cannot be liable under Title VII for failing to accommodate a religious practice until the applicant (or employee) provides the employer with actual knowledge of his need for an accommodation. *Id.*, at 1131. We granted certiorari. 573 U. S. \_\_\_ (2014).

## II

Title VII of the Civil Rights Act of 1964 78 Stat. 253, as amended, prohibits two categories of employment practices. It is unlawful for an employer:

"(1) to fail or refuse to hire or to discharge any indi-

## Opinion of the Court

vidual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e-2(a).

These two proscriptions, often referred to as the "disparate treatment" (or "intentional discrimination") provision and the "disparate impact" provision, are the only causes of action under Title VII. The word "religion" is defined to "includ[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to" a "religious observance or practice without undue hardship on the conduct of the employer's business." §2000e(j).<sup>1</sup>

Abercrombie's primary argument is that an applicant cannot show disparate treatment without first showing that an employer has "actual knowledge" of the applicant's need for an accommodation. We disagree. Instead, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision.<sup>2</sup>

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<sup>1</sup>For brevity's sake, we will in the balance of this opinion usually omit reference to the §2000e(j) "undue hardship" defense to the accommodation requirement, discussing the requirement as though it is absolute.

<sup>2</sup>The concurrence mysteriously concludes that it is not the plaintiff's burden to prove failure to accommodate. *Post*, at 5. But of course that is the plaintiff's burden, if failure to hire "because of" the plaintiff's "religious practice" is the gravamen of the complaint. Failing to hire for

## Opinion of the Court

The disparate-treatment provision forbids employers to: (1) “fail . . . to hire” an applicant (2) “because of” (3) “such individual’s . . . religion” (which includes his religious practice). Here, of course, Abercrombie (1) failed to hire Elauf. The parties concede that (if Elauf sincerely believes that her religion so requires) Elauf’s wearing of a headscarf is (3) a “religious practice.” All that remains is whether she was not hired (2) “because of” her religious practice.

The term “because of” appears frequently in antidiscrimination laws. It typically imports, at a minimum, the traditional standard of but-for causation. *University of Tex. Southwestern Medical Center v. Nassar*, 570 U. S. \_\_\_ (2013). Title VII relaxes this standard, however, to prohibit even making a protected characteristic a “motivating factor” in an employment decision. 42 U. S. C. §2000e-2(m). “Because of” in §2000e-2(a)(1) links the forbidden consideration to each of the verbs preceding it; an individual’s actual religious practice may not be a motivating factor in failing to hire, in refusing to hire, and so on.

It is significant that §2000e-2(a)(1) does not impose a knowledge requirement. As Abercrombie acknowledges, some antidiscrimination statutes do. For example, the Americans with Disabilities Act of 1990 defines discrimi-

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that reason is *synonymous* with refusing to accommodate the religious practice. To accuse the employer of the one is to accuse him of the other. If he is willing to “accommodate”—which means nothing more than allowing the plaintiff to engage in her religious practice despite the employer’s normal rules to the contrary—adverse action “because of” the religious practice is not shown. “The clause that begins with the word ‘unless,’ as the concurrence describes it, *ibid.*, has no function except to place upon the employer the burden of establishing an “undue hardship” defense. The concurrence provides no example, not even an unrealistic hypothetical one, of a claim of failure to hire because of religious practice that does not say the employer refused to permit (“failed to accommodate”) the religious practice. In the nature of things, there cannot be one.

## Opinion of the Court

nation to include an employer's failure to make "reasonable accommodations to the *known* physical or mental limitations" of an applicant. §12112(b)(5)(A) (emphasis added). Title VII contains no such limitation.

Instead, the intentional discrimination provision prohibits certain *motives*, regardless of the state of the actor's knowledge. Motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive*. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.

Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. For example, suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII.

Abercrombie urges this Court to adopt the Tenth Circuit's rule "allocat[ing] the burden of raising a religious conflict." Brief for Respondent 46. This would require the employer to have actual knowledge of a conflict between an applicant's religious practice and a work rule. The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result. That is Congress's province. We construe Title VII's silence as exactly that: silence. Its disparate-

## Opinion of the Court

treatment provision prohibits actions taken with the *motive* of avoiding the need for accommodating a religious practice. A request for accommodation, or the employer's certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability.<sup>3</sup>

Abercrombie argues in the alternative that a claim based on a failure to accommodate an applicant's religious practice must be raised as a disparate-impact claim, not a disparate-treatment claim. We think not. That might have been true if Congress had limited the meaning of "religion" in Title VII to religious *belief*—so that discriminating against a particular religious *practice* would not be disparate treatment though it might have disparate impact. In fact, however, Congress defined "religion," for Title VII's purposes, as "includ[ing] all aspects of religious observance and practice, as well as belief." 42 U. S. C. §2000e(j). Thus, religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated.

Nor does the statute limit disparate-treatment claims to only those employer policies that treat religious practices less favorably than similar secular practices. Abercrombie's argument that a neutral policy cannot constitute "intentional discrimination" may make sense in other contexts. But Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored

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<sup>3</sup>While a knowledge requirement cannot be added to the motive requirement, it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice—*i.e.*, that he cannot discriminate "because of" a "religious practice" unless he knows or suspects it to be a religious practice. That issue is not presented in this case, since Abercrombie knew—or at least suspected—that the scarf was worn for religious reasons. The question has therefore not been discussed by either side, in brief or oral argument. It seems to us inappropriate to resolve this unargued point by way of dictum, as the concurrence would do.

## Opinion of the Court

treatment, affirmatively obligating employers not “to fail or refuse to hire or discharge any individual . . . because of such individual’s” “religious observance and practice.” An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an “aspec[t] of religious . . . practice,” it is no response that the subsequent “fail[ure] . . . to hire” was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

\* \* \*

The Tenth Circuit misinterpreted Title VII’s requirements in granting summary judgment. We reverse its judgment and remand the case for further consideration consistent with this opinion.

*It is so ordered.*

***EEOC v. Abercrombie & Fitch Stores, Inc.***

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