
# 809 - Hot Topics in Public Law for In-house Counsel: Recent Developments in Constitutional & Administrative Law

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# Faculty Biographies

**Henry Azar**

Henry Azar is an associate general counsel in the legislative and regulatory affairs department of Freddie Mac's legal division in McLean, Virginia. Mr. Azar's main area of responsibility is state and federal antipredatory lending issues. In addition, he covers issues pertaining to Freddie Mac's charter and to Freddie Mac's performance under its affordable goals regulations.

Before joining Freddie Mac, Mr. Azar worked in the federal programs branch of the Justice Department's civil division, where he defended federal agencies against a wide variety of constitutional, administrative, and discrimination claims. He clerked for the Honorable Alfred Wolin in the U.S. District Court for the District of New Jersey, and started off his legal career as a commercial litigator.

Mr. Azar graduated from Yale College and from the New York University School of Law.

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**Sheldon Pine**

Sheldon Pine is assistant general counsel in legislative and regulatory affairs department of Freddie Mac in McLean, Virginia.

Previously, he was general counsel of the North American Insulation Manufacturers Association and before that worked in the Washington, DC office of Cadwalader, Wickersham & Taft. He also clerked for the Hon. Gerald B. Tjoflat of the United States Court of Appeals for the Eleventh Circuit.

After graduating from Yale College, Summa Cum Laude, Mr. Pine received a Fulbright Scholarship, which he spent as a research investigator at El Colegio de Mexico, Mexico City. Mr. Pine went Yale Graduate School and received his law degree from Yale Law School.



Supreme Court of the United States

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## 2006 TERM OPINIONS OF THE COURT

Slip Opinions, *Per Curiams* (PC), and Original Case Decrees (D)

The "slip" opinion is the second version of an opinion. It is sent to the printer later in the day on which the "bench" opinion is released by the Court. Each slip opinion has the same elements as the bench opinion--majority or plurality opinion, concurrences or dissents, and a prefatory syllabus--but may contain corrections not appearing in the bench opinion. The slip opinions collected here are those issued during October Term 2006 (October 2, 2006, through September 30, 2007). These opinions are posted on this Website within hours after the bench opinions are issued and will remain posted until the opinions are published in a bound volume of the United States Reports. For further information, see Column Header Definitions and the file entitled Information About Opinions.

**Caution:** These electronic opinions may contain computer-generated errors or other deviations from the official printed slip opinion pamphlets. Moreover, a slip opinion is replaced within a few months by a paginated version of the case in the preliminary print, and--one year after the issuance of that print--by the final version of the case in a U. S. Reports bound volume. In case of discrepancies between the print and electronic versions of a slip opinion, the print version controls. In case of discrepancies between the slip opinion and any later official version of the opinion, the later version controls.

| R- | Date | Docket | Name | J. | Pt. |
|---|---|---|---|---|---|
| 75 | 6/28/07 | 06-6407 | Panetti v. Quarterman | K | 551/2 |
| 74 | 6/28/07 | 06-480 | Leegin Creative Leather Products, Inc. v. PSKS, Inc. | K | 551/2 |
| 73 | 6/28/07 | 05-908 | Parents Involved in Community Schools v. Seattle School Dist. No. 1 | R | 551/2 |
| 72 | 6/25/07 | 06-340 | National Assn. of Home Builders v. Defenders of Wildlife | A | 551/2 |
| 71 | 6/25/07 | 06-157 | Hein v. Freedom From Religion Foundation, Inc. | A | 551/2 |
| 70 | 6/25/07 | 06-219 | Wilkie v. Robbins | DS | 551/2 |
| 69 | 6/25/07 | 06-969 | Federal Election Comm'n v. Wisconsin Right to Life, Inc. | R | 551/2 |
| 68 | 6/25/07 | 06-278 | Morse v. Frederick | R | 551/2 |
| 67 | 6/21/07 | 06-5754 | Rita v. United States | B | 551/1 |
| 66 | 6/21/07 | 06-484 | Tellabs, Inc. v. Makor Issues & Rights, Ltd. | G | 551/1 |
| 65 | 6/21/07 | 06-427 | Tennessee Secondary School Athletic Assn. v. Brentwood Academy | JS | 551/1 |
| 64 | 6/18/07 | 05-1157 | Credit Suisse Securities (USA) LLC v. Billing | B | 551/1 |
| 63 | 6/18/07 | 06-8120 | Brendlin v. California | DS | 551/1 |
| 62 | 6/18/07 | 05-85 | Powerex Corp. v. Reliant Energy Services, Inc. | AS | 551/1 |

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## COLUMN HEADER DEFINITIONS

The headers on the columns in the opinions chart have the following meanings.

**R:** Sequential number assigned by the Reporter of Decisions after the particular case was issued.

**Date:** Date the case was decided (cases are posted latest to earliest).

**Docket:** Docket number of the case.

**Name:** Parties to the case.

**J:** The Justice who wrote the principal opinion in the case, or an unsigned per curiam opinion or decree:

**A:** Associate Justice Samuel A. Alito, Jr.
**AS:** Associate Justice Antonin Scalia
**B:** Associate Justice Stephen G. Breyer
**D:** Decree in Original Case
**DS:** Associate Justice David H. Souter
**G:** Associate Justice Ruth Bader Ginsburg
**JS:** Associate Justice John Paul Stevens
**K:** Associate Justice Anthony M. Kennedy
**O:** Associate Justice Sandra Day O'Connor
**PC:** Unsigned Per Curiam Opinion
**R:** Chief Justice John G. Roberts, Jr.
**T:** Associate Justice Clarence Thomas

**Pt.:** The United States Reports volume and preliminary print part number in which the case will appear.

**Search Tip:** Use the binocular icons to search within PDF documents.

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## SCOTUSblog End-of-Term "Super StatPack" – OT06

**Included in this StatPack:**

1. End of Term Summary Memo
2. Justice Agreement – All cases
3. Justice Agreement – Non-unanimous cases
4. Visual Representation of 5-4 decisions
5. Opinion Tally
6. Circuit Scorecard
7. Decisions by Final Vote
8. The Court's Workload
9. Opinion Authors by Sitting
10. State of the Docket for OT07

**Key Dates:**

- September 24: Opening Conference of OT07
- Monday, October 1: OT07 Begins

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# MEMORANDUM

June 28, 2007

From: Akin Gump Strauss Hauer & Feld LLP

Re: End of Term Statistics and Analysis – October Term 2006

This memo presents the firm's annual summary of relevant statistics for the Term:

**1. Docket**

The Justices decided 68 cases after argument this Term, the lowest number in recent history. The number of decisions after argument for previous Terms are 71 (OT05), 76 (OT04), 74 (OT03), 73 (OT02), 76 (OT01), 79 (OT00), 74 (OT99), 78 (OT98), 92 (OT97), 81 (OT96), 77 (OT95), 84 (OT94), 84 (OT93), 107 (OT92), 107 (OT91), 102 (OT90). The Justices decided 72 cases in total this Term, including four summary dispositions, also a recent low. The numbers for previous terms are 82 (OT05), 80 (OT04), 79 (OT03), 80 (OT02), 81 (OT01), 85 (OT00) and 77 (OT99).

The Court reversed or vacated the lower court decision in 52 of 72 cases (72%) and affirmed the lower court in 18 of 72 cases (25%). In two cases, it affirmed in part or reversed or vacated in part. The previous Term, the Court reversed or vacated the lower court in 59 of 82 cases (72%) and affirmed the lower court in 20 of 82 cases (24%), with three cases being affirmed in part or reversed or vacated in part.

Once again, the Court considered more cases from the Ninth Circuit – 21 of 72 cases (29%) – than any other federal Court of Appeal. The Court vacated or reversed the Ninth Circuit in 18 of 21 cases (86%), versus in 15 of 18 cases (83%) the previous term. The Sixth Circuit came next with seven of 72 cases (10%), and the Second, Fifth and Eleventh Circuits each had five of 72 cases (7%). The Court also resolved four cases (6%) from the Federal Circuit, reflecting a desire to clarify the nation's patent laws. State courts accounted for seven cases this term, versus 15 the previous term.

**2. Split and Unanimous Decisions**

In OT06, 24 of 72 cases (33%) were decided by a 5-4 margin – the highest share in at least a decade. After the relatively calm Term last year, in which only 11 of 82 cases (13%) cases were decided 5-4, the level of divisiveness returned to levels seen during the OT04 term, when 24 of 80 cases (30%) were decided 5-4. The numbers from previous terms are 21 of 79 cases – 27% (OT03), 15 of 80 – 19% (OT02), 21 of 71 – 26% (OT01), 26 of 85 – 30% (OT00), 21 of 77 –

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27% (OT99), 19 of 80 – 24% (OT98), 16 of 96 – 17% (OT97), 17 of 91 – 19% (OT96), 16 of 85 – 19% (OT95).

At the same time, the share of unanimous opinions fell from the previous term. In OT06, the Court issued fully unanimous decisions in 18 of 72 cases (25%), not including an additional ten cases where the Justices were unanimous in judgment only. By comparison, 37 of 82 (45%) cases were fully unanimous the previous Term. Measured against previous terms, the share of unanimous opinions in OT06 fell below levels seen during most recent years under former Chief Justice William Rehnquist. The number of fully unanimous decisions from previous years are 17 of 80 – 21% (OT04), 25 of 79 – 32% (OT03), 31 of 80 – 39% (OT02), 26 of 81 – 32% (OT01), 25 of 85 – 29% (OT00), 25 of 77 – 32% (OT99), 22 of 80 – 28% (OT98), 34 of 95 – 36% (OT97), 29 of 91 – 32% (OT96), and 28 of 85 – 33% (OT95).

**3. Distribution of Justices in 5-4 Decisions**

Justice Kennedy voted with the majority in all 24 of the Court's 5-4 decisions. Among the Court's other members, Justice Alito voted with the majority 17 times (71%), the Chief Justice 16 times (67%), and Justices Scalia and Thomas 14 times (58%). Justice Breyer voted with the majority 11 times (46%), Justice Souter nine times (38%), Justice Ginsburg eight times (33%) and Justices Stevens seven times (29%).

Nineteen of the 5-4 cases broke down along ideological lines and, as in most every recent Term, the Court's five more conservative members won a greater share of 5-4 victories than the four more liberal justices. The Roberts-Scalia-Kennedy-Thomas-Alito combination prevailed in 13 of 24 (or 54%) 5-4 decisions, while the Stevens-Souter-Ginsburg-Breyer grouping prevailed in only six of 24 (25%) decisions. Unlike previous terms, members the Court's left-leaning block were unable to pick off anyone beside Justice Kennedy to prevail in a 5-4 case.

In 5-4 cases during previous terms, the five most conservative justices – which formerly included Chief Justice Williams Rehnquist and Justice Sandra Day O'Connor – prevailed in 6 of 11 cases – 55% (OT05), 5 of 24 cases – 21% (OT04) 10 of 21 cases – 48% (OT03), 6 of 15 cases – 40% (OT02), 8 of 21 cases – 38% (OT01), 14 of 26 cases – 54% (OT00), 14 of 21 cases – 66% (OT99), 10 of 19 cases –53% (OT98), and 6 of 16 cases – 38% (OT97). By comparison, the four more liberal justices prevailed in 4 of 11 cases – 36% (OT05), 8 of 24 cases – 33% (OT04), 7 of 21 cases – 33% (OT03), 5 of 15 cases – 33% (OT02), 6 of 21 cases – 29% (OT01), 8 of 26 cases – 31% (OT00), 1 of 21 cases – 5% (OT99), 6 of 19 cases – 32 % (OT98), and 6 of 16 cases – 38% (OT97).

Among the 5-4 cases not decided along liberal-conservatives lines in OT06, two featured the Chief Justice and Justices Kennedy, Souter, Breyer and Alito in the majority (*Phillip Morris* and

*James*); one featured the Justices Stevens, Kennedy, Ginsburg, Breyer and Alito in the majority (*Zuni*); and one featured the Chief Justice and Justices Scalia, Kennedy, Thomas and Breyer in the majority (*Limtiaco*). *Watters v. Wachovia*, which we believe would have been decided 5-4 had Justice Thomas not recused himself, featured Justices Kennedy, Souter, Ginsburg, Breyer and Alito in the majority.

Justice Kennedy wrote for the majority in six 5-4 opinions this term, followed by Justices Stevens, Thomas and Alito with four, the Chief Justice with three. Justice Breyer with two, and Justice Ginsburg with one. Justice Souter authored no 5-4 decisions last term, nor did Justice Scalia, who had authored four 5-4 decisions in OT05.

**4. Levels of Agreement Between Pairs of Justices**

In OT06, the Chief Justice and Justice Alito found themselves in agreement more than any other pair of Justices. The two Bush appointees agreed in full in 88% of the cases they both heard, essentially equal to their 89% rate the previous Term. Among the other conservative members of the Court, Justices Scalia and Thomas agreed in full in 80% of the cases they heard, versus 88% in OT05.

Factoring in agreements in part and in judgment only, both the Chief Justice and Justice Alito and Justices Scalia and Thomas agreed in more than nine of 10 cases. The Chief Justice and Justice Alito agreed in judgment or more in 94% of cases they both heard, and Justices Scalia and Thomas agreed in judgment or more in 93% of the cases they both heard (almost equal to the 95% rate for both pairs in OT05). Justices Kennedy and Alito also agreed in judgment or more in 91% of cases they both heard (like their 92% rate the previous Term).

Among the Court's more liberal members, Justices Stevens and Ginsburg and Justices Souter and Breyer each agreed in full 79% of the time. Justice Ginsburg maintained similar full agreement rates with Justice Souter (81%) and Justice Breyer (76%), while Justice Stevens agreed in full less often with Justice Souter (71%) and Justice Breyer (67%) than he did with Justice Ginsburg. After including agreements in part and in judgment, Justices Stevens and Ginsburg and Justices Souter and Breyer again share the same rates of agreement – 89%.

Overall, Justice Stevens enjoyed the lowest rates of full agreement with other members of the Court. He agreed in full with Justice Thomas in only 32% of the cases they both heard, the lowest rate of any pair of Justices. He also agreed in full only 36% of the time with Justice Scalia, 41% of the time with the Chief Justice, and 42% of the time with Justice Alito. Justice Kennedy, who found himself in the minority only twice all Term, agreed in full more often than not with all other members of the Court. Justice Kennedy's full agreement rates ranged from 82% with the Chief Justice and Justice Alito to 52% with Justice Stevens.

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**5. Dissents**

Justice Stevens was in the minority 26 times during the Term, more frequently than any other Justice. He was followed by Justice Ginsburg with 20 dissents, Justice Breyer with 17 dissents, Justices Souter and Thomas with 16 dissents, and Justice Scalia with 14 dissents. Justice Alito dissented 10 times, the Chief Justice dissented eight times, and Justice Kennedy dissented twice during OT06. Justice Thomas dissented alone four times, followed by Justice Stevens with three and Justices Scalia and Souter with one solo dissent each.

## SCOTUSblog Agreement Stats for OT06 - By Seniority

| | Stevens | Scalia | Ken | Sout | Thom | Gins | Breyer | Alito | Total Cases |
|---|---|---|---|---|---|---|---|---|---|
| CJ Rob | 41% | 75% | 79% | 55% | 71% | 48% | 57% | 88% | 69 |
| | 52% | 88% | 84% | 65% | 84% | 59% | 63% | 94% | |
| | **58%** | **91%** | **85%** | **70%** | **88%** | **62%** | **63%** | **94%** | |
| | 42% | 9% | 15% | 30% | 12% | 38% | 37% | 6% | |
| Stevens | 36% | 52% | 71% | 32% | 79% | 67% | 42% | | 72 |
| | 50% | 63% | 79% | 45% | 85% | 81% | 53% | | |
| | **56%** | **66%** | **81%** | **52%** | **89%** | **86%** | **58%** | | |
| | 44% | 34% | 19% | 48% | 11% | 14% | 42% | | |
| Scalia | 68% | 47% | 80% | 44% | 41% | 72% | | | 72 |
| | 75% | 60% | 90% | 58% | 54% | 83% | | | |
| | **79%** | **63%** | **93%** | **61%** | **56%** | **86%** | | | |
| | 21% | 38% | 7% | 39% | 44% | 14% | | | |
| Ken | 63% | 67% | 59% | 65% | 79% | | | | 71 |
| | 73% | 74% | 69% | 72% | 89% | | | | |
| | **75%** | **79%** | **73%** | **74%** | **90%** | | | | |
| | 25% | 21% | 27% | 26% | 10% | | | | |
| Sout | 44% | 81% | 79% | 58% | | | | | 72 |
| | 55% | 86% | 87% | 64% | | | | | |
| | **61%** | **89%** | **89%** | **67%** | | | | | |
| | 39% | 11% | 11% | 33% | | | | | |
| Thom | 41% | 41% | 66% | | | | | | 71 |
| | 52% | 51% | 82% | | | | | | |
| | **59%** | **55%** | **85%** | | | | | | |
| | 41% | 45% | 15% | | | | | | |
| Gins | 76% | 50% | | | | | | | 72 |
| | 87% | 61% | | | | | | | |
| | **90%** | **64%** | | | | | | | |
| | 10% | 36% | | | | | | | |
| Breyer | 54% | | | | | | | | 70 |
| | 66% | | | | | | | | |
| | **66%** | | | | | | | | |
| | 34% | | | | | | | | |
| Alito | | | | | | | | | 72 |

Key

| |
|---|
| Full |
| Part + All |
| **Judg + Part + All** |
| Disagree |

## SCOTUSblog Agreement Stats for OT06 - By Ideology

| | Ginsburg | Souter | Breyer | Ken | Alito | Roberts | Scalia | Thomas |
|---|---|---|---|---|---|---|---|---|
| Stevens | 79% | 71% | 67% | 52% | 42% | 41% | 36% | 32% |
| | 85% | 79% | 81% | 63% | 53% | 52% | 50% | 45% |
| | **89%** | **81%** | **86%** | **66%** | **58%** | **58%** | **56%** | **52%** |
| | **11%** | **19%** | **14%** | **34%** | **42%** | **42%** | **44%** | **48%** |
| Gins | 81% | 76% | 59% | 50% | 48% | 44% | 41% | |
| | 86% | 87% | 69% | 61% | 59% | 58% | 52% | |
| | **89%** | **90%** | **73%** | **64%** | **62%** | **61%** | **59%** | |
| | **11%** | **10%** | **27%** | **36%** | **38%** | **39%** | **41%** | |
| Souter | 79% | 63% | 56% | 55% | 47% | 44% | | |
| | 87% | 73% | 64% | 65% | 60% | 55% | | |
| | **89%** | **75%** | **67%** | **70%** | **63%** | **61%** | | |
| | **11%** | **25%** | **33%** | **30%** | **38%** | **39%** | | |
| Breyer | 65% | 54% | 57% | 41% | 41% | | | |
| | 72% | 66% | 63% | 54% | 51% | | | |
| | **74%** | **66%** | **63%** | **56%** | **55%** | | | |
| | **26%** | **34%** | **37%** | **44%** | **45%** | | | |
| Ken | 79% | 79% | 68% | 67% | | | | |
| | 89% | 84% | 75% | 74% | | | | |
| | **90%** | **85%** | **79%** | **79%** | | | | |
| | **10%** | **15%** | **21%** | **21%** | | | | |
| Alito | 88% | 72% | 66% | | | | | |
| | 94% | 83% | 82% | | | | | |
| | **94%** | **86%** | **85%** | | | | | |
| | **6%** | **14%** | **15%** | | | | | |
| Roberts | 75% | 71% | | | | | | |
| | 88% | 84% | | | | | | |
| | **91%** | **88%** | | | | | | |
| | **9%** | **12%** | | | | | | |
| Scalia | 80% | | | | | | | |
| | 90% | | | | | | | |
| | **93%** | | | | | | | |
| | **7%** | | | | | | | |
| Thomas | | | | | | | | |

Key

| |
|---|
| Full |
| Part + All |
| **Judg + Part + All** |
| Disagree |

Colors

| |
|---|
| Agree ≥ 90% |
| Agree ≥ 80% |
| Agree ≥ 70% |
| Agree ≥ 60% |
| Agree ≥ 50% |

## SCOTUSblog Agreement Stats for OT06 - Total Number of Cases

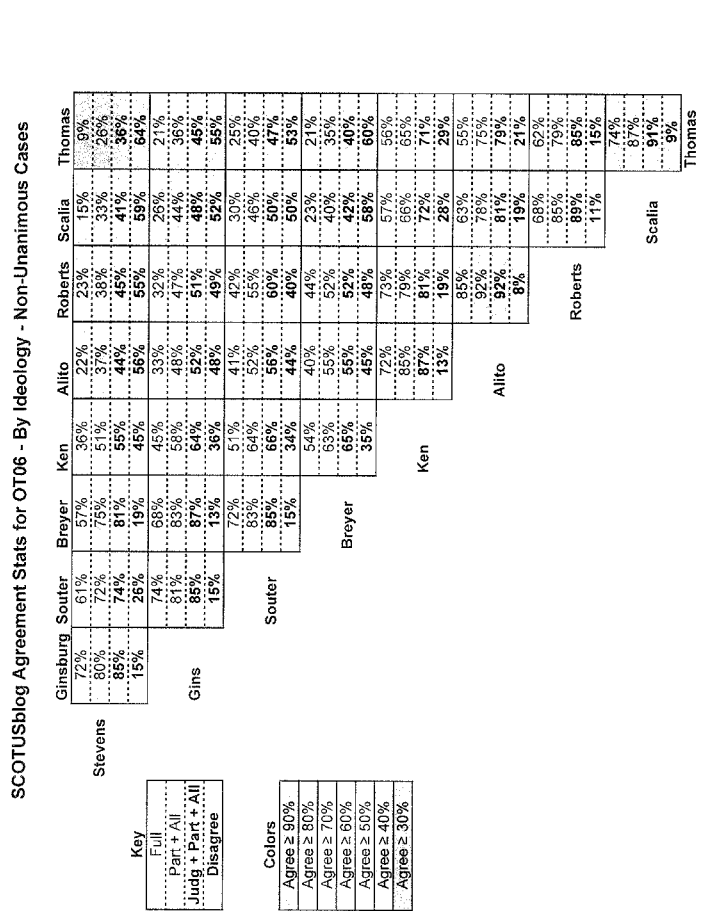
| | Stevens | Scalia | Ken | Sout | Thom | Gins | Breyer | Alito | Total Cases |
|---|---|---|---|---|---|---|---|---|---|
| | 28 | 52 | 54 | 38 | 48 | 33 | 39 | 61 | 69 |
| | 36 | 61 | 57 | 45 | 57 | 41 | 43 | 65 | |
| CJ Rob | **40** | **63** | **58** | **48** | **60** | **43** | **43** | **65** | |
| | 29 | 6 | 10 | 21 | 8 | 26 | 25 | 4 | |
| | 26 | 37 | 51 | 23 | 57 | 47 | 30 | | 72 |
| | 36 | 45 | 57 | 32 | 61 | 57 | 38 | | |
| Stevens | **40** | **47** | **58** | **37** | **64** | **60** | **42** | | |
| | 32 | 24 | 14 | 34 | 8 | 10 | 30 | | |
| | 48 | 34 | 57 | 32 | 29 | 52 | | | 72 |
| | 53 | 43 | 64 | 42 | 38 | 60 | | | |
| Scalia | **56** | **45** | **66** | **44** | **39** | **62** | | | |
| | 15 | 27 | 6 | 28 | 31 | 10 | | | |
| | 45 | 47 | 42 | 45 | 56 | | | | 71 |
| | 52 | 52 | 49 | 50 | 63 | | | | |
| Ken | **53** | **55** | **52** | **51** | **64** | | | | |
| | 18 | 15 | 19 | 18 | 7 | | | | |
| | 31 | 58 | 55 | 40 | | | | | 72 |
| | 39 | 62 | 61 | 46 | | | | | |
| Sout | **43** | **64** | **62** | **48** | | | | | |
| | 28 | 8 | 8 | 24 | | | | | |
| | 29 | 28 | 47 | | | | | | 71 |
| | 37 | 35 | 58 | | | | | | |
| Thom | **42** | **38** | **60** | | | | | | |
| | 29 | 31 | 11 | | | | | | |
| | 53 | 36 | | | | | | | 72 |
| | 61 | 44 | | | | | | | |
| Gins | **63** | **46** | | | | | | | |
| | 7 | 26 | | | | | | | |
| | 38 | | | | | | | | 70 |
| | 46 | | | | | | | | |
| Breyer | **46** | | | | | | | | |
| | 24 | | | | | | | | |
| Alito | | | | | | | | | 72 |

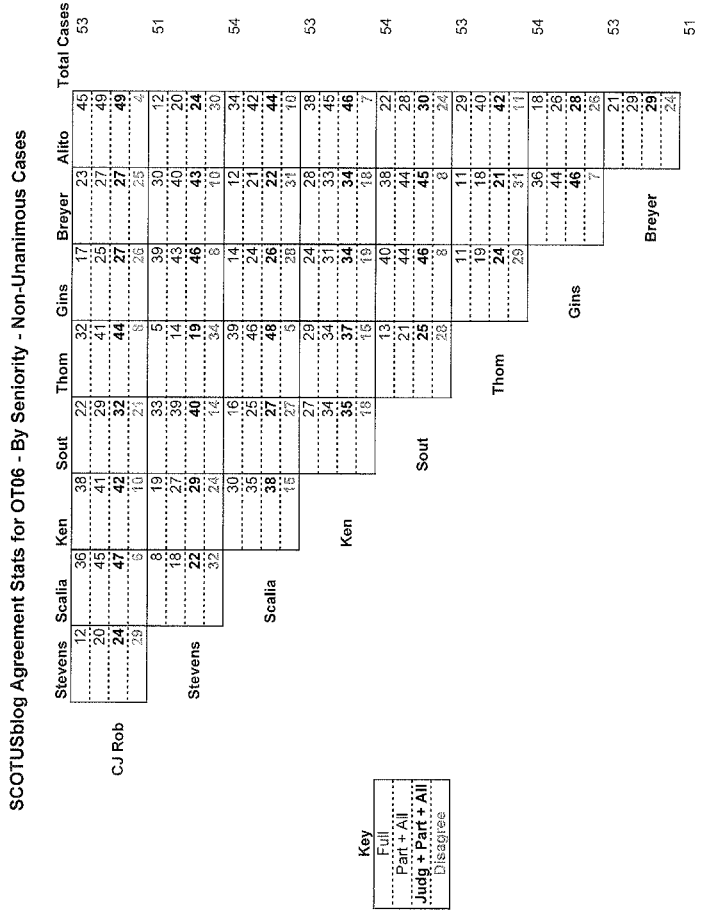
| Key |
|---|
| Full |
| Part + All |
| **Judg + Part + All** |
| Disagree |

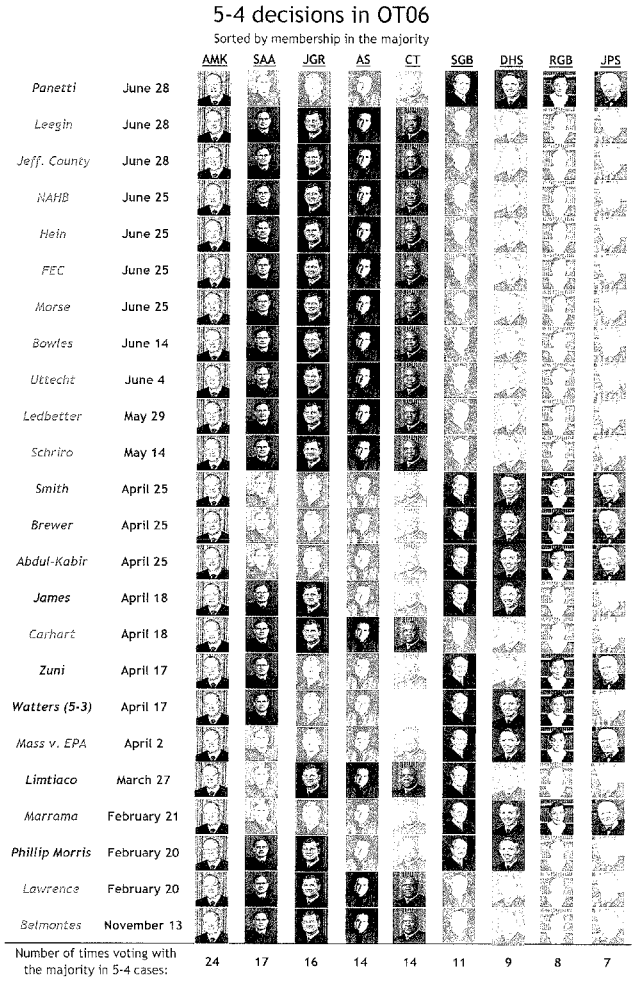
## SCOTUSblog Agreement Stats for OT06 - By Seniority - Non-Unanimous Cases

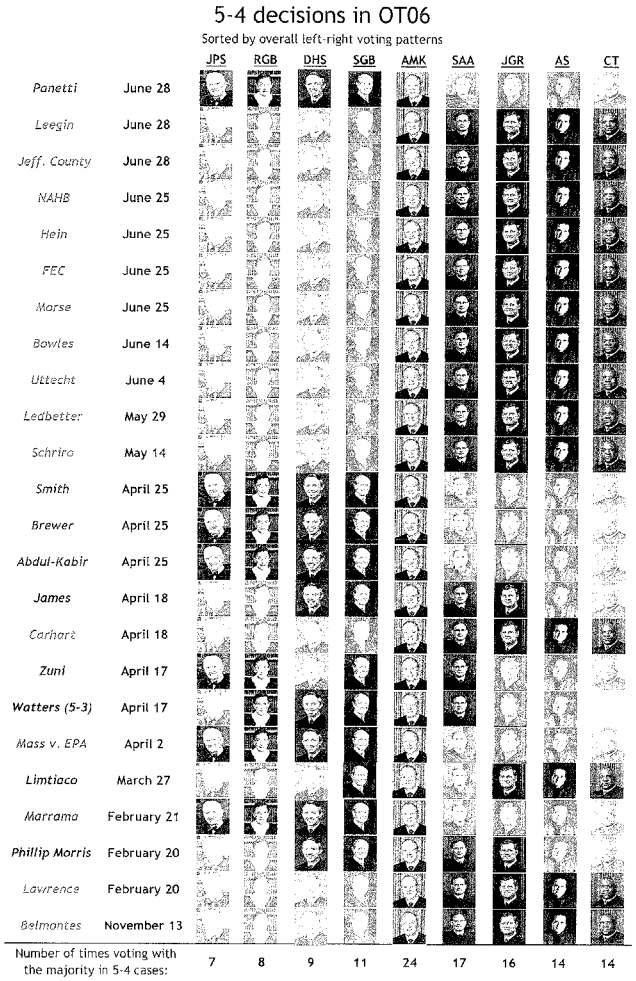
| | Stevens | Scalia | Ken | Sout | Thom | Gins | Breyer | Alito | Total Cases |
|---|---|---|---|---|---|---|---|---|---|
| | 23% | 68% | 73% | 42% | 62% | 32% | 44% | 85% | 53 |
| | 38% | 85% | 79% | 55% | 79% | 47% | 52% | 92% | |
| CJ Rob | **45%** | **89%** | **81%** | **60%** | **85%** | **51%** | **52%** | **92%** | |
| | 55% | 11% | 19% | 40% | 15% | 49% | 48% | 8% | |
| | 15% | 36% | 61% | 9% | 72% | 57% | 22% | | 51 |
| | 33% | 51% | 72% | 26% | 80% | 75% | 37% | | |
| Stevens | **41%** | **55%** | **74%** | **36%** | **85%** | **81%** | **44%** | | |
| | 59% | 45% | 26% | 64% | 15% | 19% | 56% | | |
| | 57% | 30% | 74% | 26% | 23% | 63% | | | 54 |
| | 66% | 46% | 87% | 44% | 40% | 78% | | | |
| Scalia | **72%** | **50%** | **91%** | **48%** | **42%** | **81%** | | | |
| | 28% | 50% | 9% | 52% | 58% | 19% | | | |
| | 51% | 56% | 45% | 54% | 72% | | | | 53 |
| | 64% | 65% | 58% | 63% | 85% | | | | |
| Ken | **66%** | **71%** | **64%** | **65%** | **87%** | | | | |
| | 34% | 29% | 36% | 35% | 13% | | | | |
| | 25% | 74% | 72% | 41% | | | | | 54 |
| | 40% | 81% | 83% | 52% | | | | | |
| Sout | **47%** | **85%** | **85%** | **56%** | | | | | |
| | 53% | 15% | 15% | 44% | | | | | |
| | 21% | 21% | 55% | | | | | | 53 |
| | 36% | 35% | 75% | | | | | | |
| Thom | **45%** | **40%** | **79%** | | | | | | |
| | 55% | 60% | 21% | | | | | | |
| | 68% | 33% | | | | | | | 54 |
| | 83% | 48% | | | | | | | |
| Gins | **87%** | **52%** | | | | | | | |
| | 13% | 48% | | | | | | | |
| | 40% | | | | | | | | 53 |
| | 55% | | | | | | | | |
| Breyer | **55%** | | | | | | | | |
| | 45% | | | | | | | | |
| Alito | | | | | | | | | 54 |

| Key |
|---|
| Full |
| Part + All |
| **Judg + Part + All** |
| Disagree |


SCOTUSblog Agreement Stats for OT06 - By Ideology - Non-Unanimous Cases
Ginsburg Souter Breyer Ken Alito Roberts Scalia Thomas
Stevens 72% 61% 57% 36% 22% 23% 15% 9%
80% 72% 75% 51% 37% 38% 33% 26%
85% 74% 81% 55% 44% 45% 41% 36%
15% 26% 19% 45% 56% 55% 59% 64%
Gins 74% 68% 45% 33% 32% 26% 21%
81% 83% 58% 48% 47% 44% 36%
85% 87% 64% 52% 51% 48% 45%
15% 13% 36% 48% 49% 52% 55%
Souter 72% 51% 41% 42% 30% 25%
83% 64% 52% 55% 46% 40%
85% 66% 56% 60% 50% 47%
15% 34% 44% 40% 50% 53%
Breyer 54% 40% 44% 23% 21%
63% 55% 52% 40% 35%
65% 55% 52% 42% 40%
35% 45% 48% 58% 60%
Ken 72% 73% 57% 56%
85% 79% 66% 65%
87% 81% 72% 71%
13% 19% 28% 29%
Alito 85% 63% 55%
92% 78% 75%
92% 81% 79%
8% 19% 21%
Roberts 68% 62%
85% 79%
89% 85%
11% 15%
Scalia 74%
87%
91%
9%
Thomas
Key
Full
Part + All
Judg + Part + All
Disagree
Colors
Agree ≥ 90%
Agree ≥ 80%
Agree ≥ 70%
Agree ≥ 60%
Agree ≥ 50%
Agree ≥ 40%
Agree ≥ 30%


SCOTUSblog Agreement Stats for OT06 - By Seniority - Non-Unanimous Cases
Stevens Scalia Ken Sout Thom Gins Breyer Alito Total Cases
CJ Rob 12 36 38 22 32 17 23 45 53
20 45 41 29 41 25 27 49
24 47 42 32 44 27 27 49
29 6 10 21 8 26 25 4
Stevens 8 19 33 5 39 30 12 51
18 27 39 14 43 40 20
22 29 40 19 46 43 24
32 24 14 34 6 10 30
Scalia 30 16 39 14 12 34 54
35 25 46 24 21 42
38 27 48 26 22 44
16 27 5 28 31 10
Ken 27 29 24 28 38 53
34 34 31 33 45
35 37 34 34 46
18 15 16 18 7
Sout 13 40 38 22 54
21 25 44 44 28
25 46 45 30
28 8 8 24
Thom 11 11 29 53
19 19 18 40
24 24 21 42
29 31 11
Gins 36 18 54
44 26
46 28
7 26
Breyer 21 53
29
29
24
Key
Full
Part + All
Judg + Part + All
Disagree


5-4 decisions in OT06
Sorted by membership in the majority
AMK SAA JGR AS CT SGB DHS RGB JPS
Panetti June 28
Leegin June 28
Jeff. County June 28
NAHB June 25
Hein June 25
FEC June 25
Morse June 25
Bowles June 14
Uttecht June 4
Ledbetter May 29
Schriro May 14
Smith April 25
Brewer April 25
Abdul-Kabir April 25
James April 18
Carhart April 18
Zuni April 17
Watters (5-3) April 17
Mass v. EPA April 2
Limtiaco March 27
Marrama February 21
Phillip Morris February 20
Lawrence February 20
Belmontes November 13
Number of times voting with the majority in 5-4 cases:
24 17 16 14 14 11 9 8 7


5-4 decisions in OT06
Sorted by overall left-right voting patterns
JPS RGB DHS SGB AMK SAA JGR AS CT
Panetti June 28
Leegin June 28
Jeff. County June 28
NAHB June 25
Hein June 25
FEC June 25
Morse June 25
Bowles June 14
Uttecht June 4
Ledbetter May 29
Schriro May 14
Smith April 25
Brewer April 25
Abdul-Kabir April 25
James April 18
Carhart April 18
Zuni April 17
Watters (5-3) April 17
Mass v. EPA April 2
Limtiaco March 27
Marrama February 21
Phillip Morris February 20
Lawrence February 20
Belmontes November 13
Number of times voting with the majority in 5-4 cases:
7 8 9 11 24 17 16 14 14

SCOTUSBlog

October Term 2006

## SUMMARY INFORMATION REGARDING THE TERM

### Status of Cases

| | | | | | |
|---|---|---|---|---|---|
| Granted but not argued | 2 | Argued but not decided | 3 | Decided | 72 |

### Decided Cases: Method of Disposition

| | | | | | |
|---|---|---|---|---|---|
| After argument and by signed opinion | 68 | After argument and without signed opinion | 3 | On the briefs | 4 |

### Splits in Decided Cases

| | | | | | |
|---|---|---|---|---|---|
| Unanimous | 16 | 9-0 | 10 | 6-1 or 7-1 | 9 |
| 7-2 or 6-2 | 8 | 6-3 | 3 | 5-4 | 24* |

### Treatment of the Lower Court

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Lower court reversed or vacated | 53 | Lower court affirmed | 18 | Lower court reversed or vacated in part and affirmed in part | 2 | Other | 0 |

## OPINION AUTHORSHIP

### Opinion Authorship: Total Number of Opinions

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Roberts | 11 | Stevens | 31 | Scalia | 24 | Kennedy | 15 | Souter | 17 |
| Thomas | 24 | Ginsburg | 14 | Breyer | 19 | Alito | 15 | | |

### Opinion Authorship: Majority Opinions (including Unanimous Opinions, excluding Pluralities)

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Per Curiam | 6 | Roberts | 5 | Stevens | 6 | Scalia | 8 | Kennedy | 8 |
| Souter | 7 | Thomas | 8 | Ginsburg | 7 | Breyer | 8 | Alito | 6 |

### Opinion Authorship: Plurality or Plurality-Like Opinions

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Per Curiam | 0 | Roberts | 2 | Stevens | 1 | Scalia | 0 | Kennedy | 0 |
| Souter | 0 | Thomas | 0 | Ginsburg | 0 | Breyer | 0 | Alito | 1 |

### Opinion Authorship: Concurring Opinions

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Roberts | 1 | Stevens | 10 | Scalia | 7 | Kennedy | 6 | Souter | 4 |
| Thomas | 8 | Ginsburg | 2 | Breyer | 4 | Alito | 4 | | |

### Opinion Authorship: Dissenting Opinions

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Roberts | 3 | Stevens | 14 | Scalia | 9 | Kennedy | 1 | Souter | 6 |
| Thomas | 8 | Ginsburg | 5 | Breyer | 7 | Alito | 4 | | |

### Opinion Authorship: Unanimous Majority Opinions

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Per Curiam | 2 | Roberts | 2 | Stevens | 1 | Scalia | 1 | Kennedy | 1 |
| Souter | 2 | Thomas | 2 | Ginsburg | 2 | Breyer | 2 | Alito | 3 |

## DISSENTING VOTES

### Dissenting Votes: Total Number

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Roberts | 8 | Stevens | 26 | Scalia | 15 | Kennedy | 2 | Souter | 17 |
| Thomas | 16 | Ginsburg | 20 | Breyer | 17 | Alito | 10 | | |

### Dissenting Votes: Number of Times the only Dissenter in a Case

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Roberts | 0 | Stevens | 3 | Scalia | 1 | Kennedy | 0 | Souter | 1 |
| Thomas | 4 | Ginsburg | 0 | Breyer | 0 | Alito | 0 | | |

## FIVE-TO-FOUR CASES

| Number of cases (either entirely 5-4 or 5-4 on a major issue) | 24* |
|---|---|

| Five to Four Cases: Alignments | | 5-4 Cases: |
|---|---|---|
| Roberts, Scalia, Kennedy, Thomas, Alito | 13 | Belmontes, Lawrence, Carhart, Schriro, Ledbetter, Uttecht, Bowles, Morse, FEC v. Wisc. Right to Life, Hein, NAHB, Leegin Creative, Parents v. Seattle Schools |
| Stevens, Kennedy, Souter, Ginsburg, Breyer | 6 | Marrama, Mass v. EPA, Abdul-Kabir, Brewer, Smith, Panetti |
| Roberts, Kennedy, Souter, Breyer, Alito | 2 | PM v. Williams, James |
| Roberts, Scalia, Kennedy, Thomas, Breyer | 1 | Limtiaco |
| Stevens, Kennedy, Ginsburg, Breyer, Alito | 1 | Zuni |
| Kennedy, Souter, Ginsburg, Breyer, Alito | 1 | Watters v. Wachovia* |

### Five-to-Four Cases: Authorship of the Opinion

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Roberts | 3 | Stevens | 4 | Scalia | 0 | Kennedy | 6 | Souter | 0 |
| Thomas | 4 | Ginsburg | 1 | Breyer | 2 | Alito | 4 | | |

### Five-to-Four Cases: Membership in the Majority

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Roberts | 16 | Stevens | 7 | Scalia | 14 | Kennedy | 24 | Souter | 9 |
| Thomas | 14 | Ginsburg | 8 | Breyer | 11 | Alito | 17 | | |

* *Watters v. Wachovia Bank, N.A.* is treated here as a 5-4 decision, though Justice Thomas was recused.

**NOTES:**

**Pluralities:** TSSAA, FEC v. Wisc. Right to Life, Hein, Parents v. Seattle Schools

**Cases with Opinion(s) Concurring in Part and Dissenting in Part:**
*Counted as Concurrences*: Gonzalez v. Duenas-Alvarez, Osborn v. Haley, Winkelman v. Parma City School Dist., Fry v. Pliler
*Counted as Dissents*: Limtiaco v. Camacho, Morse v. Frederick, Wilkie v. Robbins

SCOTUSblog Stats - OT06

## OT06 - Decisions by Final Vote

| 9-0 (or unan.) | 8-1 (or 7-1) | 7-2 (or 6-2) | 6-3 | 5-4 |
|---|---|---|---|---|
| 28 (38%) | 9 (12%) | 9 (12%) | 3 (4%) | 24 (33%) |
| *TSSAA* | *Tellabs* | *Wilkie* | *Roper (PC)* | *PICS/Jeff. County* |
| *Brendlin* | *Rita* | *Powerex* | *United Hauler's* | ***Panetti*** |
| *WEA* | *Scott* | *Perm. Mission* | *Cunningham* | *Leegin Creative* |
| *Coke* | *MedImmune* | *Twombly* | | *NAHB* |
| *Watson* | *Resendiz-Ponce* | *Global Crossing* | | *Hein* |
| *Atl. Research* | *Lopez* | *Wallace* | | *FEC* |
| *Fry* | *Rettele (PC)* | *Osborn* | | *Morse*** |
| *Beck* | *Microsoft (7-1)* | *Erickson (PC)* | | *Bowles* |
| *Sole* | *CSFB (7-1)* | *Rockwell (6-2)* | | *Uttecht* |
| *Safeco* | | | | *Ledbetter* |
| *Winkelman* | | | | *Schriro* |
| *Hinck* | | | | ***Smith*** |
| *EC Term of Yrs* | | | | ***Brewer*** |
| *KSR* | | | | ***Abdul-Kabir*** |
| *Duke Energy* | | | | *James* |
| *Travelers* | | | | *Carhart* |
| *Lance (PC)* | | | | *Zuni* |
| *Sinochem* | | | | ***Mass v. EPA*** |
| *Whorton* | | | | ***Marrama*** |
| *Weyerhaeuser* | | | | *PM v. Williams* |
| *Jones* | | | | *Lawrence* |
| *Duenas-Alvarez* | | | | *Belmontes* |
| *Norfolk Southern* | | | | *Limtiaco* |
| *Burton (PC)* | | | | *Watters†* |
| *Musladin* | | | | |
| *Purcell (PC)* | | | | |
| *Dayton (8-0)* | | | | |
| *BP America (7-0)* | | | | |

**DIG**

*Roper* (6-3)
*Toledo-Flores**

**Otherwise Dismissed**

*Burton*
*Dayton*
*Claiborne*

Cases colored in red had majorities formed by Kennedy plus the four more conservative members of the Court (Roberts, Scalia, Thomas, Alito).
Cases colored in blue had majorities formed by Kennedy plus the four more liberal members of the Court (Stevens, Souter, Ginsburg, Breyer).
**We have made the judgment that Justice Breyer's opinion concurring in judgment and dissenting in part in *Morse* is best described as a dissent.
†We have decided that *Watters* is best classified with the 5-4s, as it seems quite likely that had all 9 justices participated, it would have come out this way.

| | | *Final OT05* | | |
|---|---|---|---|---|
| 45 (52%) | 5 (6%) | 12 (14%) | 13 (15%) | 11 (13%) |

-The per curiam dismissals in *Toledo-Flores* and *Claiborne* are not included in the voting breakdown. The summary reversals in *Rettele*, *Lance*, *Purcell*, and *Erickson* are. A look at which justices form the majority and the minority in all of the cases can be found at: http://dailywrit.com/?page_id=55.

-Detailed voting relationships between each pair of justices will be released immediately upon Term's end.

-Finally, it is worth noting that the timing of decisions issued in OT05 may have been affected by three cases that may have been decided earlier in that Term but needed to be reargued. All three of those ended up 5-4.

*Note that this issue was decided in *Lopez v. Gonzales*.

## The Court's Workload in OT06

| | | |
|---|---|---|
| Cases Granted or Probable Jurisdiction Noted: | | 73 |
| Dismissed Before Argument: | | 2 |
| Hours of Argument: | | 71 |
| Argued Merits Cases Disposed of: | | 71 |
| Dismissals: | | 2 |
| Remaining Merits Opinions: | | 0 |
| Merits Opinions in OT06 After Argument: | | 68 |
| Summary Reversals of Non-Argued Cases: | + | 4 |
| Total Merits Decisions: | | 72 |

*The final number of merits opinions is calculated by taking the number of cases argued (71), subtracting the per curiam dismissals (-2), subtracting the number of times that cases argued separately were disposed of with one opinion (-2: *Carhart* and the school assignment cases), and adding the number of times that cases that were originally consolidated but disposed of with two majority opinions (+1: *Brewer* and *Abdul-Kabir*). Note also that for the final tally, we are counting two cases where no jurisdiction was found (*Dayton* and *Burton*) as "decisions," though the two dismissals are still not counted. Summary reversals are then added to get the final total.

SCOTUSblog Stats - OT06

## Opinion Authors by Sitting

| OCT | *Author* | Count | |
|---|---|---|---|
| Lopez/T-F | DHS | JGR | 1 |
| Belmontes | AMK | JPS | 1 |
| MedImmune | AS | AS | 1 |
| BP America | SAA | AMK | 1 |
| Global Crossing | SB | DHS | 1 |
| Norfolk Southern | JGR | CT | 1 |
| Resendiz-Ponce | JPS | RBG | 1 |
| Cunningham | RBG | SGB | 1 |
| Musladin | CT | SAA | 1 |

| NOV | *Author* | Count | |
|---|---|---|---|
| Haley | RBG | JGR | 1 |
| Williams/Bock | JGR | JPS | 1 |
| Philip Morris | SB | AS | 1 |
| Lawrence | CT | AMK | 1 |
| Bockting | SAA | DHS | 1 |
| Duke Energy | DHS | CT | 1 |
| Wallace | AS | RBG | 1 |
| Marrama | JPS | SB | 1 |
| Burton | PC | SAA | 2 |
| James | SAA | | |
| Pl. Parent./Carhart | AMK | | |

| DEC | *Author* | Count | |
|---|---|---|---|
| Ledbetter | SAA | JGR | 1 |
| Bell Atlantic | DHS | JPS | 1 |
| KSR | AMK | AS | 1 |
| Weyerhauser | CT | AMK | 1 |
| Mass v. EPA | JPS | DHS | 1 |
| Watters | RBG | CT | 1 |
| Jeff. County/PICS | JGR | RBG | 1 |
| Rockwell | AS | SB | 1 |
| Duenas-Alvarez | SB | SAA | 1 |

| JAN | *Author* | Count | |
|---|---|---|---|
| United Hauler's | JGR | JGR | 1 |
| Limtiaco | CT | JPS | 2* |
| Landrigan | CT | AS | 1 |
| Sinochem | RBG | AMK | 1 |
| Zuni | SB | DHS | 1 |
| WEA (consol) | AS | CT | 2 |
| Travelers | SAA | RBG | 1 |
| Safeco/Geico | DHS | SB | 1 |
| Smith | AMK | SAA | 1 |
| Brewer/Abdul-Kabir | JPS (x2) | | |

| FEB | *Author* | Count | |
|---|---|---|---|
| ~~Claiborne~~ | PC | JGR | 0 |
| Rita | SB | JPS | 0 |
| AT&T | RBG | AS | 1 |
| EC Term of Years | DHS | AMK | 1 |
| Scott | AS | DHS | 1 |
| Winkelman | AMK | CT | 0 |
| Hein | SAA | RBG | 1 |
| | | SB | 1 |
| | | SAA | 1 |

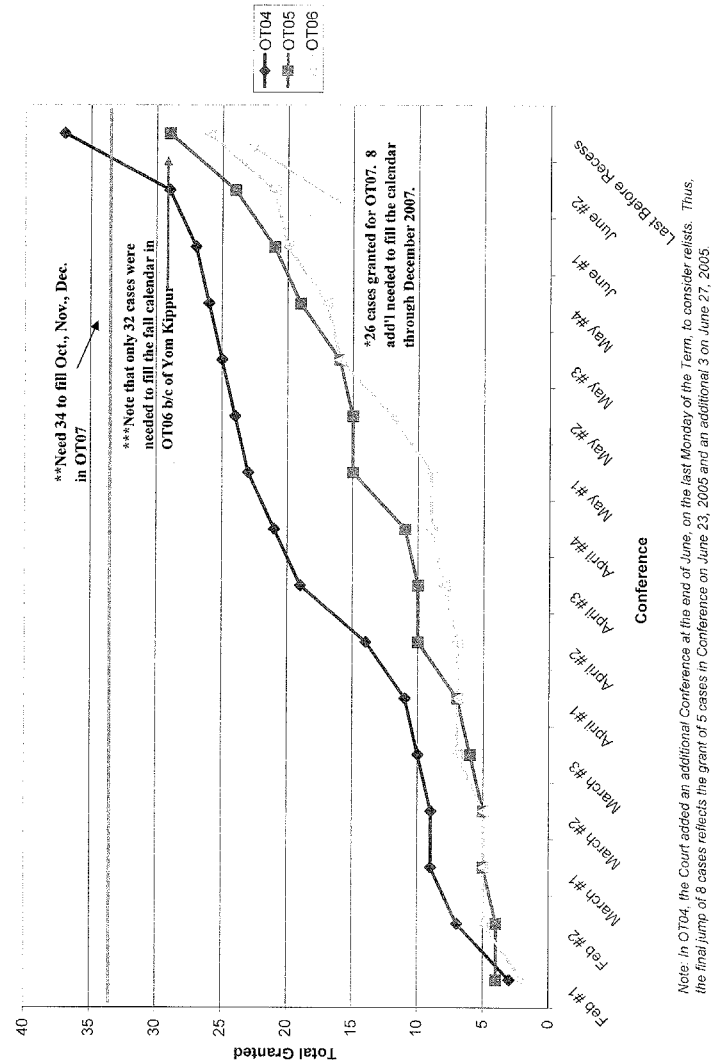
| MAR | *Author* | Count | |
|---|---|---|---|
| Morse | JGR | JGR | 1 |
| Wilkie | DHS | JPS | 0 |
| Fry | AS | AS | 1 |
| Weaver | PC | AMK | 1 |
| Leegin Creative | AMK | DHS | 1 |
| Bowles | CT | CT | 1 |
| CSFB | SB | RBG | 1 |
| Tellabs | RBG | SB | 1 |
| | | SAA | 0 |

| APR (Wk 1) | *Author* |
|---|---|
| Powerex | AS |
| LI Care at Home | SB |
| Uttecht | AMK |
| Wyner | RBG |
| Def. of Wildlife | SAA |
| TSSAA | JPS |
| Panetti | AMK |
| | |

| APR (Wk 2) | *Author* | All Apr Count | |
|---|---|---|---|
| Hinck | JGR | JGR | 2 |
| Atl Rsrch | CT | JPS | 2 |
| Brendlin | DHS | AS | 2 |
| Beck | AS | AMK | 2 |
| Perm. Miss | CT | DHS | 1 |
| Dayton | JPS | CT | 2 |
| Watson | SB | RBG | 1 |
| McCain/FEC | JGR | SB | 2 |
| | | SAA | 1 |

SCOTUSblog Stats - OT06

**Granted Cases From February to the Summer Recess**




*Note: In OT04, the Court added an additional Conference at the end of June, on the last Monday of the Term, to consider relists. Thus, the final jump of 8 cases reflects the grant of 5 cases in Conference on June 23, 2005 and an additional 3 on June 27, 2005*

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

BELL ATLANTIC CORP. ET AL. *v.* TWOMBLY ET AL.

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

No. 05–1126. Argued November 27, 2006—Decided May 21, 2007

The 1984 divestiture of the American Telephone & Telegraph Company's (AT&T) local telephone business left a system of regional service monopolies, sometimes called Incumbent Local Exchange Carriers (ILECs), and a separate long-distance market from which the ILECs were excluded. The Telecommunications Act of 1996 withdrew approval of the ILECs' monopolies, "fundamentally restructur[ing] local telephone markets" and "subject[ing] [ILECs] to a host of duties intended to facilitate market entry." *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366, 371. It also authorized them to enter the long-distance market. "Central to the [new] scheme [was each ILEC's] obligation . . . to share its network with" competitive local exchange carriers (CLECs)." *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398, 402.

Respondents (hereinafter plaintiffs) represent a class of subscribers of local telephone and/or high speed Internet services in this action against petitioner ILECs for claimed violations of §1 of the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." The complaint alleges that the ILECs conspired to restrain trade (1) by engaging in parallel conduct in their respective service areas to inhibit the growth of upstart CLECs; and (2) by agreeing to refrain from competing against one another, as indicated by their common failure to pursue attractive business opportunities in contiguous markets and by a statement by one ILEC's chief executive officer that competing in another ILEC's territory did not seem right. The District Court dismissed the complaint, concluding that parallel business conduct allegations, taken alone, do not state a claim under §1; plaintiffs must



Syllabus

allege additional facts tending to exclude independent self-interested conduct as an explanation for the parallel actions. Reversing, the Second Circuit held that plaintiffs' parallel conduct allegations were sufficient to withstand a motion to dismiss because the ILECs failed to show that there is no set of facts that would permit plaintiffs to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.

*Held:*

1. Stating a §1 claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. An allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Pp. 6–17.

(a) Because §1 prohibits "only restraints effected by a contract, combination, or conspiracy," *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 775, "[t]he crucial question" is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement," *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 540. While a showing of parallel "business behavior is admissible circumstantial evidence from which" agreement may be inferred, it falls short of "conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." *Id.*, at 540–541. The inadequacy of showing parallel conduct or interdependence, without more, mirrors the behavior's ambiguity: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. Thus, this Court has hedged against false inferences from identical behavior at a number of points in the trial sequence, *e.g.,* at the summary judgment stage, see *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574. Pp. 6–7.

(b) This case presents the antecedent question of what a plaintiff must plead in order to state a §1 claim. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley* v. *Gibson*, 355 U. S. 41, 47. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.,* a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true. Applying these general standards to a §1 claim, stating a claim requires a complaint with enough

Syllabus

factual matter to suggest an agreement. Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects Rule 8(a)(2)'s threshold requirement that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." A parallel conduct allegation gets the §1 complaint close to stating a claim, but without further factual enhancement it stops short of the line between possibility and plausibility. The requirement of allegations suggesting an agreement serves the practical purpose of preventing a plaintiff with " 'a largely groundless claim' " from " 'tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.' " *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 347. It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. That potential expense is obvious here, where plaintiffs represent a putative class of at least 90 percent of subscribers to local telephone or high-speed Internet service in an action against America's largest telecommunications firms for unspecified instances of antitrust violations that allegedly occurred over a 7-year period. It is no answer to say that a claim just shy of plausible entitlement can be weeded out early in the discovery process, given the common lament that the success of judicial supervision in checking discovery abuse has been modest. Plaintiffs' main argument against the plausibility standard at the pleading stage is its ostensible conflict with a literal reading of *Conley*'s statement construing Rule 8: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U. S., at 45–46. The "no set of facts" language has been questioned, criticized, and explained away long enough by courts and commentators, and is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *Conley* described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival. Pp. 7–17.

2. Under the plausibility standard, plaintiffs' claim of conspiracy in restraint of trade comes up short. First, the complaint leaves no doubt that plaintiffs rest their §1 claim on descriptions of parallel conduct, not on any independent allegation of actual agreement



Syllabus

among the ILECs. The nub of the complaint is the ILECs' parallel behavior, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience. Nothing in the complaint invests either the action or inaction alleged with a plausible conspiracy suggestion. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, the District Court correctly found that nothing in the complaint intimates that resisting the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on preserving its regional dominance. The complaint's general collusion premise fails to answer the point that there was no need for joint encouragement to resist the 1996 Act, since each ILEC had reason to try and avoid dealing with CLECs and would have tried to keep them out, regardless of the other ILECs' actions. Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act to enter into their competitors' territories, leaving the relevant market highly compartmentalized geographically, with minimal competition. This parallel conduct did not suggest conspiracy, not if history teaches anything. Monopoly was the norm in telecommunications, not the exception. Because the ILECs were born in that world, doubtless liked it, and surely knew the adage about him who lives by the sword, a natural explanation for the noncompetition is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same. Antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid §1 claim. This analysis does not run counter to *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 508, which held that "a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination." Here, the Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed. Pp. 18–24.

425 F. 3d 99, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, except as to Part IV.

# SUPREME COURT OF THE UNITED STATES

No. 05–1126

BELL ATLANTIC CORPORATION, ET AL., PETITIONERS *v.* WILLIAM TWOMBLY ET AL.

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

[May 21, 2007]

JUSTICE SOUTER delivered the opinion of the Court.

Liability under §1 of the Sherman Act, 15 U. S. C. §1, requires a "contract, combination . . . , or conspiracy, in restraint of trade or commerce." The question in this putative class action is whether a §1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.

## I

The upshot of the 1984 divestiture of the American Telephone & Telegraph Company's (AT&T) local telephone business was a system of regional service monopolies (variously called "Regional Bell Operating Companies," "Baby Bells," or "Incumbent Local Exchange Carriers" (ILECs)), and a separate, competitive market for long-distance service from which the ILECs were excluded. More than a decade later, Congress withdrew approval of the ILECs' monopolies by enacting the Telecommunications Act of 1996 (1996 Act), 110 Stat. 56, which "fundamentally restructure[d] local telephone markets" and "subject[ed] [ILECs] to a host of duties intended to facilitate market entry." *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366, 371 (1999). In recompense, the 1996 Act set conditions for authorizing ILECs to enter the long-distance market. See 47 U. S. C. §271.



"Central to the [new] scheme [was each ILEC's] obligation . . . to share its network with competitors," *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398, 402 (2004), which came to be known as "competitive local exchange carriers" (CLECs), Pet. for Cert. 6, n. 1. A CLEC could make use of an ILEC's network in any of three ways: by (1) "purchas[ing] local telephone services at wholesale rates for resale to end users," (2) "leas[ing] elements of the [ILEC's] network 'on an unbundled basis,'" or (3) "interconnect[ing] its own facilities with the [ILEC's] network." *Iowa Utilities Bd.*, *supra*, at 371 (quoting 47 U. S. C. §251(c)). Owing to the "considerable expense and effort" required to make unbundled network elements available to rivals at wholesale prices, *Trinko*, *supra*, at 410, the ILECs vigorously litigated the scope of the sharing obligation imposed by the 1996 Act, with the result that the Federal Communications Commission (FCC) three times revised its regulations to narrow the range of network elements to be shared with the CLECs. See *Covad Communications Co.* v. *FCC*, 450 F. 3d 528, 533–534 (CADC 2006) (summarizing the 10-year-long regulatory struggle between the ILECs and CLECs).

Respondents William Twombly and Lawrence Marcus (hereinafter plaintiffs) represent a putative class consisting of all "subscribers of local telephone and/or high speed internet services . . . from February 8, 1996 to present." Amended Complaint in No. 02 CIV. 10220 (GEL) (SDNY) ¶53, App. 28 (hereinafter Complaint). In this action

against petitioners, a group of ILECs,[1] plaintiffs seek treble damages and declaratory and injunctive relief for claimed violations of §1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. §1, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."

The complaint alleges that the ILECs conspired to restrain trade in two ways, each supposedly inflating charges for local telephone and high-speed Internet services. Plaintiffs say, first, that the ILECs "engaged in parallel conduct" in their respective service areas to inhibit the growth of upstart CLECs. Complaint ¶47, App. 23–26. Their actions allegedly included making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers. *Ibid.* According to the complaint, the ILECs' "compelling common motivatio[n]" to thwart the CLECs' competitive efforts naturally led them to form a conspiracy; "[h]ad any one [ILEC] not sought to prevent CLECs . . . from competing effectively . . . , the resulting greater competitive inroads into that [ILEC's] territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct." *Id.*, ¶50, App. 26–27.

[1] The 1984 divestiture of AT&T's local telephone service created seven Regional Bell Operating Companies. Through a series of mergers and acquisitions, those seven companies were consolidated into the four ILECs named in this suit: BellSouth Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc. (successor-in-interest to Bell Atlantic Corporation). Complaint ¶21, App. 16. Together, these ILECs allegedly control 90 percent or more of the market for local telephone service in the 48 contiguous States. *Id.*, ¶48, App. 26.



Second, the complaint charges agreements by the ILECs to refrain from competing against one another. These are to be inferred from the ILECs' common failure "meaningfully [to] pursu[e]" "attractive business opportunit[ies]" in contiguous markets where they possessed "substantial competitive advantages," *id.*, ¶¶40–41, App. 21–22, and from a statement of Richard Notebaert, chief executive officer (CEO) of the ILEC Qwest, that competing in the territory of another ILEC "'might be a good way to turn a quick dollar but that doesn't make it right,'" *id.*, ¶42, App. 22.

The complaint couches its ultimate allegations this way:

> "In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." *Id.*, ¶51, App. 27.[2]

[2] In setting forth the grounds for §1 relief, the complaint repeats these allegations in substantially similar language:

"Beginning at least as early as February 6, 1996, and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another in violation of Section 1 of the Sherman Act." *Id.,* ¶64,

The United States District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief can be granted. The District Court acknowledged that "plaintiffs may allege a conspiracy by citing instances of parallel business behavior that suggest an agreement," but emphasized that "while '[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy[, . . .] "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.'" 313 F. Supp. 2d 174, 179 (2003) (quoting *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 541 (1954); alterations in original). Thus, the District Court understood that allegations of parallel business conduct, taken alone, do not state a claim under §1; plaintiffs must allege additional facts that "ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." 313 F. Supp. 2d, at 179. The District Court found plaintiffs' allegations of parallel ILEC actions to discourage competition inadequate because "the behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory." *Id.*, at 183. As to the ILECs' supposed agreement against competing with each other, the District Court found that the complaint does not "alleg[e] facts . . . suggesting that refraining from competing in other territories as CLECs was contrary to [the ILECs'] apparent economic interests, and consequently [does] not rais[e] an inference that [the ILECs'] actions were the result of a conspiracy." *Id.*, at 188.

The Court of Appeals for the Second Circuit reversed, holding that the District Court tested the complaint by the wrong standard. It held that "plus factors are not *required*

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App. 30–31.



to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal." 425 F. 3d 99, 114 (2005) (emphasis in original). Although the Court of Appeals took the view that plaintiffs must plead facts that "include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss," it then said that "to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Ibid*.

We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct, 547 U. S. ___ (2006), and now reverse.

## II

### A

Because §1 of the Sherman Act "does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy," *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 775 (1984), "[t]he crucial question" is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement, tacit or express," *Theatre Enterprises*, 346 U. S., at 540. While a showing of parallel "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," it falls short of "conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." *Id.*, at 540–541. Even "conscious parallelism," a common reaction of "firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions" is "not in itself unlawful." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 227 (1993); see 6 P. Areeda & H. Hovenk-

amp, Antitrust Law ¶1433a, p. 236 (2d ed. 2003) (hereinafter Areeda & Hovenkamp) ("The courts are nearly unanimous in saying that mere interdependent parallelism does not establish the contract, combination, or conspiracy required by Sherman Act §1"); Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 672 (1962) ("[M]ere interdependence of basic price decisions is not conspiracy").

The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. See, *e.g.*, AEI-Brookings Joint Center for Regulatory Studies, Epstein, Motions to Dismiss Antitrust Cases: Separating Fact from Fantasy, Related Publication 06–08, pp. 3–4 (2006) (discussing problem of "false positives" in §1 suits). Accordingly, we have previously hedged against false inferences from identical behavior at a number of points in the trial sequence. An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict, see *Theatre Enterprises, supra;* proof of a §1 conspiracy must include evidence tending to exclude the possibility of independent action, see *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984); and at the summary judgment stage a §1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently, see *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986).

B

This case presents the antecedent question of what a plaintiff must plead in order to state a claim under §1 of the Sherman Act. Federal Rule of Civil Procedure 8(a)(2)



requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.; Sanjuan* v. *American Bd. of Psychiatry and Neurology, Inc.*, 40 F. 3d 247, 251 (CA7 1994), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan* v. *Allain*, 478 U. S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235–236 (3d ed. 2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"),[3] on the assumption that all the allegations in the complaint are true (even if

[3]The dissent greatly oversimplifies matters by suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether. See *post*, at 10 (opinion of STEVENS, J.) (pleading standard of Federal Rules "does not require, or even invite, the pleading of facts"). While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant "set out *in detail* the facts upon which he bases his claim," *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957) (emphasis added), Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. See 5 Wright & Miller §1202, at 94, 95 (Rule 8(a) "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

doubtful in fact), see, *e.g.*, *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 508, n. 1 (2002); *Neitzke* v. *Williams*, 490 U. S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

In applying these general standards to a §1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.[4] And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and "that a recovery is very remote and unlikely." *Ibid.* In identifying facts that are suggestive enough to render a §1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators, already quoted, that lawful parallel conduct fails to be-

[4]Commentators have offered several examples of parallel conduct allegations that would state a §1 claim under this standard. See, *e.g.*, 6 Areeda & Hovenkamp ¶1425, at 167–185 (discussing "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties"); Blechman, Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws, 24 N. Y. L. S. L. Rev. 881, 899 (1979) (describing "conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement"). The parties in this case agree that "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason" would support a plausible inference of conspiracy. Brief for Respondents 37; see also Reply Brief for Petitioners 12.



speak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a §1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a §1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a §1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "entitle[ment] to relief." Cf. *DM Research, Inc.* v. *College of Am. Pathologists*, 170 F. 3d 53, 56 (CA1 1999) ("[T]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation—for example, identifying a written agreement or even a basis for inferring a tacit agreement, . . . but a court is not required to accept such terms as a sufficient basis for a complaint").[5]

[5]The border in *DM Research* was the line between the conclusory and the factual. Here it lies between the factually neutral and the factually

We alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336 (2005), when we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with "'a largely groundless claim'" be allowed to "'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Id.*, at 347 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 741 (1975)). So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, "'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" 5 Wright & Miller §1216, at 233–234 (quoting *Daves* v. *Hawaiian Dredging Co.*, 114 F. Supp. 643, 645 (Haw. 1953)); see also *Dura*, *supra*, at 346; *Asahi Glass Co.* v. *Pentech Pharmaceuticals, Inc.*, 289 F. Supp. 2d 986, 995 (ND Ill. 2003) (Posner, J., sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase").

Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, cf. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962), but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 528, n. 17 (1983), "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." See also *Car Carriers, Inc.* v. *Ford Motor Co.*, 745 F. 2d 1101, 1106 (CA7 1984) ("[T]he

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suggestive. Each must be crossed to enter the realm of plausible liability.



costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint"); Note, Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, 78 N. Y. U. L. Rev. 1887, 1898–1899 (2003) (discussing the unusually high cost of discovery in antitrust cases); Manual for Complex Litigation, Fourth, §30, p. 519 (2004) (describing extensive scope of discovery in antitrust cases); Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F. R. D. 354, 357 (2000) (reporting that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed). That potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," *post* at 4, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. See, *e.g.*, Easterbrook, Discovery as Abuse, 69 B. U. L. Rev. 635, 638 (1989) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves"). And it is self-evident that the

problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries," *post,* at 4; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "'reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support a §1 claim. *Dura*, 544 U. S., at 347 (quoting *Blue Chip Stamps*, *supra*, at 741; alteration in *Dura*).[6]

[6]The dissent takes heart in the reassurances of plaintiffs' counsel that discovery would be "'"phased"'" and "limited to the existence of the alleged conspiracy and class certification." *Post*, at 24. But determining whether some illegal agreement may have taken place between unspecified persons at different ILECs (each a multibillion dollar corporation with legions of management level employees) at some point over seven years is a sprawling, costly, and hugely time-consuming undertaking not easily susceptible to the kind of line drawing and case management that the dissent envisions. Perhaps the best answer to the dissent's optimism that antitrust discovery is open to effective judicial control is a more extensive quotation of the authority just cited, a judge with a background in antitrust law. Given the system that we have, the hope of effective judicial supervision is slim: "The timing is all wrong. The plaintiff files a sketchy complaint (the Rules of Civil Procedure discourage fulsome documents), and discovery is launched. A judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details. Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. A magistrate supervising discovery does not—cannot—know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define 'abusive' discovery except in theory, because in practice we lack essential information." Easterbrook, Discovery as Abuse, 69 B. U. L. Rev. 635, 638–639 (1989).



Plaintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior explained in *Theatre Enterprises*, *Monsanto*, and *Matsushita*, and their main argument against the plausibility standard at the pleading stage is its ostensible conflict with an early statement of ours construing Rule 8. Justice Black's opinion for the Court in *Conley* v. *Gibson* spoke not only of the need for fair notice of the grounds for entitlement to relief but of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U. S., at 45–46. This "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard, see 425 F. 3d, at 106, 114 (invoking *Conley*'s "no set of facts" language in describing the standard for dismissal).[7]

[7]The Court of Appeals also relied on Chief Judge Clark's suggestion in *Nagler* v. *Admiral Corp.,* 248 F. 3d 319 (CA2 1957), that facts indicating parallel conduct alone suffice to state a claim under §1. 425 F. 3d, at 114 (citing *Nagler, supra*, at 325). But *Nagler* gave no explanation for citing *Theatre Enterprises* (which upheld a denial of a directed verdict for plaintiff on the ground that proof of parallelism was not proof of conspiracy) as authority that pleading parallel conduct sufficed to plead a Sherman Act conspiracy. Now that *Monsanto Co.* v. *Spray-Rite Service Corp.,* 465 U. S. 752 (1984), and *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.,* 475 U. S. 574 (1986), have made it

On such a focused and literal reading of *Conley*'s "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. 425 F. 3d, at 106, 114. It seems fair to say that this approach to pleading would dispense with any showing of a "'reasonably founded hope'" that a plaintiff would be able to make a case, see *Dura*, 544 U. S., at 347 (quoting *Blue Chip Stamps*, 421 U. S., at 741); Mr. Micawber's optimism would be enough.

Seeing this, a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. See, *e.g.*, *Car Carriers,* 745 F. 2d, at 1106 ("*Conley* has never been interpreted literally" and, "[i]n practice, a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory" (internal quotation marks omitted; emphasis and omission in original); *Ascon Properties, Inc.* v. *Mobil Oil Co.,* 866 F. 2d 1149, 1155 (CA9 1989) (tension between *Conley*'s "no set of facts" language and its acknowledgment that a plaintiff must provide the "grounds" on which his claim rests); *O'Brien* v. *DiGrazia*, 544 F. 2d 543, 546, n. 3 (CA1 1976) ("[W]hen a plaintiff . . . supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might

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clear that neither parallel conduct nor conscious parallelism, taken alone, raise the necessary implication of conspiracy, it is time for a fresh look at adequacy of pleading when a claim rests on parallel action.



turn a frivolous claim of unconstitutional . . . action into a substantial one"); *McGregor* v. *Industrial Excess Landfill, Inc.*, 856 F. 2d 39, 42–43 (CA6 1988) (quoting *O'Brien*'s analysis); Hazard, From Whom No Secrets Are Hid, 76 Tex. L. Rev. 1665, 1685 (1998) (describing *Conley* as having "turned Rule 8 on its head"); Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 463–465 (1986) (noting tension between *Conley* and subsequent understandings of Rule 8).

We could go on, but there is no need to pile up further citations to show that *Conley*'s "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. See *Sanjuan*, 40 F. 3d, at 251 (once a claim for relief has been stated, a plaintiff "receives the benefit of imagination, so long as the hypotheses are consistent with the complaint"); accord, *Swierkiewicz,* 534 U. S., at 514; *National Organization for Women, Inc.* v. *Scheidler*, 510 U. S. 249, 256 (1994); *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U. S. 229, 249–250 (1989); *Hishon* v. *King & Spalding*, 467 U. S. 69, 73 (1984). *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern

a complaint's survival.[8]

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[8] Because *Conley*'s "'no set of facts'" language was one of our earliest statements about pleading under the Federal Rules, it is no surprise that it has since been "cited as authority" by this Court and others. *Post*, at 8. Although we have not previously explained the circumstances and rejected the literal reading of the passage embraced by the Court of Appeals, our analysis comports with this Court's statements in the years since *Conley*. See *Dura*, 544 U. S., at 347 (quoting *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 741 (1975); (requiring "'reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support the claim (alteration in *Dura*)); *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 526 (1983) ("It is not . . . proper to assume that [the plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged"); *Wilson* v. *Schnettler*, 365 U. S. 381, 383 (1961) ("In the absence of . . . an allegation [that the arrest was made without probable cause] the courts below could not, nor can we, assume that respondents arrested petitioner without probable cause to believe that he had committed . . . a narcotics offense"). Nor are we reaching out to decide this issue in a case where the matter was not raised by the parties, see *post*, at 10, since both the ILECs and the Government highlight the problems stemming from a literal interpretation of *Conley*'s "no set of facts" language and seek clarification of the standard. Brief for Petitioners 27–28; Brief for United States as *Amicus Curiae* 22–25; see also Brief for Respondents 17 (describing "[p]etitioners and their amici" as mounting an "attack on *Conley*'s 'no set of facts' standard").

The dissent finds relevance in Court of Appeals precedents from the 1940s, which allegedly gave rise to *Conley*'s "no set of facts" language. See *post*, at 11–13. Even indulging this line of analysis, these cases do not challenge the understanding that, before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct. See, *e.g.*, *Leimer* v. *State Mut. Life Assur. Co.*, 108 F. 2d 302, 305 (CA8 1940) ("'[I]f, in view of what is alleged, it can reasonably be conceived that the plaintiffs . . . could, upon a trial, establish a case which would entitle them to . . . relief, the motion to dismiss should not have been granted'"); *Continental Collieries, Inc.* v. *Shober*, 130 F. 2d 631, 635 (CA3 1942) ("No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it"). Rather, these cases stand for the unobjectionable proposition that, when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment



III

When we look for plausibility in this complaint, we agree with the District Court that plaintiffs' claim of conspiracy in restraint of trade comes up short. To begin with, the complaint leaves no doubt that plaintiffs rest their §1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs. *Supra*, at 4. Although in form a few stray statements speak directly of agreement,[9] on fair reading these are merely legal conclusions resting on the prior allegations. Thus, the complaint first takes account of the alleged "absence of any meaningful competition between [the ILECs] in one another's markets," "the parallel course of conduct that each [ILEC] engaged in to prevent competition from CLECs," "and the other facts and market circumstances alleged [earlier]"; "in light of" these, the complaint concludes "that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry into their . . . markets and have agreed not to compete with one another." Complaint ¶51, App. 27.[10] The

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that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder. Cf. *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974) (a district court weighing a motion to dismiss asks "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

[9] See Complaint ¶¶51, 64, App. 27, 30–31 (alleging that ILECs engaged in a "contract, combination or conspiracy" and agreed not to compete with one another).

[10] If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint's references to an agreement among the ILECs would have given the notice required by Rule 8. Apart from identifying a seven-year span in which the §1 violations were supposed to have occurred (*i.e.*, "[b]eginning at least as early as February 6, 1996, and continuing to the present," *id.,* ¶64, App. 30), the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. This lack of notice contrasts sharply with the model form for pleading negligence, Form 9,

nub of the complaint, then, is the ILECs' parallel behavior, consisting of steps to keep the CLECs out and manifest disinterest in becoming CLECs themselves, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience.[11]

We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, we agree with the District Court that nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance. The 1996 Act did more than just subject the ILECs to competition; it obliged them to subsidize their competitors with their own equipment at wholesale rates. The economic incentive to resist was powerful, but resisting competition is routine market conduct, and even if the ILECs flouted the 1996 Act in all the ways the plaintiffs allege, see *id.,* ¶47, App. 23–24, there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if

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which the dissent says exemplifies the kind of "bare allegation" that survives a motion to dismiss. *Post*, at 6. Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the §1 context would have little idea where to begin.

[11] The dissent's quotations from the complaint leave the impression that plaintiffs directly allege illegal agreement; in fact, they proceed exclusively via allegations of parallel conduct, as both the District Court and Court of Appeals recognized. See 313 F. Supp. 2d 174, 182 (SDNY 2003); 425 F. 3d 99, 102–104 (CA 2005).



alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a §1 violation against almost any group of competing businesses would be a sure thing.

The complaint makes its closest pass at a predicate for conspiracy with the claim that collusion was necessary because success by even one CLEC in an ILEC's territory "would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories." *Id.,* ¶50, App. 26–27. But, its logic aside, this general premise still fails to answer the point that there was just no need for joint encouragement to resist the 1996 Act; as the District Court said, "each ILEC has reason to want to avoid dealing with CLECs" and "each ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs." 313 F. Supp. 2d, at 184; cf. *Kramer* v. *Pollock-Krasner Foundation*, 890 F. Supp. 250, 256 (SDNY 1995) (while the plaintiff "may believe the defendants conspired . . . , the defendants' allegedly conspiratorial actions could equally have been prompted by lawful, independent goals which do not constitute a conspiracy").[12]

Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act, which was supposedly passed in the "'hop[e] that the large incumbent local monopoly companies . . . might attack their neighbors' service areas, as

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[12] From the allegation that the ILECs belong to various trade associations, see Complaint ¶46, App. 23, the dissent playfully suggests that they conspired to restrain trade, an inference said to be "buttressed by the common sense of Adam Smith." *Post*, at 22, 25–26. If Adam Smith is peering down today, he may be surprised to learn that his tongue-in-cheek remark would be authority to force his famous pinmaker to devote financial and human capital to hire lawyers, prepare for depositions, and otherwise fend off allegations of conspiracy; all this just because he belonged to the same trade guild as one of his competitors when their pins carried the same price tag.

they are the best situated to do so.'" Complaint ¶38, App. 20 (quoting Consumer Federation of America, Lessons from 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster, p. 12 (Feb. 2000). Contrary to hope, the ILECs declined "'to enter each other's service territories in any significant way,'" Complaint ¶38, App. 20, and the local telephone and high speed Internet market remains highly compartmentalized geographically, with minimal competition. Based on this state of affairs, and perceiving the ILECs to be blessed with "especially attractive business opportunities" in surrounding markets dominated by other ILECs, the plaintiffs assert that the ILECs' parallel conduct was "strongly suggestive of conspiracy." *Id.,* ¶40, App. 21.

But it was not suggestive of conspiracy, not if history teaches anything. In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation. In the decade preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. See *Verizon Communications Inc.* v. *FCC*, 535 U. S. 467, 477–478 (2002) (describing telephone service providers as traditional public monopolies). The ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.

In fact, the complaint itself gives reasons to believe that the ILECs would see their best interests in keeping to their old turf. Although the complaint says generally that the ILECs passed up "especially attractive business opportunit[ies]" by declining to compete as CLECs against other



ILECs, Complaint ¶40, App. 21, it does not allege that competition as CLECs was potentially any more lucrative than other opportunities being pursued by the ILECs during the same period,[13] and the complaint is replete with indications that any CLEC faced nearly insurmountable barriers to profitability owing to the ILECs' flagrant resistance to the network sharing requirements of the 1996 Act, *id*., ¶47; App. 23–26. Not only that, but even without a monopolistic tradition and the peculiar difficulty of mandating shared networks, "[f]irms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." Areeda & Hovenkamp ¶307d, at 155 (Supp. 2006) (commenting on the case at bar). The upshot is that Congress may have expected some ILECs to become CLECs in the legacy territories of other ILECs, but the disappointment does not make conspiracy plausible. We agree with the District Court's assessment that antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint,

[13]The complaint quoted a reported statement of Qwest's CEO, Richard Notebaert, to suggest that the ILECs declined to compete against each other despite recognizing that it "'might be a good way to turn a quick dollar.'" ¶42, App. 22 (quoting Chicago Tribune, Oct. 31, 2002, Business Section, p. 1). This was only part of what he reportedly said, however, and the District Court was entitled to take notice of the full contents of the published articles referenced in the complaint, from which the truncated quotations were drawn. See Fed. Rule Evid. 201.

Notebaert was also quoted as saying that entering new markets as a CLEC would not be "a sustainable economic model" because the CLEC pricing model is "just . . . nuts." Chicago Tribune, Oct. 31, 2002, Business Section, p. 1 (cited at Complaint ¶42, App. 22). Another source cited in the complaint quotes Notebaert as saying he thought it "unwise" to "base a business plan" on the privileges accorded to CLECs under the 1996 Act because the regulatory environment was too unstable. Chicago Tribune, Dec. 19, 2002, Business Section, p. 2 (cited at Complaint ¶45, App. 23).

which thus fails to state a valid §1 claim.[14]

Plaintiffs say that our analysis runs counter to *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 508 (2002), which held that "a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973)." They argue that just as the prima facie case is a "flexible evidentiary standard" that "should not be transposed into a rigid pleading standard for discrimination cases," *Swierkiewicz*, *supra*, at 512, "transpos[ing] 'plus factor' summary judgment analysis woodenly into a rigid Rule 12(b)(6) pleading standard . . . would be unwise," Brief for Respondents 39. As the District Court correctly understood, however, "*Swierkiewicz* did not change the law of pleading, but simply re-emphasized . . . that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements." 313 F. Supp. 2d, at 181 (citation and footnote omitted). Even though Swierkiewicz's pleadings "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination," the Court

[14] In reaching this conclusion, we do not apply any "heightened" pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished "'by the process of amending the Federal Rules, and not by judicial interpretation.'" *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 515 (2002) (quoting *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 168 (1993)). On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. Fed. Rules Civ. Proc. 9(b)–(c). Here, our concern is not that the allegations in the complaint were insufficiently "particular[ized]", *ibid.;* rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.



of Appeals dismissed his complaint for failing to allege certain additional facts that Swierkiewicz would need at the trial stage to support his claim in the absence of direct evidence of discrimination. *Swierkiewicz*, 534 U. S., at 514. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege "specific facts" beyond those necessary to state his claim and the grounds showing entitlement to relief. *Id.*, at 508.

Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

* * *

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

*It is so ordered.*

# SUPREME COURT OF THE UNITED STATES

No. 05–1126

BELL ATLANTIC CORPORATION, ET AL., PETITIONERS *v.* WILLIAM TWOMBLY ET AL.

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

[May 21, 2007]

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins except as to Part IV, dissenting.

In the first paragraph of its 24-page opinion the Court states that the question to be decided is whether allegations that "major telecommunications providers engaged in certain parallel conduct unfavorable to competition" suffice to state a violation of §1 of the Sherman Act. *Ante,* at 1. The answer to that question has been settled for more than 50 years. If that were indeed the issue, a summary reversal citing *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.,* 346 U. S. 537 (1954), would adequately resolve this case. As *Theatre Enterprises* held, parallel conduct is circumstantial evidence admissible on the issue of conspiracy, but it is not itself illegal. *Id.*, at 540–542.

Thus, this is a case in which there is no dispute about the substantive law. If the defendants acted independently, their conduct was perfectly lawful. If, however, that conduct is the product of a horizontal agreement among potential competitors, it was unlawful. Plaintiffs have alleged such an agreement and, because the complaint was dismissed in advance of answer, the allegation has not even been denied. Why, then, does the case not proceed? Does a judicial opinion that the charge is not "plausible" provide a legally acceptable reason for dismissing



the complaint? I think not.

Respondents' amended complaint describes a variety of circumstantial evidence and makes the straightforward allegation that petitioners

> "entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." Amended Complaint in No. 02 CIV. 10220 (GEL) (SDNY) ¶51, App. 27 (hereinafter Complaint).

The complaint explains that, contrary to Congress' expectation when it enacted the 1996 Telecommunications Act, and consistent with their own economic self-interests, petitioner Incumbent Local Exchange Carriers (ILECs) have assiduously avoided infringing upon each other's markets and have refused to permit nonincumbent competitors to access their networks. The complaint quotes Richard Notebaert, the former CEO of one such ILEC, as saying that competing in a neighboring ILEC's territory "might be a good way to turn a quick dollar but that doesn't make it right." *Id.,* ¶42, App. 22. Moreover, respondents allege that petitioners "communicate amongst themselves" through numerous industry associations. *Id.,* ¶46, App. 23. In sum, respondents allege that petitioners entered into an agreement that has long been recognized as a classic *per se* violation of the Sherman Act. See Report of the Attorney General's National Committee to Study the Antitrust Laws 26 (1955).

Under rules of procedure that have been well settled since well before our decision in *Theatre Enterprises*, a judge ruling on a defendant's motion to dismiss a complaint, "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 508, n. 1 (2002); see *Overstreet* v.

*North Shore Corp.*, 318 U. S. 125, 127 (1943). But instead of requiring knowledgeable executives such as Notebaert to respond to these allegations by way of sworn depositions or other limited discovery—and indeed without so much as requiring petitioners to file an answer denying that they entered into any agreement—the majority permits immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot. The Court embraces the argument of those lawyers that "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway," *ante*, at 19; that "there was just no need for joint encouragement to resist the 1996 Act," *ante*, at 20; and that the "natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing," *ante,* at 21.

The Court and petitioners' legal team are no doubt correct that the parallel conduct alleged is consistent with the absence of any contract, combination, or conspiracy. But that conduct is also entirely consistent with the *presence* of the illegal agreement alleged in the complaint. And the charge that petitioners "agreed not to compete with one another" is not just one of "a few stray statements," *ante*, at 18; it is an allegation describing unlawful conduct. As such, the Federal Rules of Civil Procedure, our longstanding precedent, and sound practice mandate that the District Court at least require some sort of response from petitioners before dismissing the case.

Two practical concerns presumably explain the Court's dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions. Those concerns



merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking. More importantly, they do not justify an interpretation of Federal Rule of Civil Procedure 12(b)(6) that seems to be driven by the majority's appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency.

I

Rule 8(a)(2) of the Federal Rules requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The rule did not come about by happenstance and its language is not inadvertent. The English experience with Byzantine special pleading rules—illustrated by the hypertechnical Hilary rules of 1834[1]—made obvious the appeal of a pleading standard that was easy for the common litigant to understand and sufficed to put the defendant on notice as to the nature of the claim against him and the relief sought. Stateside, David Dudley Field developed the highly influential New York Code of 1848, which required "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, §120(2), 1848 N. Y. Laws pp. 497, 521. Substantially similar language appeared in the Federal Equity Rules adopted in 1912. See Fed. Equity Rule 25 (requiring "a short and simple statement of

[1] See 9 W. Holdsworth, History of English Law 324–327 (1926).

the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence").

A difficulty arose, however, in that the Field Code and its progeny required a plaintiff to plead "facts" rather than "conclusions," a distinction that proved far easier to say than to apply. As commentators have noted,

> "it is virtually impossible logically to distinguish among 'ultimate facts,' 'evidence,' and 'conclusions.' Essentially any allegation in a pleading must be an assertion that certain occurrences took place. The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a continuum varying only in the degree of particularity with which the occurrences are described." Weinstein & Distler, Comments on Procedural Reform: Drafting Pleading Rules, 57 Colum. L. Rev. 518, 520–521 (1957).

See also Cook, Statements of Fact in Pleading Under the Codes, 21 Colum. L. Rev. 416, 417 (1921) (hereinafter Cook) ("[T]here is no logical distinction between statements which are grouped by the courts under the phrases 'statements of fact' and 'conclusions of law'"). Rule 8 was directly responsive to this difficulty. Its drafters intentionally avoided any reference to "facts" or "evidence" or "conclusions." See 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, p. 207 (3d ed. 2004) (hereinafter Wright & Miller) ("The substitution of 'claim showing that the pleader is entitled to relief' for the code formulation of the 'facts' constituting a 'cause of action' was intended to avoid the distinctions drawn under the codes among 'evidentiary facts,' 'ultimate facts,' and 'conclusions' . . .").

Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial. See *Swierkiewicz*, 534



U. S., at 514 ("The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim"). Charles E. Clark, the "principal draftsman" of the Federal Rules,[2] put it thus:

> "Experience has shown . . . that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result." The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure, 23 A. B. A. J. 976, 977 (1937) (hereinafter Clark, New Federal Rules).

The pleading paradigm under the new Federal Rules was well illustrated by the inclusion in the appendix of Form 9, a complaint for negligence. As relevant, the Form 9 complaint states only: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." Form 9, Complaint for Negligence, Forms App., Fed. Rules Civ. Proc., 28 U. S. C. App., p. 829 (hereinafter Form 9). The complaint then describes the plaintiff's injuries and demands judgment. The asserted ground for relief—namely, the defendant's negligent driving—would have been called a "'conclusion of law'" under the code pleading of old. See, *e.g.*, Cook 419. But that bare allegation suffices under a system that "restrict[s] the pleadings to the task of general notice-giving and invest[s] the deposition-discovery proc-

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[2] *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 283 (1988).

ess with a vital role in the preparation for trial."[3] *Hickman* v. *Taylor*, 329 U. S. 495, 501 (1947); see also *Swierkiewicz*, 534 U. S., at 513, n. 4 (citing Form 9 as an example of "'the simplicity and brevity of statement which the rules contemplate'"); *Thomson* v. *Washington*, 362 F. 3d 969, 970 (CA7 2004) (Posner, J.) ("The federal rules replaced fact pleading with notice pleading").

II

It is in the context of this history that *Conley* v. *Gibson*, 355 U. S. 41 (1957), must be understood. The *Conley* plaintiffs were black railroad workers who alleged that their union local had refused to protect them against discriminatory discharges, in violation of the National Railway Labor Act. The union sought to dismiss the complaint on the ground that its general allegations of discriminatory treatment by the defendants lacked sufficient specificity. Writing for a unanimous Court, Justice Black rejected the union's claim as foreclosed by the language of Rule 8. *Id*., at 47–48. In the course of doing so, he articulated the formulation the Court rejects today: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id*., at 45–46.

Consistent with the design of the Federal Rules, *Conley*'s "no set of facts" formulation permits outright dismissal only when proceeding to discovery or beyond

[3]The Federal Rules do impose a "particularity" requirement on "all averments of fraud or mistake," Fed. Rule Civ. Proc. 9(b), neither of which has been alleged in this case. We have recognized that the canon of *expresio unius est exclusio alterius* applies to Rule 9(b). See *Leatherman* v. *Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 168 (1993).



would be futile. Once it is clear that a plaintiff has stated a claim that, if true, would entitle him to relief, matters of proof are appropriately relegated to other stages of the trial process. Today, however, in its explanation of a decision to dismiss a complaint that it regards as a fishing expedition, the Court scraps *Conley*'s "no set of facts" language. Concluding that the phrase has been "questioned, criticized, and explained away long enough," *ante*, at 16, the Court dismisses it as careless composition.

If *Conley*'s "no set of facts" language is to be interred, let it not be without a eulogy. That exact language, which the majority says has "puzzl[ed] the profession for 50 years," *ibid.*, has been cited as authority in a dozen opinions of this Court and four separate writings.[4] In not one of those 16 opinions was the language "questioned," "criticized," or "explained away." Indeed, today's opinion is the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation. Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears "beyond doubt" that "no set of facts" in support

[4]*SEC* v. *Zandford*, 535 U. S. 813, 818 (2002); *Davis* v. *Monroe County Bd. of Ed.*, 526 U. S. 629, 654 (1999); *Hartford Fire Ins. Co.* v. *California*, 509 U. S. 764, 811 (1993); *Brower* v. *County of Inyo*, 489 U. S. 593, 598 (1989); *Hughes* v. *Rowe*, 449 U. S. 5, 10 (1980) *(per curiam); McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U. S. 232, 246 (1980); *Estelle* v. *Gamble*, 429 U. S. 97, 106 (1976); *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U. S. 738, 746 (1976); *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974); *Cruz* v. *Beto*, 405 U. S. 319, 322 (1972) *(per curiam); Haines* v. *Kerner*, 404 U. S. 519, 521 (1972) *(per curiam); Jenkins* v. *McKeithen*, 395 U. S. 411, 422 (1969) (plurality opinion); see also *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532, 554 (1985) (Brennan, J., concurring in part and dissenting in part); *Hoover* v. *Ronwin*, 466 U. S. 558, 587 (1984) (STEVENS, J., dissenting); *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, 561, n. 1 (1977) (Marshall, J., dissenting); *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 55, n. 6 (1976) (Brennan, J., concurring in judgment).

of the claim would entitle the plaintiff to relief.[5]

[5] See, *e.g.*, *EB Invs., LLC* v. *Atlantis Development, Inc.*, 930 So. 2d 502, 507 (Ala. 2005); *Department of Health & Social Servs.* v. *Native Village of Curyung*, 151 P. 3d 388, 396 (Alaska 2006); *Newman* v. *Maricopa Cty.*, 167 Ariz. 501, 503, 808 P. 2d 1253, 1255 (App. 1991); *Public Serv. Co. of Colo.* v. *Van Wyk*, 27 P. 3d 377, 385–386 (Colo. 2001) (en banc); *Clawson* v. *St. Louis Post-Dispatch, LLC*, 906 A. 2d 308, 312 (D. C. 2006); *Hillman Constr. Corp.* v. *Wainer*, 636 So. 2d 576, 578 (Fla. App. 1994); *Kaplan* v. *Kaplan*, 266 Ga. 612, 613, 469 S. E. 2d 198, 199 (1996); *Wright* v. *Home Depot U. S. A.*, 111 Haw. 401, 406, 142 P. 3d 265, 270 (2006); *Taylor* v. *Maile*, 142 Idaho 253, 257, 127 P. 3d 156, 160 (2005); *Fink* v. *Bryant*, 2001–CC–0987, p. 4 (La. 11/28/01), 801 So. 2d 346, 349; *Gagne* v. *Cianbro Corp.*, 431 A. 2d 1313, 1318–1319 (Me. 1981); *Gasior* v. *Massachusetts Gen. Hospital*, 446 Mass. 645, 647, 846 N. E. 2d 1133, 1135 (2006); *Ralph Walker, Inc.* v. *Gallagher*, 926 So. 2d 890, 893 (Miss. 2006); *Jones* v. *Montana Univ. System*, 337 Mont. 1, 7, 155 P. 3d 1247, ____ (2007); *Johnston* v. *Nebraska Dept. of Correctional Servs.*, 270 Neb. 987, 989, 709 N. W. 2d 321, 324 (2006); *Blackjack Bonding* v. *Las Vegas Munic. Ct.*, 116 Nev. 1213, 1217, 14 P. 3d 1275, 1278 (2000); *Shepard* v. *Ocwen Fed. Bank*, 361 N. C. 137, 139, 638 S. E. 2d 197, 199 (2006); *Rose* v. *United Equitable Ins. Co.*, 2001 ND 154, ¶10, 632 N. W. 2d 429, 434; *State ex rel. Turner* v. *Houk*, 112 Ohio St. 3d 561, 562, 2007–Ohio–814, ¶5, 862 N. E. 2d 104, 105 *(per curiam)*; *Moneypenney* v. *Dawson*, 2006 OK 53, ¶2, 141 P. 3d 549, 551; *Gagnon* v. *State*, 570 A. 2d 656, 659 (R. I. 1990); *Osloond* v. *Farrier*, 2003 SD 28, ¶4, 659 N. W. 2d 20, 22 *(per curiam)*; *Smith* v. *Lincoln Brass Works, Inc.*, 712 S. W. 2d 470, 471 (Tenn. 1986); *Association of Haystack Property Owners* v. *Sprague*, 145 Vt. 443, 446, 494 A. 2d 122, 124 (1985); *In re Coday*, 156 Wash. 2d 485, 497, 130 P. 3d 809, 815 (2006) (en banc); *Haines* v. *Hampshire Cty. Comm'n*, 216 W. Va. 499, 502, 607 S. E. 2d 828, 831 (2004); *Warren* v. *Hart*, 747 P. 2d 511, 512 (Wyo. 1987); see also *Malpiede* v. *Townson*, 780 A. 2d 1075, 1082–1083 (Del. 2001) (permitting dismissal only "where the court determines with reasonable certainty that the plaintiff could prevail on no set of facts that may be inferred from the well-pleaded allegations in the complaint" (internal quotation marks omitted)); *Canel* v. *Topinka*, 212 Ill. 2d 311, 318, 818 N. E. 2d 311, 317 (2004) (replacing "appears beyond doubt" in the *Conley* formulation with "is clearly apparent"); *In re Young*, 522 N. E. 2d 386, 388 (Ind. 1988) *(per curiam)* (replacing "appears beyond doubt" with "appears to a certainty"); *Barkema* v. *Williams Pipeline Co.*, 666 N. W. 2d 612, 614 (Iowa 2003) (holding that a motion to dismiss should be sustained "only when there exists no



Petitioners have not requested that the *Conley* formulation be retired, nor have any of the six *amici* who filed briefs in support of petitioners. I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process—a rulemaking process—for revisions of that order. See 28 U. S. C. §§2072–2074 (2000 ed. and Supp. IV).

Today's majority calls *Conley*'s "'no set of facts'" language "an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Ante*, at 16. This is not and cannot be what the *Conley* Court meant. First, as I have explained, and as the *Conley* Court well knew, the pleading standard the Federal Rules meant to codify does not require, or even invite, the pleading of facts.[6] The

conceivable set of facts entitling the non-moving party to relief"); *Pioneer Village* v. *Bullitt Cty.*, 104 S. W. 3d 757, 759 (Ky. 2003) (holding that judgment on the pleadings should be granted "if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief"); *Corley* v. *Detroit Bd. of Ed.*, 470 Mich. 274, 277, 681 N. W. 2d 342, 345 (2004) *(per curiam)* (holding that a motion for judgment on the pleadings should be granted only "'if no factual development could possibly justify recovery'"); *Oberkramer* v. *Ellisville*, 706 S. W. 2d 440, 441 (Mo. 1986) (en banc) (omitting the words "beyond doubt" from the *Conley* formulation); *Colman* v. *Utah State Land Bd.*, 795 P. 2d 622, 624 (Utah 1990) (holding that a motion to dismiss is appropriate "only if it clearly appears that [the plaintiff] can prove no set of facts in support of his claim"); *NRC Management Servs. Corp.* v. *First Va. Bank-Southwest*, 63 Va. Cir. 68, 70 (2003) ("The Virginia standard is identical [to the *Conley* formulation], though the Supreme Court of Virginia may not have used the same words to describe it").

[6] The majority is correct to say that what the Federal Rules require is a "'showing'" of entitlement to relief. *Ante*, at 8, n. 3. Whether and to what extent that "showing" requires allegations of fact will depend on the particulars of the claim. For example, had the amended complaint

"pleading standard" label the majority gives to what it reads into the *Conley* opinion—a statement of the permissible factual support for an adequately pleaded complaint—would not, therefore, have impressed the *Conley* Court itself. Rather, that Court would have understood the majority's remodeling of its language to express an *evidentiary* standard, which the *Conley* Court had neither need nor want to explicate. Second, it is pellucidly clear that the *Conley* Court was interested in what a complaint *must* contain, not what it *may* contain. In fact, the Court said without qualification that it was "appraising the *sufficiency* of the complaint." 355 U. S., at 45 (emphasis added). It was, to paraphrase today's majority, describing "the minimum standard of adequate pleading to govern a complaint's survival," *ante*, at 16–17.

We can be triply sure as to *Conley*'s meaning by examining the three Court of Appeals cases the *Conley* Court cited as support for the "accepted rule" that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U. S., at 45–46. In the first case, *Leimer* v. *State Mut. Life Assur. Co. of Worcester, Mass.*, 108 F. 2d 302 (CA8 1940), the plaintiff alleged that she was the beneficiary of a life insurance plan and that the insurance company was wrongfully withholding proceeds from her.

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in this case alleged *only* parallel conduct, it would not have made the required "showing." See *supra*, at 1. Similarly, had the pleadings contained *only* an allegation of agreement, without specifying the nature or object of that agreement, they would have been susceptible to the charge that they did not provide sufficient notice that the defendants may answer intelligently. Omissions of that sort instance the type of "bareness" with which the Federal Rules are concerned. A plaintiff's inability to persuade a district court that the allegations actually included in her complaint are "plausible" is an altogether different kind of failing, and one that should not be fatal at the pleading stage.



In reversing the District Court's grant of the defendant's motion to dismiss, the Eighth Circuit noted that court's own longstanding rule that, to warrant dismissal, "'it should appear from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated.'" *Id.*, at 305 (quoting *Winget* v. *Rockwood*, 69 F. 2d 326, 329 (CA8 1934)).

The *Leimer* court viewed the Federal Rules—specifically Rules 8(a)(2), 12(b)(6), 12(e) (motion for a more definite statement), and 56 (motion for summary judgment)—as reinforcing the notion that "there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." 108 F. 2d, at 306. The court refuted in the strongest terms any suggestion that the unlikelihood of recovery should determine the fate of a complaint: "No matter how improbable it may be that she can prove her claim, she is entitled to an opportunity to make the attempt, and is not required to accept as final a determination of her rights based upon inferences drawn in favor of the defendant from her amended complaint." *Ibid.*

The Third Circuit relied on *Leimer*'s admonition in *Continental Collieries, Inc.* v. *Shober*, 130 F. 2d 631 (1942), which the *Conley* Court also cited in support of its "no set of facts" formulation. In a diversity action the plaintiff alleged breach of contract, but the District Court dismissed the complaint on the ground that the contract appeared to be unenforceable under state law. The Court of Appeals reversed, concluding that there were facts in dispute that went to the enforceability of the contract, and that the rule at the pleading stage was as in *Leimer:* "No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it." 130 F. 3d, at

635.

The third case the *Conley* Court cited approvingly was written by Judge Clark himself. In *Dioguardi* v. *Durning*, 139 F. 2d 774 (CA2 1944), the *pro se* plaintiff, an importer of "tonics," charged the customs inspector with auctioning off the plaintiff's former merchandise for less than was bid for it—and indeed for an amount equal to the plaintiff's own bid—and complained that two cases of tonics went missing three weeks before the sale. The inference, hinted at by the averments but never stated in so many words, was that the defendant fraudulently denied the plaintiff his rightful claim to the tonics, which, if true, would have violated federal law. Writing six years after the adoption of the Federal Rules he held the lead rein in drafting, Judge Clark said that the defendant

> "could have disclosed the facts from his point of view, in advance of a trial if he chose, by asking for a pretrial hearing or by moving for a summary judgment with supporting affidavits. But, as it stands, we do not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes and what for present purposes defendant must be taken as admitting." *Id.*, at 775.

As any civil procedure student knows, Judge Clark's opinion disquieted the defense bar and gave rise to a movement to revise Rule 8 to require a plaintiff to plead a "'cause of action.'" See 5 Wright & Miller §1201, at 86–87. The movement failed, see *ibid.; Dioguardi* was explicitly approved in *Conley;* and "[i]n retrospect the case itself seems to be a routine application of principles that are universally accepted," 5 Wright & Miller §1220, at 284–285.

In light of *Leimer*, *Continental Collieries*, and *Dioguardi*, *Conley*'s statement that a complaint is not to be dismissed unless "no set of facts" in support thereof



would entitle the plaintiff to relief is hardly "puzzling," *ante*, at 16. It reflects a philosophy that, unlike in the days of code pleading, separating the wheat from the chaff is a task assigned to the pretrial and trial process. *Conley*'s language, in short, captures the policy choice embodied in the Federal Rules and binding on the federal courts.

We have consistently reaffirmed that basic understanding of the Federal Rules in the half century since *Conley*. For example, in *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), we reversed the Court of Appeals' dismissal on the pleadings when the respondents, the Governor and other officials of the State of Ohio, argued that petitioners' claims were barred by sovereign immunity. In a unanimous opinion by then-Justice Rehnquist, we emphasized that

> "[w]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.*" *Id.*, at 236 (emphasis added).

The *Rhodes* plaintiffs had "alleged generally and in conclusory terms" that the defendants, by calling out the National Guard to suppress the Kent State University student protests, "were guilty of wanton, wilful and negligent conduct." *Krause* v. *Rhodes*, 471 F. 2d 430, 433 (CA6 1972). We reversed the Court of Appeals on the ground that "[w]hatever the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure," were not barred by the Eleventh Amendment because they were

styled as suits against the defendants in their individual capacities. 416 U. S., at 238.

We again spoke with one voice against efforts to expand pleading requirements beyond their appointed limits in *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163 (1993). Writing for the unanimous Court, Chief Justice Rehnquist rebuffed the Fifth Circuit's effort to craft a standard for pleading municipal liability that accounted for "the enormous expense involved today in litigation," *Leatherman* v. *Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 954 F. 2d 1054, 1057 (1992) (internal quotation marks omitted), by requiring a plaintiff to "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity." *Leatherman*, 507 U. S., at 167 (internal quotation marks omitted). We found this language inconsistent with Rules 8(a)(2) and 9(b) and emphasized that motions to dismiss were not the place to combat discovery abuse: "In the absence of [an amendment to Rule 9(b)], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.*, at 168–169.

Most recently, in *Swierkiewicz,* 534 U. S. 506, we were faced with a case more similar to the present one than the majority will allow. In discrimination cases, our precedents require a plaintiff at the summary judgment stage to produce either direct evidence of discrimination or, if the claim is based primarily on circumstantial evidence, to meet the shifting evidentiary burdens imposed under the framework articulated in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973). See, *e.g.*, *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 121 (1985). Swierkiewicz alleged that he had been terminated on account of national origin in violation of Title VII of the



Civil Rights Act of 1964. The Second Circuit dismissed the suit on the pleadings because he had not pleaded a prima facie case of discrimination under the *McDonnell Douglas* standard.

We reversed in another unanimous opinion, holding that "under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case." *Swierkiewicz*, 534 U. S., at 511. We also observed that Rule 8(a)(2) does not contemplate a court's passing on the merits of a litigant's claim at the pleading stage. Rather, the "simplified notice pleading standard" of the Federal Rules "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.*, at 512; see Brief for United States et al. as *Amici Curiae* in *Swierkiewicz* v. *Sorema N. A.*, O. T. 2001, No. 00–1853, p. 10 (stating that a Rule 12(b)(6) motion is not "an appropriate device for testing the truth of what is asserted or for determining whether a plaintiff has any evidence to back up what is in the complaint" (internal quotation marks omitted)).[7]

As in the discrimination context, we have developed an evidentiary framework for evaluating claims under §1 of the Sherman Act when those claims rest on entirely circumstantial evidence of conspiracy. See *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986).

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[7] See also 5 Wright & Miller §1202, at 89–90 ("[P]leadings under the rules simply may be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon, to provide some guidance in a subsequent proceeding as to what was decided for purposes of res judicata and collateral estoppel, and to indicate whether the case should be tried to the court or to a jury. No more is demanded of the pleadings than this; indeed, history shows that no more can be performed successfully by the pleadings" (footnotes omitted)).

Under *Matsushita*, a plaintiff's allegations of an illegal conspiracy may not, at the summary judgment stage, rest solely on the inferences that may be drawn from the parallel conduct of the defendants. In order to survive a Rule 56 motion, a §1 plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently.'" *Id.*, at 588 (quoting *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 764 (1984)). That is, the plaintiff "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action." 475 U. S., at 588.

Everything today's majority says would therefore make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than the Court has described. But it should go without saying in the wake of *Swierkiewicz* that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage. The majority rejects the complaint in this case because—in light of the fact that the parallel conduct alleged is consistent with ordinary market behavior—the claimed conspiracy is "conceivable" but not "plausible," *ante,* at 24. I have my doubts about the majority's assessment of the plausibility of this alleged conspiracy. See Part III, *infra*. But even if the majority's speculation is correct, its "plausibility" standard is irreconcilable with Rule 8 and with our governing precedents. As we made clear in *Swierkiewicz* and *Leatherman*, fear of the burdens of litigation does not justify factual conclusions supported only by lawyers' arguments rather than sworn denials or admissible evidence.

This case is a poor vehicle for the Court's new pleading rule, for we have observed that "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' . . . dismissals prior to giving the plaintiff ample



opportunity for discovery should be granted very sparingly." *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U. S. 738, 746 (1976) (quoting *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962)); see also *Knuth* v. *Erie-Crawford Dairy Cooperative Assn.*, 395 F. 2d 420, 423 (CA3 1968) ("The 'liberal' approach to the consideration of antitrust complaints is important because inherent in such an action is the fact that all the details and specific facts relied upon cannot properly be set forth as part of the pleadings"). Moreover, the fact that the Sherman Act authorizes the recovery of treble damages and attorney's fees for successful plaintiffs indicates that Congress intended to encourage, rather than discourage, private enforcement of the law. See *Radovich* v. *National Football League*, 352 U. S. 445, 454 (1957) ("Congress itself has placed the private antitrust litigant in a most favorable position . . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws"). It is therefore more, not less, important in antitrust cases to resist the urge to engage in armchair economics at the pleading stage.

The same year we decided *Conley*, Judge Clark wrote, presciently,

> "I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings, i.e., the formalistic claims of the parties. Experience has found no quick and easy short cut for trials in cases generally *and antitrust cases in particular*." Special Pleading in the "Big Case"? in Procedure—The Handmaid of Justice 147, 148 (C. Wright & H. Reasoner eds. 1965) (hereinafter Clark, Special Pleading in the Big Case) (emphasis added).

In this "Big Case," the Court succumbs to the temptation that previous Courts have steadfastly resisted.[8] While the majority assures us that it is not applying any "'heightened'" pleading standard, see *ante*, at 23, n. 14, I shall now explain why I have a difficult time understanding its opinion any other way.

III

The Court does not suggest that an agreement to do what the plaintiffs allege would be permissible under the antitrust laws, see, *e.g.*, *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 526–527 (1983). Nor does the Court hold that these plaintiffs have failed to allege an injury entitling them to sue for damages under those laws, see *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 489–490 (1977). Rather, the theory on

[8] Our decision in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336 (2005), is not to the contrary. There, the plaintiffs failed adequately to allege loss causation, a required element in a private securities fraud action. Because it alleged nothing more than that the prices of the securities the plaintiffs purchased were artificially inflated, the *Dura* complaint failed to "provide the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the [alleged] misrepresentation." *Id.*, at 347. Here, the failure the majority identifies is not a failure of notice—which "notice pleading" rightly condemns—but rather a failure to satisfy the Court that the agreement alleged might plausibly have occurred. That being a question not of *notice* but of *proof*, it should not be answered without first hearing from the defendants (as apart from their lawyers).

Similarly, in *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519 (1983), in which we also found an antitrust complaint wanting, the problem was not that the injuries the plaintiffs alleged failed to satisfy some threshold of plausibility, but rather that the injuries *as alleged* were not "the type that the antitrust statute was intended to forestall." *Id.*, at 540; see *id.*, at 526 ("As the case comes to us, we must assume that the Union can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged").



which the Court permits dismissal is that, so far as the Federal Rules are concerned, no agreement has been alleged at all. This is a mind-boggling conclusion.

As the Court explains, prior to the enactment of the Telecommunications Act of 1996 the law prohibited the defendants from competing with each other. The new statute was enacted to replace a monopolistic market with a competitive one. The Act did not merely require the regional monopolists to take affirmative steps to facilitate entry to new competitors, see *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398, 402 (2004); it also permitted the existing firms to compete with each other and to expand their operations into previously forbidden territory. See 47 U. S. C. §271. Each of the defendants decided not to take the latter step. That was obviously an extremely important business decision, and I am willing to presume that each company acted entirely independently in reaching that decision. I am even willing to entertain the majority's belief that any agreement among the companies was unlikely. But the plaintiffs allege in three places in their complaint, ¶¶ 4, 51, 64, App. 11, 27, 30, that the ILECs did in fact agree both to prevent competitors from entering into their local markets and to forgo competition with each other. And as the Court recognizes, at the motion to dismiss stage, a judge assumes "that all the allegations in the complaint are true (even if doubtful in fact)." *Ante*, at 8–9.

The majority circumvents this obvious obstacle to dismissal by pretending that it does not exist. The Court admits that "in form a few stray statements in the complaint speak directly of agreement," but disregards those allegations by saying that "on fair reading these are merely legal conclusions resting on the prior allegations" of parallel conduct. *Ante*, at 18. The Court's dichotomy between factual allegations and "legal conclusions" is the stuff of a bygone era, *supra*, at 5–7. That distinction was a

defining feature of code pleading, see generally Clark, The Complaint in Code Pleading, 35 Yale L. J. 259 (1925–1926), but was conspicuously abolished when the Federal Rules were enacted in 1938. See *United States* v. *Employing Plasterers Assn. of Chicago*, 347 U. S. 186, 188 (1954) (holding, in an antitrust case, that the Government's allegations of effects on interstate commerce must be taken into account in deciding whether to dismiss the complaint "[w]hether these charges be called 'allegations of fact' or 'mere conclusions of the pleader'"); *Brownlee* v. *Conine*, 957 F. 2d 353, 354 (CA7 1992) ("The Federal Rules of Civil Procedure establish a system of notice pleading rather than of fact pleading, . . . so the happenstance that a complaint is 'conclusory,' whatever exactly that overused lawyers' cliché means, does not automatically condemn it"); *Walker Distributing Co.* v. *Lucky Lager Brewing Co.*, 323 F. 2d 1, 3–4 (CA9 1963) ("[O]ne purpose of Rule 8 was to get away from the highly technical distinction between statements of fact and conclusions of law . . ."); *Oil, Chemical & Atomic Workers Int'l Union* v. *Delta*, 277 F. 2d 694, 697 (CA6 1960) ("Under the notice system of pleading established by the Rules of Civil Procedure, . . . the ancient distinction between pleading 'facts' and 'conclusions' is no longer significant"); 5 Wright & Miller §1218, at 267 ("[T]he federal rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties"). "Defendants entered into a contract" is no more a legal conclusion than "defendant negligently drove," see Form 9; *supra*, at 6. Indeed it is less of one.[9]

[9]The Court suggests that the allegation of an agreement, even if credited, might not give the notice required by Rule 8 because it lacks specificity. *Ante*, at 18–19, n. 10. The remedy for an allegation lacking sufficient specificity to provide adequate notice is, of course, a Rule 12(e) motion for a more definite statement. See *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 514 (2002). Petitioners made no such motion and indeed have conceded that "[o]ur problem with the current complaint is not a lack of specificity, it's quite specific." Tr. of Oral Arg. 14. Thus, the fact that "the pleadings mentioned no specific time, place, or persons involved in the alleged conspiracies," *ante*, at 18, n. 10, is, for our purposes, academic.



Even if I were inclined to accept the Court's anachronistic dichotomy and ignore the complaint's actual allegations, I would dispute the Court's suggestion that any inference of agreement from petitioners' parallel conduct is "implausible." Many years ago a truly great economist perceptively observed that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." A. Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations, in 39 Great Books of the Western World 55 (R. Hutchins & M. Adler eds. 1952). I am not so cynical as to accept that sentiment at face value, but I need not do so here. Respondents' complaint points not only to petitioners' numerous opportunities to meet with each other, Complaint ¶46, App. 23,[10] but also to Notebaert's curious statement that encroaching on a fellow incumbent's territory "might be a good way to turn a quick dollar but that doesn't make it right," *id.*, ¶42, App. 22. What did he mean by that? One possible (indeed plausible) inference is that he meant that while it would be in his company's

[10]The Court describes my reference to the allegation that the defendants belong to various trade associations as "playfully" suggesting that the defendants conspired to restrain trade. *Ante*, at 20, n. 12. Quite the contrary: an allegation that competitors meet on a regular basis, like the allegations of parallel conduct, is consistent with—though not sufficient to prove—the plaintiffs' entirely serious and unequivocal allegation that the defendants entered into an unlawful agreement. Indeed, if it were true that the plaintiffs "rest their §1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs," *ante*, at 18, there would have been no purpose in including a reference to the trade association meetings in the amended complaint.

economic self-interest to compete with its brethren, he had agreed with his competitors not to do so. According to the complaint, that is how the Illinois Coalition for Competitive Telecom construed Notebaert's statement, *id.,* ¶44, App. 22 (calling the statement "evidence of potential collusion among regional Bell phone monopolies to not compete against one another and kill off potential competitors in local phone service"), and that is how Members of Congress construed his company's behavior, *id.,* ¶45, App. 23 (describing a letter to the Justice Department requesting an investigation into the possibility that the ILECs' "very apparent non-competition policy" was coordinated).

Perhaps Notebaert meant instead that competition would be sensible in the short term but not in the long run. That's what his lawyers tell us anyway. See Brief for Petitioners 36. But I would think that no one would know better what Notebaert meant than Notebaert himself. Instead of permitting respondents to ask Notebaert, however, the Court looks to other quotes from that and other articles and decides that what he meant was that entering new markets as a CLEC would not be a "'sustainable economic model.'" *Ante*, at 22, n. 13. Never mind that—as anyone ever interviewed knows—a newspaper article is hardly a verbatim transcript; the writer selects quotes to package his story, not to record a subject's views for posterity. But more importantly the District Court was required at this stage of the proceedings to construe Notebaert's ambiguous statement in the plaintiffs' favor.[11] See

[11] It is ironic that the Court seeks to justify its decision to draw factual inferences in the defendants' favor at the pleading stage by citing to a rule of evidence, *ante*, at 22, n. 13. Under Federal Rule of Evidence 201(b), a judicially noticed fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Whether Notebaert's statements constitute evidence of a conspiracy is hardly beyond reasonable dispute.



*Allen* v. *Wright*, 468 U. S. 737, 768, n. 1 (1984). The inference the statement supports—that simultaneous decisions by ILECs not even to attempt to poach customers from one another once the law authorized them to do so were the product of an agreement—sits comfortably within the realm of possibility. That is all the Rules require.

To be clear, if I had been the trial judge in this case, I would not have permitted the plaintiffs to engage in massive discovery based solely on the allegations in this complaint. On the other hand, I surely would not have dismissed the complaint without requiring the defendants to answer the charge that they "have agreed not to compete with one another and otherwise allocated customers and markets to one another."[12] ¶51, App. 27. Even a sworn denial of that charge would not justify a summary dismissal without giving the plaintiffs the opportunity to take depositions from Notebaert and at least one responsible executive representing each of the other defendants.

Respondents in this case proposed a plan of "'phased discovery'" limited to the existence of the alleged conspiracy and class certification. Brief for Respondents 25–26. Two petitioners rejected the plan. *Ibid.* Whether or not respondents' proposed plan was sensible, it was an appropriate subject for negotiation.[13] Given the charge in the

[12] The Court worries that a defendant seeking to respond to this "conclusory" allegation "would have little idea where to begin." *Ante*, at 19, n. 10. A defendant could, of course, begin by either denying or admitting the charge.

[13] The potential for "sprawling, costly, and hugely time-consuming" discovery, *ante*, at 13, n. 6, is no reason to throw the baby out with the bathwater. The Court vastly underestimates a district court's case-management arsenal. Before discovery even begins, the court may grant a defendant's Rule 12(e) motion; Rule 7(a) permits a trial court to order a plaintiff to reply to a defendant's answer, see *Crawford-El* v. *Britton*, 523 U. S. 574, 598 (1998); and Rule 23 requires "rigorous analysis" to ensure that class certification is appropriate, *General*

complaint—buttressed by the common sense of Adam

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*Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 160 (1982); see *In re Initial Public Offering Securities Litigation*, 471 F. 3d 24 (CA2 2006) (holding that a district court may not certify a class without ruling that each Rule 23 requirement is met, even if a requirement overlaps with a merits issue). Rule 16 invests a trial judge with the power, backed by sanctions, to regulate pretrial proceedings via conferences and scheduling orders, at which the parties may discuss, *inter alia*, "the elimination of frivolous claims or defenses," Rule 16(c)(1); "the necessity or desirability of amendments to the pleadings," Rule 16(c)(2); "the control and scheduling of discovery," Rule 16(c)(6); and "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems," Rule 16(c)(12). Subsequently, Rule 26 confers broad discretion to control the combination of interrogatories, requests for admissions, production requests, and depositions permitted in a given case; the sequence in which such discovery devices may be deployed; and the limitations imposed upon them. See 523 U. S., at 598–599. Indeed, Rule 26(c) specifically permits a court to take actions "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by, for example, disallowing a particular discovery request, setting appropriate terms and conditions, or limiting its scope.

In short, the Federal Rules contemplate that pretrial matters will be settled through a flexible process of give and take, of proffers, stipulations, and stonewalls, not by having trial judges screen allegations for their plausibility *vel non* without requiring an answer from the defendant. See *Societe Internationale pour Participations Industrielles et Commerciales, S. A.* v. *Rogers*, 357 U. S. 197, 206 (1958) ("Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation"). And should it become apparent over the course of litigation that a plaintiff's filings bespeak an *in terrorem* suit, the district court has at its call its own *in terrorem* device, in the form of a wide array of Rule 11 sanctions. See Rules 11(b), (c) (authorizing sanctions if a suit is presented "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"); see *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 498 U. S. 533 (1991) (holding that Rule 11 applies to a represented party who signs a pleading, motion, or other papers, as well as to attorneys); *Atkins* v. *Fischer*, 232 F. R. D. 116, 126 (DC 2005) ("As possible sanctions pursuant to Rule 11, the court has an arsenal of options at its disposal").



Smith—I cannot say that the possibility that joint discussions and perhaps some agreements played a role in petitioners' decisionmaking process is so implausible that dismissing the complaint before any defendant has denied the charge is preferable to granting respondents even a minimal opportunity to prove their claims. See Clark, New Federal Rules 977 ("[T]hrough the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of *proof*, and do not need to force the pleadings to their less appropriate function").

I fear that the unfortunate result of the majority's new pleading rule will be to invite lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence. It is no surprise that the antitrust defense bar—among whom "lament" as to inadequate judicial supervision of discovery is most "common," see *ante*, at 12—should lobby for this state of affairs. But "we must recall that their primary responsibility is to win cases for their clients, not to improve law administration for the public." Clark, Special Pleading in the Big Case 152. As we did in our prior decisions, we should have instructed them that their remedy was to seek to amend the Federal Rules—not our interpretation of them.[14] See

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[14] Given his "background in antitrust law," *ante*, at 13, n. 6, Judge Easterbrook has recognized that the most effective solution to discovery abuse lies in the legislative and rulemaking arenas. He has suggested that the remedy for the ills he complains of requires a revolution in the rules of civil procedure:

"Perhaps a system in which judges pare away issues and focus on investigation is too radical to contemplate in this country—although it prevailed here before 1938, when the Federal Rules of Civil Procedure were adopted. The change could not be accomplished without abandoning notice pleading, increasing the number of judicial officers, and giving them more authority . . . . If we are to rule out judge-directed discovery, however, we must be prepared to pay the piper. Part of the price is the high cost of unnecessary discovery—impositional and

*Swierkiewicz*, 534 U. S., at 515; *Crawford-El* v. *Britton*, 523 U. S. 574, 595 (1998); *Leatherman*, 507 U. S., at 168.

IV

Just a few weeks ago some of my colleagues explained that a strict interpretation of the literal text of statutory language is essential to avoid judicial decisions that are not faithful to the intent of Congress. *Zuni Public School Dist. No. 89* v. *Department of Education*, 550 U. S. ___, ___ (2007) (SCALIA, J., dissenting). I happen to believe that there are cases in which other tools of construction are more reliable than text, but I agree of course that congressional intent should guide us in matters of statutory interpretation. *Id.*, at ___ (STEVENS, J., concurring). This is a case in which the intentions of the drafters of three important sources of law—the Sherman Act, the Telecommunications Act of 1996, and the Federal Rules of Civil Procedure—all point unmistakably in the same direction, yet the Court marches resolutely the other way. Whether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer. But that the Court has announced a significant new rule that does not even purport to respond to any congressional command is glaringly obvious.

The transparent policy concern that drives the decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our economy—from the burdens of pretrial discovery. *Ante*, at 11–13. Even if it were not apparent that the legal fees petitioners have incurred in arguing the merits of their Rule 12(b) motion have far exceeded the cost of limited discovery, or that those discovery costs would burden

otherwise." Discovery as Abuse, 69 B. U. L. Rev. 635, 645 (1989).



respondents as well as petitioners,[15] that concern would not provide an adequate justification for this law-changing decision. For in the final analysis it is only a lack of confidence in the ability of trial judges to control discovery, buttressed by appellate judges' independent appraisal of the plausibility of profoundly serious factual allegations, that could account for this stark break from precedent.

If the allegation of conspiracy happens to be true, today's decision obstructs the congressional policy favoring competition that undergirds both the Telecommunications Act of 1996 and the Sherman Act itself. More importantly, even if there is abundant evidence that the allegation is untrue, directing that the case be dismissed without even looking at any of that evidence marks a fundamental—and unjustified—change in the character of pretrial practice.

Accordingly, I respectfully dissent.

[15] It would be quite wrong, of course, to assume that dismissal of an antitrust case after discovery is costless to plaintiffs. See Fed. Rule Civ. Proc. 54(d)(1) ("[C]osts other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs").

**The Most Important Business Cases of the 2006-07 Supreme Court Term: Various Perspectives**

**I. The Incredibly Shrinking Supreme Court Docket: 75 Cases**

**II. What is Taken, Matters More So . . . What Were the Leading Business Cases of the 2006-07 Term ( Use and Not Abuse of A Moderator's Prerogatives )**

- **A. Phillip Morris v. Williams (included)**
- **B. Massachusetts v. EPA (included)**
- **C. Watters v. Wachovia (included)**
- **D. Bell Atlantic v. Twombly (included)**
- **E. Ledbetter v. Goodyear Tire**
- **F. Safeco Insurance v. Burr (included)**
- **G. Long Island Care at Home v. Coke (included)**
- **H. Tellabs, Inc. v. Makor Issues**
- **I. Leggin Creative Leather Products v. PSKS, Inc.**
- **J. Microsoft v. ATT Corp.**
- **K. NAHB v. Defenders of Wildlife**
- **L. Credit Suisse Securities v. Billing**
- M. **KSR International v. Teleflex**
- N. **Global Crossing v. Metrophones**



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

NATIONAL ASSOCIATION OF HOME BUILDERS ET AL. *v.* DEFENDERS OF WILDLIFE ET AL.

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

No. 06–340. Argued April 17, 2007—Decided June 25, 2007*

Under the Clean Water Act (CWA), petitioner Environmental Protection Agency (EPA) initially administers each State's National Pollution Discharge Elimination System (NPDES) permitting program, but CWA §402(b) provides that the EPA "shall approve" transfer of permitting authority to a State upon application and a showing that the State has met nine specified criteria. Section 7(a)(2) of the Endangered Species Act of 1973 (ESA) requires federal agencies to consult with agencies designated by the Secretaries of Commerce and the Interior to "insure" that a proposed agency action is unlikely to jeopardize an endangered or threatened species. The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) administer the ESA. Once a consultation process is complete, a written biological opinion is issued, which may suggest alternative actions to protect a jeopardized species or its critical habitat. When Arizona officials sought EPA authorization to administer the State's NPDES program, the EPA initiated consultation with the FWS to determine whether the transfer would adversely affect any listed species. The FWS regional office wanted potential impacts taken into account, but the EPA disagreed, finding that §402(b)'s mandatory nature stripped it of authority to disapprove a transfer based on any other considerations. The dispute was referred to the agencies' national offices for resolution. The FWS's biological opinion concluded that the requested transfer would not jeopardize listed species. The EPA concluded that Arizona had met each of §402(b)'s

*Together with No. 06–549, *Environmental Protection Agency* v. *Defenders of Wildlife et al.*, also on certiorari to the same court.

nine criteria and approved the transfer, noting that the biological opinion had concluded the consultation "required" by ESA §7(a)(2). Respondents sought review in the Ninth Circuit, petitioner National Association of Home Builders intervened, and part of respondent Defenders of Wildlife's separate action was consolidated with the suit. The court held that the EPA's transfer approval was arbitrary and capricious because the EPA had relied on contradictory positions regarding its §7(a)(2) responsibilities during the administrative process. Rather than remanding the case for the agency to explain its decision, however, the court reviewed the EPA's substantive construction of the statutes. It did not dispute that Arizona had met CWA §402(b)'s nine criteria, but nevertheless concluded that ESA §7(a)(2) required the EPA to determine whether its transfer decision would jeopardize listed species, in effect adding a tenth criterion. The court dismissed the argument that the EPA's approval was not subject to §7(a)(2) because it was not a "discretionary action" under 50 CFR §402.03, §7(a)(2)'s interpretative regulation. The court thus vacated the EPA's transfer decision.

*Held:*

1. The Ninth Circuit's determination that the EPA's action was arbitrary and capricious is not fairly supported by the record. This Court will not vacate an agency's decision under the arbitrary and capricious standard unless the agency "relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43. Here, the Ninth Circuit concluded that the EPA's decision was internally inconsistent in its statements during the review process. Federal courts ordinarily are empowered to review only an agency's *final* action, and the fact that a local agency representative's preliminary determination is later overruled at a higher agency level does not render the decisionmaking process arbitrary and capricious. The EPA's final approval notice stating that §7(a)(2)'s required consultation process had been concluded may be inconsistent with its previously expressed position—and position in this litigation—that §7(a)(2)'s consultation requirement is not triggered by a §402 transfer application, but that is not the type of error requiring a remand. By the time the statement was issued, the EPA and FWS had already consulted, and the question whether that consultation had been *required* was not germane to the final agency decision. Thus, this Court need not further delay the permitting authority transfer by



remanding to the agency for clarification. Respondents suggest that the EPA nullified their right to participate in the application proceedings by altering its legal position during the pendency of the transfer decision and its associated litigation, but they do not suggest that they were deprived of their right to comment during the comment period made available under the EPA's regulations. Pp. 10–14.

2. Because §7(a)(2)'s no-jeopardy duty covers only discretionary agency actions, it does not attach to actions (like the NPDES permitting transfer authorization) that an agency is *required* by statute to undertake once certain specified triggering events have occurred. Pp. 14–25.

(a) At first glance the legislative commands here are irreconcilable. Section 402(b)'s "shall approve" language is mandatory and its list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application. Section 7(a)(2)'s similarly imperative language would literally add a tenth criterion to §402(b). Pp. 14–15.

(b) While a later enacted statute (such as the ESA) can sometimes operate to amend or even repeal an earlier statutory provision (such as the CWA), "repeals by implication are not favored" and will not be presumed unless the legislature's intention "to repeal [is] clear and manifest." *Watt* v. *Alaska*, 451 U. S. 259, 267. Statutory repeal will not be inferred "unless the later statute ' "expressly contradict[s] the original act" ' or such a construction ' "is absolutely necessary [to give the later statute's words] any meaning at all." ' " *Traynor* v. *Turnage*, 485 U. S. 535, 548. Otherwise, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 153. The Ninth Circuit's reading of §7(a)(2) would effectively repeal §402(b)'s mandate that the EPA "shall" issue a permit whenever all nine exclusive statutory prerequisites are met. Section 402(b) does not just set *minimum* requirements; it affirmatively mandates a transfer's approval, thus operating as a ceiling as well as a floor. By adding an additional criterion, the Ninth Circuit raises that floor and alters the statute's command. Read broadly, the Ninth Circuit's construction would also partially override every federal statute mandating agency action by subjecting such action to the further condition that it not jeopardize listed species. Pp. 15–17.

(c) Title 50 CFR §402.03, promulgated by the NMFS and FWS and applying §7(a)(2) "to all actions in which there is *discretionary* Federal involvement or control" (emphasis added), harmonizes the CWA and ESA by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency

is forbidden from considering such extrastatutory factors. The Court owes "some degree of deference to the Secretary's reasonable interpretation" of the ESA, *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 703. Deference is not due if Congress has made its intent "clear" in the statutory text, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842, but "if the statute is silent or ambiguous . . . the question . . . is whether the agency's answer is based on a permissible construction of the statute," *id.*, at 843. Because the "meaning—or ambiguity—of certain words or phrases may only become evident . . . in context," *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 132, §7(a)(2) must be read against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or repeal were it construed as broadly as the Ninth Circuit did below. Such a reading leaves a fundamental ambiguity. An agency cannot simultaneously obey the differing mandates of ESA §7(a)(2) and CWA §402(b), and consequently the statutory language—read in light of the canon against implied repeals—does not itself provide clear guidance as to which command must give way. Thus, it is appropriate to look to the implementing agency's expert interpretation, which harmonizes the statutes by applying §7(a)(2) to guide agencies' existing discretionary authority, but not reading it to override express statutory mandates. This interpretation is reasonable in light of the statute's text and the overall statutory scheme and is therefore entitled to *Chevron* deference. The regulation's focus on "discretionary" actions accords with the commonsense conclusion that, when an agency is *required* to do something by statute, it simply lacks the power to "insure" that such action will not jeopardize listed species. The basic principle of *Department of Transportation* v. *Public Citizen*, 541 U. S. 752—that an agency cannot be considered the legal "cause" of an action that it has no statutory discretion *not* to take, *id.*, at 770—supports the reasonableness of the FWS's interpretation. Pp. 17–22.

(d) Respondents' contrary position is not supported by *TVA* v. *Hill*, 437 U. S. 153, which had no occasion to answer the question presented in these cases. Pp. 22–24.

(e) Also unavailing is the argument that EPA's decision to transfer NPDES permitting authority to Arizona represented a "discretionary" agency action. While the EPA may exercise some judgment in determining whether a State has shown that it can carry out §402(b)'s enumerated criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list. Nothing in §402(b) authorizes the EPA to consider the protection of listed species as an end in itself when evaluating a transfer application. And to the extent that some of §402(b)'s criteria may result in environmental benefits to marine species, Arizona has satisfied each of those criteria. Respondents' argument has also been disclaimed by the FWS and the NMFS, the agencies primarily charged with administering §7(a)(2) and the drafters of the regulations implementing that section. Pp. 24–25.

420 F. 3d 946, reversed and remanded.



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

# SUPREME COURT OF THE UNITED STATES

Nos. 06–340 and 06–549

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL., PETITIONERS
06–340 *v.*
DEFENDERS OF WILDLIFE ET AL.

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER
06–549 *v.*
DEFENDERS OF WILDLIFE ET AL.

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

[June 25, 2007]

JUSTICE ALITO delivered the opinion of the Court.

These cases concern the interplay between two federal environmental statutes. Section 402(b) of the Clean Water Act requires that the Environmental Protection Agency transfer certain permitting powers to state authorities upon an application and a showing that nine specified criteria have been met. Section 7(a)(2) of the Endangered Species Act of 1973 provides that a federal agency must consult with agencies designated by the Secretaries of Commerce and the Interior in order to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." The question presented is whether §7(a)(2) effectively operates as a



tenth criterion on which the transfer of permitting power under the first statute must be conditioned. We conclude that it does not. The transfer of permitting authority to state authorities—who will exercise that authority under continuing federal oversight to ensure compliance with relevant mandates of the Endangered Species Act and other federal environmental protection statutes—was proper. We therefore reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

## I

### A

#### 1

The Clean Water Act of 1972 (CWA), 86 Stat. 816, 33 U. S. C. §1251 *et seq.*, established a National Pollution Discharge Elimination System (NPDES) that is designed to prevent harmful discharges into the Nation's waters. The Environmental Protection Agency (EPA) initially administers the NPDES permitting system for each State, but a State may apply for a transfer of permitting authority to state officials. See 33 U. S. C. §1342; see also §1251(b) ("It is the policy of Congress that the Stat[e] . . . implement the permit progra[m] under sectio[n] 1342 . . . of this title"). If authority is transferred, then state officials—not the federal EPA—have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight.[1]

Under §402(b) of the CWA, "the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to [the EPA] a full and complete description of the

[1] The State must advise the EPA of each permit it proposes to issue, and the EPA may object to any permit. 33 U. S. C. §§1342(d)(1), (2); see also 40 CFR §123.44(c) (2006). If the State cannot address the EPA's concerns, authority over the permit reverts to the EPA. 33 U. S. C. §1342(d)(4).

program it proposes to establish and administer under State law or under an interstate compact," as well as a certification "that the laws of such State . . . provide adequate authority to carry out the described program." 33 U. S. C. §1342(b). The same section provides that the EPA "shall approve each submitted program" for transfer of permitting authority to a State "unless [it] determines that adequate authority does not exist" to ensure that nine specified criteria are satisfied. *Ibid.* These criteria all relate to whether the state agency that will be responsible for permitting has the requisite authority under state law to administer the NPDES program.[2] If the criteria are met, the transfer must be approved.

2

The Endangered Species Act of 1973 (ESA), 87 Stat. 884, as amended, 16 U. S. C. §1531 *et seq.*, is intended to protect and conserve endangered and threatened species and their habitats. Section 4 of the ESA directs the Secretaries of Commerce and the Interior to list threatened and

[2]The State must demonstrate that it has the ability: (1) to issue fixed-term permits that apply and ensure compliance with the CWA's substantive requirements and which are revocable for cause; (2) to inspect, monitor, and enter facilities and to require reports to the extent required by the CWA; (3) to provide for public notice and public hearings; (4) to ensure that the EPA receives notice of each permit application; (5) to ensure that any other State whose waters may be affected by the issuance of a permit may submit written recommendations and that written reasons be provided if such recommendations are not accepted; (6) to ensure that no permit is issued if the Army Corps of Engineers concludes that it would substantially impair the anchoring and navigation of navigable waters; (7) to abate violations of permits or the permit program, including through civil and criminal penalties; (8) to ensure that any permit for a discharge from a publicly owned treatment works includes conditions requiring the identification of the type and volume of certain pollutants; and (9) to ensure that any industrial user of any publicly owned treatment works will comply with certain of the CWA's substantive provisions. §§1342(b)(1)–(9).



endangered species and to designate their critical habitats. §1533. The Fish and Wildlife Service (FWS) administers the ESA with respect to species under the jurisdiction of the Secretary of the Interior, while the National Marine Fisheries Service (NMFS) administers the ESA with respect to species under the jurisdiction of the Secretary of Commerce. See 50 CFR §§17.11, 222.101(a), 223.102, 402.01(b) (2006).

Section 7 of the ESA prescribes the steps that federal agencies must take to ensure that their actions do not jeopardize endangered wildlife and flora. Section 7(a)(2) provides that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U. S. C. §1536(a)(2).

Once the consultation process contemplated by §7(a)(2) has been completed, the Secretary is required to give the agency a written biological opinion "setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." §1536(b)(3)(A); see also 50 CFR §402.14(h). If the Secretary concludes that the agency action would place the listed species in jeopardy or adversely modify its critical habitat, "the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate [§7(a)(2)] and can be taken by the Federal agency . . . in implementing the agency action." 16 U. S. C. §1536(b)(3)(A); see also 50 CFR §402.14(h)(3). Regulations promulgated jointly by the Secretaries of Commerce and the Interior provide that, in order to qualify as a "reasonable and prudent alternative," an alternative course of action must be able to be implemented in a way "consis-

tent with the scope of the Federal agency's legal authority and jurisdiction." §402.02. Following the issuance of a "jeopardy" opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee pursuant to 16 U. S. C. §1536(e). The regulations also provide that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 CFR §402.03.

B

1

In February 2002, Arizona officials applied for EPA authorization to administer that State's NPDES program.[3] The EPA initiated consultation with the FWS to determine whether the transfer of permitting authority would adversely affect any listed species.

The FWS regional office concluded that the transfer of authority would not cause any direct impact on water quality that would adversely affect listed species. App. to Pet. for Cert. in No. 06–340, p. 564. However, the FWS office was concerned that the transfer could result in the issuance of more discharge permits, which would lead to more development, which in turn could have an indirect adverse effect on the habitat of certain upland species, such as the cactus ferruginous pygmy-owl and the Pima pineapple cactus. Specifically, the FWS feared that, because §7(a)(2)'s consultation requirement does not apply to permitting decisions by state authorities,[4] the transfer of authority would empower Arizona officials to issue individual permits without considering and mitigating their

[3]At the time when Arizona applied, the EPA had already transferred permitting authority to local authorities in 44 other States and several United States Territories.

[4]By its terms, §7(a)(2)'s consultation requirement applies only to "action[s] authorized, funded, or carried out" by "Federal agenc[ies]."



indirect impact on these upland species. *Id.,* at 565–566. The FWS regional office therefore urged that, in considering the proposed transfer of permitting authority, those involved in the consultation process should take these potential indirect impacts into account.

The EPA disagreed, maintaining that "its approval action, which is an administrative transfer of authority, [would not be] the cause of future non-discharge-related impacts on endangered species from projects requiring State NPDES permits." *Id.,* at 564. As a factual matter, the EPA believed that the link between the transfer of permitting authority and the potential harm that could result from increased development was too attenuated. *Id.*, at 654. And as a legal matter, the EPA concluded that the mandatory nature of CWA §402(b)—which directs that the EPA "shall approve" a transfer request if that section's nine statutory criteria are met—stripped it of authority to disapprove a transfer based on any other considerations. *Id.*, at 654–655.

Pursuant to procedures set forth in a memorandum of understanding between the agencies, the dispute was referred to the agencies' national offices for resolution. In December 2002, the FWS issued its biological opinion, which concluded that the requested transfer would not cause jeopardy to listed species. The opinion reasoned that "the loss of section 7-related conservation benefits . . . is not an indirect effect of the authorization action," *id.,* at 117, because

> "loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of

[§]402(b) of the Clean Water Act." *Id.,* at 114.

In addition, the FWS opined that the EPA's continuing oversight of Arizona's permitting program, along with other statutory protections, would adequately protect listed species and their habitats following the transfer. *Id.*, at 101–107.

The EPA concluded that Arizona had met each of the nine statutory criteria listed in §402(b) and approved the transfer of permitting authority. In the notice announcing the approval of the transfer, the EPA noted that the issuance of the FWS's biological opinion had "conclude[d] the consultation process required by ESA section 7(a)(2) and reflects the [FWS'] agreement with EPA that the approval of the State program meets the substantive requirements of the ESA." *Id.,* at 73.

2

On April 2, 2003, respondents filed a petition in the United States Court of Appeals for the Ninth Circuit seeking review of the transfer pursuant to 33 U. S. C. §1369(b)(1)(D), which allows private parties to seek direct review of the EPA's determinations regarding state permitting programs in the federal courts of appeals. The court granted petitioner National Association of Homebuilders leave to intervene as a respondent in that case. Respondent Defenders of Wildlife also filed a separate action in the United States District Court for the District of Arizona, alleging, among other things, that the biological opinion issued by the FWS in support of the proposed transfer did not comply with the ESA's standards. The District Court severed that claim and transferred it to the Court of Appeals for the Ninth Circuit, which consolidated the case with the suit challenging the EPA transfer. See 420 F. 3d 946 (2005).

A divided panel of the Ninth Circuit held that the EPA's approval of the transfer was arbitrary and capricious



because the EPA "relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations." *Id.,* at 959. The court concluded that the EPA "fail[ed] to understand its own authority under section 7(a)(2) to act on behalf of listed species and their habitat," *id.*, at 977, because "the two propositions that underlie the EPA's action—that (1) it must, under the [ESA], consult concerning transfers of CWA permitting authority, but (2) it is not permitted, as a matter of law, to take into account the impact on listed species in making the transfer decision—cannot both be true," *id.*, at 961. The court therefore concluded that it was required to "remand to the agency for a plausible explanation of its decision, based on a single, coherent interpretation of the statute." *Id.*, at 962.

The panel majority, however, did not follow this course of action. Rather, the panel went on to review the EPA's substantive construction of the statutes at issue and held that the ESA granted the EPA both the power and the duty to determine whether its transfer decision would jeopardize threatened or endangered species. The panel did not dispute that Arizona had met the nine criteria set forth in §402(b) of the CWA, but the panel nevertheless concluded that §7(a)(2) of the ESA provided an "affirmative grant of authority to attend to [the] protection of listed species," *id.*, at 965, in effect adding a tenth criterion to those specified in §402(b). The panel dismissed the argument that the EPA's approval of the transfer application was not subject to §7(a)(2) because it was not a "discretionary action" within the meaning of 50 CFR §402.03 (interpreting §7(a)(2) to apply only to agency actions "in which there is discretionary Federal involvement and control"). 420 F. 3d, at 967–969. It viewed the FWS's regulation as merely "coterminous" with the express statutory language encompassing all agency actions that are "'authorized, funded, or carried out'" by the agency.

*Id.*, at 969 (quoting 16 U. S. C. §1536(a)(2)). On these grounds, the court granted the petition and vacated the EPA's transfer decision.

In dissent, Judge Thompson explained that the transfer decision was not a "discretionary action" under 50 CFR §402.03 because "[t]he Clean Water Act, by its very terms, permits the EPA to consider only the nine specified factors. If a state's proposed permitting program meets the enumerated requirements," he reasoned, "the EPA administrator 'shall approve' the program. 33 U. S. C. §1342(b). This [c]ongressional directive does not permit the EPA to impose additional conditions." 420 F. 3d, at 980.

The Ninth Circuit denied rehearing and rehearing en banc. 450 F. 3d 394 (2006). Writing for the six judges who dissented from the denial of rehearing en banc, Judge Kozinski disagreed with the panel's conclusion that the EPA's analysis was so internally inconsistent as to be arbitrary and capricious. He further noted that, if the panel was correct on this point, the proper resolution would have been to remand to the EPA for further explanation. *Id.,* at 396–398. On the statutory question, Judge Kozinski echoed Judge Thompson's conclusion that once the nine criteria set forth in §402(b) of the CWA are satisfied, a transfer is mandatory and nondiscretionary. *Id.*, at 397–399. He rejected the panel majority's broad construction of ESA §7(a)(2), concluding that "[i]f the ESA were as powerful as the majority contends, it would modify not only the EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." *Id.*, at 399, n. 4.

The Ninth Circuit's construction of §7(a)(2) is at odds with that of other Courts of Appeals. Compare 420 F. 3d 946 (case below), with *Platte River Whooping Crane Critical Habitat Maintenance Trust* v. *FERC*, 962 F. 2d 27, 33–34 (CADC 1992), and *American Forest & Paper Association* v. *EPA*, 137 F. 3d 291, 298–299 (CA5 1998). We



granted certiorari to resolve this conflict, 549 U. S. ___ (2007), and we now reverse.

II

Before addressing this question of statutory interpretation, however, we first consider whether the Court of Appeals erred in holding that the EPA's transfer decision was arbitrary and capricious because, in that court's words, the agencies involved in the decision "relied . . . on legally contradictory positions regarding [their] section 7 obligations." App. to Pet. for Cert. in No. 06–340, at 23.

As an initial matter, we note that if the EPA's action was arbitrary and capricious, as the Ninth Circuit held, the proper course would have been to remand to the agency for clarification of its reasons. See *Gonzales* v. *Thomas*, 547 U. S. 183 (2006) *(per curiam).* Indeed, the court below expressly recognized that this finding required it to "remand to the agency for a plausible explanation of its decision, based on a single, coherent interpretation of the statute." App. to Pet. for Cert. in No. 06–340, at 28. But the Ninth Circuit did not take this course; instead, it jumped ahead to resolve the merits of the dispute. In so doing, it erroneously deprived the agency of its usual administrative avenue for explaining and reconciling the arguably contradictory rationales that sometimes appear in the course of lengthy and complex administrative decisions. We need not examine this question further, however, because we conclude that the Ninth Circuit's determination that the EPA's action was arbitrary and capricious is not fairly supported by the record.

Review under the arbitrary and capricious standard is deferential; we will not vacate an agency's decision unless it

> "has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explana-

> tion for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983).

"We will, however, 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Ibid.* (quoting *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286 (1974)).

The Court of Appeals concluded that the EPA's decision was "internally inconsistent" because, in its view, the agency stated—both during preliminary review of Arizona's transfer application and in the Federal Register notice memorializing its final action—"that section 7 requires consultation regarding the effect of a permitting transfer on listed species." App. to Pet. for Cert. in No. 06–340, at 23.

With regard to the various statements made by the involved agencies' regional offices during the early stages of consideration, the only "inconsistency" respondents can point to is the fact that the agencies changed their minds—something that, as long as the proper procedures were followed, they were fully entitled to do. The federal courts ordinarily are empowered to review only an agency's *final* action, see 5 U. S. C. §704, and the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious.

Respondents also point to the final Federal Register notice memorializing the EPA's approval of Arizona's transfer application. This notice stated that the FWS's issuance of its biological opinion had "conclude[d] the consultation process required by ESA section 7(a)(2)."



App. to Pet. for Cert. in No. 06–340, at 73. Respondents contend that this statement is inconsistent with the EPA's previously expressed position—and their position throughout this litigation—that §7(a)(2)'s consultation requirement is not triggered by a transfer application under §402 of the CWA.

We are not persuaded that this statement constitutes the type of error that requires a remand. By the time the Federal Register statement was issued, the EPA had already consulted with the FWS about the Arizona application, and the question whether that consultation had been *required*, as opposed to voluntarily undertaken by the agency, was simply not germane to the final agency transfer decision. The Federal Register statement, in short, was dictum, and it had no bearing on the final agency action that respondents challenge. Mindful of Congress' admonition that in reviewing agency action, "due account shall be taken of the rule of prejudicial error," 5 U. S. C. §706, we do not believe that this stray statement, which could have had no effect on the underlying agency action being challenged, requires that we further delay the transfer of permitting authority to Arizona by remanding to the agency for clarification. See also *PDK Labs., Inc.* v. *United States Drug Enforcement Admin.*, 362 F. 3d 786, 799 (CADC 2004) ("In administrative law, as in federal civil and criminal litigation, there is a harmless error rule").[5]

[5] We also note that the agencies involved have resolved any ambiguity in their positions going forward. Following the issuance of the panel's opinion below, the EPA—in connection with the State of Alaska's pending application for transfer of NPDES permitting authority—requested confirmation from the FWS and NMFS of the EPA's position that "the no-jeopardy and consultation duties of ESA Section 7(a)(2) do not apply to approval of a State's application to administer the NPDES program," in the apparent hope that obtaining those agencies' views "in advance of processing Alaska's application may avoid a repetition of" the confusion that occurred during the Arizona

We further disagree with respondents' suggestion that, by allegedly altering its legal position while the Arizona transfer decision and its associated litigation was pending, the "EPA is effectively nullifying respondents' rights to participate in administrative proceedings concerning Arizona's application, and particularly respondents' rights under EPA's own regulations to comment on NPDES transfer applications." Brief for Respondents 28 (citing 40 CFR §123.61(b); emphasis deleted). Consistent with EPA regulations, the agency made available "a comment period of not less than 45 days during which interested members of the public [could] express their views on the State program." §123.61(a)(1). Respondents do not suggest that they were deprived of their right to comment during this period.[6]

Respondents also contend that if the case were remanded to the EPA, they would raise additional challenges—including, for example, a challenge to the EPA's provision of financial assistance to Arizona for the administration of its NPDES program. However, as explained below, any such agency action is separate and independent of the agency's decision to authorize the transfer of

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permitting process. App. to Pet. for Cert. in No. 06–549, at 96a, 95a. In response, both the FWS and the NMFS confirmed their understanding that "there is no need to conduct Section 7 consultations on proposed actions to approve State NPDES programs because such actions are not the cause of any impact on listed species and do not constitute discretionary federal agency actions to which Section 7 applies." *Id.*, at 107a; see also *id.*, at 116a (NMFS "concur[s] with EPA's conclusion that EPA is not required to engage in section 7 consultation on applications to approve State programs in situations under Section 402(b) of the CWA").

[6]Nor is there any independent right to public comment with regard to consultations conducted under §7(a)(2)—a consultation process that we conclude, in any case, was not required here. See 51 Fed. Reg. 19928 (1986) ("Nothing in section 7 authorizes or requires the Service to provide for public involvement (other than that of the applicant) in the 'interagency' consultation process").



permitting authority pursuant to §402(b). See n. 11, *infra*. We express no opinion as to the viability of a separate administrative or legal challenge to such actions.

## III

### A

We turn now to the substantive statutory question raised by the petitions, a question that requires us to mediate a clash of seemingly categorical—and, at first glance, irreconcilable—legislative commands. Section 402(b) of the CWA provides, without qualification, that the EPA "shall approve" a transfer application unless it determines that the State lacks adequate authority to perform the nine functions specified in the section. 33 U. S. C. §1342(b). By its terms, the statutory language is mandatory and the list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application. Cf. *Lopez* v. *Davis*, 531 U. S. 230, 241 (2001) (noting Congress' "use of a mandatory 'shall' . . . to impose discretionless obligations"); *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion"); *Association of Civil Technicians* v. *FLRA*, 22 F. 3d 1150, 1153 (CADC 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"); Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes . . . this word is generally imperative or mandatory"). Neither respondents nor the Ninth Circuit has ever disputed that Arizona satisfied each of these nine criteria. See 420 F. 3d, at 963, n. 11; Brief for Respondents 19, n. 8.

The language of §7(a)(2) of the ESA is similarly imperative: it provides that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out

by such agency . . . is not likely to jeopardize" endangered or threatened species or their habitats. 16 U. S. C. §1536(a)(2). This mandate is to be carried out through consultation and may require the agency to adopt an alternative course of action. As the author of the panel opinion below recognized, applying this language literally would "*ad[d]* one [additional] requirement to the list of considerations under the Clean Water Act permitting transfer provision." 450 F. 3d, at 404, n. 2 (Berzon, J., concurring in denial of rehearing en banc) (emphasis in original). That is, it would effectively repeal the mandatory and exclusive list of criteria set forth in §402(b), and replace it with a new, expanded list that includes §7(a)(2)'s no-jeopardy requirement.

B

While a later enacted statute (such as the ESA) can sometimes operate to amend or even repeal an earlier statutory provision (such as the CWA), "repeals by implication are not favored" and will not be presumed unless the "intention of the legislature to repeal [is] clear and manifest." *Watt* v. *Alaska*, 451 U. S. 259, 267 (1981) (internal quotation marks omitted). We will not infer a statutory repeal "unless the later statute '"expressly contradict[s] the original act"' or unless such a construction '"is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all."'" *Traynor* v. *Turnage*, 485 U. S. 535, 548 (1988) (quoting *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 153 (1976), in turn quoting T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874)); see also *Branch* v. *Smith*, 538 U. S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute'"); *Posadas* v.



*National City Bank*, 296 U. S. 497, 503 (1936) ("[T]he intention of the legislature to repeal must be clear and manifest"). Outside these limited circumstances, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower*, *supra*, at 153.

Here, reading §7(a)(2) as the Court of Appeals did would effectively repeal §402(b)'s statutory mandate by engrafting a tenth criterion onto the CWA.[7] Section 402(b) of the CWA commands that the EPA "shall" issue a permit whenever all nine exclusive statutory prerequisites are met. Thus, §402(b) does not just set forth *minimum* requirements for the transfer of permitting authority; it affirmatively mandates that the transfer "shall" be approved if the specified criteria are met. The provision operates as a ceiling as well as a floor. By adding an additional criterion, the Ninth Circuit's construction of §7(a)(2) raises that floor and alters §402(b)'s statutory command.[8]

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[7] JUSTICE STEVENS' dissenting opinion attempts to paper over this conflict by suggesting that the EPA and the agencies designated by the Secretary of the Interior could reconcile the commands of the CWA and the ESA by "generat[ing] an alternative course of action whereby the transfer could still take place . . . but in such a way that would honor the mandatory requirements of §7(a)(2)." *Post*, at 15. For example, it suggests that the EPA could condition transfers of permitting authority on the State's acceptance of additional continuing oversight by the EPA (presumably beyond that oversight already contemplated by the CWA's statutory language). *Post*, at 17–19. But such a take-it-or-leave-it approach, no less than a straightforward rejection of a transfer application, would impose conditions on an NPDES transfer beyond those set forth in §402(b), and thus alter the CWA's statutory command.

[8] It does not matter whether this alteration is characterized as an amendment or a partial repeal. Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands, and we have repeatedly recognized that implied amendments are no more favored than implied repeals. See, *e.g.*, *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 134

The Ninth Circuit's reading of §7(a)(2) would not only abrogate §402(b)'s statutory mandate, but also result in the implicit repeal of many additional otherwise categorical statutory commands. Section 7(a)(2) by its terms applies to "any action authorized, funded, or carried out by" a federal agency—covering, in effect, almost anything that an agency might do. Reading the provision broadly would thus partially override every federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy to endangered species. See, *e.g.*, *Platte River Whooping Crane Critical Habitat Maintenance Trust* v. *FERC*, 962 F. 2d, at 33–34 (considering whether §7(a)(2) overrides the Federal Power Act's prohibition on amending annual power licenses). While the language of §7(a)(2) does not explicitly repeal any provision of the CWA (or any other statute), reading it for all that it might be worth runs foursquare into our presumption against implied repeals.

C

1

The agencies charged with implementing the ESA have attempted to resolve this tension through regulations implementing §7(a)(2). The NMFS and FWS, acting jointly on behalf of the Secretaries of Commerce and the Interior and following notice-and-comment rulemaking procedures, have promulgated a regulation stating that "Section 7 and the requirements of this part apply to all

(1974) ("'A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled'") (quoting *In re Penn Central Transportation Co.*, 384 F. Supp. 895, 943 (Sp. Ct. R. R. R. A. 1974)); *United States* v. *Welden*, 377 U. S. 95, 103, n. 12 (1964) ("Amendments by implication . . . are not favored"); *United States* v. *Madigan*, 300 U. S. 500, 506 (1937) ("[T]he modification by implication of the settled construction of an earlier and different section is not favored").



actions in which there is *discretionary* Federal involvement or control." 50 CFR §402.03 (emphasis added). Pursuant to this regulation, §7(a)(2) would not be read as impliedly repealing nondiscretionary statutory mandates, even when they might result in some agency action. Rather, the ESA's requirements would come into play only when an action results from the exercise of agency discretion. This interpretation harmonizes the statutes by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency is forbidden from considering such extrastatutory factors.

We have recognized that "[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation" of the statutory scheme. *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 703 (1995). But such deference is appropriate only where "Congress has not directly addressed the precise question at issue" through the statutory text. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984).

> "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [However,] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 842–843 (footnotes omitted).

In making the threshold determination under *Chevron*, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 132 (2000). Rather, "[t]he meaning—or ambiguity—of certain words or

phrases may only become evident when placed in context. . . . It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Id.,* at 132–133 (quoting *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989)).

We must therefore read §7(a)(2) of the ESA against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or repeal if it were construed as broadly as the Ninth Circuit did below. When §7(a)(2) is read this way, we are left with a fundamental ambiguity that is not resolved by the statutory text. An agency cannot simultaneously obey the differing mandates set forth in §7(a)(2) of the ESA and §402(b) of the CWA, and consequently the statutory language—read in light of the canon against implied repeals—does not itself provide clear guidance as to which command must give way.

In this situation, it is appropriate to look to the implementing agency's expert interpretation, which cabins §7(a)(2)'s application to "actions in which there is discretionary Federal involvement or control." 50 CFR §402.03. This reading harmonizes the statutes by applying §7(a)(2) to guide agencies' existing discretionary authority, but not reading it to override express statutory mandates.

2

We conclude that this interpretation is reasonable in light of the statute's text and the overall statutory scheme, and that it is therefore entitled to deference under *Chevron*. Section 7(a)(2) requires that an agency "insure" that the actions it authorizes, funds, or carries out are not likely to jeopardize listed species or their habitats. To "insure" something—as the court below recognized—means "'[t]o make certain, to secure, to guarantee (some thing, event, etc.).'" 420 F. 3d, at 963 (quoting 7 Oxford



English Dictionary 1059 (2d ed. 1989)). The regulation's focus on "discretionary" actions accords with the commonsense conclusion that, when an agency is *required* to do something by statute, it simply lacks the power to "insure" that such action will not jeopardize endangered species.

This reasoning is supported by our decision in *Department of Transportation* v. *Public Citizen*, 541 U. S. 752 (2004). That case concerned safety regulations that were promulgated by the Federal Motor Carrier Safety Administration (FMCSA) and had the effect of triggering a Presidential directive allowing Mexican trucks to ply their trade on United States roads. The Court held that the National Environmental Policy Act (NEPA) did not require the agency to assess the environmental effects of allowing the trucks entry because "the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion." *Id.*, at 769 (emphasis in original). The Court concluded that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.*, at 770.

We do not suggest that *Public Citizen* controls the outcome here; §7(a)(2), unlike NEPA, imposes a substantive (and not just a procedural) statutory requirement, and these cases involve agency action more directly related to environmental concerns than the FMCSA's truck safety regulations. But the basic principle announced in *Public Citizen*—that an agency cannot be considered the legal "cause" of an action that it has no statutory discretion *not* to take—supports the reasonableness of the FWS's interpretation of §7(a)(2) as reaching only discretionary agency actions. See also *California* v. *United States*, 438 U. S.

645, 668, n. 21 (1978) (holding that a statutory requirement that federal operating agencies conform to state water usage rules applied only to the extent that it was not "inconsistent with other congressional directives").

3

The court below simply disregarded §402.03's interpretation of the ESA's reach, dismissing "the regulation's reference to 'discretionary . . . involvement'" as merely "congruent with the statutory reference to actions 'authorized, funded, or carried out' by the agency." 420 F. 3d, 968. But this reading cannot be right. Agency discretion presumes that an agency can exercise "judgment" in connection with a particular action. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 415–416 (1971); see also Random House Dictionary of the English Language 411 (unabridged ed. 1967) ("discretion" defined as "the power or right to decide or act according to one's own judgment; freedom of judgment or choice"). As the mandatory language of §402(b) itself illustrates, not every action authorized, funded, or carried out by a federal agency is a product of that agency's exercise of discretion.

The dissent's interpretation of §402.03 is similarly implausible. The dissent would read the regulation as simply clarifying that discretionary agency actions are included within the scope of §7(a)(2), but not confining the statute's reach to such actions. See *post*, at 7–11. But this reading would render the regulation entirely superfluous. Nothing in either §7(a)(2) or the other agency regulations interpreting that section, see §402.02, suggests that discretionary actions are *excluded* from the scope of the ESA, and there is thus no need for a separate regulation to bring them within the statute's scope. On the dissent's reading, §402.03's reference to "discretionary" federal involvement is mere surplusage, and we have cautioned against reading a text in a way that makes part of it redundant. See, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U. S. 19, 31 (2001).



This history of the regulation also supports the reading to which we defer today. As the dissent itself points out, the proposed version of §402.03 initially stated that "Section 7 and the requirements of this Part apply to *all actions in which there is Federal involvement or control*," 48 Fed. Reg. 29999 (1983) (emphasis added); the Secretary of the Interior modified this language to provide (as adopted in the Final Rule now at issue) that the statuory requirements apply to "all actions in which there is *discretionary* Federal involvement or control," 51 Fed. Reg. 19958 (1986) (emphasis added). The dissent's reading would rob the word "discretionary" of any effect, and substitute the earlier, proposed version of the regulation for the text that was actually adopted.

In short, we read §402.03 to mean what it says: that §7(a)(2)'s no-jeopardy duty covers only discretionary agency actions and does not attach to actions (like the NPDES permitting transfer authorization) that an agency is *required* by statute to undertake once certain specified triggering events have occurred. This reading not only is reasonable, inasmuch as it gives effect to the ESA's provision, but also comports with the canon against implied repeals because it stays §7(a)(2)'s mandate where it would effectively override otherwise mandatory statutory duties.

D

Respondents argue that our opinion in *TVA* v. *Hill*, 437 U. S. 153 (1978), supports their contrary position. In that case, we held that the ESA prohibited the Tennessee Valley Authority (TVA) from putting into operation the Tellico Dam—despite the fact that the agency had already spent over $100 million on the nearly completed project—because doing so would have threatened the critical habitat of the endangered snail darter. In language on which

respondents rely, the Court concluded that "the ordinary meaning" of §7 of the ESA contained "no exemptions" and reflected "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id.*, at 173, 185, 188.

*TVA* v. *Hill*, however, had no occasion to answer the question presented in these cases. That case was decided almost a decade before the adoption in 1986 of the regulations contained in 50 CFR §402.03. And in any event, the construction project at issue in *TVA* v. *Hill*, while expensive, was also discretionary. The TVA argued that by continuing to make lump-sum appropriations to the TVA, some of which were informally earmarked for the Tellico Dam project, Congress had implicitly repealed §7's no-jeopardy requirement as it applied to that project. See 437 U. S., at 189–193. The Court rejected this argument, concluding that "[t]he Appropriations Acts did not themselves identify the projects for which the sums had been appropriated" and that reports by congressional committees allegedly directing the TVA to complete the project lacked the force of law. *Id.*, at 189, n. 35. Central to the Court's decision was the conclusion that Congress did not *mandate* that the TVA put the dam into operation; there was no statutory command to that effect; and there was therefore no basis for contending that applying the ESA's no-jeopardy requirement would implicitly repeal another affirmative congressional directive.[9]

[9] The dissent is incorrect in suggesting that "if the Secretary of the Interior had not declared the snail darter an endangered species . . . the TVA surely would have been obligated to spend the additional funds that Congress appropriated to complete the project." *Post*, at 4. To the contrary, the Court in *TVA* v. *Hill* found that there was no clear repugnancy between the ESA and the Acts appropriating funds to the TVA because the latter simply did not *require* the agency to use any of the generally appropriated funds to complete the Tellico Dam project. 437 U. S., at 189–193.



*TVA* v. *Hill* thus supports the position, expressed in §402.03, that the ESA's no-jeopardy mandate applies to every *discretionary* agency action—regardless of the expense or burden its application might impose. But that case did not speak to the question whether §7(a)(2) applies to *non*-discretionary actions, like the one at issue here. The regulation set forth in 50 CFR §402.03 addressed that question, and we defer to its reasonable interpretation.

IV

Finally, respondents and their *amici* argue that, even if §7(a)(2) is read to apply only to "discretionary" agency actions, the decision to transfer NPDES permitting authority to Arizona represented such an exercise of discretion. They contend that the EPA's decision to authorize a transfer is not entirely mechanical; that it involves some exercise of judgment as to whether a State has met the criteria set forth in §402(b); and that these criteria incorporate references to wildlife conservation that bring consideration of §7(a)(2)'s no-jeopardy mandate properly within the agency's discretion.

The argument is unavailing. While the EPA may exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out §402(b)'s enumerated statutory criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list. Nothing in the text of §402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application. And to the extent that some of the §402(b) criteria may result in environmental benefits to marine species,[10] there is no dispute that Ari-

[10] For example, §402(b) requires the EPA to consider whether the State has the legal authority to enforce applicable water quality standards—some of which, in turn, are informed by the "judgment" of the EPA's Administrator. 33 U. S. C. §1342(b)(1)(A); see also, *e.g.*, §1312.

zona has satisfied each of those statutory criteria.

Respondents' argument has been disclaimed not only by the EPA, but also by the FWS and the NMFS, the two agencies primarily charged with administering §7(a)(2) and the drafters of the regulations implementing that section. Each agency recently issued a formal letter concluding that the authorization of an NPDES permitting transfer is not the kind of discretionary agency action that is covered by §402.03. See App. to Pet. for Cert. in No. 06–549, at 103a–116a. An agency's interpretation of the meaning of its own regulations is entitled to deference "unless plainly erroneous or inconsistent with the regulation," *Auer* v. *Robbins*, 519 U. S. 452, 461 (1997) (internal quotation marks omitted), and that deferential standard is plainly met here.[11]

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But the permit transfer process does not itself require scrutiny of the underlying standards or of their effect on marine or wildlife—only of the state applicant's "*authority* . . . [t]o issue permits which . . . apply, and insure compliance with" the applicable standards. §1342(b)(1)(A) (emphasis added). In any event, respondents do not dispute that, as both the EPA and the FWS determined, the transfer of permitting authority to Arizona officials would have no adverse water quality related impact on any listed species. See App. to Pet. for Cert. in No. 06–340, at 562–563, 615–617.

[11] Respondents also contend that the EPA has taken, or will take, other discretionary actions apart from the transfer authorization that implicate the ESA. For example, they argue that the EPA's alleged provision of funding to Arizona for the administration of its clean water programs is the kind of discretionary agency action that is subject to §7(a)(2). However, assuming this is true, any such funding decision is a separate agency action that is outside the scope of this lawsuit. Respondents also point to the fact that, following the transfer of permitting authority, the EPA will retain oversight authority over the state permitting process, including the power to object to proposed permits. But the fact that the EPA may exercise discretionary oversight authority—which may trigger §7(a)(2)'s consultation and no-jeopardy obligations—*after* the transfer does not mean that the decision authorizing the transfer is itself discretionary.



* * *

Applying *Chevron*, we defer to the agency's reasonable interpretation of ESA §7(a)(2) as applying only to "actions in which there is discretionary Federal involvement or control." 50 CFR §402.03. Since the transfer of NPDES permitting authority is not discretionary, but rather is mandated once a State has met the criteria set forth in §402(b) of the CWA, it follows that a transfer of NPDES permitting authority does not trigger §7(a)(2)'s consultation and no-jeopardy requirements. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and these cases are remanded for further proceedings consistent with this opinion.

# SUPREME COURT OF THE UNITED STATES

Nos. 06–340 and 06–549

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL., PETITIONERS
06–340 *v.*
DEFENDERS OF WILDLIFE ET AL.

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER
06–549 *v.*
DEFENDERS OF WILDLIFE ET AL.

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

[June 25, 2007]

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

These cases present a problem of conflicting "shalls." On the one hand, §402(b) of the Clean Water Act (CWA) provides that the Environmental Protection Agency (EPA) "shall" approve a State's application to administer a National Pollution Discharge Elimination System (NPDES) permitting program unless it determines that nine criteria are not satisfied. 33 U. S. C. §1342(b). On the other hand, shortly after the passage of the CWA, Congress enacted §7(a)(2) of the Endangered Species Act of 1973 (ESA), which commands that federal agencies "shall" insure that their actions do not jeopardize endangered species. 16 U. S. C. §1536(a)(2).

When faced with competing statutory mandates, it is our duty to give full effect to both if at all possible. See, *e.g.*, *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974) ("[W]hen



two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective"). The Court fails at this task. Its opinion unsuccessfully tries to reconcile the CWA and ESA by relying on a federal regulation, 50 CFR §402.03 (2006), which it reads as limiting the reach of §7(a)(2) to *only* discretionary federal actions, see *ante*, at 17–19. Not only is this reading inconsistent with the text and history of §402.03, but it is fundamentally inconsistent with the ESA itself.

In the celebrated "snail darter" case, *TVA* v. *Hill*, 437 U. S. 153 (1978), we held that the ESA "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies," *id*., at 185. Consistent with that intent, Chief Justice Burger's exceptionally thorough and admirable opinion explained that §7 "admits of no exception." *Id*., at 173. Creating precisely such an exception by exempting nondiscretionary federal actions from the ESA's coverage, the Court whittles away at Congress' comprehensive effort to protect endangered species from the risk of extinction and fails to give the Act its intended effect. After first giving *Hill* the attention it deserves, I will comment further on the irrelevance of §402.03 to these cases and offer other available ways to give effect to both CWA and the ESA. Having done so, I conclude by explaining why these cases should be remanded to the EPA for further proceedings.

## I

In *Hill,* we were presented with two separate questions: (1) whether the ESA required a court to enjoin the operation of the nearly completed Tellico Dam and Reservoir Project because the Secretary of the Interior had determined that its operation would eradicate a small endangered fish known as a snail darter; and (2) whether post-1973 congressional appropriations for the completion of the Tellico Dam constituted an implied repeal of the ESA,

at least insofar as it applied to the Dam. 437 U. S., at 156. More than 30 pages of our opinion explain our affirmative answer to the first question, see *id.,* at 156–188, but just over four pages sufficed to explain our negative answer to the second, see *id*., at 189–193. While it is our ruling on the first question that is relevant to the cases before us, it is our refusal to hold that the ESA itself had been impliedly repealed that the majority strangely deems most significant. See *ante,* at 21–22.

In answering *Hill*'s first question, we did not discuss implied repeals. On the contrary, that portion of the opinion contained our definitive interpretation of the ESA, in which we concluded that "the language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." 437 U. S., at 174; see also *id*., at 177 (" 'The dominant theme pervading all Congressional discussion of the proposed [ESA] was the overriding need *to devote whatever effort and resources were necessary* to avoid further diminution of national and worldwide wildlife resources' " (quoting Coggins, Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973, 51 N. D. L. Rev. 315, 321 (1975) (emphasis added in *Hill*))). With respect to §7 in particular, our opinion could not have been any clearer. We plainly held that it "admits of *no exception*." 437 U. S., at 173 (emphasis added).[1]

Our opinion in *Hill* explained at length why §7 imposed obligations on "all federal agencies" to ensure that "actions authorized, funded, or carried out by them do not jeopard-

[1]See also *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 692 (1995) ("Section 7 requires federal agencies to ensure that *none of their activities*, including the granting of licenses and permits, will jeopardize the continued existence of endangered species 'or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical' " (emphasis added)).



ize the continued existence of endangered species." 437 U. S., at 173 (emphasis deleted; internal quotation marks omitted). Not a word in the opinion stated or suggested that §7 obligations are inapplicable to mandatory agency actions that would threaten the eradication of an endangered species. Nor did the opinion describe the Tennessee Valley Authority's (TVA) attempted completion of the Tellico Dam as a discretionary act. How could it? After all, if the Secretary of the Interior had not declared the snail darter an endangered species whose critical habitat would be destroyed by operation of the Tellico Dam, the TVA surely would have been obligated to spend the additional funds that Congress appropriated to complete the project.[2] Unconcerned with whether an agency action was mandatory or discretionary, we simply held that §7 of the ESA

> "reveals an explicit congressional decision to require agencies to afford *first priority* to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species *priority over the 'primary missions'*

[2]The Court misreads this sentence and, in so doing, overreads our decision in *Hill*. JUSTICE ALITO maintains that *Hill* held that the "acts appropriating funds to the TVA . . . did not *require* the agency to use any of the generally appropriated funds to complete the Tellico Dam project." *Ante*, at 23–24, n. 9. But *Hill* said no such thing. That case only held that the *subsequent* appropriation of funds for the Tellico Dam Project could not overcome the mandatory requirements of §7 of the ESA; it did not hold that the TVA would not have been required to spend any and all appropriated funds if the ESA had never been passed. See *Hill*, 437 U. S., at 189–190. If the ESA had never been enacted and did not stand in the way of the completion of the Tellico Dam, there is no doubt that the TVA would have finished the project that Congress had funded.

*of federal agencies.*" *Id.*, at 185 (emphasis added).[3]

The fact that we also concluded that the post-1973 congressional appropriations did not impliedly repeal the ESA provides no support for the majority's contention that the obligations imposed by §7(a)(2) may be limited to discretionary acts. A few passages from the relevant parts of *Hill* belie that suggestion. After noting the oddity of holding that the interest in protecting the survival of a relatively small number of 3-inch fish "would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million," we found "that the explicit provisions of the Endangered Species Act require precisely that result." *Id.,* at 172, 173. We then continued:

> "One would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act. Its very words affirmatively command all federal agencies 'to *insure* that actions *authorized, funded,* or *carried out* by them do not *jeopardize* the continued existence' of an endangered species or *'result* in the destruction or modification of habitat of such species . . . .' " *Id.*, at 173 (quoting 16 U. S. C. §1536 (1976 ed.) (emphasis added in *Hill*)).

We also reviewed the ESA's history to identify a variety of

[3]The road not taken in *Hill* also helps to clarify our interpretation that §7 was not limited to discretionary agency action. Throughout the course of the litigation, the TVA insisted that §7 did not refer to "all the actions that an agency can ever take." Brief. for Petitioner in *Tennessee Valley Authority* v. *Hill,* O.T. 1977, No. 76–1701, p. 26. Instead, the TVA sought to restrict §7 to only those actions for "which the agency has reasonable decision-making alternatives before it." *Ibid.* We rejected that narrow interpretation, stating that the only way to sustain the TVA's position would be to "ignore the ordinary meaning of plain language." *Hill,* 437 U. S., at 173.



exceptions that had been included in earlier legislation and unenacted proposals but were omitted from the final version of the 1973 statute. We explained that earlier endangered species legislation "qualified the obligation of federal agencies," but the 1973 Act purposefully omitted "all phrases which might have qualified an agency's responsibilities." 437 U. S., at 181, 182. Moreover, after observing that the ESA creates only a limited number of "hardship exemptions," see 16 U. S. C. §1539—none of which would apply to federal agencies—we applied the maxim *expressio unius est expression alterius* to conclude that "there are no exemptions in the Endangered Species Act for federal agencies,"437 U. S., at 188.

Today, however, the Court countenances such an exemption. It erroneously concludes that the ESA contains an unmentioned exception for nondiscretionary agency action and that the statute's command to enjoin the completion of the Tellico Dam depended on the unmentioned fact that the TVA was attempting to perform a discretionary act. But both the text of the ESA and our opinion in *Hill* compel the contrary determination that Congress intended the ESA to apply to "all federal agencies" and to all "actions authorized, funded, or carried out by them." *Id.,* at 173 (emphasis deleted).

A transfer of NPDES permitting authority under §402(b) of the CWA is undoubtedly one of those "actions" that is "authorized" or "carried out" by a federal agency. See 16 U. S. C. §1536(b); 50 CFR §402.02 (defining "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to . . . actions directly or indirectly causing modifications to the land, water, or air"). It follows from *Hill* that §7(a)(2) applies to such NPDES transfers—whether they are mandatory or discretionary.

II

Given our unequivocal holding in *Hill* that the ESA has "first priority" over all other federal action, 437 U. S., at 185, if any statute should yield, it should be the CWA. But no statute must yield unless it is truly incapable of coexistence. See, *e.g.*, *Morton*, 417 U. S., at 551. Therefore, assuming that §402(b) of the CWA contains its own mandatory command, we should first try to harmonize that provision with the mandatory requirements of §7(a)(2) of the ESA.

The Court's solution is to rely on 50 CFR §402.03, which states that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." The Court explains that this regulation "harmonizes the statutes by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but by lifting that mandate when the agency is forbidden from considering such extrastatutory factors." *Ante*, at 17. This is not harmony, and it certainly isn't effect. Rather than giving genuine effect to §7(a)(2), the Court permits a wholesale limitation on the reach of the ESA. Its interpretation of §402.03 conflicts with the text and history of the regulation, as well as our interpretation of §7 in the "snail darter" case.

To begin with, the plain language of §402.03 does not state that its coverage is limited to discretionary actions. Quite the opposite, the most natural reading of the text is that it confirms the broad construction of §7 endorsed by our opinion in *Hill*. Indeed, the only way to read §402.03 in accordance with the facts of the case and our holding that §7 "admits of no exception[s]," 437 U. S., at 173, is that it eliminates any possible argument that the ESA does not extend to situations in which the discretionary federal involvement is only marginal.

The Court is simply mistaken when it says that it reads §402.03 "to mean what it says: that §7(a)(2)'s no-jeopardy



duty covers *only* discretionary agency actions . . . ." *Ante,* at 21 (emphasis added). That is not, in fact, what §402.03 "says." The word "only" is the Court's addition to the text, not the agency's. Moreover, that text surely does not go on to say (as the Court does) that the duty "does not attach to actions (like the NPDES permitting transfer authorization) that an agency is *required* by statute to undertake once certain specified triggering events have occurred." *Ibid.* If the drafters of the regulation had intended such a far-reaching change in the law, surely they would have said so by using language similar to that which the Court uses today.

Nothing in the proceedings that led to the promulgation of the regulation suggests any reason for limiting the pre-existing understanding of the scope of §7's coverage. EPA codified the current version of §402.03 in 1986 as part of a general redrafting of ESA regulations. In the 1983 Notice of Proposed Rulemaking, the proposed version of §402.03 stated that "§7 and the requirements of this Part apply to all actions in which there is Federal involvement or control." 48 Fed. Reg. 29999 (1983). Without any explanation, the final rule inserted the word "discretionary" before "Federal involvement or control." 51 Fed. Reg. 19958 (1986).[4] Clearly, if the Secretary of the Interior meant to limit the pre-existing understanding of the scope of the coverage of §7(a)(2) by promulgating this regulation, that intent would have been mentioned somewhere in the text of the regulations or in contemporaneous comment about them. See *National Cable & Telecommunications Assn.* v.

[4]See also Kilbourne, The Endangered Species Act Under the Microscope: A Closeup Look From A Litigator's Perspective, 21 Envtl. L. 499, 529 (1991) (noting that the agency did not explain the addition of the word "discretionary"); Weller, Limiting the Scope of the Endangered Species Act: Discretionary Federal Involvement or Control Under Section 402.03, 5 Hastings W.-Nw. J. Envtl. L. & Pol'y 309, 311, 334 (Spring 1999) (same)

*Brand X Internet Services*, 545 U. S. 967, 1001 (2005) (holding that an agency is free within "the limits of reasoned interpretation to change course" only if it "adequately justifies the change"); *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 48 (1983) ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner"). Yet, the final rule said nothing about limiting the reach of §7 or our decision in *Hill*. Nor did it mention the change from the notice of proposed rulemaking. I can only assume, then, that the regulation does mean what both it and the notice of proposed rulemaking says: Section 7(a)(2) applies to discretionary federal action, but not *only* to discretionary action.

The only explanation the agency provided for §402.03 was the following:

> "This section, which explains the applicability of section 7, implicitly covers Federal activities within the territorial jurisdiction of the United States and upon the high seas as a result of the definition of 'action' in §402.02. The explanation for the scope of the term 'action' is provided in the discussion under §402.01 above." 51 Fed. Reg. 19937.

This statement directs us to two sources: the definition of "action" in §402.02 and the "explanation for the scope of the term 'action' " in §402.01. *Ibid*. Both confirm that there was no intent to draw a distinction between discretionary and nondiscretionary actions.

Section 402.02 provides in relevant part:

> "*Action* means *all* activities or programs *of any kind* authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:
>
> "(a) actions intended to conserve listed species or their habitat;



> "(b) the promulgation of regulations . . . " (second and third emphases added.)

Actions in either of the described sub-categories are sometimes mandatory and sometimes discretionary. Likewise, as the italicized portions indicate, the term "action" expressly refers to "all" agency activities or programs "of any kind," regardless of whether they are discretionary or mandatory. By reading the term "discretionary" as a limitation on "action," the Court creates a contradiction in the EPA's own regulation.[5]

As for the final rule's explanation for the scope of the term 'action' in §402.01, that too is fully consistent with my interpretation of §402.03. That explanation plainly states that "*all* Federal actions including 'conservations programs' are subject to the consultation requirements of section 7(a)(2) if they 'may affect' listed species or their critical habitats." 51 Fed. Reg. 19929 (emphasis added). The regulation does not say all "discretionary" federal actions, nor does it evince an intent to limit the scope of §7(a)(2) in any way. Rather, it just restates that the ESA applies to "all" federal actions, just as the notice of pro-

[5] Petitioner National Association of Home Builders (NAHB) points to the following language from the final rule as an indication that §7 only applies to discretionary action: "'a Federal agency's responsibility under section 7(a)(2) permeates the full range of discretionary authority held by that agency.'" Brief for Petitoioners NAHB et al. 32 (quoting 51 Fed. Reg. 19937). However, that language is found in a different section of the Final Rule—the section describing the definition of "'[r]easonable and prudent alternatives'" under 50 CFR §402.02. When put in its proper context, the cited language simply indicates that any "reasonable and prudent alternative" may involve the "maximum exercise federal agency authority when to do so is necessary, in the opinion of the Service, to avoid jeopardy." 51 Fed. Reg. 19926. If that isn't enough, the quoted text supports my reading of §402.03 even on petitioner's reading. By indicating that an agency's §7(a)(2) responsibility "permeates the full range" of its discretionary authority, EPA confirmed that the ESA covers the all discretionary actions.

posed rulemaking did. This explanation of the scope of the word "action" is therefore a strong indication that the Court's reading of "discretionary" is contrary to its intended meaning.

An even stronger indication is the fact that at no point in the administrative proceedings in these cases did EPA even mention it.[6] As an initial matter, it is worth emphasizing that even if EPA had relied on §402.03, its interpretation of the ESA would not be entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), because it is not charged with administering that statute, *id.*, at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme *it is entrusted to administer*." (emphasis added)); *Department of Treasury* v. *FLRA*, 837 F. 2d 1163, 1167 (CADC 1988) ("[W]hen an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference"). The Departments of the Interior and Commerce, not EPA, are charged with administering the ESA. See *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.,* 515 U. S., 687, 703–704 (1995). And EPA has conceded that the Department of the Interior's biological opinion "did not discuss 50 CFR. 402.03, and it did not address the question whether the consultation that produced the [biological opinion] was required by the ESA." Pet. for Cert. in No. 06–549, p. 24; see App. 77–124 (never mentioning §402.03). Left with this unfavorable administrative record, EPA can only lean on the fact that the Department of the Interior has recently "clarified" its position regarding §402.03 in a *different* administrative proceeding. See Pet. for Cert. in No. 06–549, pp. 24–25; *id.*, at 26 ("The recent F[ish and Wildlife Service] and N[ational Marine Fisheries Service] communications regarding Alaska's pending transfer application reflect those agencies' considered interpretations . . . of [50 CFR] 402.03"); App. to Pet. for Cert. in No. 06–340, pp. 103a–116a; see also *ante*, at 12 n. 5. We have long held, however, that courts may not affirm an agency action on grounds other than those adopted by the agency in the administrative proceedings. See *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87 (1943). The majority ignores this hoary principle of administrative law and substitutes a post-hoc interpretation of §7(a)(2) and §402.03 for that of the relevant agency. For that reason alone, these cases should be remanded to the agency. And for the other reasons I have given, §402.03 cannot be used to harmonize the CWA and the ESA.

[6] EPA also did not rely on §402.03 in the Court of Appeals. See 420 F. 3d 946, 968 ("EPA makes no argument that its transfer decision was not a 'discretionary' one within the meaning of 50 CFR §402.03. . . . We may not affirm the EPA's transfer decision on grounds not relied upon by the agency. As the EPA evidently does not regard §402.03 as excluding the transfer decision, we should not so interpret the regulations." (citations omitted)).



III

There are at least two ways in which the CWA and the ESA can be given full effect without privileging one statute over the other.

A

The text of §7(a)(2) itself provides the first possible way of reconciling that provision with §402(b) of the CWA. The subsection reads:

> "Each Federal agency shall, *in consultation with and with the assistance of the Secretary*, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modifi-

> cation of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section." 16 U. S. C. §1536(a)(2) (emphasis added).

The Court is certainly correct that the use of the word "shall" in §7(a)(2) imposes a mandatory requirement on the federal agencies. See *ante*, at 14. It is also correct that the ESA's "mandate is to be carried out through consultation and may require the agency to adopt an alternative course of action." *Ante,* at 15. The Court is too quick to conclude, however, that this consultation requirement creates an irreconcilable conflict between this provision and §402(b) of the CWA. It rushes to this flawed judgment because of a basic conceptual error—an error that is revealed as early as the first paragraph of its opinion. Rather than attempting to find a way to give effect to §7(a)(2)'s consultation requirement, the Court frames the question presented as "whether §7(a)(2) effectively operates as a tenth criterion on which the transfer of permitting power under the first statute must be conditioned. " *Ante*, at 1–2. The Court is not alone in this. The author of the Ninth Circuit opinion below also stated that the ESA "*adds* one requirement to the list of considerations under the Clean Water Act permitting transfer provision." 450 F. 3d, at 404 n. 2 (2006) (Berzon, J., concurring in denial of rehearing en banc) (emphasis in original). But while the ESA does mandate that the relevant agencies "consul[t]" with the Interior Department, that consultation process also provides a way for the agencies to give effect to both statutes.

The first step in the statutory consultation process is to identify whether any endangered species will be affected by an agency action. An agency proposing a particular



action, such as an NPDES transfer, will typically ask the Secretary of the Interior whether any listed species may be present in the area of the proposed action and whether that action will "affect" those species. See 16 U. S. C. §1536(c). It is entirely possible that no listed species will be affected, and any anticipated conflict between the ESA and another statute will have been avoided at this threshold stage. If, however, the Secretary determines that a proposed action may affect an endangered species or its critical habitat, the agency must formally consult with the Secretary. This consultation culminates in the issuance of a "biological opinion," which "detail[s] how the agency action affects the species or its critical habitat." §1536(b)(3)(A); see also 50 CFR §402.14(h). Even at this stage, it is still possible that formal consultation will reveal that the agency action will not jeopardize any species. See, *e.g.*, 63 Fed. Reg. 51199 (1998) (noting that FWS rendered a "no jeopardy" finding with respect to the transfer of permitting authority to Texas).

If the biological opinion concludes that the agency action would put a listed species in jeopardy, however, the ESA contains a process for resolving the competing demands of agency action and species protection. The ESA provides that "the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action." 16 U. S. C. §1536(b)(3)(A); see also 50 CFR §402.14(h)(3). The agency's regulations define "[r]easonable and prudent alternatives" as

> "alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is

> economically and technologically feasible, and that the Director [of FWS] believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. " 50 CFR §402.02.

Thus, in the face of any conflict between the ESA and another federal statute, the ESA and its implementing regulations encourage federal agencies to work out a reasonable alternative that would let the proposed action move forward "consistent with [its] intended purpose" and the agency's "legal authority," while also avoiding any violation of §7(a)(2).

When applied to the NPDES transfer program, the "reasonable and prudent alternatives" process would enable EPA and the Department of the Interior to develop a substitute that would allow a transfer of permitting authority *and* would not jeopardize endangered species. Stated differently, the consultation process would generate an alternative course of action whereby the transfer could still take place—as required by §402(b) of the CWA—but in such a way that would honor the mandatory requirements of §7(a)(2) of the ESA. This should come as no surprise to EPA, as it has engaged in pre-transfer consultations at least six times in the past and has stated that it is not barred from doing so by the CWA.[7]

Finally, for the rare case in which no "reasonable and prudent alternative" can be found, Congress has provided

[7] See, *e.g.*, 63 Fed. Reg. 51199 (1998) (approving Texas' application to administer the NPDES program after consultation with FWS and stating that "EPA believes that section 7 does apply" to EPA's action); 61 Fed. Reg. 65053 (1996) (approving Oklahoma's NPDES application after consultation with FWS and stating that "EPA's approval of the State permitting program under section 402 of the Clear Water Act is a federal action subject to [§7's consultation] requirement"); see also Tr. of Oral Arg. 5 (conceding that EPA conducted six pre-transfer consultations in the past).



yet another mechanism for resolving any conflicts between the ESA and a proposed agency action. In 1978, shortly after our decision in *Hill*, Congress amended the ESA to create the "Endangered Species Committee," which it authorized to grant exemptions from §7(a)(2). 16 U. S. C. §1536(e). Because it has the authority to approve the extinction of an endangered species, the Endangered Species Committee is colloquially described as the "God Squad" or "God Committee." In light of this weighty responsibility, Congress carefully laid out requirements for the God Committee's membership,[8] procedures,[9] and the factors it must consider in deciding whether to grant an exemption.[10]

[8] The Endangered Species Committee is composed of six high-ranking federal officials and a representative from each affected State appointed by the President. See 16 U. S. C. §1536(e)(3).

[9] See 16 U. S. C. §§1536(e)–(l).

[10] Title 16 U. S. C. §1536(h)(1) provides:

"The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person—

"(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) and on such other testimony or evidence as it may receive, that—

"(i) there are no reasonable and prudent alternatives to the agency action;

"(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

"(iii) the action is of regional or national significance; and

"(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

"(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned."

As the final arbiter in situations in which the ESA conflicts with a proposed agency action, the God Committee embodies the primacy of the ESA's mandate and serves as the final mechanism for harmonizing that Act with other federal statutes. By creating this Committee, Congress recognized that some conflicts with the ESA may not be capable of resolution without having to forever sacrifice some endangered species. At the same time, the creation of this last line of defense reflects Congress' view that the ESA should not yield to another federal action except as a final resort and except when authorized by high level officials after serious consideration. In short, when all else has failed and two federal statutes are incapable of resolution, Congress left the choice to the Committee—not to this Court; it did not limit the ESA in the way the majority does today.

B

EPA's regulations offer a second way to harmonize the CWA with the ESA. After EPA has transferred NPDES permitting authority to a State, the agency continues to oversee the State's permitting program. See *Arkansas* v. *Oklahoma*, 503 U. S. 91, 105 (1992) ("Congress preserved for the Administrator broad authority to oversee state permit programs"). If a state permit is "outside the guidelines and the requirements" of the CWA, EPA may object to it and block its issuance. See 33 U. S. C. §1342(d)(2); 66 Fed. Reg. 11206 (2001). Given these ongoing responsibilities, EPA has enacted a regulation that requires a State to enter into a Memorandum of Agreement (MOA) that sets forth the particulars of the agency's oversight duties. See 40 CFR §123.24(a) (2006).

The regulation governing MOAs contains several detailed requirements. For instance, the regulation states that an MOA must contain "[p]rovisions specifying classes and categories of permit applications, draft permits and



proposed permits that the State will send to the [EPA] Regional Administrator for review, comment and, where applicable, objection," §123.24(b)(2); "[p]rovisions specifying the frequency and content of reports, documents and other information which the State is required to submit to the EPA," §123.24(b)(3); and "[p]rovisions for coordination of compliance monitoring activities by the State and by EPA," §123.24(b)(4)(i). More generally, the regulation provides that an MOA "may include other terms, conditions, or agreements" that are "relevant to the administration and enforcement of the State's regulatory program." §123.24(a). Under the MOA regulation, furthermore, EPA will not approve any MOA that restricts its statutory oversight responsibility. *Ibid*.

Like the §7(a)(2) consultation process described above, MOAs provide a potential mechanism for giving effect to §7 of the ESA while also allowing the transfer of permitting authority to a State. It is important to remember that EPA must approve an MOA *prior to* the transfer of NPDES authority. As such, EPA can use—and in fact has used—the MOA process to structure its later oversight in a way that will allow it to protect endangered species in accordance with §7(a)(2) of the ESA. EPA might negotiate a provision in the MOA that would require a State to abide by the ESA requirements when issuing pollution permits. See Brief for American Fisheries Society et al. as *Amici Curiae* 28. ("In the Maine MOA, for example, EPA and the state agreed that state permits would protect ESA-listed species by ensuring compliance with state water quality standards"). Alternatively, "EPA could require the state to provide copies of draft permits for discharges in particularly sensitive habitats such as those of ESA-listed species or for discharges that contain a pollutant that threatens ESA-listed wildlife." *Id*., at 10. Or the MOA might be drafted in a way that would allow the agency to object to state permits that would jeopardize

any and all endangered species. See *id*., at 28 (explaining that the Maine MOA includes a provision allowing EPA to "object to any state permit that risks harm to a listed species by threatening water quality"). These are just three of many possibilities. I need not identify other ways EPA could use the MOA process to comply with the ESA; it is enough to observe that MOAs provide a straightforward way to give the ESA its full effect without restricting §7(a)(2) in the way the Court does.

IV

As discussed above, I believe that the Court incorrectly restricts the reach of §7(a)(2) to discretionary federal actions. See Part II, *supra*. Even if such a limitation were permissible, however, it is clear that EPA's authority to transfer permitting authority under §402(b) *is* discretionary.[11]

The EPA Administrator's authority to approve state permit programs pursuant to §402(b) of the CWA does not even fit within the Court's description of the category of mandatory actions that the Court holds are covered by the ESA. In the Court's words, that category includes actions "that an agency is *required* by statute to undertake once certain specified triggering events have occurred." *Ante*, at 22. The "triggering event" for EPA's approval is simply the filing of a satisfactory description of the State's proposed program. See 33 U. S. C. §1342(b). The statute then commands that the EPA Administrator "shall approve" the submitted program unless he determines that state law does not satisfy nine specified conditions. Those conditions are not "triggering events"; they are potential objections to the exercise of the Administrator's authority.

What is more, §402(b) is a perfect example of why our

[11] Because it is quite lengthy, I include the full text of §402(b) in an appendix to this dissent.



analysis should not end simply because a statute uses the word "shall." Instead, we must look more closely at its listed criteria to determine whether they allow for discretion, despite the use of "shall." After all, as then-Justice Rehnquist's dissenting opinion in the "snail darter" case explains, a federal statute using the word "shall" will sometimes allow room for discretion. See *Hill*, 437 U. S. at 211–212 (Rehnquist, J., dissenting).[12] In these cases, there is significant room for discretion in EPA's evaluation of §402(b)'s nine conditions. The first criterion, for example, requires the EPA Administrator to examine five other statutes and ensure that the State has adequate authority to comply with each. 33 U. S. C. §1342(b)(1)(A). One of those five statutes, in turn, expressly directs the Administrator to exercise his "judgment." §1312. Even the Court acknowledges that EPA must exercise "some judgment in determining whether a State has demonstrated that it has the authority to carry out §402(b)'s enumerated statutory criteria." *Ante*, at 24. However, in the very same breath, the Court states that the dispositive fact is that "the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list." *Ibid*. This reasoning flouts the Court's own logic. Under the Court's reading of §402.03, §7(a)(2) applies to discretionary federal actions of any kind. The Court plainly acknowledges that EPA exercises discretion when deciding whether to transfer permitting authority to a State. If we are to take the

[12] See *Gutierrez de Martinez* v. *Lamagno*, 515 U. S. 417, 432–433, n. 9 (1995) ("Though 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.' See D. Mellinkoff, Mellinkoff's Dictionary of American Legal Usage 402–403 (1992) ('shall' and 'may' are 'frequently treated as synonyms' and their meaning depends on context); B. Garner, Dictionary of Modern Legal Usage 939 (2d ed. 1995) ("Courts in virtually every English-speaking jurisdiction have held—by necessity—that shall means may in some contexts, and vice versa.')").

Court's approach seriously, once *any* discretion has been identified—as it has here—§7(a)(2) must apply.[13]

The MOA regulation described in Part III–B, *supra,* also demonstrates that an NPDES transfer is not as ministerial a task as the Court would suggest. The agency retains significant discretion under §123.24 over the content of an MOA, which of course must be approved prior to a transfer. For instance, EPA may require a State to file reports on a weekly basis or a monthly basis. It may require a State to submit only certain classes and categories of permit applications. And it may include any additional terms and conditions that are relevant to the enforcement of the NPDES program. There is ample room for judgment in all of these areas, and EPA has exercised such judgment in the past when approving MOAs from many States. See, *e.g.*, Approval of Application by Maine to Administer the NPDES Program, 66 Fed. Reg. 12791, (2001); Approval of Application by Maine to Administer the NPDES Program; Texas, 63 Fed. Reg. 51165 (1998).

In fact, in an earlier case raising a question similar to this one, see *American Forest & Paper Assn.* v. *EPA*, 137 F. 3d 291, 298–299 (CA5 1998), EPA itself explained how 40 CFR §123.24 gives it discretion over the approval of a State pollution control program, see Brief for EPA in No. 96–60874 (CA5). Arguing that "[i]ndicia of discretionary involvement or control abound in [its] regulations," the agency listed its MOA regulation as a prime example.[14] Again, because EPA's approval of a State application to administer an NPDES program entails significant—indeed, abounding—discretion, I would find that §7(a)(2) of the ESA applies even under the Court's own flawed theory of these cases.

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[13] The Court also claims that the "basic principle announced in" *Department of Transportation* v. *Public Citizen*, 541 U. S. 752 (2004),—"that an agency cannot be considered the legal 'cause' of an action that it has no statutory discretion *not* to take"—supports its reliance on §402.03. *Ante*, at 20. First of all, the Court itself recognizes that it must distance itself from that case, *ibid.*, because *Public Citizen* dealt with a procedural requirement under the National Environmental Policy Act (NEPA), not a substantive requirement like that imposed by §7(a)(2) of the ESA, see *TVA* v. *Hill*, 437 U. S. 158, 188, n. 34 (1978) (holding that NEPA cases are "completely inapposite" to the ESA context). What the Court does not recognize, however, is that what it views as the "basic principle" of *Public Citizen* is stated too broadly and therefore inapplicable to this case. *Ante,* at 20.

Our decision in *Public Citizen* turned on what we called "a critical feature of the case": that the Federal Motor Carrier Safety Administration (FMCSA) had "no ability to countermand" the President's lifting a moratorium that prohibited certain motor carriers from obtaining authority to operate within the United States. 541 U. S., at 766. Once the President decided to lift that moratorium, and once the relevant vehicles had entered the United States, FMCSA was required by statute to register the vehicles if certain conditions were met. *Ibid.* ("Under FMCSA's entirely reasonable reading of this provision, it must certify any motor carrier that can show that it is willing and able to comply with the various substantive requirements for safety and financial responsibility contained in DOT regulations; only the moratorium prevented it from doing so for Mexican motor carriers before 2001" (emphasis deleted)). Therefore, any potential NEPA concerns were generated by another decisionmaker, the President, and not the FMCSA. Here, by contrast, EPA is not required to act ministerially once another person or agency has made a decision. Instead, EPA must exercise *its own* judgment when considering the transfer of NPDES authority to a State; it also has *its own* authority to deny such a transfer. Any effect on endangered species will be caused, even if indirectly, by the agency's own decision to transfer NPDES authority. Cf. 50 CFR §402.02 (providing that the ESA will apply to all agency activities that "directly *or indirectly* caus[e] modifications to the land, water, or air" (emphasis added)).



[14] EPA also discussed several other regulations that give it discretion. For example, under 40 CFR §123.61(b), EPA is required to solicit public comments on a State's transfer application, and it must "approve or disapprove the program" after "taking into consideration all comments received." As EPA explained in its Fifth Circuit brief, if it "were simply acting in a ministerial fashion, such weighing of the merits of public comments would be unnecessary." Brief for EPA in No. 96–60874 (CA5).

V

Mindful that judges must always remain faithful to the intent of the legislature, Chief Justice Burger closed his opinion in the "snail darter" case with a reminder that "[o]nce the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." *Hill*, 437 U. S., at 194. This Court offered a definitive interpretation of the Endangered Species Act nearly 30 years ago in that very case. Today the Court turns its back on our decision in *Hill* and places a great number of endangered species in jeopardy, including the cactus ferruginous pygmy-owl and Pima pineapple cactus at issue here. At the risk of plagiarizing Chief Justice Burger's fine opinion, I think it is appropriate to end my opinion just as he did—with a quotation attributed to Sir Thomas More that has as much relevance today as it did three decades ago. This quotation illustrates not only the fundamental character of the rule of law embodied in §7 of the ESA but also the pernicious consequences of official disobedience of such a rule. Repetition of that literary allusion is especially appropriate today:

> "The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm *not* God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake." R. Bolt, A Man for All Seasons, Act I, p. 147 (Three Plays, Heinemann ed. 1967) (quoted in *Hill*, 437 U. S., at 195).



Although its reasons have shifted over time, at both the administrative level and in the federal courts, EPA has insisted that the requirements of §7(a)(2) of the ESA do not apply to its decision to transfer permitting authority under §402(b) of the CWA. See App. 114; Brief for Petitioner EPA 16, 42. As I have explained above, that conclusion is contrary to the text of §7(a)(2), our decision in the *TVA* v. *Hill*, and the regulation on which the agency has since relied and upon which the Court relies on today. Accordingly, I would hold that EPA's decision was arbitrary and capricious under the Administrative Procedure Act, see 5 U. S. C. §706(2)(A), and would remand to the agency for further proceedings consistent with this opinion.

I respectfully dissent.

APPENDIX TO OPINION OF STEVENS, J.

**33 U. S. C. §1342(b)**

"(b) State permit programs.

"At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

"(1) To issue permits which—

"(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

"(B) are for fixed terms not exceeding five years; and

"(C) can be terminated or modified for cause including, but not limited to, the following:

"(i) violation of any condition of the permit;

"(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

"(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

"(D) control the disposal of pollutants into wells;

"(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or



"(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

"(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

"(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

"(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

"(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

"(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

"(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to

assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.





# SUPREME COURT OF THE UNITED STATES

Nos. 06–340 and 06–549

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL., PETITIONERS
06–340 *v.*
DEFENDERS OF WILDLIFE ET AL.

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER
06–549 *v.*
DEFENDERS OF WILDLIFE ET AL.

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

[June 25, 2007]

JUSTICE BREYER, dissenting.

I join JUSTICE STEVENS' dissent, while reserving judgment as to whether §7(a)(2) of the Endangered Species Act of 1973, 16 U. S. C. §1536(a)(2), really covers every possible agency action even of totally unrelated agencies—such as, say, a discretionary determination by the Internal Revenue Service whether to prosecute or settle a particular tax liability, see 26 U. S. C. §7121.

At the same time I add one additional consideration in support of his (and my own) dissenting views. The Court emphasizes that "[b]y its terms, the statutory language [of §402(b) of the Clean Water Act, 33 U. S. C. §1342(b)] is mandatory and *the list exclusive*; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application." *Ante*, at 14 (emphasis added). My own understanding of agency action leads me to believe that the majority cannot possibly be correct in

concluding that the structure of §402(b) precludes application of §7(a)(2) to the EPA's discretionary action. See *ante*, at 19–21 (STEVENS, J., dissenting). That is because grants of discretionary authority always come with *some* implicit limits attached. See L. Jaffe, Judicial Control of Administrative Action 359 (1965) (discretion is "a power to make a choice" from a "permissible class of actions"). And there are likely numerous instances in which, prior to, but not after, the enactment of §7(a)(2), the statute might have implicitly placed "species preservation" outside those limits.

To take one example, consider the statute that once granted the old Federal Power Commission (FPC) the authority to grant a "certificate of public convenience and necessity" to permit a natural gas company to operate a new pipeline. See 15 U. S. C. §717f(c)(1)(A). It says that "a certificate shall be issued to any qualified applicant therefor . . . if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed . . . and that the proposed service . . . is or will be required by the present or future public convenience and necessity." §717f(e).

Before enactment of the Endangered Species Act of 1973, 87 Stat. 884, it is at least uncertain whether the FPC could have withheld a certificate simply because a natural gas pipeline might threaten an endangered animal, for given the Act's language and history, species preservation does not naturally fall within its terms. But we have held that the Endangered Species Act changed the regulatory landscape, "indicat[ing] beyond doubt that Congress intended endangered species to be afforded the *highest* of priorities." *TVA* v. *Hill*, 437 U. S. 153, 174 (1978) (emphasis added). Indeed, the Endangered Species Act demonstrated "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id.*, at 185. And given a new



pipeline's potential effect upon habitat and landscape, it seems reasonable to believe, once Congress enacted the new law, the FPC's successor (the Federal Energy Regulatory Commission) would act within its authority in taking species-endangering effects into account.

To take another example, the Food and Drug Administration (FDA) has, by statute, an "exclusive" list of criteria to consider in reviewing applications for approval of a new drug. See 21 U. S. C. §355(d) ("If the Secretary finds . . . [*e.g.*,] the investigations . . . do not include adequate tests by all methods reasonably applicable to show whether or not such drug is safe . . . he shall issue an order refusing to approve the application"). Preservation of endangered species is not on this "exclusive" list of criteria. Yet I imagine that the FDA *now* should take account, when it grants or denies drug approval, of the effect of manufacture and marketing of a new drug upon the preservation or destruction of an endangered species.

The only meaningful difference between the provision now before us, §402(b) of the Clean Water Act, and the energy- and drug-related statutes that I have mentioned is that the very purpose of the former is to preserve the state of our natural environment—a purpose that the Endangered Species Act shares. That shared purpose shows that §7(a)(2) must apply to the Clean Water Act *a fortiori*.

**Outline: Major Substantive Trends and Themes in Constitutional and Administrative Law Affecting Business, The 2006-07 Supreme Court Term and Developments in the Courts of Appeals**

1. **Limitations on Broad Class Action Liability**

2. **Limits on Costly and Burdensome Discovery as a Settlement Tool: Limits and Possibilities of the Judiciary**

3. **"Raising the Bar" for Plaintiffs at the Pleadings and Dispositive Motion Stage**

1. **4. The Allocation and Separation of Powers in the Administrative State: Chevron and Skidmore and the Evolving Scope of Judicial Deference to Government Regulatory Action: Waxing and Waning**

4. **Expanding Scope of Federal Preemption of State and Local Business Regulation**

5. **Punitive Damages: Steadily (?) Evolving Qualitative and Quantitative Limits or Judicial Waivering**

6. **Clarifying Standards of Care for Civil Liability under Federal Regulatory Statutes**

7. **Antitrust Liability: Completing the Revolution (?)**

8. **Equality for Competitors Facing Government Regulation**

**Outline – Questions and Themes of the Panel's Discussion**

1. **The "Most Successful Supreme Court Term" for Business?**

2. **A "Bitterly Divided" Court, or a Court Broadly Unified on "Taking Care of Business"?**

3. **Federalism or Centralization in Economic Regulation?**

4. **"Litigation and Social Reform": What Does the Future Hold?**

5. **Separation and Balance of Powers in the Regulatory State**

6. **The End or the Rationalization of Antitrust Law? Sic Semper Chicago?**

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

## PHILIP MORRIS USA *v.* WILLIAMS, PERSONAL REPRESENTATIVE OF ESTATE OF WILLIAMS, DECEASED

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 05–1256. Argued October 31, 2006—Decided February 20, 2007

In this state negligence and deceit lawsuit, a jury found that Jesse Williams' death was caused by smoking and that petitioner Philip Morris, which manufactured the cigarettes he favored, knowingly and falsely led him to believe that smoking was safe. In respect to deceit, it awarded $821,000 in compensatory damages and $79.5 million in punitive damages to respondent, the personal representative of Williams' estate. The trial court reduced the latter award, but it was restored by the Oregon Court of Appeals. The State Supreme Court rejected Philip Morris' arguments that the trial court should have instructed the jury that it could not punish Philip Morris for injury to persons not before the court, and that the roughly 100-to-1 ratio the $79.5 million award bore to the compensatory damages amount indicated a "grossly excessive" punitive award.

*Held:*

1. A punitive damages award based in part on a jury's desire to punish a defendant for harming nonparties amounts to a taking of property from the defendant without due process. Pp. 4–10.

(a) While "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition," *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 568, unless a State insists upon proper standards to cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of "fair notice . . . of the severity of the penalty that a State may impose," *id.*, at 574; may threaten "arbitrary punishments," *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408, 416; and, where the amounts are sufficiently large, may impose one State's (or one jury's) "policy choice" upon "neighboring States" with different public policies, *BMW*, *supra*, at 571–572. Thus,



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the Constitution imposes limits on both the procedures for awarding punitive damages and amounts forbidden as "grossly excessive." See *Honda Motor Co.* v. *Oberg*, 512 U. S. 415, 432. The Constitution's procedural limitations are considered here. Pp. 4–5.

(b) The Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury inflicted on strangers to the litigation. For one thing, a defendant threatened with punishment for such injury has no opportunity to defend against the charge. See *Lindsey* v. *Normet*, 405 U. S. 56, 66. For another, permitting such punishment would add a near standardless dimension to the punitive damages equation and magnify the fundamental due process concerns of this Court's pertinent cases—arbitrariness, uncertainty, and lack of notice. Finally, the Court finds no authority to support using punitive damages awards to punish a defendant for harming others. *BMW, supra,* at 568, n.11, distinguished. Respondent argues that showing harm to others is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. While evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk to the general public, and so was particularly reprehensible, a jury may not go further and use a punitive damages verdict to punish a defendant directly for harms to those nonparties. Given the risks of unfairness, it is constitutionally important for a court to provide assurance that a jury is asking the right question; and given the risks of arbitrariness, inadequate notice, and imposing one State's policies on other States, it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. Pp. 5–8.

(c) The Oregon Supreme Court's opinion focused on more than reprehensibility. In rejecting Philip Morris' claim that the Constitution prohibits using punitive damages to punish a defendant for harm to nonparties, it made three statements. The first—that this Court held in *State Farm* only that a jury could not base an award on dissimilar acts of a defendant—was correct, but this Court now explicitly holds that a jury may not punish for harm to others. This Court disagrees with the second statement—that if a jury cannot punish for the conduct, there is no reason to consider it—since the Due Process Clause prohibits a State's inflicting punishment for harm to nonparties, but permits a jury to consider such harm in determining reprehensibility. The third statement—that it is unclear how a jury could consider harm to nonparties and then withhold that consideration from the punishment calculus—raises the practical problem of how to know whether a jury punished the defendant for causing injury to others rather than just took such injury into ac-

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count under the rubric of reprehensibility. The answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. Although States have some flexibility in determining what kind of procedures to implement to protect against that risk, federal constitutional law obligates them to provide some form of protection where the risk of misunderstanding is a significant one. Pp. 8–10.

2. Because the Oregon Supreme Court's application of the correct standard may lead to a new trial, or a change in the level of the punitive damages award, this Court will not consider the question whether the award is constitutionally "grossly excessive." P. 10.

340 Ore. 35, 127 P. 3d 1165, vacated and remanded.

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



Opinion of the Court



# SUPREME COURT OF THE UNITED STATES

No. 05–1256

PHILIP MORRIS USA, PETITIONER *v.* MAYOLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE D. WILLIAMS, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

[February 20, 2007]

JUSTICE BREYER delivered the opinion of the Court.

The question we address today concerns a large state-court punitive damages award. We are asked whether the Constitution's Due Process Clause permits a jury to base that award in part upon its desire to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent). We hold that such an award would amount to a taking of "property" from the defendant without due process.

I

This lawsuit arises out of the death of Jesse Williams, a heavy cigarette smoker. Respondent, Williams' widow, represents his estate in this state lawsuit for negligence and deceit against Philip Morris, the manufacturer of Marlboro, the brand that Williams favored. A jury found that Williams' death was caused by smoking; that Williams smoked in significant part because he thought it was safe to do so; and that Philip Morris knowingly and falsely led him to believe that this was so. The jury ultimately

found that Philip Morris was negligent (as was Williams) and that Philip Morris had engaged in deceit. In respect to deceit, the claim at issue here, it awarded compensatory damages of about $821,000 (about $21,000 economic and $800,000 noneconomic) along with $79.5 million in punitive damages.

The trial judge subsequently found the $79.5 million punitive damages award "excessive," see, *e.g.*, *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996), and reduced it to $32 million. Both sides appealed. The Oregon Court of Appeals rejected Philip Morris' arguments and restored the $79.5 million jury award. Subsequently, Philip Morris sought review in the Oregon Supreme Court (which denied review) and then here. We remanded the case in light of *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408 (2003). 540 U. S. 801 (2003). The Oregon Court of Appeals adhered to its original views. And Philip Morris sought, and this time obtained, review in the Oregon Supreme Court.

Philip Morris then made two arguments relevant here. First, it said that the trial court should have accepted, but did not accept, a proposed "punitive damages" instruction that specified the jury could not seek to punish Philip Morris for injury to other persons not before the court. In particular, Philip Morris pointed out that the plaintiff's attorney had told the jury to "think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. . . . In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? . . . [C]igarettes . . . are going to kill ten [of every hundred]. [And] the market share of Marlboros [*i.e.*, Philip Morris] is one-third [*i.e.*, one of every three killed]." App. 197a, 199a. In light of this argument, Philip Morris asked the trial court to tell the jury that "you may consider the extent of harm suffered by others in determining what [the] reasonable relationship is" between any punitive award and "the harm caused to Jesse Williams" by Philip Morris' misconduct, "[but] you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims . . . ." *Id.,* at 280a. The judge rejected this proposal and instead told the jury that "[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct," and "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct." *Id.,* at 283a. In Philip Morris' view, the result was a significant likelihood that a portion of the $79.5 million award represented punishment for its having harmed others, a punishment that the Due Process Clause would here forbid.



Second, Philip Morris pointed to the roughly 100-to-1 ratio the $79.5 million punitive damages award bears to $821,000 in compensatory damages. Philip Morris noted that this Court in *BMW* emphasized the constitutional need for punitive damages awards to reflect (1) the "reprehensibility" of the defendant's conduct, (2) a "reasonable relationship" to the harm the plaintiff (or related victim) suffered, and (3) the presence (or absence) of "sanctions," *e.g.*, criminal penalties, that state law provided for comparable conduct, 517 U. S., at 575–585. And in *State Farm,* this Court said that the longstanding historical practice of setting punitive damages at two, three, or four times the size of compensatory damages, while "not binding," is "instructive," and that "[s]ingle-digit multipliers are more likely to comport with due process." 538 U. S., at 425. Philip Morris claimed that, in light of this case law, the punitive award was "grossly excessive." See *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 458 (1993) (plurality opinion); *BMW*, *supra*, at 574–575; *State Farm*, *supra*, at 416–417.

The Oregon Supreme Court rejected these and other Philip Morris arguments. In particular, it rejected Philip

Morris' claim that the Constitution prohibits a state jury "from using punitive damages to punish a defendant for harm to nonparties." 340 Ore. 35, 51–52, 127 P. 3d 1165, 1175 (2006). And in light of Philip Morris' reprehensible conduct, it found that the $79.5 million award was not "grossly excessive." *Id.,* at 63–64, 127 P. 3d, at 1181–1182.

Philip Morris then sought certiorari. It asked us to consider, among other things, (1) its claim that Oregon had unconstitutionally permitted it to be punished for harming nonparty victims; and (2) whether Oregon had in effect disregarded "the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm." Pet. for Cert. (I). We granted certiorari limited to these two questions.

For reasons we shall set forth, we consider only the first of these questions. We vacate the Oregon Supreme Court's judgment, and we remand the case for further proceedings.

II

This Court has long made clear that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW*, *supra*, at 568. See also *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974); *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266–267 (1981); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 22 (1991). At the same time, we have emphasized the need to avoid an arbitrary determination of an award's amount. Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of "fair notice . . . of the severity of the penalty that a State may impose," *BMW*, *supra*, at 574; it may threaten "arbitrary punishments," *i.e.*, punishments that reflect not an "application of law" but "a decisionmaker's caprice," *State Farm*, *supra*, at 416, 418 (internal quotation marks omitted); and, where the amounts are sufficiently large, it may impose one State's (or one jury's) "policy choice," say as to the conditions under which (or even whether) certain products can be sold, upon "neighboring States" with different public policies, *BMW*, *supra*, at 571–572.



For these and similar reasons, this Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as "grossly excessive." See *Honda Motor Co.* v. *Oberg*, 512 U. S. 415, 432 (1994) (requiring judicial review of the size of punitive awards); *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U. S. 424, 443 (2001) (review must be *de novo*); *BMW*, *supra*, at 574–585 (excessiveness decision depends upon the reprehensibility of the defendant's conduct, whether the award bears a reasonable relationship to the actual and potential harm caused by the defendant to the plaintiff, and the difference between the award and sanctions "authorized or imposed in comparable cases"); *State Farm*, *supra*, at 425 (excessiveness more likely where ratio exceeds single digits). Because we shall not decide whether the award here at issue is "grossly excessive," we need now only consider the Constitution's procedural limitations.

III

In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with "an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U. S. 56, 66 (1972) (internal quotation marks omitted). Yet a defen-

dant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.

For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified. *State Farm*, 538 U. S., at 416, 418; *BMW*, 517 U. S., at 574.

Finally, we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*. See *State Farm*, *supra*, at 424 ("[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, *to the plaintiff* and the punitive damages award" (emphasis added)). See also *TXO*, 509 U. S., at 460–462 (plurality opinion) (using same kind of comparison as basis for finding a punitive award not unconstitutionally excessive). We did use the term "error-free" (in *BMW*) to describe a lower court punitive damages calculation that likely included harm to others in the equation. 517 U. S., at 568, n. 11. But context makes clear that the term "error-free" in the *BMW* footnote referred to errors relevant to the case



at hand. Although elsewhere in *BMW* we noted that there was no suggestion that the plaintiff "or any other BMW purchaser was threatened with any additional potential harm" by the defendant's conduct, we did not purport to decide the question of harm to others. *Id.,* at 582. Rather, the opinion appears to have left the question open.

Respondent argues that she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. That is to say, harm to others shows more reprehensible conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.

Given the risks of unfairness that we have mentioned, it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. And given the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies (*e.g.*, banning cigarettes) upon other States—all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries, see *id.*, at 594–595 (BREYER, J., concurring)—it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. We therefore conclude that the Due Process

Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.

IV

Respondent suggests as well that the Oregon Supreme Court, in essence, agreed with us, that it did not authorize punitive damages awards based upon punishment for harm caused to nonparties. We concede that one might read some portions of the Oregon Supreme Court's opinion as focusing only upon reprehensibility. See, *e.g.*, 340 Ore., at 51, 127 P. 3d, at 1175 ("[T]he jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large"). But the Oregon court's opinion elsewhere makes clear that that court held more than these few phrases might suggest.

The instruction that Philip Morris said the trial court should have given distinguishes between using harm to others as part of the "reasonable relationship" equation (which it would allow) and using it directly as a basis for punishment. The instruction asked the trial court to tell the jury that "you *may* consider the extent of harm suffered by others *in determining what [the] reasonable relationship is*" between Philip Morris' punishable misconduct and harm caused to Jesse Williams, "*[but] you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own* in which other juries can resolve their claims . . . ." App. 280a (emphasis added). And as the Oregon Supreme Court explicitly recognized, Philip Morris argued that the Constitution "prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties." 340 Ore., at 51–52, 127 P. 3d, at 1175.



The court rejected that claim. In doing so, it pointed out (1) that this Court in *State Farm* had held only that a jury could not base its award upon "dissimilar" acts of a defendant. 340 Ore., at 52–53, 127 P. 3d, at 1175–1176. It added (2) that "[i]f a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all." *Id.*, at 52, n. 3, 127 P. 3d, at 1175, n. 3. And it stated (3) that "[i]t is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus." *Ibid.*

The Oregon court's first statement is correct. We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now. We do not agree with the Oregon court's second statement. We have explained why we believe the Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation. At the same time we recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility. Cf., *e.g.*, *Witte* v. *United States*, 515 U. S. 389, 400 (1995) (recidivism statutes taking into account a criminal defendant's other misconduct do not impose an "'additional penalty for the earlier crimes,' but instead . . . 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one'" (quoting *Gryger* v. *Burke*, 334 U. S. 728, 732 (1948))).

The Oregon court's third statement raises a practical problem. How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misun-

derstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.

V

As the preceding discussion makes clear, we believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris' appeal. We remand this case so that the Oregon Supreme Court can apply the standard we have set forth. Because the application of this standard may lead to the need for a new trial, or a change in the level of the punitive damages award, we shall not consider whether the award is constitutionally "grossly excessive." We vacate the Oregon Supreme Court's judgment and remand the case for further proceedings not inconsistent with this opinion.

*It is so ordered.*



# SUPREME COURT OF THE UNITED STATES

No. 05–1256

PHILIP MORRIS USA, PETITIONER *v.* MAYOLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE D. WILLIAMS, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

[February 20, 2007]

JUSTICE STEVENS, dissenting.

The Due Process Clause of the Fourteenth Amendment imposes both substantive and procedural constraints on the power of the States to impose punitive damages on tortfeasors. See *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408 (2003); *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U. S. 424 (2001); *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996); *Honda Motor Co.* v. *Oberg*, 512 U. S. 415 (1994); *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443 (1993). I remain firmly convinced that the cases announcing those constraints were correctly decided. In my view the Oregon Supreme Court faithfully applied the reasoning in those opinions to the egregious facts disclosed by this record. I agree with JUSTICE GINSBURG's explanation of why no procedural error even arguably justifying reversal occurred at the trial in this case. See *post*, p. ___.

Of greater importance to me, however, is the Court's imposition of a novel limit on the State's power to impose punishment in civil litigation. Unlike the Court, I see no reason why an interest in punishing a wrongdoer "for harming persons who are not before the court," *ante,* at 1, should not be taken into consideration when assessing the

appropriate sanction for reprehensible conduct.

Whereas compensatory damages are measured by the harm the defendant has caused the plaintiff, punitive damages are a sanction for the public harm the defendant's conduct has caused or threatened. There is little difference between the justification for a criminal sanction, such as a fine or a term of imprisonment, and an award of punitive damages. See *Cooper Industries*, 532 U. S., at 432. In our early history either type of sanction might have been imposed in litigation prosecuted by a private citizen. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 127–128 (1998) (STEVENS, J., concurring in judgment). And while in neither context would the sanction typically include a pecuniary award measured by the harm that the conduct had caused to any third parties, in both contexts the harm to third parties would surely be a relevant factor to consider in evaluating the reprehensibility of the defendant's wrongdoing. We have never held otherwise.

In the case before us, evidence attesting to the possible harm the defendant's extensive deceitful conduct caused other Oregonians was properly presented to the jury. No evidence was offered to establish an appropriate measure of damages to compensate such third parties for their injuries, and no one argued that the punitive damages award would serve any such purpose. To award compensatory damages to remedy such third-party harm might well constitute a taking of property from the defendant without due process, see *ante*, at 1. But a punitive damages award, instead of serving a compensatory purpose, serves the entirely different purposes of retribution and deterrence that underlie every criminal sanction. *State Farm*, 538 U. S., at 416. This justification for punitive damages has even greater salience when, as in this case, see Ore. Rev. Stat. §31.735(1) (2003), the award is payable in whole or in part to the State rather than to the private



litigant.[1]

While apparently recognizing the novelty of its holding, *ante*, at 9, the majority relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant's conduct—which is permitted—from doing so in order to punish the defendant "directly"—which is forbidden. *Ante*, at 7. This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant—directly—for third-party harm.[2] A murderer who kills his victim by throwing a bomb that injures dozens of bystanders should be punished more severely than one who harms no one other than his intended victim. Similarly, there is no reason why the measure of the appropriate punishment for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers

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[1]The Court's holding in *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257 (1989), distinguished, for the purposes of appellate review under the Excessive Fines Clause of the Eighth Amendment, between criminal sanctions and civil fines awarded entirely to the plaintiff. The fact that part of the award in this case is payable to the State lends further support to my conclusion that it should be treated as the functional equivalent of a criminal sanction. See *id.*, at 263–264. I continue to agree with Justice O'Connor and those scholars who have concluded that the Excessive Fines Clause is applicable to punitive damages awards regardless of who receives the ultimate payout. See *id.*, at 286–299 (O'Connor, J., concurring in part and dissenting in part).

[2]It is no answer to refer, as the majority does, to recidivism statutes. *Ante*, at 9. In that context, we have distinguished between taking prior crimes into account as an aggravating factor in penalizing the conduct before the court versus doing so to punish for the earlier crimes. *Ibid*. But if enhancing a penalty for a present crime because of prior conduct that has already been punished is permissible, it is certainly proper to enhance a penalty because the conduct before the court, which has never been punished, injured multiple victims.

statewide should not include consideration of the harm to those "bystanders" as well as the harm to the individual plaintiff. The Court endorses a contrary conclusion without providing us with any reasoned justification.

It is far too late in the day to argue that the Due Process Clause merely guarantees fair procedure and imposes no substantive limits on a State's lawmaking power. See, *e.g., Moore* v. *East Cleveland*, 431 U. S. 494, 544 (1977) (White, J., dissenting); *Poe* v. *Ullman*, 367 U. S. 497, 540–541 (1961) (Harlan, J., dissenting); *Whitney* v. *California*, 274 U. S. 357, 373 (1927) (Brandeis, J., concurring). It remains true, however, that the Court should be "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992). Judicial restraint counsels us to "exercise the utmost care whenever we are asked to break new ground in this field." *Ibid.* Today the majority ignores that sound advice when it announces its new rule of substantive law.

Essentially for the reasons stated in the opinion of the Supreme Court of Oregon, I would affirm its judgment.



# SUPREME COURT OF THE UNITED STATES

No. 05–1256

PHILIP MORRIS USA, PETITIONER *v.* MAYOLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE D. WILLIAMS, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

[February 20, 2007]

JUSTICE THOMAS, dissenting.

I join JUSTICE GINSBURG's dissent in full. I write separately to reiterate my view that "'the Constitution does not constrain the size of punitive damages awards.'" *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408, 429–430 (2003) (THOMAS, J., dissenting) (quoting *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U. S. 424, 443 (2001) (THOMAS, J., concurring)). It matters not that the Court styles today's holding as "procedural" because the "procedural" rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages. See *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 26–27 (1991) (SCALIA, J., concurring in judgment) ("In 1868 . . . punitive damages were undoubtedly an established part of the American common law of torts. It is . . . clear that no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount"). Today's opinion proves once again that this Court's punitive damages jurisprudence is "insusceptible of principled application." *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 599 (1996) (SCALIA, J., joined by THOMAS, J., dissenting).

# SUPREME COURT OF THE UNITED STATES

No. 05–1256

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

[February 20, 2007]

JUSTICE GINSBURG, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The purpose of punitive damages, it can hardly be denied, is not to compensate, but to punish. Punish for what? Not for harm actually caused "strangers to the litigation," *ante*, at 5, the Court states, but for the *reprehensibility* of defendant's conduct, *ante*, at 7–8. "[C]onduct that risks harm to many," the Court observes, "is likely more reprehensible than conduct that risks harm to only a few." *Ante*, at 9. The Court thus conveys that, when punitive damages are at issue, a jury is properly instructed to consider the extent of harm suffered by others as a measure of reprehensibility, but not to mete out punishment for injuries in fact sustained by nonparties. *Ante*, at 7–9. The Oregon courts did not rule otherwise. They have endeavored to follow our decisions, most recently in *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996), and *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408 (2003), and have "deprive[d] [no jury] of proper legal guidance," *ante*, at 7. Vacation of the Oregon Supreme Court's judgment, I am convinced, is unwarranted.



The right question regarding reprehensibility, the Court acknowledges, *ante*, at 8, would train on "the harm that Philip Morris was prepared to inflict on the smoking public at large." *Ibid.* (quoting 340 Ore. 35, 51, 127 P. 3d 1165, 1175 (2006)). See also 340 Ore., at 55, 127 P. 3d, at 1177 ("[T]he jury, *in assessing the reprehensibility of Philip Morris's actions*, could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct." (emphasis added)). The Court identifies no evidence introduced and no charge delivered inconsistent with that inquiry.

The Court's order vacating the Oregon Supreme Court's judgment is all the more inexplicable considering that Philip Morris did not preserve any objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel's argument. The sole objection Philip Morris preserved was to the trial court's refusal to give defendant's requested charge number 34. See *id.*, at 54, 127 P. 3d, at 1176. The proposed instruction read in pertinent part:

> "If you determine that some amount of punitive damages should be imposed on the defendant, it will then be your task to set an amount that is appropriate. This should be such amount as you believe is necessary to achieve the objectives of deterrence and punishment. While there is no set formula to be applied in reaching an appropriate amount, I will now advise you of some of the factors that you may wish to consider in this connection.
>
> "(1) The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for

the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

. . . . .

"(2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant's conduct—that is, how far the defendant has departed from accepted societal norms of conduct." App. 280a.

Under that charge, just what use could the jury properly make of "the extent of harm suffered by others"? The answer slips from my grasp. A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge.

The Court ventures no opinion on the propriety of the charge proposed by Philip Morris, though Philip Morris preserved no other objection to the trial proceedings. Rather than addressing the one objection Philip Morris properly preserved, the Court reaches outside the bounds of the case as postured when the trial court entered its judgment. I would accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent.

* * *

For the reasons stated, and in light of the abundant evidence of "the potential harm [Philip Morris'] conduct could have caused," *ante*, at 6 (emphasis deleted), I would affirm the decision of the Oregon Supreme Court.



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

SAFECO INSURANCE CO. OF AMERICA ET AL. *v.* BURR ET AL.

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

No. 06–84. Argued January 16, 2007 —Decided June 4, 2007*

The Fair Credit Reporting Act (FCRA) requires notice to a consumer subjected to "adverse action . . . based in whole or in part on any information contained in a consumer [credit] report." 15 U. S. C. §1681m(a). As applied to insurance companies, "adverse action" is "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." §1681a(k)(1)(B)(i). FCRA provides a private right of action against businesses that use consumer reports but fail to comply. A negligent violation entitles a consumer to actual damages, §1681*o*(a), and a willful one entitles the consumer to actual, statutory, and even punitive damages, §1681n(a).

Petitioners in No. 06–100 (GEICO) use an applicant's credit score to select the appropriate subsidiary insurance company and the particular rate at which a policy may be issued. GEICO sends an adverse action notice only if a neutral credit score would have put the applicant in a lower priced tier or company; the applicant is not otherwise told if he would have gotten better terms with a better credit score. Respondent Edo's credit score was taken into account when GEICO issued him a policy, but GEICO sent no adverse action notice because his company and tier placement would have been the same with a neutral score. Edo filed a proposed class action, alleging willful violation of §1681m(a) and seeking statutory and punitive damages under §1681n(a). The District Court granted GEICO summary judgment, finding no adverse action because the premium would

*Together with No. 06–100, *GEICO General Insurance Co. et al.* v. *Edo,* also on certiorari to the same court.

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have been the same had Edo's credit history not been considered. Petitioners in No. 06–100 (Safeco) also rely on credit reports to set initial insurance premiums. Respondents Burr and Massey—whom Safeco offered higher than the best rates possible without sending adverse action notices—joined a proposed class action, alleging willful violation of §1681m(a) and seeking statutory and punitive damages under §1681n(a). The District Court granted Safeco summary judgment on the ground that offering a single, initial rate for insurance cannot be "adverse action." The Ninth Circuit reversed both judgments. In GEICO's case, it held that an adverse action occurs whenever a consumer would have received a lower rate had his consumer report contained more favorable information. Since that would have happened to Edo, GEICO's failure to give notice was an adverse action. The court also held that an insurer willfully fails to comply with FCRA if it acts in reckless disregard of a consumer's FCRA rights, remanding for further proceedings on the reckless disregard issue. Relying on its decision in GEICO's case, the Ninth Circuit rejected the District Court's position in the Safeco case and remanded for further proceedings.

*Held:*

1. Willful failure covers a violation committed in reckless disregard of the notice obligation. Where willfulness is a statutory condition of civil liability, it is generally taken to cover not only knowing violations of a standard, but reckless ones as well. See, *e.g., McLaughlin* v. *Richland Shoe Co.*, 486 U. S. 128, 133. This construction reflects common law usage. The standard civil usage thus counsels reading §1681n(a)'s phrase "willfully fails to comply" as reaching reckless FCRA violations, both on the interpretive assumption that Congress knows how this Court construes statutes and expects it to run true to form, see *Commissioner* v. *Keystone Consol. Industries, Inc.*, 508 U. S. 152, 159, and under the rule that a common law term in a statute comes with a common law meaning, absent anything pointing another way, *Beck* v. *Prupis*, 529 U. S. 494, 500–501. Petitioners claim that §1681n(a)'s drafting history points to a reading that liability attaches only to knowing violations, but the text as finally adopted points to the traditional understanding of willfulness in the civil sphere. Their other textual and structural arguments are also unpersuasive. Pp. 6–10.

2. Initial rates charged for new insurance policies may be adverse actions. Pp. 10–17.

(a) Reading the phrase "increase in any charge for . . . any insurance, existing or applied for," §1681a(k)(1)(B)(i), to include a disadvantageous rate even with no prior dealing fits with the ambitious objective of FCRA's statement of purpose, which uses expansive



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terms to describe the adverse effects of unfair and inaccurate credit reporting and the responsibilities of consumer reporting agencies. See §1681(a). These descriptions do nothing to suggest that remedies for consumers disadvantaged by unsound credit ratings should be denied to first-time victims, and the legislative histories of both FCRA's original enactment and a 1996 amendment reveal no reason to confine attention to customers and businesses with prior dealings. Finally, nothing about insurance contracts suggests that Congress meant to differentiate applicants from existing customers when it set the notice requirement; the newly insured who gets charged more owing to an erroneous report is in the same boat with the renewal applicant. Pp. 10–13.

(b) An increased rate is not "based in whole or in part on" a credit report under §1681m(a) unless the report was a necessary condition of the increase. In common talk, "based on" indicates a but-for causal relationship and thus a necessary logical condition. Though some textual arguments point another way, it makes more sense to suspect that Congress meant to require notice and prompt a consumer challenge only when the consumer would gain something if the challenge succeeded. Pp. 13–14.

(c) In determining whether a first-time rate is a disadvantageous increase, the baseline is the rate that the applicant would have received had the company not taken his credit score into account (the "neutral score" rate GEICO used in Edo's case). That baseline comports with the understanding that §1681m(a) notice is required only when the credit report's effect on the initial rate is necessary to put the consumer in a worse position than other relevant facts would have decreed anyway. Congress was more likely concerned with the practical question whether the consumer's rate actually suffered when his credit report was taken into account than the theoretical question whether the consumer would have gotten a better rate with the best possible credit score, the baseline suggested by the Government and respondent-plaintiffs. The Government's objection to this reading is rejected. Although the rate initially offered for new insurance is an "increase" calling for notice if it exceeds the neutral rate, once a consumer has learned that his credit report led the insurer to charge more, he need not be told with each renewal if his rate has not changed. After initial dealing between the consumer and the insurer, the baseline for "increase" is the previous rate or charge, not the "neutral" baseline that applies at the start. Pp. 15–17.

3. GEICO did not violate the statute, and while Safeco might have, it did not act recklessly. Pp. 18–21.

(a) Because the initial rate GEICO offered Edo was what he would have received had his credit score not been taken into account,

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GEICO owed him no adverse action notice under §1681m(a). P. 18.

(b) Even if Safeco violated FCRA when it failed to give Burr and Massey notice on the mistaken belief that §1681m(a) did not apply to initial applications, the company was not reckless. The common law has generally understood "recklessness" in the civil liability sphere as conduct violating an objective standard: action entailing "an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Farmer* v. *Brennan*, 511 U. S. 825, 836. There being no indication that Congress had something different in mind, there is no reason to deviate from the common law understanding in applying the statute. See *Beck* v. *Prupis*, 529 U. S., at 500–501. Thus, a company does not act in reckless disregard of FCRA unless the action is not only a violation under a reasonable reading of the statute, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless. The negligence/recklessness line need not be pinpointed here, for Safeco's reading of the statute, albeit erroneous, was not objectively unreasonable. Section 1681a(k)(1)(B)(i) is silent on the point from which to measure "increase," and Safeco's reading has a foundation in the statutory text and a sufficiently convincing justification to have persuaded the District Court to adopt it and rule in Safeco's favor. Before these cases, no court of appeals had spoken on the issue, and no authoritative guidance has yet come from the Federal Trade Commission. Given this dearth of guidance and the less-than-pellucid statutory text, Safeco's reading was not objectively unreasonable, and so falls well short of raising the "unjustifiably high risk" of violating the statute necessary for reckless liability. Pp. 18–21.

No. 06–84, 140 Fed. Appx. 746; No. 06–100, 435 F. 3d 1081, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY and BREYER, JJ., joined, in which SCALIA, J., joined as to all but footnotes 11 and 15, in which THOMAS and ALITO, JJ., joined as to all but Part III–A, and in which STEVENS and GINSBURG, JJ., joined as to Parts I, II, III–A, and IV–B. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, in which GINSBURG, J., joined. THOMAS, J., filed an opinion concurring in part, in which ALITO, J., joined.



Opinion of the Court



# SUPREME COURT OF THE UNITED STATES

Nos. 06–84 and 06–100

SAFECO INSURANCE COMPANY OF AMERICA, ET AL., PETITIONERS
06–84 *v.*
CHARLES BURR ET AL.

GEICO GENERAL INSURANCE COMPANY, ET AL., PETITIONERS
06–100 *v.*
AJENE EDO

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

[June 4, 2007]

JUSTICE SOUTER delivered the opinion of the Court.*

The Fair Credit Reporting Act (FCRA or Act) requires notice to any consumer subjected to "adverse action . . . based in whole or in part on any information contained in a consumer [credit] report." 15 U. S. C. §1681m(a). Anyone who "willfully fails" to provide notice is civilly liable to the consumer. §1681n(a). The questions in these consolidated cases are whether willful failure covers a violation committed in reckless disregard of the notice obligation, and, if so, whether petitioners Safeco and GEICO committed reckless violations. We hold that reckless action is covered, that GEICO did not violate the statute, and that

*JUSTICE SCALIA joins all but footnotes 11 and 15 of this opinion.

while Safeco might have, it did not act recklessly.

I

A

Congress enacted FCRA in 1970 to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy. See 84 Stat. 1128, 15 U. S. C. §1681; *TRW Inc.* v. *Andrews*, 534 U. S. 19, 23 (2001). The Act requires, among other things, that "any person [who] takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" must notify the affected consumer.[1] 15 U. S. C. §1681m(a). The notice must point out the adverse action, explain how to reach the agency that reported on the consumer's credit, and tell the consumer that he can get a free copy of the report and dispute its accuracy with the agency. *Ibid.* As it applies to an insurance company, "adverse action" is "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." §1681a(k)(1)(B)(i).

FCRA provides a private right of action against businesses that use consumer reports but fail to comply. If a violation is negligent, the affected consumer is entitled to actual damages. §1681*o*(a) (2000 ed., Supp. IV). If willful, however, the consumer may have actual damages, or statutory damages ranging from $100 to $1,000, and even

[1] So far as it matters here, the Act defines "consumer report" as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, [or] credit capacity . . . which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . credit or insurance to be used primarily for personal, family, or household purposes." 15 U. S. C. §1681a(d)(1) (footnote omitted). The scope of this definition is not at issue.



punitive damages. §1681n(a) (2000 ed.).

B

Petitioner GEICO[2] writes auto insurance through four subsidiaries: GEICO General, which sells "preferred" policies at low rates to low-risk customers; Government Employees, which also sells "preferred" policies, but only to government employees; GEICO Indemnity, which sells standard policies to moderate-risk customers; and GEICO Casualty, which sells nonstandard policies at higher rates to high-risk customers. Potential customers call a toll-free number answered by an agent of the four affiliates, who takes information and, with permission, gets the applicant's credit score.[3] This information goes into GEICO's computer system, which selects any appropriate company and the particular rate at which a policy may be issued.

For some time after FCRA went into effect, GEICO sent adverse action notices to all applicants who were not offered "preferred" policies from GEICO General or Government Employees. GEICO changed its practice, however, after a method to "neutralize" an applicant's credit score was devised: the applicant's company and tier placement is compared with the company and tier placement he would have been assigned with a "neutral" credit score, that is, one calculated without reliance on credit history.[4] Under this new scheme, it is only if using a

[2] The specific petitioners are subsidiary companies of the GEICO Corporation; for the sake of convenience, we call them "GEICO" collectively.

[3] The Act defines a "credit score" as "a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors, including default." 15 U. S. C. §1681g(f)(2)(A) (2000 ed., Supp. IV). Under its contract with its credit information providers, GEICO learned credit scores and facts in the credit reports that significantly influenced the scores, but did not have access to the credit reports themselves.

[4] A number of States permit the use of such "neutral" credit scores to

neutral credit score would have put the applicant in a lower priced tier or company that GEICO sends an adverse action notice; the applicant is not otherwise told if he would have gotten better terms with a better credit score.

Respondent Ajene Edo applied for auto insurance with GEICO. After obtaining Edo's credit score, GEICO offered him a standard policy with GEICO Indemnity (at rates higher than the most favorable), which he accepted. Because Edo's company and tier placement would have been the same with a neutral score, GEICO did not give Edo an adverse action notice. Edo later filed this proposed class action against GEICO, alleging willful failure to give notice in violation of §1681m(a); he claimed no actual harm, but sought statutory and punitive damages under §1681n(a). The District Court granted summary judgment for GEICO, finding there was no adverse action when "the premium charged to [Edo] . . . would have been the same even if GEICO Indemnity did not consider information in [his] consumer credit history." *Edo* v. *GEICO Casualty Co.*, CV 02–678–BR, 2004 U. S. Dist. LEXIS 28522, *12 (D. Ore., Feb. 23, 2004), App. to Pet. for Cert. in No. 06–100, p. 46a.

Like GEICO, petitioner Safeco[5] relies on credit reports to set initial insurance premiums,[6] as it did for respondents Charles Burr and Shannon Massey, who were offered higher rates than the best rates possible. Safeco

ensure that consumers with thin or unidentifiable credit histories are not treated disadvantageously. See, *e.g.*, N. Y. Ins. Law Ann. §§2802(e), (e)(1) (West 2006) (generally prohibiting an insurer from "consider[ing] an absence of credit information," but allowing it to do so if it "treats the consumer as if the applicant or insured had neutral credit information, as defined by the insurer").

[5]Again, the actual petitioners are subsidiary companies, of Safeco Corporation in this case; for convenience, we call them "Safeco" collectively.

[6]The parties do not dispute that the credit scores and credit reports relied on by GEICO and Safeco are "consumer reports" under 15 U. S. C. §1681a(d)(1).



sent them no adverse action notices, and they later joined a proposed class action against the company, alleging willful violation of §1681m(a) and seeking statutory and punitive damages under §1681n(a). The District Court ordered summary judgment for Safeco, on the understanding that offering a single, initial rate for insurance cannot be "adverse action."

The Court of Appeals for the Ninth Circuit reversed both judgments. In GEICO's case, it held that whenever a consumer "would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken against him." *Reynolds* v. *Hartford Financial Servs. Group, Inc.*, 435 F. 3d 1081, 1093 (2006). Since a better credit score would have placed Edo with GEICO General, not GEICO Indemnity, the appeals court held that GEICO's failure to give notice was an adverse action.

The Ninth Circuit also held that an insurer "willfully" fails to comply with FCRA if it acts with "reckless disregard" of a consumer's rights under the Act. *Id.*, at 1099. It explained that a company would not be acting recklessly if it "diligently and in good faith attempted to fulfill its statutory obligations" and came to a "tenable, albeit erroneous, interpretation of the statute." *Ibid.* The court went on to say that "a deliberate failure to determine the extent of its obligations" would not ordinarily escape liability under §1681n, any more than "reliance on creative lawyering that provides indefensible answers." *Ibid.* Because the court believed that the enquiry into GEICO's reckless disregard might turn on undisclosed circumstances surrounding GEICO's revision of its notification policy, the Court of Appeals remanded the company's case for further proceedings.[7]

[7]Prior to issuing its final opinion in this case, the Court of Appeals had issued, then withdrawn, two opinions in which it held that GEICO

In the action against Safeco, the Court of Appeals rejected the District Court's position, relying on its reasoning in GEICO's case (where it had held that the notice requirement applies to a single statement of an initial charge for a new policy). *Spano* v. *Safeco Corp.*, 140 Fed. Appx. 746 (2005). The Court of Appeals also rejected Safeco's argument that its conduct was not willful, again citing the GEICO case, and remanded for further proceedings.

We consolidated the two matters and granted certiorari to resolve a conflict in the Circuits as to whether §1681n(a) reaches reckless disregard of FCRA's obligations,[8] and to clarify the notice requirement in §1681m(a). 548 U. S. ___ (2006). We now reverse in both cases.

## II

GEICO and Safeco argue that liability under §1681n(a) for "willfully fail[ing] to comply" with FCRA goes only to acts known to violate the Act, not to reckless disregard of statutory duty, but we think they are wrong. We have said before that "willfully" is a "word of many meanings whose construction is often dependent on the context in which it appears," *Bryan* v. *United States*, 524 U. S. 184, 191 (1998) (internal quotation marks omitted); and where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well, see *McLaughlin* v. *Richland Shoe Co.*, 486 U. S. 128, 132–133 (1988) ("willful," as used in a limitation provision for

had "willfully" violated FCRA as a matter of law. *Reynolds* v. *Hartford Financial Servs. Group, Inc.*, 416 F. 3d 1097 (CA9 2005); *Reynolds* v. *Hartford Financial Servs. Group, Inc.*, 426 F. 3d 1020 (CA9 2005).

[8] Compare, *e.g.*, *Cushman* v. *Trans Union Corp.*, 115 F. 3d 220, 227 (CA3 1997) (adopting the "reckless disregard" standard), with *Wantz* v. *Experian Information Solutions*, 386 F. 3d 829, 834 (CA7 2004) (construing "willfully" to require that a user "knowingly and intentionally violate the Act"); *Phillips* v. *Grendahl*, 312 F. 3d 357, 368 (CA8 2002) (same).



actions under the Fair Labor Standards Act, covers claims of reckless violation); *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 125–126 (1985) (same, as to a liquidated damages provision of the Age Discrimination in Employment Act of 1967); cf. *United States* v. *Illinois Central R. Co.*, 303 U. S. 239, 242–243 (1938) ("willfully," as used in a civil penalty provision, includes "'conduct marked by careless disregard whether or not one has the right so to act'" (quoting *United States* v. *Murdock*, 290 U. S. 389, 395 (1933))). This construction reflects common law usage, which treated actions in "reckless disregard" of the law as "willful" violations. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §34, p. 212 (5th ed. 1984) (hereinafter Prosser and Keeton) ("Although efforts have been made to distinguish" the terms "willful," "wanton," and "reckless," "such distinctions have consistently been ignored, and the three terms have been treated as meaning the same thing, or at least as coming out at the same legal exit"). The standard civil usage thus counsels reading the phrase "willfully fails to comply" in §1681n(a) as reaching reckless FCRA violations,[9] and this is so both on the interpretive assumption

[9] It is different in the criminal law. When the term "willful" or "willfully" has been used in a criminal statute, we have regularly read the modifier as limiting liability to knowing violations. See *Ratzlaf* v. *United States*, 510 U. S. 135, 137 (1994); *Bryan* v. *United States*, 524 U. S. 184, 191–192 (1998); *Cheek* v. *United States*, 498 U. S. 192, 200–201 (1991). This reading of the term, however, is tailored to the criminal law, where it is characteristically used to require a criminal intent beyond the purpose otherwise required for guilt, *Ratzlaf*, *supra*, at 136–137; or an additional "'bad purpose,'" *Bryan*, *supra*, at 191; or specific intent to violate a known legal duty created by highly technical statutes, *Cheek*, *supra*, at 200–201. Thus we have consistently held that a defendant cannot harbor such criminal intent unless he "acted with knowledge that his conduct was unlawful." *Bryan*, *supra*, at 193. Civil use of the term, however, typically presents neither the textual nor the substantive reasons for pegging the threshold of liability at knowledge of wrongdoing. Cf. *Farmer* v. *Brennan*, 511 U. S. 825, 836–837 (1994)

that Congress knows how we construe statutes and expects us to run true to form, see *Commissioner* v. *Keystone Consol. Industries, Inc.*, 508 U. S. 152, 159 (1993), and under the general rule that a common law term in a statute comes with a common law meaning, absent anything pointing another way, *Beck* v. *Prupis*, 529 U. S. 494, 500–501 (2000).

GEICO and Safeco argue that Congress did point to something different in FCRA, by a drafting history of §1681n(a) said to show that liability was supposed to attach only to knowing violations. The original version of the Senate bill that turned out as FCRA had two standards of liability to victims: grossly negligent violation (supporting actual damages) and willful violation (supporting actual, statutory, and punitive damages). S. 823, 91st Cong., 1st Sess., §1 (1969). GEICO and Safeco argue that since a "gross negligence" standard is effectively the same as a "reckless disregard" standard, the original bill's "willfulness" standard must have meant a level of culpability higher than "reckless disregard," or there would have been no requirement to show a different state of mind as a condition of the potentially much greater liability; thus, "willfully fails to comply" must have referred to a knowing violation. Although the gross negligence standard was reduced later in the legislative process to simple negligence (as it now appears in §1681*o*), the provision for willful liability remains unchanged and so must require knowing action, just as it did originally in the draft of §1681n.

Perhaps. But Congress may have scaled the standard for actual damages down to simple negligence because it thought gross negligence, being like reckless action, was covered by willfulness. Because this alternative reading is

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(contrasting the different uses of the term "recklessness" in civil and criminal contexts).



possible, any inference from the drafting sequence is shaky, and certainly no match for the following clue in the text as finally adopted, which points to the traditional understanding of willfulness in the civil sphere.

The phrase in question appears in the preamble sentence of §1681n(a): "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer . . . ." Then come the details, in paragraphs (1)(A) and (1)(B), spelling out two distinct measures of damages chargeable against the willful violator. As a general matter, the consumer may get either actual damages or "damages of not less than $100 and not more than $1,000." §1681n(a)(1)(A). But where the offender is liable "for obtaining a consumer report under false pretenses or knowingly without a permissible purpose," the statute sets liability higher: "actual damages . . . or $1,000, whichever is greater." §1681n(a)(1)(B).

If the companies were right that "willfully" limits liability under §1681n(a) to knowing violations, the modifier "knowingly" in §1681n(a)(1)(B) would be superfluous and incongruous; it would have made no sense for Congress to condition the higher damages under §1681n(a) on knowingly obtaining a report without a permissible purpose if the general threshold of any liability under the section were knowing misconduct. If, on the other hand, "willfully" covers both knowing and reckless disregard of the law, knowing violations are sensibly understood as a more serious subcategory of willful ones, and both the preamble and the subsection have distinct jobs to do. See *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955) ("'[G]ive effect, if possible, to every clause and word of a statute'" (quoting *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883))).

The companies make other textual and structural arguments for their view, but none is persuasive. Safeco

thinks our reading would lead to the absurd result that one could, with reckless disregard, knowingly obtain a consumer report without a permissible purpose. But this is not so; action falling within the knowing subcategory does not simultaneously fall within the reckless alternative. Then both GEICO and Safeco argue that the reference to acting "knowingly and willfully" in FCRA's criminal enforcement provisions, §1681q and §1681r, indicates that "willfully" cannot include recklessness. But we are now on the criminal side of the law, where the paired modifiers are often found, see, *e.g.*, 18 U. S. C. §1001 (2000 ed. and Supp. IV) (false statements to federal investigators); 20 U. S. C. §1097(a) (embezzlement of student loan funds); 18 U. S. C. §1542 (2000 ed. and Supp. IV) (false statements in a passport application). As we said before, in the criminal law "willfully" typically narrows the otherwise sufficient intent, making the government prove something extra, in contrast to its civil-law usage, giving a plaintiff a choice of mental states to show in making a case for liability, see n. 9, *supra*. The vocabulary of the criminal side of FCRA is consequently beside the point in construing the civil side.

III

A

Before getting to the claims that the companies acted recklessly, we have the antecedent question whether either company violated the adverse action notice requirement at all. In both cases, respondent-plaintiffs' claims are premised on initial rates charged for new insurance policies, which are not "adverse" actions unless quoting or charging a first-time premium is "an increase in any charge for . . . any insurance, existing or applied for." 15 U. S. C. §1681a(k)(1)(B)(i).

In Safeco's case, the District Court held that the initial rate for a new insurance policy cannot be an "increase"



because there is no prior dealing. The phrase "increase in any charge for . . . insurance" is readily understood to mean a change in treatment for an insured, which assumes a previous charge for comparison. See Webster's New International Dictionary 1260 (2d ed. 1957) (defining "increase" as "[a]ddition or enlargement in size, extent, quantity, number, intensity, value, substance, etc.; augmentation; growth; multiplication"). Since the District Court understood "increase" to speak of change just as much as of comparative size or quantity, it reasoned that the statute's "increase" never touches the initial rate offer, where there is no change.

The Government takes the part of the Court of Appeals in construing "increase" to reach a first-time rate. It says that regular usage of the term is not as narrow as the District Court thought: the point from which to measure difference can just as easily be understood without referring to prior individual dealing. The Government gives the example of a gas station owner who charges more than the posted price for gas to customers he doesn't like; it makes sense to say that the owner increases the price and that the driver pays an increased price, even if he never pulled in there for gas before. See Brief for United States as *Amicus Curiae* 26.[10] The Government implies, then, that reading "increase" requires a choice, and the chosen reading should be the broad one in order to conform to what Congress had in mind.

We think the Government's reading has the better fit with the ambitious objective set out in the Act's statement

[10] Since the posted price seems to be addressed to the world in general, one could argue that the increased gas price is not the initial quote. But the same usage point can be made with the example of the clothing model who gets a call from a ritzy store after posing for a discount retailer. If she quotes a higher fee, it would be natural to say that the uptown store will have to pay the "increase" to have her in its ad.

of purpose, which uses expansive terms to describe the adverse effects of unfair and inaccurate credit reporting and the responsibilities of consumer reporting agencies. See §1681(a) (inaccurate reports "directly impair the efficiency of the banking system"; unfair reporting methods undermine public confidence "essential to the continued functioning of the banking system"; need to "insure" that reporting agencies "exercise their grave responsibilities" fairly, impartially, and with respect for privacy). The descriptions of systemic problem and systemic need as Congress saw them do nothing to suggest that remedies for consumers placed at a disadvantage by unsound credit ratings should be denied to first-time victims, and the legislative histories of FCRA's original enactment and of the 1996 amendment reveal no reason to confine attention to customers and businesses with prior dealings. Quite the contrary.[11] Finally, there is nothing about insurance contracts to suggest that Congress might have meant to differentiate applicants from existing customers when it set the notice requirement; the newly insured who gets charged more owing to an erroneous report is in the same boat with the renewal applicant.[12] We therefore hold that

[11] See S. Rep. No. 91–517, p. 7 (1969) ("Those who . . . charge a higher rate for credit or insurance wholly or partly because of a consumer report must, upon written request, so advise the consumer . . ."); S. Rep. No. 103–209, p. 4 (1993) (adverse action notice is required "any time the permissible use of a report results in an outcome adverse to the interests of the consumer"); H. R. Rep. No. 103–486, p. 26 (1994) ("[W]henever a consumer report is obtained for a permissible purpose . . . , any action taken based on that report that is adverse to the interests of the consumer triggers the adverse action notice requirements").

[12] In fact, notice in the context of an initially offered rate may be of greater significance than notice in the context of a renewal rate; if, for instance, insurance is offered on the basis of a single, long-term guaranteed rate, a consumer who is not given notice during the initial application process may never have an opportunity to learn of any adverse treatment.



the "increase" required for "adverse action," 15 U. S. C. §1681a(k)(1)(B)(i), speaks to a disadvantageous rate even with no prior dealing; the term reaches initial rates for new applicants.

B

Although offering the initial rate for new insurance can be an "adverse action," respondent-plaintiffs have another hurdle to clear, for §1681m(a) calls for notice only when the adverse action is "based in whole or in part on" a credit report. GEICO argues that in order to have adverse action "based on" a credit report, consideration of the report must be a necessary condition for the increased rate. The Government and respondent-plaintiffs do not explicitly take a position on this point.

To the extent there is any disagreement on the issue, we accept GEICO's reading. In common talk, the phrase "based on" indicates a but-for causal relationship and thus a necessary logical condition. Under this most natural reading of §1681m(a), then, an increased rate is not "based in whole or in part on" the credit report unless the report was a necessary condition of the increase.

As before, there are textual arguments pointing another way. The statute speaks in terms of basing the action "in part" as well as wholly on the credit report, and this phrasing could mean that adverse action is "based on" a credit report whenever the report was considered in the rate-setting process, even without being a necessary condition for the rate increase. But there are good reasons to think Congress preferred GEICO's necessary-condition reading.

If the statute has any claim to lucidity, not all "adverse actions" require notice, only those "based . . . on" information in a credit report. Since the statute does not explicitly call for notice when a business acts adversely merely after consulting a report, conditioning the requirement on

action "based . . . on" a report suggests that the duty to report arises from some practical consequence of reading the report, not merely some subsequent adverse occurrence that would have happened anyway. If the credit report has no identifiable effect on the rate, the consumer has no immediately practical reason to worry about it (unless he has the power to change every other fact that stands between himself and the best possible deal); both the company and the consumer are just where they would have been if the company had never seen the report.[13] And if examining reports that make no difference was supposed to trigger a reporting requirement, it would be hard to find any practical point in imposing the "based . . . on" restriction. So it makes more sense to suspect that Congress meant to require notice and prompt a challenge by the consumer only when the consumer would gain something if the challenge succeeded.[14]

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[13] For instance, if a consumer's driving record is so poor that no insurer would give him anything but the highest possible rate regardless of his credit report, whether or not an insurer happened to look at his credit report should have no bearing on whether the consumer must receive notice, since he has not been treated differently as a result of it.

[14] The history of the Act provides further support for this reading. The originally enacted version of the notice requirement stated: "Whenever . . . the charge for . . . insurance is increased either wholly or partly because of information contained in a consumer report . . . , the user of the consumer report shall so advise the consumer . . . ." 15 U. S. C. §1681m(a) (1976 ed.). The "because of" language in the original statute emphasized that the consumer report must actually have caused the adverse action for the notice requirement to apply. When Congress amended FCRA in 1996, it sought to define "adverse action" with greater particularity, and thus split the notice provision into two separate subsections. See 110 Stat. 3009–426 to 3009–427, 3009–443 to 3009–444. In the revised version of §1681m(a), the original "because of" phrasing changed to "based on," but there was no indication that this change was meant to be a substantive alteration of the statute's scope.



C

To sum up, the difference required for an increase can be understood without reference to prior dealing (allowing a first-time applicant to sue), and considering the credit report must be a necessary condition for the difference. The remaining step in determining a duty to notify in cases like these is identifying the benchmark for determining whether a first-time rate is a disadvantageous increase. And in dealing with this issue, the pragmatic reading of "based . . . on" as a condition necessary to make a practical difference carries a helpful suggestion.

The Government and respondent-plaintiffs argue that the baseline should be the rate that the applicant would have received with the best possible credit score, while GEICO contends it is what the applicant would have had if the company had not taken his credit score into account (the "neutral score" rate GEICO used in Edo's case). We think GEICO has the better position, primarily because its "increase" baseline is more comfortable with the understanding of causation just discussed, which requires notice under §1681m(a) only when the effect of the credit report on the initial rate offered is necessary to put the consumer in a worse position than other relevant facts would have decreed anyway. If Congress was this concerned with practical consequences when it adopted a "based . . . on" causation standard, it presumably thought in equally practical terms when it spoke of an "increase" that must be defined by a baseline to measure from. Congress was therefore more likely concerned with the practical question whether the consumer's rate actually suffered when the company took his credit report into account than the theoretical question whether the consumer would have gotten a better rate with perfect credit.[15]

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[15] While it might seem odd, under the current statutory structure, to interpret the definition of "adverse action" (in §1681a(k)(1)(B)(i)) in

The Government objects that this reading leaves a loophole, since it keeps first-time applicants who actually deserve better-than-neutral credit scores from getting notice, even when errors in credit reports saddle them with unfair rates. This is true; the neutral-score baseline will leave some consumers without a notice that might lead to discovering errors. But we do not know how often these cases will occur, whereas we see a more demonstrable and serious disadvantage inhering in the Government's position.

Since the best rates (the Government's preferred baseline) presumably go only to a minority of consumers, adopting the Government's view would require insurers to send slews of adverse action notices; every young applicant who had yet to establish a gilt-edged credit report, for example, would get a notice that his charge had been "increased" based on his credit report. We think that the consequence of sending out notices on this scale would undercut the obvious policy behind the notice requirement, for notices as common as these would take on the character of formalities, and formalities tend to be ignored. It would get around that new insurance usually

conjunction with §1681m(a), which simply applies the notice requirement to a particular subset of "adverse actions," there are strong indications that Congress intended these provisions to be construed in tandem. When FCRA was initially enacted, the link between the definition of "adverse action" and the notice requirement was clear, since "adverse action" was defined within §1681m(a). See 15 U. S. C. §1681m(a) (1976 ed.). Though Congress eventually split the provision into two parts (with the definition of "adverse action" now located at §1681a(k)(1)(B)(i)), the legislative history suggests that this change was not meant to alter Congress's intent to define "adverse action" in light of the notice requirement. See S. Rep. No. 103–209, at 4 ("The Committee bill . . . defines an 'adverse action' as any action that is adverse to the interests of the consumer and is based in whole or in part on a consumer report"); H. R. Rep. No. 103–486, at 26 ("[A]ny action based on [a consumer] report that is adverse to the interests of the consumer triggers the adverse action notice requirements").



comes with an adverse action notice, owing to some legal quirk, and instead of piquing an applicant's interest about the accuracy of his credit record, the commonplace notices would mean just about nothing and go the way of junk mail. Assuming that Congress meant a notice of adverse action to get some attention, we think the cost of closing the loophole would be too high.

While on the subject of hypernotification, we should add a word on another point of practical significance. Although the rate initially offered for new insurance is an "increase" calling for notice if it exceeds the neutral rate, did Congress intend the same baseline to apply if the quoted rate remains the same over a course of dealing, being repeated at each renewal date?

We cannot believe so. Once a consumer has learned that his credit report led the insurer to charge more, he has no need to be told over again with each renewal if his rate has not changed. For that matter, any other construction would probably stretch the word "increase" more than it could bear. Once the gas station owner had charged the customer the above-market price, it would be strange to speak of the same price as an increase every time the customer pulled in. Once buyer and seller have begun a course of dealing, customary usage does demand a change for "increase" to make sense.[16] Thus, after initial dealing between the consumer and the insurer, the baseline for "increase" is the previous rate or charge, not the "neutral" baseline that applies at the start.

[16] Consider, too, a consumer who, at the initial application stage, had a perfect credit score and thus obtained the best insurance rate, but, at the renewal stage, was charged at a higher rate (but still lower than the rate he would have received had his credit report not been taken into account) solely because his credit score fell during the interim. Although the consumer clearly suffered an "increase" in his insurance rate that was "based on" his credit score, he would not be entitled to an adverse action notice under the baseline used for initial applications.

IV

A

In GEICO's case, the initial rate offered to Edo was the one he would have received if his credit score had not been taken into account, and GEICO owed him no adverse action notice under §1681m(a).[17]

B

Safeco did not give Burr and Massey any notice because it thought §1681m(a) did not apply to initial applications, a mistake that left the company in violation of the statute if Burr and Massey received higher rates "based in whole or in part" on their credit reports; if they did, Safeco would be liable to them on a showing of reckless conduct (or worse). The first issue we can forget, however, for although the record does not reliably indicate what rates they would have obtained if their credit reports had not been considered, it is clear enough that if Safeco did violate the statute, the company was not reckless in falling down in its duty.

While "the term recklessness is not self-defining," the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard:

[17] We reject Edo's alternative argument that GEICO's offer of a standard insurance policy with GEICO Indemnity was an "adverse action" requiring notice because it amounted to a "denial" of insurance through a lower cost, "preferred" policy with GEICO General. See §1681a(k)(1)(B)(i) (defining "adverse action" to include a "denial . . . of . . . insurance"). An applicant calling GEICO for insurance talks with a sales representative who acts for all the GEICO companies. The record has no indication that GEICO tells applicants about its corporate structure, or that applicants request insurance from one of the several companies or even know of their separate existence. The salesperson takes information from the applicant and obtains his credit score, then either denies any insurance or assigns him to one of the companies willing to provide it; the other companies receive no application and take no separate action. This way of accepting new business is clearly outside the natural meaning of "denial" of insurance.



action entailing "an unjustifiably high risk of harm that is either known or so obvious that it should be known."[18] *Farmer* v. *Brennan*, 511 U. S. 825, 836 (1994); see Prosser and Keeton §34, at 213–214. The Restatement, for example, defines reckless disregard of a person's physical safety this way:

> "The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." Restatement (Second) of Torts §500, p. 587 (1963–1964).

It is this high risk of harm, objectively assessed, that is the essence of recklessness at common law. See Prosser and Keeton §34, at 213 (recklessness requires "a known or obvious risk that was so great as to make it highly probable that harm would follow").

There being no indication that Congress had something different in mind, we have no reason to deviate from the common law understanding in applying the statute. See *Prupis*, 529 U. S., at 500–501. Thus, a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.

Here, there is no need to pinpoint the negligence/recklessness line, for Safeco's reading of the statute,

[18] Unlike civil recklessness, criminal recklessness also requires subjective knowledge on the part of the offender. *Brennan*, 511 U. S., at 836–837; ALI, Model Penal Code §2.02(2)(c) (1985).

albeit erroneous, was not objectively unreasonable. As we said, §1681a(k)(1)(B)(i) is silent on the point from which to measure "increase." On the rationale that "increase" presupposes prior dealing, Safeco took the definition as excluding initial rate offers for new insurance, and so sent no adverse action notices to Burr and Massey. While we disagree with Safeco's analysis, we recognize that its reading has a foundation in the statutory text, see *supra*, at 11, and a sufficiently convincing justification to have persuaded the District Court to adopt it and rule in Safeco's favor.

This is not a case in which the business subject to the Act had the benefit of guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took. Before these cases, no court of appeals had spoken on the issue, and no authoritative guidance has yet come from the FTC[19] (which in any case has only enforcement responsibility, not substantive rulemaking authority, for the provisions in question, see 15 U. S. C. §§1681s(a)(1), (e)). Cf. *Saucier* v. *Katz*, 533 U. S. 194, 202 (2001) (assessing, for qualified immunity purposes, whether an action was reasonable in light of legal rules that were "clearly established" at the time). Given this dearth of guidance and the less-than-pellucid statutory text, Safeco's reading was not objectively unreasonable, and so falls well short of raising the "unjustifiably high risk" of violating the statute necessary

[19] Respondent-plaintiffs point to a letter, written by an FTC staff member to an insurance company lawyer, that suggests that an "adverse action" occurs when "the applicant will have to pay more for insurance at the inception of the policy than he or she would have been charged if the consumer report had been more favorable." Letter from Hannah A. Stires to James M. Ball (Mar. 1, 2000), http://www.ftc.gov/os/statutes/fcra/ball.htm (as visited May 17, 2007, and available in Clerk of Court's case file). But the letter did not canvas the issue, and it explicitly indicated that it was merely "an informal staff opinion . . . not binding on the Commission." *Ibid.*



for reckless liability.[20]

* * *

The Court of Appeals correctly held that reckless disregard of a requirement of FCRA would qualify as a willful violation within the meaning of §1681n(a). But there was no need for that court to remand the cases for factual development. GEICO's decision to issue no adverse action notice to Edo was not a violation of §1681m(a), and Safeco's misreading of the statute was not reckless. The judgments of the Court of Appeals are therefore reversed in both cases, which are remanded for further proceedings consistent with this opinion.

*It is so ordered.*

[20] Respondent-plaintiffs argue that evidence of subjective bad faith must be taken into account in determining whether a company acted knowingly or recklessly for purposes of §1681n(a). To the extent that they argue that evidence of subjective bad faith can support a willfulness finding even when the company's reading of the statute is objectively reasonable, their argument is unsound. Where, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator. Congress could not have intended such a result for those who followed an interpretation that could reasonably have found support in the courts, whatever their subjective intent may have been.

Both Safeco and GEICO argue that good-faith reliance on legal advice should render companies immune to claims raised under §1681n(a). While we do not foreclose this possibility, we need not address the issue here in light of our present holdings.

# SUPREME COURT OF THE UNITED STATES

Nos. 06–84 and 06–100

SAFECO INSURANCE COMPANY OF AMERICA, ET AL., PETITIONERS
06–84 *v.*
CHARLES BURR ET AL.

GEICO GENERAL INSURANCE COMPANY, ET AL., PETITIONERS
06–100 *v.*
AJENE EDO

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

[June 4, 2007]

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring in part and concurring in the judgment.

While I join the Court's judgment and Parts I, II, III–A, and IV–B of the Court's opinion, I disagree with the reasoning in Parts III–B and III–C, as well as with Part IV–A, which relies on that reasoning.

An adverse action taken after reviewing a credit report "is based in whole or in part on" that report within the meaning of 15 U. S. C. §1681m(a). That is true even if the company would have made the same decision without looking at the report, because what the company actually did is more relevant than what it might have done. I find nothing in the statute making the examination of a credit report a "necessary condition" of any resulting increase. *Ante*, at 13. The more natural reading is that reviewing a report is only a sufficient condition.

The Court's contrary position leads to a serious anom-



aly. As a matter of federal law, companies are free to adopt whatever "neutral" credit scores they want. That score need not (and probably will not) reflect the median consumer credit score. More likely, it will reflect a company's assessment of the creditworthiness of a run-of-the-mill applicant who lacks a credit report. Because those who have yet to develop a credit history are unlikely to be good credit risks, "neutral" credit scores will in many cases be quite low. Yet under the Court's reasoning, only those consumers with credit scores even lower than what may already be a very low "neutral" score will ever receive adverse action notices.[1]

While the Court acknowledges that "the neutral-score baseline will leave some consumers without a notice that might lead to discovering errors," *ante*, at 16, it finds this unobjectionable because Congress was likely uninterested in "the theoretical question of whether the consumer would have gotten a better rate with perfect credit." *Ante*, at 16.[2] The Court's decision, however, disserves not only those consumers with "gilt-edged credit report[s]," *ante*, at 16, but also the much larger category of consumers with better-than-"neutral" scores. I find it difficult to believe

[1] Stranger still, companies that automatically disqualify consumers who lack credit reports will never need to send any adverse action notices. After all, the Court's baseline is "what the applicant would have had if the company had not taken his credit score into account," *ante*, at 15, but from such companies, what the applicant "would have had" is no insurance at all. An offer of insurance at *any* price, however inflated by a poor and perhaps incorrect credit score, will therefore never constitute an adverse action.

[2] The Court also justifies its deviation from the statute's text by reasoning that frequent adverse action notices would be ignored. See *ante*, at 16–17. To borrow a sentence from the Court's opinion: "Perhaps." *Ante*, at 8. But rather than speculate about the likely effect of "hyper-notification," *ante*, at 17, I would defer to the Solicitor General's position, informed by the Federal Trade Commission's expert judgment, that consumers by and large benefit from adverse action notices, however common. See Brief for United States as *Amicus Curiae* 27–29.

that Congress could have intended for a company's unrestrained adoption of a "neutral" score to keep many (if not most) consumers from ever hearing that their credit reports are costing them money. In my view, the statute's text is amenable to a more sensible interpretation.



# SUPREME COURT OF THE UNITED STATES

Nos. 06–84 and 06–100

SAFECO INSURANCE COMPANY OF AMERICA, ET AL., PETITIONERS
06–84 *v.*
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06–100 *v.*
AJENE EDO

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

[June 4, 2007]

JUSTICE THOMAS, with whom JUSTICE ALITO joins, concurring in part.

I agree with the Court's disposition and most of its reasoning. Safeco did not send notices to new customers because it took the position that the initial insurance rate it offered a customer could not be an "increase in any charge for . . . insurance" under 15 U. S. C. §1681a(k)(1)(B)(i). The Court properly holds that regardless of the merits of this interpretation, it is not an unreasonable one, and Safeco therefore did not act willfully. *Ante*, at 18–21. I do not join Part III–A of the Court's opinion, however, because it resolves the merits of Safeco's interpretation of §1681a(k)(1)(B)(i)—an issue not necessary to the Court's conclusion and not briefed or argued by the parties.

## NCLC in the Supreme Court

The National Chamber Litigation Center (NCLC), the public policy law firm of the U.S. Chamber of Commerce, has represented the broad business perspective in the courts since 1977. NCLC's effective four-part litigation program consists of:

- Initiating litigation as a party plaintiff
- Filing *amicus curiae* briefs in important business cases
- Conducting moot courts to help counsel prepare for argument
- Working with the media to present the business point of view on cases of national concern to the business community.

NCLC files briefs at every level of the judicial system. NCLC entered a record number of fifteen cases as an *amicus curiae* in the October 2006 Supreme Court Term. Outlined below are the highlights and significance of NCLC's thirteen Supreme Court victories, ranked by importance to the business community.

**1. POLITICAL SPEECH**
*Federal Election Commission v. Wisconsin Right to Life, Inc.*, 5-4
Noting that when it comes to the First Amendment the tie goes to the speaker and not the censor, the Court limited the Bipartisan Campaign Reform Act's restrictions to issue ads which are the "functional equivalent" of express advocacy. The Court clarified that true grassroots lobbying is not equivalent to express campaign advocacy, and explicitly left open the question of whether *McConnell v. FEC* was wrongly decided.

**2. PUNITIVE DAMAGES**
*Philip Morris USA v. Williams*, 5-4
Confirmed the commonsense notion that plaintiffs may not obtain punitive damages for harm done to parties not before the Court. This decision should prevent juries from arbitrarily jacking-up punitive damages awards by taking into account conduct that may have injured strangers to the litigation.

**3. ANTITRUST**
*Bell Atlantic v. Twombly*, 7-2
Prevents the plaintiffs' bar from filing treble damages antitrust complaints based on mere assertions of "conspiracy," without any supporting factual allegations against the defendants. This decision should allow for dismissal of more cases at the pleadings stage, prior to costly and onerous discovery.

**4. EMPLOYMENT LAW**
*Ledbetter v. Goodyear Tire*, 5-4
Employees alleging pay discrimination must file their claims with the EEOC within 180 days. The purpose of Title VII's timely filing clause is to encourage prompt resolution of employment disputes.

**5. ANTITRUST**
*Credit Suisse Securities L.L.C. v. Billing*, 7-1
Regulation of initial public offerings belongs with the SEC and not antitrust class action lawyers suing for treble damages. This decision should prevent trial lawyers from masquerading shareholder strike suits as antitrust class actions.

**6. SECURITIES**
*Tellabs v. Makor Issues & Rights*, 8-1
Plaintiffs' inferences about a defendant's knowledge of wrongdoing must be "cogent and compelling" in order to survive a motion to dismiss and proceed to discovery in cases brought under the Private Securities Litigation Reform Act. This standard should weed out baseless securities class actions.

**7. FAIR CREDIT REPORTING ACT**
*SafeCo v. Burr; GEICO General Insurance v. Edo.*, 9-0
Insurance companies did not act recklessly by failing to notify customers that their quoted insurance rates were based on their credit scores. This case is important to any company that relies on credit reports to make financial decisions.

**8. FALSE CLAIMS ACT**
*Rockwell Int'l Corp. v. United States*, 6-2
Limited availability of whistleblower damages to persons who have "direct and independent knowledge" of the fraud proved at trial. This decision should prevent bounty-hunters who base their claims on publicly disclosed information from profiteering under the False Claims Act.

**9. NATIONAL BANK PREEMPTION**
*Watters v. Wachovia Bank*, N.A., 5-3
States are preempted from regulating subsidiaries of national banks. This decision reaffirms the importance of national uniformity in banking and other industries.

**10. ANTITRUST**
*Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.*, 9-0
Predatory purchasers are subject to the same competition standards as predatory sellers. This decision rejected a Ninth Circuit ruling which would have limited legitimate competition for securing key materials by applying an amorphous standard.

**11. CERCLA**
*United States v. Atlantic Research Corp.*, 9-0
Required the federal government—the nation's worst polluter—to pay its fair share of Superfund clean-up costs. Companies that engage in voluntary clean up operations may now seek to recover costs from the government.

**12. ERISA**
*Beck v. PACE Int'l Union*, 9-0
Rejected union's demand that employer merge its over-funded pension plan into the union's multiemployer plan. This decision reaffirms that business decisions regarding the creation, modification or termination of employee benefit plans are not regulated under ERISA.

**13. PUNITIVE DAMAGES**
*Ford Motor Co. v. Buell-Wilson*
Remanded this excessive punitive damages case back to California Supreme Court for proper jury instructions in light of *Philip Morris v. Williams*.

**SUPREME COURT OCTOBER 2007 TERM:**
**CASES GRANTED INVOLVING BUSINESS INTERESTS**
**(AS OF AUGUST 20, 2007)**

*Stoneridge Investment Partners, L.L. C. v. Scientific-Atlanta, Inc.* [Primary Liability of Secondary Actors for Securities Fraud]

*Riegel v. Medtronic, Inc.* [Preemption of State Law Claims by Medical Device Amendments to Food, Drug and Cosmetic Act]

*Rowe v. New Hampshire Motor TransportAss'n* [Federal Preemption of State Regulation of Interstate Distribution of Tobacco]

*Kentucky Department of Revenue v. Davis* [Dormant Commerce Clause and Tax Exemptions for Interest Earned on State and Municipal Bonds]

*LaRue v. DeWolff, Boberg & Associates, Inc.* [Availability of Monetary Relief for Breach of Fiduciary Duty under ERISA]

*Hall Street Associates, L.L. C. v. Mattel, Inc.* [Scope of Judicial Review under Federal Arbitration Act]

*John R. Sand & Gravel Co. v. United States* [Statute of Limitations under the Tucker Act]

*Sprint/United Management Co. v. Mendelsohn* [Admission of Evidence of Discrimination under Title VII against Nonparties by Individuals Uninvolved in Adverse Action]

*Klein & Co. Futures, Inc. v. Board of Trade of the City ofNew York* [Private Right of Action under the Commodity Exchange Act]

*CSX Transportation, Inc. v. Georgia Board ofEqualization* [State Tax Valuation of Railroad Property under Railroad Revitalization and Regulatory Reform Act]

*Federal Express Corp. v. Holowecki* [Filing of Intake Questionnaire with EEOC as Initiation of Charge under Age Discrimination in Employment Act]

*Knight v. Commissioner of Internal Revenue* [Availability of Tax Deduction for Investment Management Services]

Through the National Chamber Litigation Center, the United States Chamber of Commerce filed and/or will likely participate as *amicus curi*ae in each case marked with an asterisk.

***Stoneridge Investment Partners, L.L.C. v. Scientific-Atlanta, Inc.*** Whether this Court's decision in *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), forecloses claims for deceptive conduct under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5(a) and (c), 17 C.F.R. 240.l0b-5(a) and (c), where Respondents engaged in transactions with a public corporation with no legitimate business or economic purpose except to inflate artificially the public corporation's financial statements, but where Respondents themselves made no public statements concerning those transactions.

***Riegel v. Medtronic, Inc.*** Does express preemption provision of Medical Device Amendments to Food, Drug and Cosmetic Act, 21 U.S.C. § 360k(a), preempt state law claims seeking damages for injuries caused by medical devices that received premarket approval from FDA?

***Rowe v. New Hampshire Motor Transport Ass'n.*** (1) Does 1994 Federal Aviation Administration Authorization Act, 49 U.S.C. §§ 14501 (c) (1) and 41713(b)(4)(A), preempt states from exercising their historic public health police powers to regulate carriers that deliver contraband such as tobacco and other dangerous substances to children? (2) Does FAAAA preempt states from exercising their historic public health police powers to require shippers of contraband such as tobacco and other dangerous substances to use carrier that provides age verification and signature service to ensure that such substances are not delivered to children.

***Kentucky Department of Revenue v. Davis.*** Whether a state violates the dormant Commerce Clause by providing an exemption from its income tax for interest income derived from bonds issued by the state and its political subdivisions, while treating interest income realized from bonds issued by other states and their political subdivisions as taxable to the same extent, and in the same manner, as interest earned on bonds issued by commercial entities, whether domestic or foreign.

***LaRue v. DeWolff, Boberg & Associates, Inc.*** (1) Does Section 502(a)(2) of ERISA permit participant to bring action to recover losses attributable to his account in "defined contribution plan" that were caused by fiduciary breach? (2) Does Section 502(a)(3) permit participant to bring action for monetary "make-whole" relief to compensate for losses directly caused by fiduciary breach (known in pre-merger courts of equity as "surcharge")?

***Hall Street Associates, L.L.C. v. Mattel, Inc.*** Did the Ninth Circuit Court of Appeals err when it held, in conflict with several other federal Courts of Appeals, that the Federal Arbitration Act ("FAA") precludes a federal court from enforcing the parties' clearly expressed agreement providing for more expansive judicial review of

an arbitration award than the narrow standard of review otherwise provided for in the FAA?

***John R. Sand & Gravel Co. v. United States.*** The statute of limitations in the Tucker Act, 28 U.S.C. §2501, provides: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The questions presented are: (1) Whether the statute of limitations in the Tucker Act limits the subject matter jurisdiction of the Court of Federal Claims. (2) Whether a claim for a permanent

physical taking of a portion of real property first accrues upon the government's temporary exclusion of the property holder from another portion of the property.

***Sprint/United Management Co. v. Mendelsohn.*** Must district court admit "me, too" evidence--testimony, by nonparties, alleging discrimination at hands of persons who played no role in adverse employment decision challenged by plaintiff?

***Klein & Co. Futures, Inc. v. Board of Trade of the City of New York.*** The Commodity Exchange Act provides an express private right of action for actual losses to a person who "engaged in any transaction on" or "subject to the rules of" a commodity board of trade against that board of trade if the board, in bad faith, engaged in illegal conduct that caused the person to suffer the actual losses, 7 U.S.C. § 25(b)(1). The question presented is: Whether the court of appeals erred in concluding that futures commission merchants lack statutory standing to invoke that right of action because, in the court's view, they do not engage in such transactions, despite the statutory requirement that the merchants enter into and execute their transactions on, and subject to the rules of, a board of trade and the fact of the merchants' financial liability for the transactions.

***CSX Transportation, Inc. v. Georgia Board of Equalization.*** Whether, under the federal statute prohibiting state tax discrimination against railroads, 49 U.S.C. § 11501 (b)(1), a federal district court determining the "true market value" of railroad property must accept the valuation method chosen by the State.

***Federal Express Corp. v. Holowecki.*** Whether the Second Circuit erred in concluding, contrary to the law of several other circuits and implicating an issue this Court has examined but not yet decided, that an "intake questionnaire" submitted to the Equal Employment Opportunity Commission ("EEOC") may suffice for the charge of discrimination that must be submitted pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), even in the absence of evidence that the EEOC treated the form as a charge or the employee submitting the questionnaire reasonably believed it constituted a charge.

***Knight v. Commissioner of Internal Revenue.*** Does 26 U.S.C. § 67(e) permit full deduction for costs and fees for investment management and advisory services provided to trusts and estates?

(Slip Opinion) OCTOBER TERM, 2006 1

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

TELLABS, INC., ET AL. *v.* MAKOR ISSUES & RIGHTS, LTD., ET AL.

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

No. 06–484. Argued March 28, 2007—Decided June 21, 2007

As a check against abusive litigation in private securities fraud actions, the Private Securities Litigation Reform Act of 1995 (PSLRA) includes exacting pleading requirements. The Act requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, *i.e.*, the defendant's intention "to deceive, manipulate, or defraud." *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 194, and n. 12. As set out in §21D(b)(2), plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U. S. C. §78u–4(b)(2). Congress left the key term "strong inference" undefined.

Petitioner Tellabs, Inc., manufactures specialized equipment for fiber optic networks. Respondents (Shareholders) purchased Tellabs stock between December 11, 2000, and June 19, 2001. They filed a class action, alleging that Tellabs and petitioner Notebaert, then Tellabs' chief executive officer and president, had engaged in securities fraud in violation of §10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b–5, and that Notebaert was a "controlling person" under the 1934 Act, and therefore derivatively liable for the company's fraudulent acts. Tellabs moved to dismiss the complaint on the ground that the Shareholders had failed to plead their case with the particularity the PSLRA requires. The District Court agreed, dismissing the complaint without prejudice. The Shareholders then amended their complaint, adding references to 27 confidential sources and making further, more specific, allegations concerning Notebaert's mental state. The District Court again dismissed, this time with prejudice. The Shareholders

Syllabus

had sufficiently pleaded that Notebaert's statements were misleading, the court determined, but they had insufficiently alleged that he acted with scienter. The Seventh Circuit reversed in relevant part. Like the District Court, it found that the Shareholders had pleaded the misleading character of Notebaert's statements with sufficient particularity. Unlike the District Court, however, it concluded that the Shareholders had sufficiently alleged that Notebaert acted with the requisite state of mind. In evaluating whether the PSLRA's pleading standard is met, the Circuit said, courts should examine all of the complaint's allegations to decide whether collectively they establish an inference of scienter; the complaint would survive, the court stated, if a reasonable person could infer from the complaint's allegations that the defendant acted with the requisite state of mind.

*Held:* To qualify as "strong" within the intendment of §21D(b)(2), an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent. Pp. 6–18.

(a) Setting a uniform pleading standard for §10(b) actions was among Congress' objectives in enacting the PSLRA. Designed to curb perceived abuses of the §10(b) private action, the PSLRA installed both substantive and procedural controls. As relevant here, §21D(b) of the PSLRA "impose[d] heightened pleading requirements in [§10(b) and Rule 10b–5] actions." *Dabit,* 547 U. S., at 81. In the instant case, the District Court and the Seventh Circuit agreed that the complaint sufficiently specified Notebaert's alleged misleading statements and the reasons why the statements were misleading. But those courts disagreed on whether the Shareholders, as required by §21D(b)(2), "state[d] with particularity facts giving rise to a strong inference that [Notebaert] acted with [scienter]," §78u–4(b)(2). Congress did not shed much light on what facts would create a strong inference or how courts could determine the existence of the requisite inference. With no clear guide from Congress other than its "inten[tion] to strengthen existing pleading requirements," H. R. Conf. Rep., at 41, Courts of Appeals have diverged in construing the term "strong inference." Among the uncertainties, should courts consider competing inferences in determining whether an inference of scienter is "strong"? This Court's task is to prescribe a workable construction of the "strong inference" standard, a reading geared to the PSLRA's twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims. Pp. 6–10.

(b) The Court establishes the following prescriptions: *First*, faced with a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss a §10(b) action, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true. See *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 164. *Second*, courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions. The inquiry is whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard. *Third*, in determining whether the pleaded facts give rise to a "strong" inference of scienter, the court must take into account plausible opposing inferences. The Seventh Circuit expressly declined to engage in such a comparative inquiry. But in §21D(b)(2), Congress did not merely require plaintiffs to allege facts from which an inference of scienter rationally *could* be drawn. Instead, Congress required plaintiffs to plead with particularity facts that give rise to a "strong"—*i.e.*, a powerful or cogent—inference. To determine whether the plaintiff has alleged facts giving rise to the requisite "strong inference," a court must consider plausible nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff. The inference that the defendant acted with scienter need not be irrefutable, but it must be more than merely "reasonable" or "permissible"—it must be cogent and compelling, thus strong in light of other explanations. A complaint will survive only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any plausible opposing inference one could draw from the facts alleged. Pp. 11–13.

(c) Tellabs contends that when competing inferences are considered, Notebaert's evident lack of pecuniary motive will be dispositive. The Court agrees that motive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference. The absence of a motive allegation, however, is not fatal for allegations must be considered collectively; the significance that can be ascribed to an allegation of motive, or lack thereof, depends on the complaint's entirety. Tellabs also maintains that several of the Shareholders' allegations are too vague or ambiguous to contribute to a strong inference of scienter. While omissions and ambiguities count against inferring scienter, the court's job is not to scrutinize each allegation in isolation but to access all the allegations holistically. Pp. 13–15.

(d) The Seventh Circuit was unduly concerned that a court's comparative assessment of plausible inferences would impinge upon the Seventh Amendment right to jury trial. Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has power to determine what must be proved to prevail on the merits. It is the federal lawmaker's preroga-



Syllabus

Syllabus

tive, therefore, to allow, disallow, or shape the contours of—including the pleading and proof requirements for—§10(b) private actions. This Court has never questioned that authority in general, or suggested, in particular, that the Seventh Amendment inhibits Congress from establishing whatever pleading requirements it finds appropriate for federal statutory claims. Provided that the Shareholders have satisfied the congressionally "prescribe[d] . . . means of making an issue," *Fidelity & Deposit Co. of Md.* v. *United States*, 187 U. S. 315, 320, the case will fall within the jury's authority to assess the credibility of witnesses, resolve genuine issues of fact, and make the ultimate determination whether Notebaert and, by imputation, Tellabs acted with scienter. Under this Court's construction of the "strong inference" standard, a plaintiff is not forced to plead more than she would be required to prove at trial. A plaintiff alleging fraud under §10(b) must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference. At trial, she must then prove her case by a "preponderance of the evidence." Pp. 15–17.

(e) Neither the District Court nor the Court of Appeals had the opportunity to consider whether the Shareholders' allegations warrant "a strong inference that [Notebaert and Tellabs] acted with the required state of mind," 15 U. S. C. §78u–4(b)(2), in light of the prescriptions announced today. Thus, the case is remanded for a determination under this Court's construction of §21D(b)(2). P. 18.

437 F. 3d 588, vacated and remanded.

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



Opinion of the Court



# SUPREME COURT OF THE UNITED STATES

No. 06–484

TELLABS, INC., ET AL., PETITIONERS *v.* MAKOR ISSUES & RIGHTS, LTD., ET AL.

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

[June 21, 2007]

JUSTICE GINSBURG delivered the opinion of the Court.

This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC). See, *e.g.*, *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 345 (2005); *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964). Private securities fraud actions, however, if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law. See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U. S. 71, 81 (2006). As a check against abusive litigation by private parties, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737.

Exacting pleading requirements are among the control measures Congress included in the PSLRA. The Act requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, *i.e.*, the defendant's intention "to deceive, ma-

nipulate, or defraud." *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 194, and n. 12 (1976); see 15 U. S. C. §78u–4(b)(1),(2). This case concerns the latter requirement. As set out in §21D(b)(2) of the PSLRA, plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U. S. C. §78u–4(b)(2).

Congress left the key term "strong inference" undefined, and Courts of Appeals have divided on its meaning. In the case before us, the Court of Appeals for the Seventh Circuit held that the "strong inference" standard would be met if the complaint "allege[d] facts from which, if true, a reasonable person could infer that the defendant acted with the required intent." 437 F. 3d 588, 602 (2006). That formulation, we conclude, does not capture the stricter demand Congress sought to convey in §21D(b)(2). It does not suffice that a reasonable factfinder plausibly could infer from the complaint's allegations the requisite state of mind. Rather, to determine whether a complaint's scienter allegations can survive threshold inspection for sufficiency, a court governed by §21D(b)(2) must engage in a comparative evaluation; it must consider, not only inferences urged by the plaintiff, as the Seventh Circuit did, but also competing inferences rationally drawn from the facts alleged. An inference of fraudulent intent may be plausible, yet less cogent than other, nonculpable explanations for the defendant's conduct. To qualify as "strong" within the intendment of §21D(b)(2), we hold, an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.

## I

Petitioner Tellabs, Inc., manufactures specialized equipment used in fiber optic networks. During the time period relevant to this case, petitioner Richard Notebaert



was Tellabs' chief executive officer and president. Respondents (Shareholders) are persons who purchased Tellabs stock between December 11, 2000, and June 19, 2001. They accuse Tellabs and Notebaert (as well as several other Tellabs executives) of engaging in a scheme to deceive the investing public about the true value of Tellabs' stock. See 437 F. 3d, at 591; App. 94–98.[1]

Beginning on December 11, 2000, the Shareholders allege, Notebaert (and by imputation Tellabs) "falsely reassured public investors, in a series of statements . . . that Tellabs was continuing to enjoy strong demand for its products and earning record revenues," when, in fact, Notebaert knew the opposite was true. *Id.,* at 94–95, 98. From December 2000 until the spring of 2001, the Shareholders claim, Notebaert knowingly misled the public in four ways. 437 F. 3d, at 596. First, he made statements indicating that demand for Tellabs' flagship networking device, the TITAN 5500, was continuing to grow, when in fact demand for that product was waning. *Id*., at 596, 597. Second, Notebaert made statements indicating that the TITAN 6500, Tellabs' next-generation networking device, was available for delivery, and that demand for that product was strong and growing, when in truth the product was not ready for delivery and demand was weak. *Id*., at 596, 597–598. Third, he falsely represented Tellabs' financial results for the fourth quarter of 2000 (and, in connection with those results, condoned the practice of "channel stuffing," under which Tellabs flooded its customers with unwanted products). *Id.*, at 596, 598. Fourth, Notebaert made a series of overstated revenue projections,

[1] The Shareholders brought suit against Tellabs executives other than Notebaert, including Richard Birck, Tellabs' chairman and former chief executive officer. Because the claims against the other executives, many of which have been dismissed, are not before us, we focus on the allegations as they relate to Notebaert. We refer to the defendant-petitioners collectively as "Tellabs."

when demand for the TITAN 5500 was drying up and production of the TITAN 6500 was behind schedule. *Id.*, at 596, 598–599. Based on Notebaert's sunny assessments, the Shareholders contend, market analysts recommended that investors buy Tellabs' stock. See *id.*, at 592.

The first public glimmer that business was not so healthy came in March 2001 when Tellabs modestly reduced its first quarter sales projections. *Ibid.* In the next months, Tellabs made progressively more cautious statements about its projected sales. On June 19, 2001, the last day of the class period, Tellabs disclosed that demand for the TITAN 5500 had significantly dropped. *Id.*, at 593. Simultaneously, the company substantially lowered its revenue projections for the second quarter of 2001. The next day, the price of Tellabs stock, which had reached a high of $67 during the period, plunged to a low of $15.87. *Ibid.*

On December 3, 2002, the Shareholders filed a class action in the District Court for the Northern District of Illinois. *Ibid.* Their complaint stated, *inter alia*, that Tellabs and Notebaert had engaged in securities fraud in violation of §10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. §78j(b), and SEC Rule 10b–5, 17 CFR §240.10b–5 (2006), also that Notebaert was a "controlling person" under §20(a) of the 1934 Act, 15 U. S. C. §78t(a), and therefore derivatively liable for the company's fraudulent acts. See App. 98–101, 167–171. Tellabs moved to dismiss the complaint on the ground that the Shareholders had failed to plead their case with the particularity the PSLRA requires. The District Court agreed, and therefore dismissed the complaint without prejudice. App. to Pet. for Cert. 80a–117a; see *Johnson* v. *Tellabs, Inc.*, 303 F. Supp. 2d 941, 945 (ND Ill. 2004).

The Shareholders then amended their complaint, adding references to 27 confidential sources and making further,



more specific, allegations concerning Notebaert's mental state. See 437 F. 3d, at 594; App. 91–93, 152–160. The District Court again dismissed, this time with prejudice. 303 F. Supp. 2d, at 971. The Shareholders had sufficiently pleaded that Notebaert's statements were misleading, the court determined, *id.*, at 955–961, but they had insufficiently alleged that he acted with scienter, *id.*, at 954–955, 961–969.

The Court of Appeals for the Seventh Circuit reversed in relevant part. 437 F. 3d, at 591. Like the District Court, the Court of Appeals found that the Shareholders had pleaded the misleading character of Notebaert's statements with sufficient particularity. *Id.*, at 595–600. Unlike the District Court, however, the Seventh Circuit concluded that the Shareholders had sufficiently alleged that Notebaert acted with the requisite state of mind. *Id.*, at 603–605.

The Court of Appeals recognized that the PSLRA "unequivocally raise[d] the bar for pleading scienter" by requiring plaintiffs to "plea[d] sufficient facts to create a strong inference of scienter." *Id.*, at 601 (internal quotation marks omitted). In evaluating whether that pleading standard is met, the Seventh Circuit said, "courts [should] examine all of the allegations in the complaint and then . . . decide whether collectively they establish such an inference." *Ibid.* "[W]e will allow the complaint to survive," the court next and critically stated, "if it alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent . . . . If a reasonable person could not draw such an inference from the alleged facts, the defendants are entitled to dismissal." *Id.*, at 602.

In adopting its standard for the survival of a complaint, the Seventh Circuit explicitly rejected a stiffer standard adopted by the Sixth Circuit, *i.e.*, that "plaintiffs are entitled only to the most plausible of competing inferences."

*Id.*, at 601, 602 (quoting *Fidel* v. *Farley*, 392 F. 3d 220, 227 (CA6 2004)). The Sixth Circuit's standard, the court observed, because it involved an assessment of competing inferences, "could potentially infringe upon plaintiffs' Seventh Amendment rights." 437 F. 3d, at 602. We granted certiorari to resolve the disagreement among the Circuits on whether, and to what extent, a court must consider competing inferences in determining whether a securities fraud complaint gives rise to a "strong inference" of scienter.[2] 549 U. S. ___ (2007).

II

Section 10(b) of the Securities Exchange Act of 1934 forbids the "use or employ, in connection with the purchase or sale of any security . . . , [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. §78j(b). SEC Rule 10b–5 implements §10(b) by declaring it unlawful:

> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 CFR §240.10b–5.

[2] See, *e.g.*, 437 F. 3d 588, 602 (CA7 2006) (decision below); *In re Credit Suisse First Boston Corp.*, 431 F. 3d 36, 49, 51 (CA1 2005); *Ottmann* v. *Hanger Orthopedic Group, Inc.*, 353 F. 3d 338, 347–349 (CA4 2003); *Pirraglia* v. *Novell, Inc.*, 339 F. 3d 1182, 1187–1188 (CA10 2003); *Gompper* v. *VISX, Inc.*, 298 F. 3d 893, 896–897 (CA9 2002); *Helwig* v. *Vencor, Inc.*, 251 F. 3d 540, 553 (CA6 2001) (en banc).



Section 10(b), this Court has implied from the statute's text and purpose, affords a right of action to purchasers or sellers of securities injured by its violation. See, *e.g.*, *Dura Pharmaceuticals*, 544 U. S., at 341. See also *id.*, at 345 ("The securities statutes seek to maintain public confidence in the marketplace . . . . by deterring fraud, in part, through the availability of private securities fraud actions."); *Borak*, 377 U. S., at 432 (private securities fraud actions provide "a most effective weapon in the enforcement" of securities laws and are "a necessary supplement to Commission action"). To establish liability under §10(b) and Rule 10b–5, a private plaintiff must prove that the defendant acted with scienter, "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst*, 425 U. S., at 193–194, and n. 12.[3]

In an ordinary civil action, the Federal Rules of Civil Procedure require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2). Although the rule encourages brevity, the complaint must say enough to give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Dura Pharmaceuticals*, 544 U. S., at 346 (internal quotation marks omitted). Prior to the enactment of the PSLRA, the sufficiency of a complaint for securities fraud was governed not by Rule 8, but by the heightened pleading standard set forth in Rule 9(b). See *Greenstone* v. *Cambex Corp.*, 975 F. 2d 22, 25 (CA1

[3] We have previously reserved the question whether reckless behavior is sufficient for civil liability under §10(b) and Rule 10b–5. See *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 194, n. 12 (1976). Every Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness required. See *Ottmann*, 353 F. 3d, at 343 (collecting cases). The question whether and when recklessness satisfies the scienter requirement is not presented in this case.

1992) (Breyer, J.) (collecting cases). Rule 9(b) applies to "all averments of fraud or mistake"; it requires that "the circumstances constituting fraud . . . be stated with particularity" but provides that "[m]alice, intent, knowledge, and other condition of mind of a person, may be averred generally."

Courts of Appeals diverged on the character of the Rule 9(b) inquiry in §10(b) cases: Could securities fraud plaintiffs allege the requisite mental state "simply by stating that scienter existed," *In re GlenFed, Inc. Securities Litigation*, 42 F. 3d 1541, 1546–1547 (CA9 1994) (en banc), or were they required to allege with particularity facts giving rise to an inference of scienter? Compare *id.*, at 1546 ("We are not permitted to add new requirements to Rule 9(b) simply because we like the effects of doing so."), with, *e.g.*, *Greenstone*, 975 F. 2d, at 25 (were the law to permit a securities fraud complaint simply to allege scienter without supporting facts, "a complaint could evade too easily the 'particularity' requirement in Rule 9(b)'s first sentence"). Circuits requiring plaintiffs to allege specific facts indicating scienter expressed that requirement variously. See 5A C. Wright & A. Miller, Federal Practice and Procedure §1301.1, pp. 300–302 (3d ed. 2004) (hereinafter Wright & Miller). The Second Circuit's formulation was the most stringent. Securities fraud plaintiffs in that Circuit were required to "specifically plead those [facts] which they assert give rise to a *strong inference* that the defendants had" the requisite state of mind. *Ross* v. *A. H. Robins Co.*, 607 F. 2d 545, 558 (1979) (emphasis added). The "strong inference" formulation was appropriate, the Second Circuit said, to ward off allegations of "fraud by hindsight." See, *e.g.*, *Shields* v. *Citytrust Bancorp, Inc.*, 25 F. 3d 1124, 1129 (1994) (quoting *Denny* v. *Barber*, 576 F. 2d 465, 470 (CA2 1978) (Friendly, J.)).

Setting a uniform pleading standard for §10(b) actions was among Congress' objectives when it enacted the



PSLRA. Designed to curb perceived abuses of the §10(b) private action—"nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and manipulation by class action lawyers," *Dabit*, 547 U. S., at 81 (quoting H. R. Conf. Rep. No. 104–369, p. 31 (1995) (hereinafter H. R. Conf. Rep.))—the PSLRA installed both substantive and procedural controls.[4] Notably, Congress prescribed new procedures for the appointment of lead plaintiffs and lead counsel. This innovation aimed to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead plaintiffs. See *id.,* at 33–34; S. Rep. No. 104–98, p. 11 (1995). Congress also "limit[ed] recoverable damages and attorney's fees, provide[d] a 'safe harbor' for forward-looking statements, . . . mandate[d] imposition of sanctions for frivolous litigation, and authorize[d] a stay of discovery pending resolution of any motion to dismiss." *Dabit*, 547 U. S., at 81. And in §21D(b) of the PSLRA, Congress "impose[d] heightened pleading requirements in actions brought pursuant to §10(b) and Rule 10b–5." *Ibid.*

Under the PSLRA's heightened pleading instructions, any private securities complaint alleging that the defendant made a false or misleading statement must: (1) "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading," 15 U. S. C. §78u–4(b)(1); and (2) "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," §78u–4(b)(2). In the instant case, as earlier stated, see *supra*, at 5, the

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[4] Nothing in the Act, we have previously noted, casts doubt on the conclusion "that private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses"—a matter crucial to the integrity of domestic capital markets. See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U. S. 71, 81 (2006) (internal quotation marks omitted).

District Court and the Seventh Circuit agreed that the Shareholders met the first of the two requirements: The complaint sufficiently specified Notebaert's alleged misleading statements and the reasons why the statements were misleading. 303 F. Supp. 2d, at 955–961; 437 F. 3d, at 596–600. But those courts disagreed on whether the Shareholders, as required by §21D(b)(2), "state[d] with particularity facts giving rise to a strong inference that [Notebaert] acted with [scienter]," §78u–4(b)(2). See *supra*, at 5.

The "strong inference" standard "unequivocally raise[d] the bar for pleading scienter," 437 F. 3d, at 601, and signaled Congress' purpose to promote greater uniformity among the Circuits, see H. R. Conf. Rep., p. 41. But "Congress did not . . . throw much light on what facts . . . suffice to create [a strong] inference," or on what "degree of imagination courts can use in divining whether" the requisite inference exists. 437 F. 3d, at 601. While adopting the Second Circuit's "strong inference" standard, Congress did not codify that Circuit's case law interpreting the standard. See §78u–4(b)(2). See also Brief for United States as *Amicus Curiae* 18. With no clear guide from Congress other than its "inten[tion] to strengthen existing pleading requirements," H. R. Conf. Rep., p. 41, Courts of Appeals have diverged again, this time in construing the term "strong inference." Among the uncertainties, should courts consider competing inferences in determining whether an inference of scienter is "strong"? See 437 F. 3d, at 601–602 (collecting cases). Our task is to prescribe a workable construction of the "strong inference" standard, a reading geared to the PSLRA's twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims.



III

A

We establish the following prescriptions: *First*, faced with a Rule 12(b)(6) motion to dismiss a §10(b) action, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true. See *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 164 (1993). On this point, the parties agree. See Reply Brief 8; Brief for Respondents 26; Brief for United States as *Amicus Curiae* 8, 20, 21.

*Second*, courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. See 5B Wright & Miller §1357 (3d ed. 2004 and Supp. 2007). The inquiry, as several Courts of Appeals have recognized, is whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard. See, *e.g.*, *Abrams* v. *Baker Hughes Inc.*, 292 F. 3d 424, 431 (CA5 2002); *Gompper* v. *VISX, Inc.*, 298 F. 3d 893, 897 (CA9 2002). See also Brief for United States as *Amicus Curiae* 25.

*Third*, in determining whether the pleaded facts give rise to a "strong" inference of scienter, the court must take into account plausible opposing inferences. The Seventh Circuit expressly declined to engage in such a comparative inquiry. A complaint could survive, that court said, as long as it "alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent"; in other words, only "[i]f a reasonable person could not draw such an inference from the alleged facts" would the defendant prevail on a motion to dismiss. 437 F. 3d, at 602. But in §21D(b)(2), Congress did not

merely require plaintiffs to "provide a factual basis for [their] scienter allegations," *ibid.* (quoting *In re Cerner Corp. Securities Litigation*, 425 F. 3d 1079, 1084, 1085 (CA8 2005)), *i.e.*, to allege facts from which an inference of scienter rationally *could* be drawn. Instead, Congress required plaintiffs to plead with particularity facts that give rise to a "strong"—*i.e.*, a powerful or cogent—inference. See American Heritage Dictionary 1717 (4th ed. 2000) (defining "strong" as "[p]ersuasive, effective, and cogent"); 16 Oxford English Dictionary 949 (2d ed. 1989) (defining "strong" as "[p]owerful to demonstrate or convince" (definition 16b)); cf. 7 *id.,* at 924 (defining "inference" as "a conclusion [drawn] from known or assumed facts or statements"; "reasoning from something known or assumed to something else which follows from it").

The strength of an inference cannot be decided in a vacuum. The inquiry is inherently comparative: How likely is it that one conclusion, as compared to others, follows from the underlying facts? To determine whether the plaintiff has alleged facts that give rise to the requisite "strong inference" of scienter, a court must consider plausible nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff. The inference that the defendant acted with scienter need not be irrefutable, *i.e.*, of the "smoking-gun" genre, or even the "most plausible of competing inferences," *Fidel*, 392 F. 3d, at 227 (quoting *Helwig* v. *Vencor, Inc.*, 251 F. 3d 540, 553 (CA6 2001) (en banc)). Recall in this regard that §21D(b)'s pleading requirements are but one constraint among many the PSLRA installed to screen out frivolous suits, while allowing meritorious actions to move forward. See *supra*, at 9, and n. 4. Yet the inference of scienter must be more than merely "reasonable" or "permissible"—it must be cogent and compelling, thus strong in light of other explanations. A complaint will survive, we hold, only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.[5]



B

Tellabs contends that when competing inferences are considered, Notebaert's evident lack of pecuniary motive will be dispositive. The Shareholders, Tellabs stresses, did not allege that Notebaert sold any shares during the class period. See Brief for Petitioners 50 ("The absence of any allegations of motive color all the other allegations putatively giving rise to an inference of scienter."). While it is

[5] JUSTICE SCALIA objects to this standard on the ground that "[i]f a jade falcon were stolen from a room to which only A and B had access," it could not "*possibly* be said there was a 'strong inference' that B was the thief." *Post*, at 1 (opinion concurring in judgment) (emphasis in original). I suspect, however, that law enforcement officials as well as the owner of the precious falcon would find the inference of guilt as to B quite strong—certainly strong enough to warrant further investigation. Indeed, an inference at least as likely as competing inferences can, in some cases, warrant recovery. See *Summers* v. *Tice*, 33 Cal. 2d 80, 84–87, 199 P. 2d 1, 3–5 (1948) (in bank) (plaintiff wounded by gunshot could recover from two defendants, even though the most he could prove was that each defendant was at least as likely to have injured him as the other); Restatement (Third) of Torts §28(b), Comment *e*, p. 504 (Proposed Final Draft No. 1, Apr. 6, 2005) ("Since the publication of the Second Restatement in 1965, courts have generally accepted the alternative-liability principle of [*Summers* v. *Tice*, adopted in] §433B(3), while fleshing out its limits."). In any event, we disagree with JUSTICE SCALIA that the hardly stock term "strong inference" has only one invariably right ("natural" or "normal") reading—his. See *post*, at 3.

JUSTICE ALITO agrees with JUSTICE SCALIA, and would transpose to the pleading stage "the test that is used at the summary-judgment and judgment-as-a-matter-of-law stages." *Post*, at 3 (opinion concurring in judgment). But the test at each stage is measured against a different backdrop. It is improbable that Congress, without so stating, intended courts to test pleadings, unaided by discovery, to determine whether there is "no genuine issue as to any material fact." See Fed. Rule Civ. Proc. 56(c). And judgment as a matter of law is a post-trial device, turning on the question whether a party has produced evidence "legally sufficient" to warrant a jury determination in that party's favor. See Rule 50(a)(1).

true that motive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference, we agree with the Seventh Circuit that the absence of a motive allegation is not fatal. See 437 F. 3d, at 601. As earlier stated, *supra*, at 11, allegations must be considered collectively; the significance that can be ascribed to an allegation of motive, or lack thereof, depends on the entirety of the complaint.

Tellabs also maintains that several of the Shareholders' allegations are too vague or ambiguous to contribute to a strong inference of scienter. For example, the Shareholders alleged that Tellabs flooded its customers with unwanted products, a practice known as "channel stuffing." See *supra*, at 3. But they failed, Tellabs argues, to specify whether the channel stuffing allegedly known to Notebaert was the illegitimate kind (*e.g.*, writing orders for products customers had not requested) or the legitimate kind (*e.g.*, offering customers discounts as an incentive to buy). Brief for Petitioners 44–46; Reply Brief 8. See also *id.*, at 8–9 (complaint lacks precise dates of reports critical to distinguish legitimate conduct from culpable conduct). But see 437 F. 3d, at 598, 603–604 (pointing to multiple particulars alleged by the Shareholders, including specifications as to timing). We agree that omissions and ambiguities count against inferring scienter, for plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." §78u–4(b)(2). We reiterate, however, that the court's job is not to scrutinize each allegation in isolation but to assess all the allegations holistically. See *supra*, at 11; 437 F. 3d, at 601. In sum, the reviewing court must ask: When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter at least as strong as any opposing inference?[6]

[6]The Seventh Circuit held that allegations of scienter made against one defendant cannot be imputed to all other individual defendants. 437 F. 3d, at 602–603. See also *id.*, at 603 (to proceed beyond the pleading stage, the plaintiff must allege as to each defendant facts sufficient to demonstrate a culpable state of mind regarding his or her violations) (citing *Phillips* v. *Scientific-Atlanta, Inc.*, 374 F. 3d 1015, 1018 (CA11 2004)). Though there is disagreement among the Circuits as to whether the group pleading doctrine survived the PSLRA, see, *e.g.*, *Southland Securities Corp.* v. *Inspire Ins. Solutions Inc.*, 365 F. 3d 353, 364 (CA5 2004), the Shareholders do not contest the Seventh Circuit's determination, and we do not disturb it.



## IV

Accounting for its construction of §21D(b)(2), the Seventh Circuit explained that the court "th[ought] it wis[e] to adopt an approach that [could not] be misunderstood as a usurpation of the jury's role." 437 F. 3d, at 602. In our view, the Seventh Circuit's concern was undue.[7] A court's comparative assessment of plausible inferences, while constantly assuming the plaintiff's allegations to be true, we think it plain, does not impinge upon the Seventh Amendment right to jury trial.[8]

Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has power to determine what must be proved to prevail on the merits. It is the federal law-

[7]The Seventh Circuit raised the possibility of a Seventh Amendment problem on its own initiative. The Shareholders did not contend below that dismissal of their complaint under §21D(b)(2) would violate their right to trial by jury. Cf. *Monroe Employees Retirement System* v. *Bridgestone Corp.*, 399 F. 3d 651, 683, n. 25 (CA6 2005) (noting possible Seventh Amendment argument but declining to address it when not raised by plaintiffs).

[8]In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment. See, *e.g.*, *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 589 (1993) (expert testimony can be excluded based on judicial determination of reliability); *Neely* v. *Martin K. Eby Constr. Co.*, 386 U. S. 317, 321 (1967) (judgment as a matter of law); *Pease* v. *Rathbun-Jones Engineering Co.*, 243 U. S. 273, 278 (1917) (summary judgment).

maker's prerogative, therefore, to allow, disallow, or shape the contours of—including the pleading and proof requirements for—§10(b) private actions. No decision of this Court questions that authority in general, or suggests, in particular, that the Seventh Amendment inhibits Congress from establishing whatever pleading requirements it finds appropriate for federal statutory claims. Cf. *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 512–513 (2002); *Leatherman*, 507 U. S., at 168 (both recognizing that heightened pleading requirements can be established by Federal Rule, citing Fed. Rule Civ. Proc. 9(b), which requires that fraud or mistake be pleaded with particularity).[9]

Our decision in *Fidelity & Deposit Co. of Md.* v. *United States*, 187 U. S. 315 (1902), is instructive. That case concerned a rule adopted by the Supreme Court of the District of Columbia in 1879 pursuant to rulemaking power delegated by Congress. The rule required defendants, in certain contract actions, to file an affidavit "specifically stating . . . , in precise and distinct terms, the grounds of his defen[s]e." *Id.*, at 318 (internal quotation marks omitted). The defendant's affidavit was found insufficient, and judgment was entered for the plaintiff, whose declaration and supporting affidavit had been found satisfactory. *Ibid.* This Court upheld the District's rule against the contention that it violated the Seventh Amendment. *Id.*, at 320. Just as the purpose of §21D(b) is to screen out frivolous complaints, the purpose of the prescription at issue in *Fidelity & Deposit Co.* was to "preserve the courts from frivolous defen[s]es," *ibid.* Explaining why the Seventh Amendment was not implicated, this Court said that the heightened pleading rule simply "prescribes the means of making an issue," and that, when "[t]he issue [was] made as prescribed, the right of trial by jury accrues." *Ibid.;* accord *Ex parte Peterson*, 253 U. S. 300, 310 (1920) (Brandeis, J.) (citing *Fidelity & Deposit Co.*, and reiterating: "It does not infringe the constitutional right to a trial by jury [in a civil case], to require, with a view to formulating the issues, an oath by each party to the facts relied upon."). See also *Walker* v. *New Mexico & Southern Pacific R. Co.*, 165 U. S. 593, 596 (1897) (Seventh Amendment "does not attempt to regulate matters of pleading").

[9]Any heightened pleading rule, including Fed. Rule Civ. Proc. 9(b), could have the effect of preventing a plaintiff from getting discovery on a claim that might have gone to a jury, had discovery occurred and yielded substantial evidence. In recognizing Congress' or the Federal Rule makers' authority to adopt special pleading rules, we have detected no Seventh Amendment impediment.



In the instant case, provided that the Shareholders have satisfied the congressionally "prescribe[d] . . . means of making an issue," *Fidelity & Deposit Co.*, 187 U. S., at 320, the case will fall within the jury's authority to assess the credibility of witnesses, resolve any genuine issues of fact, and make the ultimate determination whether Notebaert and, by imputation, Tellabs acted with scienter. We emphasize, as well, that under our construction of the "strong inference" standard, a plaintiff is not forced to plead more than she would be required to prove at trial. A plaintiff alleging fraud in a §10(b) action, we hold today, must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference. At trial, she must then prove her case by a "preponderance of the evidence." Stated otherwise, she must demonstrate that it is *more likely* than not that the defendant acted with scienter. See *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 390 (1983).

* * *

While we reject the Seventh Circuit's approach to §21D(b)(2), we do not decide whether, under the standard we have described, see *supra*, at 11–14, the Shareholders'

allegations warrant "a strong inference that [Notebaert and Tellabs] acted with the required state of mind," 15 U. S. C. §78u–4(b)(2). Neither the District Court nor the Court of Appeals had the opportunity to consider the matter in light of the prescriptions we announce today. We therefore vacate the Seventh Circuit's judgment so that the case may be reexamined in accord with our construction of §21D(b)(2).

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

*It is so ordered.*



# SUPREME COURT OF THE UNITED STATES

No. 06–484

TELLABS, INC., ET AL., PETITIONERS *v.* MAKOR ISSUES & RIGHTS, LTD., ET AL.

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

[June 21, 2007]

JUSTICE SCALIA, concurring in the judgment.

I fail to see how an inference that is merely "at least as compelling as any opposing inference," *ante,* at 2, can conceivably be called what the statute here at issue requires: a "strong inference," 15 U. S. C. §78u–4(b)(2). If a jade falcon were stolen from a room to which only A and B had access, could it *possibly* be said there was a "strong inference" that B was the thief? I think not, and I therefore think that the Court's test must fail. In my view, the test should be whether the inference of scienter (if any) is *more plausible* than the inference of innocence.*

The Court's explicit rejection of this reading, *ante,* at 12, rests on two assertions. The first (doubtless true) is that the statute does not require that "[t]he inference that the defendant acted with scienter . . . be irrefutable, *i.e.*, of the

*The Court suggests that "the owner of the precious falcon would find the inference of guilt as to B quite strong." *Ante*, at 13, n. 5. If he should draw such an inference, it would only prove the wisdom of the ancient maxim "*aliquis non debet esse Judex in propria causa*"—no man ought to be a judge of his own cause. *Dr. Bonham's Case*, 8 Co. 107a, 114a, 118a, 77 Eng. Rep. 638, 646, 652 (C. P. 1610). For it is quite clear (from the dispassionate perspective of one who does not own a jade falcon) that a *possibility*, even a strong possibility, that B is responsible is not a strong *inference* that B is responsible. "Inference" connotes "belief" in what is inferred, and it would be impossible to form a strong belief that it was B and not A, or A and not B.

'smoking-gun' genre," *ibid.* It is up to Congress, however, and not to us, to determine what pleading standard would avoid those extremities while yet effectively deterring baseless actions. Congress has expressed its determination in the phrase "strong inference"; it is our job to give that phrase its normal meaning. And if we are to abandon text in favor of unexpressed purpose, as the Court does, it is inconceivable that Congress's enactment of stringent pleading requirements in the Private Securities Litigation Reform Act of 1995 somehow manifests the purpose of giving plaintiffs the edge in close cases.

The Court's second assertion (also true) is that "an inference at least as likely as competing inferences can, in some cases, warrant recovery." *Ante*, at 13, n. 5 (citing *Summers* v. *Tice*, 33 Cal. 2d 80, 84–87, 199 P. 2d 1, 3–5 (1948) (in bank)). *Summers* is a famous case, however, because it sticks out of the ordinary body of tort law like a sore thumb. It represented "a relaxation" of "such proof as is ordinarily required" to succeed in a negligence action. *Id.*, at 86, 199 P. 2d, at 4 (internal quotation marks omitted). There is no indication that the statute at issue here was meant to relax the ordinary rule under which a tie goes to the defendant. To the contrary, it explicitly strengthens that rule by extending it to the pleading stage of a case.

One of petitioners' *amici* suggests that my reading of the statute would transform the text from requiring a "strong" inference to requiring the "strongest" inference. See Brief for American Association for Justice as *Amicus Curiae* 27. The point might have some force if Congress could have more clearly adopted my standard by using the word "strongest" instead of the word "strong." But the use of the superlative would not have made any sense given the provision's structure: What does it mean to require a plaintiff to plead "facts giving rise to *the strongest* inference that the defendant acted with the required state of mind"? It is certainly true that, if Congress had wanted to adopt my standard with even greater clarity, it could have restructured the entire provision—to require, for example, that the plaintiff plead "facts giving rise to *an inference of scienter that is more compelling than the inference that the defendant acted with a nonculpable state of mind.*" But if one is to consider the possibility of total restructuring, it is equally true that, to express the Court's standard, Congress could have demanded "*an inference of scienter that is at least as compelling as the inference that the defendant acted with a nonculpable state of mind.*" Argument from the possibility of saying it differently is clearly a draw. We must be content to give "strong inference" its normal meaning. I hasten to add that, while precision of interpretation should always be pursued for its own sake, I doubt that in this instance what I deem to be the correct test will produce results much different from the Court's. How often is it that inferences are precisely in equipoise? All the more reason, I think, to read the language for what it says.



The Court and the dissent criticize me for suggesting that there is only one reading of the text. *Ante*, at 13, n. 5; *post*, at 2, n. 1 (STEVENS, J., dissenting). They are both mistaken. I assert only that mine is the natural reading of the statute (*i.e.*, the normal reading), not that it is the only conceivable one. The Court has no standing to object to this approach, since it concludes that, in another respect, the statute admits of only one natural reading, namely, that competing inferences must be weighed because the strong-inference requirement "is inherently comparative" *ante*, at 12. As for the dissent, it asserts that the statute cannot possibly have a natural and discernible meaning, since "courts of appeals" and "Members of this Court" "have divided" over the question. It was just weeks ago, however, that the author of the dissent, joined by the author of today's opinion for the Court, concluded that a

statute's meaning was "plain," *Rockwell Int'l Corp.* v. *United States*, 549 U. S. ___, ___ (2007) (slip op., at 1) (STEVENS, J., dissenting), even though the Courts of Appeals and Members of this Court divided over the question, *id.*, at __, n. 5 (slip op., at 12, n. 5). Was plain meaning then, as the dissent claims it is today, *post*, at 2, n. 1, "in the eye of the beholder"?

It is unremarkable that various Justices in this case reach different conclusions about the correct interpretation of the statutory text. It is remarkable, however, that the dissent believes that Congress "implicitly delegated significant lawmaking authority to the Judiciary in determining how th[e] [strong-inference] standard should operate in practice." *Post*, at 1. This is language usually employed to describe the discretion conferred upon administrative agencies, which need not adopt what courts would consider the interpretation most faithful to the text of the statute, but may choose some other interpretation, so long as it is within the bounds of the reasonable, and may later change to some *other* interpretation that is within the bounds of the reasonable. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). Courts, by contrast, *must* give the statute its single, most plausible, reading. To describe this as an exercise of "delegated lawmaking authority" seems to me peculiar—unless one believes in lawmakers who have no discretion. Courts must apply judgment, to be sure. But judgment is not discretion.

Even if I agreed with the Court's interpretation of "strong inference," I would not join the Court's opinion because of its frequent indulgence in the last remaining legal fiction of the West: that the report of a single committee of a single House expresses the will of Congress. The Court says, for example, that "Congress'[s] purpose" was "to promote greater uniformity among the Circuits," *ante,* at 10, relying for that certitude upon the statement



of managers accompanying a House Conference Committee Report whose text was never adopted by the House, much less by the Senate, and as far as we know was read by almost no one. The Court is sure that Congress "'inten[ded] to strengthen existing pleading requirements,'" *ibid.*, because—again—the statement of managers said so. I come to the same conclusion for the much safer reason that the law which Congress adopted (and which the Members of both Houses actually *voted* on) so indicates. And had the legislation not done so, the statement of managers assuredly could not have remedied the deficiency.

With the above exceptions, I am generally in agreement with the Court's analysis, and so concur in its judgment.

# SUPREME COURT OF THE UNITED STATES

No. 06–484

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

[June 21, 2007]

JUSTICE ALITO, concurring in the judgment.

I agree with the Court that the Seventh Circuit used an erroneously low standard for determining whether the plaintiffs in this case satisfied their burden of pleading "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U. S. C. §78u–4(b)(2). I further agree that the case should be remanded to allow the lower courts to decide in the first instance whether the allegations survive under the correct standard. In two respects, however, I disagree with the opinion of the Court. First, the best interpretation of the statute is that only those facts that are alleged "with particularity" may properly be considered in determining whether the allegations of scienter are sufficient. Second, I agree with JUSTICE SCALIA that a "strong inference" of scienter, in the present context, means an inference that is more likely than not correct.

## I

On the first point, the statutory language is quite clear. Section 78u–4(b)(2) states that "the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." Thus, "a strong inference" of scienter must arise from those facts that are stated "with particularity." It follows that facts not stated with the requisite particularity cannot be considered in determining whether the strong-inference test is met.



In dicta, however, the Court states that "omissions and ambiguities" merely "count against" inferring scienter, and that a court should consider all allegations of scienter, even nonparticularized ones, when considering whether a complaint meets the "strong inference" requirement. *Ante,* at 14. Not only does this interpretation contradict the clear statutory language on this point, but it undermines the particularity requirement's purpose of preventing a plaintiff from using vague or general allegations in order to get by a motion to dismiss for failure to state a claim. Allowing a plaintiff to derive benefit from such allegations would permit him to circumvent this important provision.

Furthermore, the Court's interpretation of the particularity requirement in no way distinguishes it from normal pleading review, under which a court naturally gives less weight to allegations containing "omissions and ambiguities" and more weight to allegations stating particularized facts. The particularity requirement is thus stripped of all meaning.

Questions certainly may arise as to whether certain allegations meet the statutory particularity requirement, but where that requirement is violated, the offending allegations cannot be taken into account.

## II

I would also hold that a "strong inference that the defendant acted with the required state of mind" is an inference that is stronger than the inference that the defendant lacked the required state of mind. Congress has provided very little guidance regarding the meaning of "strong inference," and the difference between the Court's interpretation (the inference of scienter must be at least as

strong as the inference of no scienter) and JUSTICE SCALIA's (the inference of scienter must be at least marginally stronger than the inference of no scienter) is unlikely to make any practical difference. The two approaches are similar in that they both regard the critical question as posing a binary choice (either the facts give rise to a "strong inference" of scienter or they do not). But JUSTICE SCALIA's interpretation would align the pleading test under §78u–4(b)(2) with the test that is used at the summary-judgment and judgment-as-a-matter-of-law stages, whereas the Court's test would introduce a test previously unknown in civil litigation. It seems more likely that Congress meant to adopt a known quantity and thus to adopt JUSTICE SCALIA's approach.



# SUPREME COURT OF THE UNITED STATES

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[June 21, 2007]

JUSTICE STEVENS, dissenting.

As the Court explains, when Congress enacted a heightened pleading requirement for private actions to enforce the federal securities laws, it "left the key term 'strong inference' undefined." *Ante*, at 2. It thus implicitly delegated significant lawmaking authority to the Judiciary in determining how that standard should operate in practice. Today the majority crafts a perfectly workable definition of the term, but I am persuaded that a different interpretation would be both easier to apply and more consistent with the statute.

The basic purpose of the heightened pleading requirement in the context of securities fraud litigation is to protect defendants from the costs of discovery and trial in unmeritorious cases. Because of its intrusive nature, discovery may also invade the privacy interests of the defendants and their executives. Like citizens suspected of having engaged in criminal activity, those defendants should not be required to produce their private effects unless there is probable cause to believe them guilty of misconduct. Admittedly, the probable-cause standard is not capable of precise measurement, but it is a concept that is familiar to judges. As a matter of normal English usage, its meaning is roughly the same as "strong inference." Moreover, it is most unlikely that Congress in-

tended us to adopt a standard that makes it more difficult to commence a civil case than a criminal case.[1]

In addition to the benefit of its grounding in an already familiar legal concept, using a probable-cause standard would avoid the unnecessary conclusion that "in determining whether the pleaded facts give rise to a 'strong' inference of scienter, the court *must* take into account plausible opposing inferences." *Ante*, at 11 (emphasis added). There are times when an inference can easily be deemed strong without any need to weigh competing inferences. For example, if a known drug dealer exits a building immediately after a confirmed drug transaction, carrying a suspicious looking package, a judge could draw a strong inference that the individual was involved in the aforementioned drug transaction without debating whether the suspect might have been leaving the building at that exact time for another unrelated reason.

If, using that same methodology, we assume (as we must, see *ante*, at 11, 14) the truth of the detailed factual allegations attributed to 27 different confidential informants described in the complaint, App. 91–93, and view those allegations collectively, I think it clear that they establish probable cause to believe that Tellabs' chief executive officer "acted with the required intent," as the Seventh Circuit held.[2] 437 F. 3d 588, 602 (2006).

Accordingly, I would affirm the judgment of the Court of Appeals.

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[1] The meaning of a statute can only be determined on a case by case basis and will, in each case, turn differently on the clarity of the statutory language, its context, and the intent of its drafters. Here, in my judgment, a probable-cause standard is more faithful to the intent of Congress, as expressed in both the specific pleading requirement and the statute as a whole, than the more defendant-friendly interpretation that JUSTICE SCALIA prefers. He is clearly wrong in concluding that in divining the meaning of this term, we can merely "read the language for what it says," and that it is susceptible to only one reading. *Ante*, at 3 (opinion concurring in judgment). He argues that we "must be content to give 'strong inference' its normal meaning," *ibid.*, and yet the "normal meaning" of a term such as "strong inference" is surely in the eye of the beholder. As the Court's opinion points out, Courts of Appeals have divided on the meaning of the standard, see *ante*, at 2, 10, and today, the Members of this Court have done the same. Although JUSTICE SCALIA may disagree with the Court's reading of the term, he should at least acknowledge that, in this case, the term itself is open to interpretation.



[2] The "channel stuffing" allegations in ¶¶ 62–72 of the amended complaint, App. 110–113, are particularly persuasive. Contrary to petitioners' arguments that respondents' allegations of channel stuffing "are too vague or ambiguous to contribute to a strong inference of scienter," *ante*, at 13, this portion of the complaint clearly alleges that Notebaert himself had specific knowledge of illegitimate channel stuffing during the relevant time period. See, *e.g.*, App. 111, ¶67 ("Defendant Notebaert worked directly with Tellabs' sales personnel to channel stuff SBC"); *id.*, at 110–112 (alleging, in describing such channel stuffing, that Tellabs took "extraordinary" steps that amounted to "an abnormal practice in the industry"; that "distributors were upset and later returned the inventory" (and, in the case of Verizon's Chairman, called Tellabs to complain); that customers "did not want" products that Tellabs sent and that Tellabs employees wrote purchase orders for; that "returns were so heavy during January and February 2001 that Tellabs had to lease extra storage space to accommodate all the returns"; and that Tellabs "backdat[ed] sales" that actually took place in 2001 to appear as having occurred in 2000). If these allegations are actually taken as true and viewed in the collective, it is hard to imagine what competing inference could effectively counteract the inference that Notebaert and Tellabs "'acted with the required state of mind.'" *Ante*, at 18 (opinion of the Court) (quoting 15 U. S. C. §78u–4(b)(2)).

*The Supreme Court's October 2007 Term: Cases Granted For Argument and Those Involving Business Interests (With Questions Presented) (As of July 30, 2007)*

# *SUPREME COURT OF THE UNITED STATES*
## *GRANTED & NOTED CASES LIST*
## *FOR ARGUMENT - OCTOBER TERM 2007*

***As of July 30, 2007***

***06-43*** ***CFX*** ***STONERIDGE INVESTMENT V. SCIENTIFIC-ATLANTA, INC.***
Court: USCA-8 Grant: 3/26/07 (CJ & SGB – no part)
Argument Date: 10/9/07

***06-179*** ***CFX*** ***RIEGEL V. MEDTRONIC, INC.***
Court: USCA-2 Grant: 6/25/07

***06-457*** ***CFX*** ***ROWE, ATT'Y GEN. OF ME V. NH MOTOR TRANSPORT ASSN.***
Court: USCA-1 Grant: 6/25/07

***06-571*** ***CFY*** ***WATSON V. UNITED STATES***
Court: USCA-5 Grant: 2/26/07
Argument Date: 10/9/07

***06-637*** ***CFX*** ***BD. OF EDUCATION OF CITY OF NEW YORK V. TOM F.***
Court: USCA-2 Grant: 2/26/07
Argument Date: 10/1/07

***06-666*** ***CSX*** ***DEPT. OF REVENUE OF KY V. DAVIS***
Court: CA-KY Grant: 5/21/07

***06-694*** ***CFY*** ***UNITED STATES V. WILLIAMS***
Court: USCA-11 Grant: 3/26/07

***06-713)*** ***CFX*** ***WASHINGTON STATE GRANGE V. WASHINGTON REPUBLICAN PARTY***
***06-730)*** ***CFX*** ***WASHINGTON V. WASHINGTON REPUBLICAN PARTY***
Court: USCA-9 Grant: 2/26/07
Argument Date: 10/1/07

NOTE: * Unanimous Court
** Unanimous Court in Part
# Unanimous in Judgment

## *SUPREME COURT OF THE UNITED STATES*
### *GRANTED & NOTED CASES LIST*
### *FOR ARGUMENT - OCTOBER TERM 2007*

***06-766*** ***CFX*** ***NY BD. OF ELECTIONS V. TORRES***
Court: USCA-2 Grant: 2/20/07
Argument Date: 10/3/07

***06-856*** ***CFX*** ***LARUE V. DEWOLFF, BOBERG & ASSOC., INC.***
Court: USCA-4 Grant: 6/18/07

***06-984*** ***CSH*** ***MEDELLIN V. TEXAS***
Court: Crim. App., TX Grant: 4/30/07
Argument Date: 10/10/07

***06-989*** ***CFX*** ***HALL STREET ASSOC. V. MATTEL, INC.***
Court: USCA-9 Grant: 5/29/07

***06-1005*** ***CFH*** ***UNITED STATES V. SANTOS***
Court: USCA-7 Grant: 4/23/07
Argument Date: 10/3/07

***06-1164*** ***CFX*** ***JOHN R. SAND & GRAVEL CO. V. UNITED STATES***
Court: USCA-Fed. Grant: 5/29/07

***06-1195)*** ***CFH*** ***BOUMEDIENE V. BUSH, PRESIDENT OF UNITED STATES***
***06-1196)*** ***CFH*** ***AL ODAH V. UNITED STATES***
Court: USCA-DC Grant: 6/29/07

***06-1221*** ***CFX*** ***SPRINT/UNITED MANAGEMENT CO. V. MENDELSOHN***
Court: USCA-10 Grant: 6/11/07

***06-1265*** ***CFX*** ***KLEIN & CO. FUTURES, INC. V. BD. OF TRADE OF THE CITY OF NY***
Court: USCA-2 Grant: 5/21/07

***06-1286*** ***CFX*** ***KNIGHT V. CIR***
Court: USCA-2 Grant: 6/25/07



NOTE: * Unanimous Court
** Unanimous Court in Part
# Unanimous in Judgment

*SUPREME COURT OF THE UNITED STATES*
*GRANTED & NOTED CASES LIST*
*FOR ARGUMENT - OCTOBER TERM 2007*

***06-1287*** ***CFX*** ***CSX TRANSPORTATION, INC. V. GA BD. OF EQUALIZATION***
Court: USCA-11 Grant: 5/29/07

***06-1322*** ***CFX*** ***FEDERAL EXPRESS CORP. V. HOLOWECKI***
Court: USCA-2 Grant: 6/4/07

***06-6330*** ***CFY*** ***KIMBROUGH V. UNITED STATES***
Court: USCA-4 Grant: 6/11/07
Argument Date: 10/2/07

***06-6911*** ***CFY*** ***LOGAN V. UNITED STATES***
Court: USCA-7 Grant: 2/20/07

***06-7949*** ***CFY*** ***GALL V. UNITED STATES***
Court: USCA-8 Grant: 6/11/07
Argument Date: 10/2/07

***06-8273*** ***CSH*** ***DANFORTH V. MINNESOTA***
Court: SC-MN Grant: 5/21/07

***06-9130*** ***CFX*** ***ALI V. FED. BUREAU OF PRISONS***
Court: USCA-11 Grant: 5/29/07

***06-10119*** ***CSY*** ***SNYDER V. LOUISIANA***
Court: SC-LA Grant: 6/25/07

**NOTE:**



NOTE: * Unanimous Court
** Unanimous Court in Part
# Unanimous in Judgment

## *SUPREME COURT OF THE UNITED STATES*
## *GRANTED & NOTED CASES LIST*
## *FOR ARGUMENT - OCTOBER TERM 2007*

No. of Cases made available for Argument (Hours): ***28 (26)***

No. of Cases Argued (Hours):

Total Disposed of:

Breakdown (no. in parentheses = no. of cases)

Signed Opinion/Judgment - Per Curiam - Dismissed - Other -

CASE CODE KEY

❑ First Letter = Jurisdictional Grounds (ex. 99-804 CFY)

C - Certiorari
A - Appeal
Q - Certified Question

❑ Second Letter = Court Below (ex. 99-804 CFY)

S - State
F - U.S. Court of Appeals
T - Three-Judge District Court
M - U.S. Court of Appeals for the Armed Forces
O - Other Court

❑ Third Letter = Nature of Case (ex. 99-804 CFY)

X - Civil
Y - Criminal
H - Habeas Corpus or other collateral attack

NOTE: * Unanimous Court
** Unanimous Court in Part
# Unanimous in Judgment

4

**SUPREME COURT OCTOBER 2007 TERM:**
**CASES GRANTED INVOLVING BUSINESS INTERESTS**
**(AS OF AUGUST 20, 2007)**

* *Stoneridge Investment Partners, L.L. C. v. Scientific-Atlanta, Inc.* [Primary Liability of Secondary Actors for Securities Fraud]

* *Riegel v. Medtronic, Inc.* [Preemption of State Law Claims by Medical Device Amendments to Food, Drug and Cosmetic Act]

* *Rowe v. New Hampshire Motor TransportAss'n* [Federal Preemption of State Regulation of Interstate Distribution of Tobacco]

*Kentucky Department of Revenue v. Davis* [Dormant Commerce Clause and Tax Exemptions for Interest Earned on State and Municipal Bonds]

* *LaRue v. DeWolff, Boberg & Associates, Inc.* [Availability of Monetary Relief for Breach of Fiduciary Duty under ERISA]

*Hall Street Associates, L.L. C. v. Mattel, Inc.* [Scope of Judicial Review under Federal Arbitration Act]

*John R. Sand & Gravel Co. v. United States* [Statute of Limitations under the Tucker Act]

* *Sprint/United Management Co. v. Mendelsohn* [Admission of Evidence of Discrimination under Title VII against Nonparties by Individuals Uninvolved in Adverse Action]

*Klein & Co. Futures, Inc. v. Board of Trade of the City ofNew York* [Private Right of Action under the Commodity Exchange Act]

*CSX Transportation, Inc. v. Georgia Board ofEqualization* [State Tax Valuation of Railroad Property under Railroad Revitalization and Regulatory Reform Act]

* *Federal Express Corp. v. Holowecki* [Filing of Intake Questionnaire with EEOC as Initiation of Charge under Age Discrimination in Employment Act]

*Knight v. Commissioner of Internal Revenue* [Availability of Tax Deduction for Investment Management Services]

* Through the National Chamber Litigation Center, the United States Chamber of Commerce filed and/or will likely participate as *amicus curiae* in each case marked with an asterisk.

***Stoneridge Investment Partners, L.L.C. v. Scientific-Atlanta, Inc.*** Whether this Court's decision in *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), forecloses claims for deceptive conduct under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5(a) and (c), 17 C.F.R. 240.10b-5(a) and (c), where Respondents engaged in transactions with a public corporation with no legitimate business or economic purpose except to inflate artificially the public corporation's financial statements, but where Respondents themselves made no public statements concerning those transactions.

***Riegel v. Medtronic, Inc.*** Does express preemption provision of Medical Device Amendments to Food, Drug and Cosmetic Act, 21 U.S.C. § 360k(a), preempt state law claims seeking damages for injuries caused by medical devices that received premarket approval from FDA?

***Rowe v. New Hampshire Motor Transport Ass'n.*** (1) Does 1994 Federal Aviation Administration Authorization Act, 49 U.S.C. §§ 14501 (c) (1) and 41713(b)(4)(A), preempt states from exercising their historic public health police powers to regulate carriers that deliver contraband such as tobacco and other dangerous substances to children? (2) Does FAAAA preempt states from exercising their historic public health police powers to require shippers of contraband such as tobacco and other dangerous substances to use carrier that provides age verification and signature service to ensure that such substances are not delivered to children.

***Kentucky Department of Revenue v. Davis.*** Whether a state violates the dormant Commerce Clause by providing an exemption from its income tax for interest income derived from bonds issued by the state and its political subdivisions, while treating interest income realized from bonds issued by other states and their political subdivisions as taxable to the same extent, and in the same manner, as interest earned on bonds issued by commercial entities, whether domestic or foreign.

***LaRue v. DeWolff, Boberg & Associates, Inc.*** (1) Does Section 502(a)(2) of ERISA permit participant to bring action to recover losses attributable to his account in "defined contribution plan" that were caused by fiduciary breach? (2) Does Section 502(a)(3) permit participant to bring action for monetary "make-whole" relief to compensate for losses directly caused by fiduciary breach (known in pre-merger courts of equity as "surcharge")?

***Hall Street Associates, L.L.C. v. Mattel, Inc.*** Did the Ninth Circuit Court of Appeals err when it held, in conflict with several other federal Courts of Appeals, that the Federal Arbitration Act ("FAA") precludes a federal court from enforcing the parties' clearly expressed agreement providing for more expansive judicial review of





an arbitration award than the narrow standard of review otherwise provided for in the FAA?

***John R. Sand & Gravel Co. v. United States.*** The statute of limitations in the Tucker Act, 28 U.S.C. §2501, provides: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The questions presented are: (1) Whether the statute of limitations in the Tucker Act limits the subject matter jurisdiction of the Court of Federal Claims. (2) Whether a claim for a permanent physical taking of a portion of real property first accrues upon the government's temporary exclusion of the property holder from another portion of the property.

***Sprint/United Management Co. v. Mendelsohn.*** Must district court admit "me, too" evidence--testimony, by nonparties, alleging discrimination at hands of persons who played no role in adverse employment decision challenged by plaintiff?

***Klein & Co. Futures, Inc. v. Board of Trade of the City of New York.*** The Commodity Exchange Act provides an express private right of action for actual losses to a person who "engaged in any transaction on" or "subject to the rules of" a commodity board of trade against that board of trade if the board, in bad faith, engaged in illegal conduct that caused the person to suffer the actual losses, 7 U.S.C. § 25(b)(1). The question presented is: Whether the court of appeals erred in concluding that futures commission merchants lack statutory standing to invoke that right of action because, in the court's view, they do not engage in such transactions, despite the statutory requirement that the merchants enter into and execute their transactions on, and subject to the rules of, a board of trade and the fact of the merchants' financial liability for the transactions.

***CSX Transportation, Inc. v. Georgia Board of Equalization.*** Whether, under the federal statute prohibiting state tax discrimination against railroads, 49 U.S.C. § 11501 (b)(1), a federal district court determining the "true market value" of railroad property must accept the valuation method chosen by the State.

***Federal Express Corp. v. Holowecki.*** Whether the Second Circuit erred in concluding, contrary to the law of several other circuits and implicating an issue this Court has examined but not yet decided, that an "intake questionnaire" submitted to the Equal Employment Opportunity Commission ("EEOC") may suffice for the charge of discrimination that must be submitted pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), even in the absence of evidence that the EEOC treated the form as a charge or the employee submitting the questionnaire reasonably believed it constituted a charge.

QUESTIONS PRESENTED

***Knight v. Commissioner of Internal Revenue.*** Does 26 U.S.C. § 67(e) permit full deduction for costs and fees for investment management and advisory services provided to trusts and estates?





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

WATTERS, COMMISSIONER, MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES *v.* WACHOVIA BANK, N. A., ET AL.

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

No. 05–1342. Argued November 29, 2006—Decided April 17, 2007

National banks' business activities are controlled by the National Bank Act (NBA), 12 U. S. C. §1 *et seq*., and regulations promulgated thereunder by the Office of the Comptroller of the Currency (OCC), see §§24, 93a, 371(a). OCC is charged with supervision of the NBA and, thus, oversees the banks' operations and interactions with customers. See *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 254, 256. The NBA grants OCC, as part of its supervisory authority, visitorial powers to audit the banks' books and records, largely to the exclusion of other state or federal entities. See §484(a); 12 CFR §7.4000. The NBA specifically authorizes federally chartered banks to engage in real estate lending, 12 U. S. C. §371, and "[t]o exercise . . . such incidental powers as shall be necessary to carry on the business of banking," §24 Seventh. Among incidental powers, national banks may conduct certain activities through "operating subsidiaries," discrete entities authorized to engage solely in activities the bank itself could undertake, and subject to the same terms and conditions as the bank. See §24a(g)(3)(A); 12 CFR §5.34(e).

Respondent Wachovia Bank is an OCC-chartered national banking association that conducts its real estate lending business through respondent Wachovia Mortgage Corporation, a wholly owned, North Carolina-chartered entity licensed as an operating subsidiary by OCC, and doing business in Michigan and elsewhere. Michigan law exempts banks, both national and state, from state mortgage lending regulation, but requires their subsidiaries to register with the State's Office of Insurance and Financial Services (OIFS) and submit to state supervision. Although Wachovia Mortgage initially complied with

Syllabus

Michigan's requirements, it surrendered its Michigan registration once it became a wholly owned operating subsidiary of Wachovia Bank. Subsequently, petitioner Watters, the OIFS Commissioner, advised Wachovia Mortgage it would no longer be authorized to engage in mortgage lending in Michigan. Respondents sued for declaratory and injunctive relief, contending that the NBA and OCC's regulations preempt application of the relevant Michigan mortgage lending laws to a national bank's operating subsidiary. Watters responded that, because Wachovia Mortgage was not itself a national bank, the challenged Michigan laws were applicable and were not preempted. She also argued that the Tenth Amendment to the U. S. Constitution prohibits OCC's exclusive regulation and supervision of national banks' lending activities conducted through operating subsidiaries. Rejecting those arguments, the Federal District Court granted the Wachovia plaintiffs summary judgment in relevant part, and the Sixth Circuit affirmed.

*Held:*

1. Wachovia's mortgage business, whether conducted by the bank itself or through the bank's operating subsidiary, is subject to OCC's superintendence, and not to the licensing, reporting, and visitorial regimes of the several States in which the subsidiary operates. Pp. 5–17.

(a) The NBA vests in nationally chartered banks enumerated powers and all "necessary" incidental powers. 12 U. S. C. §24 Seventh. To prevent inconsistent or intrusive state regulation, the NBA provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law . . . ." §484(a). Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or purposes of the NBA. But when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way. *E.g., Barnett Bank of Marion Cty., N. A.* v. *Nelson*, 517 U. S. 25, 32–34. The NBA expressly authorizes national banks to engage in mortgage lending, subject to OCC regulation, §371(a). State law may not significantly burden a bank's exercise of that power, see, *e.g., Barnett Bank*, 517 U. S., at 33–34. In particular, real estate lending, when conducted by a national bank, is immune from state visitorial control: The NBA specifically vests exclusive authority to examine and inspect in OCC. 12 U. S. C. §484(a). The Michigan provisions at issue exempt national banks themselves from coverage. This is not simply a matter of the Michigan Legislature's grace. For, as the parties recognize, the NBA would spare a national bank from state controls of the kind here involved. Pp. 5–10.



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(b) Since 1966, OCC has recognized national banks' "incidental" authority under §24 Seventh to do business through operating subsidiaries. See 12 CFR §5.34(e)(1). That authority is uncontested by Michigan's Commissioner. OCC licenses and oversees national bank operating subsidiaries just as it does national banks. See, *e.g.*, §5.34(e)(3); 12 U. S. C. §24a(g)(3)(A). Just as duplicative state examination, supervision, and regulation would significantly burden national banks' mortgage lending, so too those state controls would interfere with that same activity when engaged in by a national bank's operating subsidiary. This Court has never held that the NBA's preemptive reach extends only to a national bank itself; instead, the Court has focused on the exercise of a national bank's *powers*, not on its corporate structure, in analyzing whether state law hampers the federally permitted activities of a national bank. See, *e.g.*, *Barnett Bank*, 517 U. S., at 32. And the Court has treated operating subsidiaries as equivalent to national banks with respect to powers exercised under federal law (except where federal law provides otherwise). See, *e.g., NationsBank*, 513 U. S., at 256–251. Security against significant interference by state regulators is a characteristic condition of "the business of banking" conducted by national banks, and mortgage lending is one aspect of that business. See, *e.g.*, 12 U. S. C. §484(a). That security should adhere whether the business is conducted by the bank itself or by an OCC-licensed operating subsidiary whose authority to carry on the business coincides completely with the bank's.

Watters contends that if Congress meant to deny States visitorial powers over operating subsidiaries, it would have written §484(a)'s ban on state inspection to apply not only to national banks but also to their affiliates. She points out that §481, which authorizes OCC to examine "affiliates" of national banks, does not speak to state visitorial powers. This argument fails for two reasons. *First*, any intention regarding operating subsidiaries cannot be ascribed to the 1864 Congress that enacted §§481 and 484, or the 1933 Congress that added the affiliate examination provisions to §481 and the "affiliate" definition to §221a, because operating subsidiaries were not authorized until 1966. *Second*, Watters ignores the distinctions Congress recognized among "affiliates." Unlike affiliates that may engage in functions not authorized by the NBA, an operating subsidiary is tightly tied to its parent by the specification that it may engage only in "the business of banking," §24a(g)(3)(A). Notably, when Congress amended the NBA to provide that operating subsidiaries may "engag[e] solely in activities that national banks are permitted to engage in directly," *ibid.*, it did so in an Act providing that other affiliates, authorized to engage in nonbanking financial activities, *e.g.*, securi-

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ties and insurance, are subject to state regulation in connection with those activities. See, *e.g.*, §§1843(k), 1844(c)(4). Pp. 10–15.

(c) Recognizing the necessary consequence of national banks' authority to engage in mortgage lending through an operating subsidiary "subject to the same terms and conditions that govern the conduct of such activities by national banks," §24a(g)(3)(A), OCC promulgated 12 CFR §7.4006: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Watters disputes OCC's authority to promulgate this regulation and contends that, because preemption is a legal question for determination by courts, §7.4006 should attract no deference. This argument is beside the point, for §7.4006 merely clarifies and confirms what the NBA already conveys: A national bank may engage in real estate lending through an operating subsidiary, subject to the same terms and conditions that govern the bank itself; that power cannot be significantly impaired or impeded by state law. Though state law governs incorporation-related issues, state regulators cannot interfere with the "business of banking" by subjecting national banks or their OCC-licensed operating subsidiaries to multiple audits and surveillance under rival oversight regimes. Pp. 15–17.

2. Watters' alternative argument, that 12 CFR §7.4006 violates the Tenth Amendment, is unavailing. The Amendment expressly disclaims any reservation to the States of a power delegated to Congress in the Constitution, *New York* v. *United States*, 505 U. S. 144, 156. Because regulation of national bank operations is Congress' prerogative under the Commerce and Necessary and Proper Clauses, see *Citizens Bank* v. *Alafabco, Inc.*, 539 U. S. 52, 58, the Amendment is not implicated here. P. 17.

431 F. 3d 556, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA, J., joined. THOMAS, J., took no part in the consideration or decision of the case.



Opinion of the Court



# SUPREME COURT OF THE UNITED STATES

No. 05–1342

LINDA A. WATTERS, COMMISSIONER, MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES, PETITIONER *v.* WACHOVIA BANK, N. A., ET AL.

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

[April 17, 2007]

JUSTICE GINSBURG delivered the opinion of the Court.

Business activities of national banks are controlled by the National Bank Act (NBA or Act), 12 U. S. C. §1 *et seq.*, and regulations promulgated thereunder by the Office of the Comptroller of the Currency (OCC). See §§24, 93a, 371(a). As the agency charged by Congress with supervision of the NBA, OCC oversees the operations of national banks and their interactions with customers. See *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 254, 256 (1995). The agency exercises visitorial powers, including the authority to audit the bank's books and records, largely to the exclusion of other governmental entities, state or federal. See §484(a); 12 CFR §7.4000 (2006).

The NBA specifically authorizes federally chartered banks to engage in real estate lending. 12 U. S. C. §371. It also provides that banks shall have power "[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking." §24 Seventh. Among

incidental powers, national banks may conduct certain activities through "operating subsidiaries," discrete entities authorized to engage solely in activities the bank itself could undertake, and subject to the same terms and conditions as those applicable to the bank. See §24a(g)(3)(A); 12 CFR §5.34(e) (2006).

Respondent Wachovia Bank, a national bank, conducts its real estate lending business through Wachovia Mortgage Corporation, a wholly owned, state-chartered entity, licensed as an operating subsidiary by OCC. It is uncontested in this suit that Wachovia's real estate business, if conducted by the national bank itself, would be subject to OCC's superintendence, to the exclusion of state registration requirements and visitorial authority. The question in dispute is whether the bank's mortgage lending activities remain outside the governance of state licensing and auditing agencies when those activities are conducted, not by a division or department of the bank, but by the bank's operating subsidiary. In accord with the Courts of Appeals that have addressed the issue,[1] we hold that Wachovia's mortgage business, whether conducted by the bank itself or through the bank's operating subsidiary, is subject to OCC's superintendence, and not to the licensing, reporting, and visitorial regimes of the several States in which the subsidiary operates.

I

Wachovia Bank is a national banking association chartered by OCC. Respondent Wachovia Mortgage is a North Carolina corporation that engages in the business of real estate lending in the State of Michigan and elsewhere. Michigan's statutory regime exempts banks, both national

[1] *National City Bank of Indiana* v. *Turnbaugh*, 463 F. 3d 325 (CA4 2006); *Wachovia Bank, N. A.* v. *Burke*, 414 F. 3d 305 (CA2 2005); 431 F. 3d 556 (CA6 2005) (case below); *Wells Fargo Bank N. A.* v. *Boutris*, 419 F. 3d 949 (CA9 2005).



and state, from state mortgage lending regulation, but requires mortgage brokers, lenders, and servicers that are subsidiaries of national banks to register with the State's Office of Insurance and Financial Services (OIFS) and submit to state supervision. Mich. Comp. Laws Ann. §§445.1656(1), 445.1679(1)(a) (West 2002), 493.52(1), and 493.53a(d) (West 1998).[2] From 1997 until 2003, Wachovia Mortgage was registered with OIFS to engage in mortgage lending. As a registrant, Wachovia Mortgage was required, *inter alia*, to pay an annual operating fee, file an annual report, and open its books and records to inspection by OIFS examiners. §§445.1657, 445.1658, 445.1671 (West 2002), 493.54, 493.56a(2), (13) (West 1998).

Petitioner Linda Watters, the commissioner of OIFS, administers the State's lending laws. She exercises "general supervision and control" over registered lenders, and has authority to conduct examinations and investigations and to enforce requirements against registrants. See §§445.1661, 445.1665, 445.1666 (West 2002), 493.58, 493.56b, 493.59, 493.62a (West 1998 and Supp. 2005). She also has authority to investigate consumer complaints and take enforcement action if she finds that a complaint is not "being adequately pursued by the appropriate federal regulatory authority." §445.1663(2) (West 2002).

On January 1, 2003, Wachovia Mortgage became a wholly owned operating subsidiary of Wachovia Bank. Three months later, Wachovia Mortgage advised the State of Michigan that it was surrendering its mortgage lending registration. Because it had become an operating subsidiary of a national bank, Wachovia Mortgage maintained, Michigan's registration and inspection requirements were

[2] Michigan's law exempts subsidiaries of national banks that maintain a main office or branch office in Michigan. Mich. Comp. Laws Ann. §§445.1652(1)(b) (West Supp. 2006), 445.1675(m) (West 2002), 493.53a(d) (West 1998). Wachovia Bank has no such office in Michigan.

preempted. Watters responded with a letter advising Wachovia Mortgage that it would no longer be authorized to conduct mortgage lending activities in Michigan.

Wachovia Mortgage and Wachovia Bank filed suit against Watters, in her official capacity as commissioner, in the United States District Court for the Western District of Michigan. They sought declaratory and injunctive relief prohibiting Watters from enforcing Michigan's registration prescriptions against Wachovia Mortgage, and from interfering with OCC's exclusive visitorial authority. The NBA and regulations promulgated thereunder, they urged, vest supervisory authority in OCC and preempt the application of the state-law controls at issue. Specifically, Wachovia Mortgage and Wachovia Bank challenged as preempted certain provisions of two Michigan statutes—the Mortgage Brokers, Lenders, and Services Licensing Act and the Secondary Mortgage Loan Act. The challenged provisions (1) require mortgage lenders—including national bank operating subsidiaries but not national banks themselves—to register and pay fees to the State before they may conduct banking activities in Michigan, and authorize the commissioner to deny or revoke registrations, §§445.1652(1) (West Supp. 2006), 445.1656(1)(d) (West 2002), 445.1657(1), 445.1658, 445.1679(1)(a), 493.52(1) (West 1998), 493.53a(d), 493.54, 493.55(4), 493.56a(2), and 493.61; (2) require submission of annual financial statements to the commissioner and retention of certain documents in a particular format, §§445.1657(2) (West 2002), 445.1671, 493.56a(2) (West 1998); (3) grant the commissioner inspection and enforcement authority over registrants, §§445.1661 (West 2002), 493.56b (West Supp. 2005); and (4) authorize the commissioner to take regulatory or enforcement actions against covered lenders, §§445.1665 (West 2002), 445.1666, 493.58–59, and 493.62a (West 1998).

In response, Watters argued that, because Wachovia



Mortgage was not itself a national bank, the challenged Michigan controls were applicable and were not preempted. She also contended that the Tenth Amendment to the Constitution of the United States prohibits OCC's exclusive superintendence of national bank lending activities conducted through operating subsidiaries.

The District Court granted summary judgment to the banks in relevant part. 334 F. Supp. 2d 957, 966 (WD Mich. 2004). Invoking the two-step framework of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), the court deferred to the Comptroller's determination that an operating subsidiary is subject to state regulation only to the extent that the parent bank would be if it performed the same functions. 334 F. Supp. 2d, at 963–965 (citing, *e.g.*, 12 CFR §§5.34(e)(3), 7.4006 (2004)). The court also rejected Watters' Tenth Amendment argument. 334 F. Supp. 2d, at 965–966. The Sixth Circuit affirmed. 431 F. 3d 556 (2005). We granted certiorari. 547 U. S. ___ (2006).

II

A

Nearly two hundred years ago, in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), this Court held federal law supreme over state law with respect to national banking. Though the bank at issue in *McCulloch* was short-lived, a federal banking system reemerged in the Civil War era. See *Atherton* v. *FDIC*, 519 U. S. 213, 221–222 (1997); B. Hammond, Banks and Politics in America: from the Revolution to the Civil War (1957). In 1864, Congress enacted the NBA, establishing the system of national banking still in place today. National Bank Act, ch. 106, 13 Stat. 99;[3] *Atherton*, 519 U. S., at 222; *Marquette Nat. Bank of Min-*

[3]The Act of June 3, 1864, ch. 106, 13 Stat. 99, was originally entitled "An Act to provide a National Currency . . ."; its title was altered by Congress in 1874 to "the National Bank Act." Ch. 343, 18 Stat. 123.

*neapolis* v. *First of Omaha Service Corp.*, 439 U. S. 299, 310, 314–315 (1978). The Act vested in nationally chartered banks enumerated powers and "all such incidental powers as shall be necessary to carry on the business of banking." 12 U. S. C. §24 Seventh. To prevent inconsistent or intrusive state regulation from impairing the national system, Congress provided: "No national bank shall be subject to any visitorial powers except as authorized by Federal law . . . ." §484(a).

In the years since the NBA's enactment, we have repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation. See, *e.g.*, *Beneficial Nat. Bank* v. *Anderson*, 539 U. S. 1, 10 (2003) (national banking system protected from "possible unfriendly State legislation" (quoting *Tiffany* v. *National Bank of Mo.*, 18 Wall. 409, 412 (1874))). Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 290 (1896). See also *Atherton*, 519 U. S., at 223. For example, state usury laws govern the maximum rate of interest national banks can charge on loans, 12 U. S. C. §85, contracts made by national banks "are governed and construed by State laws," *National Bank* v. *Commonwealth*, 9 Wall. 353, 362 (1870), and national banks' "acquisition and transfer of property [are] based on State law," *ibid.* However, "the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is an abuse, because it is the usurpation of power which a single State cannot give." *Farmers' and Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29, 34 (1875) (internal quotation marks omitted).

We have "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law." *Barnett Bank of Marion Cty., N. A.* v. *Nelson*, 517 U. S. 25, 32 (1996). See also *Franklin Nat. Bank of Franklin Square* v. *New York*, 347 U. S. 373, 375–379 (1954). States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers. But when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way. *Barnett Bank*, 517 U. S., at 32–34 (federal law permitting national banks to sell insurance in small towns preempted state statute prohibiting banks from selling most types of insurance); *Franklin Nat. Bank*, 347 U. S., at 377–379 (local restrictions preempted because they burdened exercise of national banks' incidental power to advertise).



The NBA authorizes national banks to engage in mortgage lending, subject to OCC regulation. The Act provides:

> "Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to 1828*(o)* of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U. S. C. §371(a).[4]

Beyond genuine dispute, state law may not significantly burden a national bank's own exercise of its real estate

[4] Section1828(*o*) requires federal banking agencies to adopt uniform regulations prescribing standards for real estate lending by depository institutions and sets forth criteria governing such standards. See, *e.g.*, §1828(*o*)(2)(A) ("In prescribing standards . . . the agencies shall consider—(i) the risk posed to the deposit insurance funds by such extensions of credit; (ii) the need for safe and sound operation of insured depository institutions; and (iii) the availability of credit.").

lending power, just as it may not curtail or hinder a national bank's efficient exercise of any other power, incidental or enumerated under the NBA. See *Barnett Bank*, 517 U. S., at 33–34; *Franklin*, 347 U. S., at 375–379. See also 12 CFR §34.4(a)(1) (2006) (identifying preempted state controls on mortgage lending, including licensing and registration). In particular, real estate lending, when conducted by a national bank, is immune from state visitorial control: The NBA specifically vests exclusive authority to examine and inspect in OCC. 12 U. S. C. §484(a) ("No national bank shall be subject to any visitorial powers except as authorized by Federal law.").[5]

Harmoniously, the Michigan provisions at issue exempt national banks from coverage. Mich. Comp. Laws Ann. §445.1675(a) (West 2002). This is not simply a matter of the Michigan Legislature's grace. Cf. *post*, at 13–14, and n. 17. For, as the parties recognize, the NBA would have preemptive force, *i.e.*, it would spare a national bank from state controls of the kind here involved. See Brief for Petitioner 12; Brief for Respondents 14; Brief for United States as *Amicus Curiae* 9. State laws that conditioned national banks' real estate lending on registration with the State, and subjected such lending to the State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business: National banks would be subject to registration, inspection, and enforcement regimes imposed not just by Michigan, but by all States in which the banks operate.[6] Diverse and

[5]See also 2 R. Taylor, Banking Law §37.02, p. 37–5 (2006) ("[OCC] has exclusive authority to charter and examine [national] banks." (footnote omitted)).

[6]See 69 Fed. Reg. 1908 (2004) ("The application of multiple, often unpredictable, different state or local restrictions and requirements prevents [national banks] from operating in the manner authorized under Federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure.").



duplicative superintendence of national banks' engagement in the business of banking, we observed over a century ago, is precisely what the NBA was designed to prevent: "Th[e] legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States." *Easton* v. *Iowa*, 188 U. S. 220, 229 (1903). Congress did not intend, we explained, "to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation. . . . [C]onfusion would necessarily result from control possessed and exercised by two independent authorities." *Id.*, at 231–232.

Recognizing the burdens and undue duplication state controls could produce, Congress included in the NBA an express command: "No national bank shall be subject to any visitorial powers except as authorized by Federal law. . . ." 12 U. S. C. §484(a). See *supra*, at 6, 8; *post*, at 10 (acknowledging that national banks have been "exemp[t] from state visitorial authority . . . for more than 140 years"). "Visitation," we have explained "is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations." *Guthrie* v. *Harkness*, 199 U. S. 148, 158 (1905) (internal quotation marks omitted). See also 12 CFR §7.4000(a)(2) (2006) (defining "visitorial" power as "(i) [e]xamination of a bank; (ii) [i]nspection of a bank's books and records; (iii) [r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) [e]nforcing compliance with any applicable federal or state laws concerning those activities"). Michigan, therefore,

cannot confer on its commissioner examination and enforcement authority over mortgage lending, or any other banking business done by national banks.[7]

B

While conceding that Michigan's licensing, registration, and inspection requirements cannot be applied to national banks, see, *e.g.*, Brief for Petitioner 10, 12, Watters argues that the State's regulatory regime survives preemption with respect to national banks' operating subsidiaries. Because such subsidiaries are separately chartered under some State's law, Watters characterizes them simply as "affiliates" of national banks, and contends that even though they are subject to OCC's superintendence, they

[7] Ours is indeed a "dual banking system." See *post*, at 1–5, 23. But it is a system that has never permitted States to license, inspect, and supervise national banks as they do state banks. The dissent repeatedly refers to the policy of "competitive equality" featured in *First Nat. Bank in Plant City* v. *Dickinson*, 396 U. S. 122, 131 (1969). See *post*, at 4, 14, 19, 23. Those words, however, should not be ripped from their context. *Plant City* involved the McFadden Act (Branch Banks), 44 Stat. 1228, 12 U. S. C. §36, in which Congress expressly authorized national banks to establish branches "only when, where, and how state law would authorize a state bank to establish and operate such [branches]." 396 U. S., at 130. See also *id.*, at 131 ("[W]hile Congress has absolute authority over national banks, the [McFadden Act] has incorporated by reference the limitations which state law places on branch banking activities by state banks. Congress has deliberately settled upon a policy intended to foster competitive equality. . . . [The] Act reflects the congressional concern that neither system ha[s] advantages over the other in the use of branch banking." (quoting *First Nat. Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U. S. 252, 261 (1966))). "[W]here Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." *Barnett Bank of Marion Cty., N. A.* v. *Nelson*, 517 U. S. 25, 34 (1996). The NBA provisions before us, unlike the McFadden Act, do not condition the exercise of power by national banks on state allowance of similar exercises by state banks. See *supra*, at 7–8.



are also subject to multistate control. *Id.*, at 17–22. We disagree.

Since 1966, OCC has recognized the "incidental" authority of national banks under §24 Seventh to do business through operating subsidiaries. See 31 Fed. Reg. 11459–11460 (1966); 12 CFR §5.34(e)(1) (2006) ("A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking . . . ."). That authority is uncontested by Michigan's commissioner. See Brief for Petitioner 21 ("[N]o one disputes that 12 U. S. C. §24 (Seventh) authorizes national banks to use nonbank operating subsidiaries . . . ."). OCC licenses and oversees national bank operating subsidiaries just as it does national banks. §5.34(e)(3) ("An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank.");[8] United States Office of the Comptroller of the Currency, Related Organizations: Comptroller's Handbook 53 (Aug. 2004) (hereinafter Comptroller's Handbook) ("Operating subsidiaries are subject to the same supervision and regulation as the parent bank, except where otherwise provided by law or OCC regulation.").

In 1999, Congress defined and regulated "financial" subsidiaries; simultaneously, Congress distinguished those national bank affiliates from subsidiaries—typed "operating subsidiaries" by OCC—which may engage only

[8] The regulation further provides:
"If, upon examination, the OCC determines that the operating subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety or soundness of the bank, the OCC will direct the bank or operating subsidiary to take appropriate remedial action, which may include requiring the bank to divest or liquidate the operating subsidiary, or discontinue specified activities." 12 CFR §5.34(e)(3) (2006).

in activities national banks may engage in directly, "subject to the same terms and conditions that govern the conduct of such activities by national banks." Gramm-Leach-Bliley Act (GLBA), §121(a)(2), 113 Stat. 1378 (codified at 12 U. S. C. §24a(g)(3)(A)).[9] For supervisory purposes, OCC treats national banks and their operating subsidiaries as a single economic enterprise. Comptroller's Handbook 64. OCC oversees both entities by reference to "business line," applying the same controls whether banking "activities are conducted directly or through an operating subsidiary." *Ibid.*[10]

As earlier noted, Watters does not contest the authority of national banks to do business through operating subsidiaries. Nor does she dispute OCC's authority to supervise and regulate operating subsidiaries in the same manner as national banks. Still, Watters seeks to impose state regulation on operating subsidiaries over and above regulation undertaken by OCC. But just as duplicative state examination, supervision, and regulation would significantly burden mortgage lending when engaged in by national banks, see *supra*, at 6–10, so too would those state controls interfere with that same activity when engaged in by an operating subsidiary.

We have never held that the preemptive reach of the NBA extends only to a national bank itself. Rather, in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercise of a national bank's *powers*, not on its corporate structure. See, *e.g.*, *Barnett Bank*, 517 U. S., at 32. And we have treated operating subsidiaries as equivalent to national banks with respect to powers exercised under federal law (except where federal law provides otherwise). In *NationsBank of N. C., N. A.,* 513 U. S., at 256–261, for example, we upheld OCC's determination that national banks had "incidental" authority to act as agents in the sale of annuities. It was not material that the function qualifying as within "the business of banking," §24 Seventh, was to be carried out not by the bank itself, but by an operating subsidiary, *i.e.*, an entity "subject to the same terms and conditions that govern the conduct of [the activity] by national banks [themselves]." §24a(g)(3)(A); 12 CFR §5.34(e)(3) (2006). See also *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388 (1987) (national banks, acting through operating subsidiaries, have power to offer discount brokerage services).[11]

[9] OCC subsequently revised its regulations to track the statute. See §5.34(e)(1), (3); Financial Subsidiaries and Operating Subsidiaries, 65 Fed. Reg. 12905, 12911 (2000). Cf. *post*, at 10 (dissent's grudging acknowledgment that Congress "may have acquiesced" in OCC's position that national banks may engage in "the business of banking" through operating subsidiaries empowered to do only what the bank itself can do).

[10] For example, "for purposes of applying statutory or regulatory limits, such as lending limits or dividend restrictions," *e.g.*, 12 U. S. C. §§56, 60, 84, 371d, "[t]he results of operations of operating subsidiaries are consolidated with those of its parent." Comptroller's Handbook 64. Likewise, for accounting and regulatory reporting purposes, an operating subsidiary is treated as part of the member bank; assets and liabilities of the two entities are combined. See 12 CFR §§5.34(e)(4)(i), 223.3(w) (2006). OCC treats financial subsidiaries differently. A national bank may not consolidate the assets and liabilities of a financial subsidiary with those of the bank. Comptroller's Handbook 64. It cannot be fairly maintained "that the transfer in 2003 of [Wachovia Mortgage's] ownership from the holding company to the Bank" resulted in no relevant changes to the company's business. Compare *post*, at 14, with *supra*, at 11, n. 8. On becoming Wachovia's operating subsidiary, Wachovia Mortgage became subject to the same terms and conditions as national banks, including the full supervisory authority of OCC. This change exposed the company to significantly more federal oversight than it experienced as a state nondepository institution.

[11] Cf. *Marquette Nat. Bank of Minneapolis* v. *First of Omaha Service Corp.*, 439 U. S. 299, 308, and n. 24 (1978) (holding that national bank may charge home State's interest rate, regardless of more restrictive usury laws in borrower's State, but declining to consider operating subsidiaries).

Security against significant interference by state regulators is a characteristic condition of the "business of banking" conducted by national banks, and mortgage lending is one aspect of that business. See, *e.g.*, 12 U. S C. §484(a); 12 CFR §34.4(a)(1) (2006). See also *supra*, at 6–10; *post*, at 6 (acknowledging that, in 1982, Congress broadly authorized national banks to engage in mortgage lending); *post*, at 16, and n. 20 (acknowledging that operating subsidiaries "are subject to the same federal oversight as their national bank parents"). That security should adhere whether the business is conducted by the bank itself or is assigned to an operating subsidiary licensed by OCC whose authority to carry on the business coincides completely with that of the bank. See *Wells Fargo Bank, N. A.* v. *Boutris*, 419 F. 3d 949, 960 (CA9 2005) (determination whether to conduct business through operating subsidiaries or through subdivisions is "essentially one of internal organization").

Watters contends that if Congress meant to deny States visitorial powers over operating subsidiaries, it would have written §484(a)'s ban on state inspection to apply not only to national banks but also to their affiliates. She points out that §481, which authorizes OCC to examine "affiliates" of national banks, does not speak to state visitorial powers. This argument fails for two reasons. *First*, one cannot ascribe any intention regarding operating subsidiaries to the 1864 Congress that enacted §§481 and 484, or the 1933 Congress that added the provisions on examining affiliates to §481 and the definition of "affiliate" to §221a. That is so because operating subsidiaries were not authorized until 1966. See *supra*, at 11. Over the past four decades, during which operating subsidiaries have emerged as important instrumentalities of national banks, Congress and OCC have indicated no doubt that such subsidiaries are "subject to the same terms and conditions" as national banks themselves.



*Second*, Watters ignores the distinctions Congress recognized among "affiliates." The NBA broadly defines the term "affiliate" to include "any corporation" controlled by a national bank, including a subsidiary. See 12 U. S. C. §221a(b). An operating subsidiary is therefore one type of "affiliate." But unlike affiliates that may engage in functions not authorized by the NBA, *e.g.*, financial subsidiaries, an operating subsidiary is tightly tied to its parent by the specification that it may engage only in "the business of banking" as authorized by the Act. §24a(g)(3)(A); 12 CFR §5.34(e)(1) (2006). See also *supra*, at 11–12, and n. 10. Notably, when Congress amended the NBA confirming that operating subsidiaries may "engag[e] solely in activities that national banks are permitted to engage in directly," 12 U. S. C. §24a(g)(3)(A), it did so in an Act, the GLBA, providing that other affiliates, authorized to engage in nonbanking financial activities, *e.g.*, securities and insurance, are subject to state regulation in connection with those activities. See, *e.g.*, §§1843(k), 1844(c)(4). See also 15 U. S. C. §6701(b) (any person who sells insurance must obtain a state license to do so).[12]

C

Recognizing the necessary consequence of national banks' authority to engage in mortgage lending through an operating subsidiary "subject to the same terms and conditions that govern the conduct of such activities by national banks," 12 U. S. C. §24a(g)(3)(A), see also §24 Seventh, OCC promulgated 12 CFR §7.4006 (2006): "Unless otherwise provided by Federal law or OCC regula-

[12]The dissent protests that the GLBA does not itself preempt the Michigan provisions at issue. Cf. *post*, at 15–17. We express no opinion on that matter. Our point is more modest: The GLBA simply demonstrates Congress' formal recognition that national banks have incidental power to do business through operating subsidiaries. See *supra*, at 11–12; cf. *post*, at 9–10.

tion, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." See Investment Securities; Bank Activities & Operations; Leasing, 66 Fed. Reg. 34784, 34788 (2001). Watters disputes the authority of OCC to promulgate this regulation and contends that, because preemption is a legal question for determination by courts, §7.4006 should attract no deference. See also *post*, at 17–23. This argument is beside the point, for under our interpretation of the statute, the level of deference owed to the regulation is an academic question. Section 7.4006 merely clarifies and confirms what the NBA already conveys: A national bank has the power to engage in real estate lending through an operating subsidiary, subject to the same terms and conditions that govern the national bank itself; that power cannot be significantly impaired or impeded by state law. See, *e.g.*, *Barnett Bank*, 517 U. S., at 33–34; 12 U. S. C. §§24 Seventh, 24a(g)(3)(A), 371.[13]

The NBA is thus properly read by OCC to protect from state hindrance a national bank's engagement in the "business of banking" whether conducted by the bank itself or by an operating subsidiary, empowered to do only what the bank itself could do. See *supra*, at 11–12. The authority to engage in the business of mortgage lending comes from the NBA, §371, as does the authority to conduct business through an operating subsidiary. See §§24 Seventh, 24a(g)(3)(A). That Act vests visitorial oversight

[13] Because we hold that the NBA itself—independent of OCC's regulation—preempts the application of the pertinent Michigan laws to national bank operating subsidiaries, we need not consider the dissent's lengthy discourse on the dangers of vesting preemptive authority in administrative agencies. See *post*, at 17–23; cf. *post*, at 23–24 (maintaining that "[w]hatever the Court says, this is a case about an administrative agency's power to preempt state laws," and accusing the Court of "endors[ing] administrative action whose sole purpose was to preempt state law rather than to implement a statutory command").



in OCC, not state regulators. §484(a). State law (in this case, North Carolina law), all agree, governs incorporation-related issues, such as the formation, dissolution, and internal governance of operating subsidiaries.[14] And the laws of the States in which national banks or their affiliates are located govern matters the NBA does not address. See *supra*, at 6. But state regulators cannot interfere with the "business of banking" by subjecting national banks or their OCC-licensed operating subsidiaries to multiple audits and surveillance under rival oversight regimes.

III

Watters' alternative argument, that 12 CFR §7.4006 violates the Tenth Amendment to the Constitution, is unavailing. As we have previously explained, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York* v. *United States*, 505 U. S. 144, 156 (1992). Regulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses. See *Citizens Bank* v. *Alafabco, Inc.*, 539 U. S. 52, 58 (2003) *(per curiam)*. The Tenth Amendment, therefore, is not implicated here.

* * *

For the reasons stated, the judgment of the Sixth Circuit is

*Affirmed.*

JUSTICE THOMAS took no part in the consideration or decision of this case.

[14] Watters does not assert that Wachovia Mortgage is out of compliance with any North Carolina law governing its corporate status.

# SUPREME COURT OF THE UNITED STATES

No. 05–1342

LINDA A. WATTERS, COMMISSIONER, MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES, PETITIONER *v.* WACHOVIA BANK, N. A., ET AL.

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

[April 17, 2007]

JUSTICE STEVENS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

Congress has enacted no legislation immunizing national bank subsidiaries from compliance with nondiscriminatory state laws regulating the business activities of mortgage brokers and lenders. Nor has it authorized an executive agency to preempt such state laws whenever it concludes that they interfere with national bank activities. Notwithstanding the absence of relevant statutory authority, today the Court endorses an agency's incorrect determination that the laws of a sovereign State must yield to federal power. The significant impact of the Court's decision on the federal-state balance and the dual banking system makes it appropriate to set forth in full the reasons for my dissent.

## I

The National Bank Act (or NBA), 13 Stat. 99, authorized the incorporation of national banks, §5, *id.,* at 98, and granted them "all such incidental powers as shall be necessary to carry on the business of banking," §8, *id.,* at 98 (codified at 12 U. S. C. §24 Seventh), subject to regulatory oversight by the Comptroller of the Currency, §54, 13 Stat.



116. To maintain a meaningful role for state legislation and for state corporations that did not engage in core banking activities, Congress circumscribed national bank authority. Notably, national banks were expressly forbidden from making mortgage loans, §28, *id.,* at 108.[1] Moreover, the shares of national banks, as well their real estate holdings, were subject to nondiscriminatory state taxation, §41, *id.,* at 111; and while national banks could lend money, state law capped the interest rates they could charge, §20, *id.,* at 105.

Originally, it was anticipated that "existing banks would surrender their state charters and re-incorporate under the terms of the new law with national charters."[2] That did not happen. Instead, after an initial post-National Bank Act decline, state-chartered institutions thrived.[3] What emerged was the competitive mix of state and national banks known as the dual banking system.

This Court has consistently recognized that because federal law is generally interstitial, national banks must comply with most of the same rules as their state counterparts. As early as 1870, we articulated the principle that has remained the lodestar of our jurisprudence: that national banks

> "are only exempted from State legislation, so far as that legislation may interfere with, or impair their ef-

[1] "There is no more characteristic difference between the state and the national banking laws than the fact that almost without exception, state banks may loan on real estate security, while national banks are prohibited from doing so." G. Barnett, State Banking in the United States Since the Passage of the National Bank Act 50 (1902) (reprint 1983) (hereinafter Barnett).

[2] B. Hammond, Banks and Politics in America: from the Revolution to the Civil War 728 (1957).

[3] *Id.*, at 733. See also Barnett 73–74 (estimating that more than 800 state banks were in operation in 1877, and noting the "remarkable increase in the number of state banks" during the last two decades of the 19th century).

> ficiency in performing the functions by which they are designed to serve that government. . . . They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. *It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional*." *National Bank* v. *Commonwealth*, 9 Wall. 353, 362 (1870) (emphasis added).[4]

Until today, we have remained faithful to the principle that nondiscriminatory laws of general application that do not "forbid" or "impair significantly" national bank activities should not be preempted. See, *e.g.*, *Barnett Bank of Marion Cty., N. A.* v. *Nelson*, 517 U. S. 25, 33 (1996).[5]

Nor is the Court alone in recognizing the vital role that state legislation plays in the dual banking system. Although the dual banking system's main virtue is its divergent treatment of national and state banks,[6] Congress has consistently recognized that state law must usually govern the activities of both national and state banks for the dual banking system to operate effectively. As early as 1934, Justice Brandeis observed for the Court that this congressional recognition is embodied in a long string of statutes:

> "The policy of equalization was adopted in the National Bank Act of 1864, and has ever since been applied, in the provision concerning taxation. In amendments to that act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches; in those conferring power to act as fiduciary; in those concerning interest on deposits; and in those concerning capitalization. It appears also to have been of some influence in securing the grant in 1913 of the power to loan on mortgage." *Lewis* v. *Fidelity & Deposit Co. of Md.*, 292 U. S. 559, 564–565 (footnotes, with citations to relevant statutes, omitted).[7]

For the same reasons, we observed in *First Nat. Bank in Plant City* v. *Dickinson*, 396 U. S. 122, 133 (1969), that "[t]he policy of competitive equality is . . . firmly embedded in the statutes governing the national banking system." So firmly embedded, in fact, that "the congressional policy of competitive equality with its deference to state standards" is not "open to modification by the Comptroller of the Currency." *Id.,* at 138.

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[4] See also *McClellan* v. *Chipman*, 164 U. S. 347, 357 (1896) (explaining that our cases establish "a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States").

[5] See also *Anderson Nat. Bank* v. *Luckett*, 321 U. S. 233, 248 (1944) ("This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions"); *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 290 (1896) ("Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purposes of Congressional legislation")

[6] See Scott, The Dual Banking System: A Model of Competition in Regulation, 30 Stan. L. Rev. 1, 8–13 (1978) (explaining the perceived benefits of the dual banking system).

[7] See also *First Nat. Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U. S. 252, 261 (1966) (observing that in passing the McFadden Act, "Congress was continuing its policy of equalization first adopted in the National Bank Act of 1864").

II

Although the dual banking system has remained intact, Congress has radically transformed the national bank system from its Civil War antecedent and brought considerably more federal authority to bear on state-chartered institutions. Yet despite all the changes Congress has made to the national bank system, and despite its exercise of federal power over state banks, it has never preempted state laws like those at issue in this case.

Most significantly, in 1913 Congress established the Federal Reserve System to oversee federal monetary policy through its influence over the availability of credit. Federal Reserve Act §§2, 9, 38 Stat. 252, 259. The Act required national banks and permitted state banks to become Federal Reserve member banks, and subjected all member banks to Federal Reserve regulations and oversight. *Ibid.* Also of signal importance, after the banking system collapsed during the Great Depression, Congress required all member banks to obtain deposit insurance from the newly established Federal Deposit Insurance Corporation. Banking Act of 1933 (or Glass-Steagall Act), §8, 48 Stat. 168; see also Banking Act of 1935, 49 Stat. 684. Although both of these steps meant that many state banks were subjected to significant federal regulation,[8] "the state banking system continued along with the national banking system, with no attempt to exercise preemptive federal regulatory authority over the activities of the existing state banks." M. Malloy, Banking and Financial Services Law 48 (2d ed. 2005).

In addition to these systemic overhauls, Congress has

[8] What has emerged are "two interrelated systems in which most state-chartered banks are subject to varying degrees of federal regulation, and where state laws are made applicable, to a varying extent, to federally-chartered institutions." 1 A. Graham, Banking Law §1.04, p. 1–12 (Nov. 2006).



over time modified the powers of national banks. The changes are too various to recount in detail, but two are of particular importance to this case. First, Congress has gradually relaxed its prohibition on mortgage lending by national banks. In 1913, Congress permitted national banks to make loans secured by farm land, Federal Reserve Act, §24, 38 Stat. 273, and in succeeding years, their mortgage-lending power was enlarged to cover loans on real estate in the vicinity of the bank, Act of Sept. 7, 1916, 39 Stat. 754, and loans "secured by first liens upon forest tracts which are properly managed in all respects," Act of Aug. 15, 1953, ch. 510, 67 Stat. 614. Congress substantially expanded national banks' power to make real estate loans in 1974, see Housing and Community Development Act, Title VII, §711, 88 Stat 716, and in 1982 it enacted the broad language, now codified at 12 U. S. C. §371(a), authorizing national banks to make "loans . . . secured by liens on interests in real estate." Garn-St Germain Depository Institutions Act of 1982, Title IV, §403, 96 Stat. 1510. While these changes have enabled national banks to engage in more evenhanded competition with state banks, they certainly reflect no purpose to give them any competitive advantage.[9]

Second, Congress has over the years both curtailed and expanded the ability of national banks to affiliate with other companies. In the early part of the century, banks routinely engaged in investment activities and affiliated with companies that did the same. The Glass-Steagall Act put an end to that. "[E]nacted in 1933 to protect bank depositors from any repetition of the widespread bank

[9] It is noteworthy that the principal cases that the Court cites to support its conclusion that the federal statute itself preempts the Michigan laws were decided years before Congress authorized national banks to engage in mortgage lending and years before the Office of the Comptroller of the Currency (OCC) authorized their use of operating subsidiaries. See *ante*, at 6, 9.

closings that occurred during the Great Depression," *Board of Governors, FRS* v. *Investment Company Institute,* 450 U. S. 46, 61 (1981), Glass-Steagall prohibited Federal Reserve member banks (both state and national) from affiliating with investment banks.[10] In Congress' view, the affiliates had engaged in speculative activities that in turn contributed to commercial banks' Depression-era failures.[11] It was this focus on the welfare of depositors—as opposed to stockholders—that provided the basis for legislative action designed to ensure bank solvency.

A scant two years later, Congress forbade national banks from owning the shares of any company because of a similar fear that such ownership could undermine the safety and soundness of national banks:[12] "Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by [a national bank] for its own account of *any* shares of stock of *any* corporation." Banking Act of 1935, §308(b), 49 Stat. 709 (emphasis added). That provision remains on the books today. See 12 U. S. C. §24 Seventh.

These congressional restrictions did not forbid all affiliations, however, and national banks began experimenting with new corporate forms. One of those forms involved the

[10] In *Investment Company Institute* v. *Camp,* 401 U. S. 617 (1971), we set aside a regulation issued by the Comptroller of the Currency authorizing banks to operate collective investment funds because that activity was prohibited by the Glass-Steagall Act. Similarly, in *Securities Industry Assn.* v. *Board of Governors, FRS,* 468 U. S. 137 (1984), the Glass-Steagall Act provided the basis for invalidating a regulation authorizing banks to enter the business of selling third-party commercial paper.

[11] See J. Macey, G. Miller, & R. Carnell, Banking Law and Regulation 21 (3d ed. 2001) (describing "the alleged misdeeds of the large banks' securities affiliates and the ways in which such affiliations could promote unsound lending, irresponsible speculation, and conflicts of interest").

[12] See 31 Fed. Reg. 11459 (1966).



national bank ownership of "operating subsidiaries." In 1966, the Comptroller of the Currency took the position "that a national bank may acquire and hold the controlling stock interest in a subsidiary operations corporation" so long as that corporation's "functions or activities . . . are limited to one or several of the functions or activities that a national bank is authorized to carry on." 31 Fed. Reg. 11459 (1966). The Comptroller declined to read the categorical prohibition on national bank ownership of stock to foreclose bank ownership of operating subsidiaries, finding authority for this aggressive interpretation of national bank authority in the "incidental powers" provision of 12 U. S. C. §24 Seventh. See 31 Fed. Reg. 11460.

While Congress eventually restricted some of the new corporate structures,[13] it neither disavowed nor endorsed the Comptroller's position on national bank ownership of operating subsidiaries. Notwithstanding the congressional silence, in 1996 the OCC once again attempted to expand national banks' ownership powers. The agency issued a regulation permitting national bank operating subsidiaries to undertake activities that the bank was *not* allowed to engage in directly. 12 CFR §§5.34(d), (f) (1997) (authorizing national banks to "acquire or establish an operating subsidiary to engage in [activities] different from that permissible for the parent national bank," so long as those activities are "part of or incidental to the business of banking, as determined by the Comptroller of the Currency"); see also 61 Fed. Reg. 60342 (1996).

Congress overruled this OCC regulation in 1999 in the Gramm-Leach-Bliley Act (GLBA), 113 Stat. 1338. The GLBA was a seminal piece of banking legislation inasmuch as it repealed the Glass-Steagall Act's ban on affiliations between commercial and investment banks. See

[13] See Bank Holding Company Act of 1956, 70 Stat. 133; Bank Holding Company Act Amendments of 1970, 84 Stat. 1760.

§101, *id.,* at 1341. More relevant to this case, however, the GLBA addressed the powers of national banks to own subsidiary corporations. The Act provided that any national bank subsidiary engaging in activities forbidden to the parent bank would be considered a "financial subsidiary," §121, *id.,* at 1380, and would be subjected to heightened regulatory obligations, see, *e.g.*, 12 U. S. C. §371c–1(a)(1). The GLBA's definition of "financial subsidiaries" excluded those subsidiaries that "engag[e] solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." §24a(g)(3).

By negative implication, then, only subsidiaries engaging in purely national bank activities—which the OCC had termed "operating subsidiaries," but which the GLBA never mentions by name—could avoid being subjected to the restrictions that applied to financial subsidiaries. Compare §371c(b)(2) (exempting subsidiaries from certain regulatory restrictions) with §371c(e) (clarifying that financial subsidiaries are not to be treated as "subsidiaries"). Taken together, these provisions worked a rejection of the OCC's position that an *operating* subsidiary could engage in activities that national banks could not engage in directly.[14] See §24a(g)(3). Apart from this implicit rejection of the OCC's 1996 regulation, however, the GLBA does not even mention operating subsidiaries.

[14] While the statutory text provides ample support for this conclusion, it is noteworthy that it was so understood by contemporary commentators. See, *e.g.*, 145 Cong. Rec. 29681 (1999) ("Recently, the Comptroller of the Currency has interpreted section 24 (Seventh) of the National Bank Act to permit national banks to own and control subsidiaries engaged in activities that national banks cannot conduct directly. These decisions and the legal reasoning therein are erroneous and contrary to the law. The [GLBA] overturns these decisions . . . ." (statement of Representative Bliley)).



In sum, Congress itself has never authorized national banks to use subsidiaries incorporated under state law to perform traditional banking functions. Nor has it authorized OCC to "license" any state-chartered entity to do so. The fact that it may have acquiesced in the OCC's expansive interpretation of its authority is a plainly insufficient basis for finding preemption.

III

It is familiar learning that "[t]he purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 516 (1992) (internal quotation marks omitted). In divining that congressional purpose, I would have hoped that the Court would hew both to the NBA's text and to the basic rule, central to our federal system, that "[i]n all pre-emption cases . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)). Had it done so, it could have avoided the untenable conclusion that Congress meant the NBA to preempt the state laws at issue here.

The NBA in fact evinces quite the opposite congressional purpose. It provides in 12 U. S. C. §484(a) that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." Although this exemption from state visitorial authority has been in place for more than 140 years, see §54, 13 Stat. 116 (national banks "shall not be subject to any other visitorial powers than such as are authorized by this act"), it is significant that Congress has never extended 12 U. S. C. §484(a)'s preemptive blanket to cover national bank *subsidiaries*.

This is not, contrary to the Court's suggestion, see *ante*, at 14–15, some kind of oversight. As the complex history

of the banking laws demonstrates, Congress has legislated extensively with respect to national bank "affiliates"—an operating subsidiary is one type of affiliate[15]—and has moreover given the OCC extensive supervisory powers over those affiliates, see §481 (providing that a federal examiner "shall have power to make a thorough examination of all the affairs of [a national bank] affiliate, and in doing so he shall have power . . . to make a report of his findings to the Comptroller of the Currency"). That Congress lavished such attention on national bank affiliates and conferred such far-reaching authority on the OCC without ever expanding the scope of §484(a) speaks volumes about Congress' preemptive intent, or rather its lack thereof. Consistent with our presumption against preemption—a presumption I do not understand the Court to reject—I would read §484(a) to reflect Congress' considered judgment not to preempt the application of state visitorial laws to national bank "affiliates."

Instead, the Court likens §484(a) to a congressional afterthought, musing that it merely "recogniz[es] the burdens and undue duplication that state controls could produce." *Ante*, at 9. By that logic, I take it the Court believes that the NBA would impliedly preempt all state visitorial laws as applied to national banks *even if §484(a) did not exist*. That is surprising and unlikely. Not only would it reduce the NBA's express preemption provision to so much surplusage, but it would give Congress' silence greater statutory dignity than an express command. Perhaps that explains why none of the four Circuits to have addressed this issue relied on the preemptive force of the NBA itself. Each instead asked whether the OCC's regulations preempted state laws.[16] Stranger still, the

[15] See 12 U. S. C. §221a(b) (defining affiliates to include "any corporation" that a federal member bank owns or controls).

[16] See *National City Bank of Indiana* v. *Turnbaugh*, 463 F. 3d 325, 331–334 (CA4 2006) (holding that State law conflicted with OCC regulations, not with the NBA); *Wachovia Bank, N. A.* v. *Burke*, 414 F. 3d 305, 315–316 (CA2 2005) (same); 431 F. 3d 556, 560–563 (CA6 2005) (case below) (same); *Wells Fargo Bank, N. A.* v. *Boutris*, 419 F. 3d 949, 962–967 (CA9 2005) (same).



Court's reasoning would suggest that operating subsidiaries have been exempted from state visitorial authority from the moment the OCC first authorized them in 1966. See 31 Fed. Reg. 11459. Yet if that were true, surely at some point over the last 40 years some national bank would have gone to court to spare its subsidiaries from the yoke of state regulation; national banks are neither heedless of their rights nor shy of litigation. But respondents point us to no such cases that predate the OCC's preemption regulations.

The Court licenses itself to ignore §484(a)'s limits by reasoning that "when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way." *Ante*, at 7. But it intones this "significant impairment" refrain without remembering that it merely provides a useful tool—not the only tool, and not even the best tool—to discover congressional intent. As we explained in *Barnett Bank*, this Court "take[s] the view that *normally* Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress has explicitly granted." 517 U. S., at 33 (emphasis added). But any assumption about what Congress "normally" wants is of little moment when Congress has said exactly what it wants.

The Court also puts great weight on *Barnett Bank*'s reference to our "history . . . of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Id.,* at 32. The Court neglects to mention that *Barnett Bank* is quite

clear that this interpretive rule applies only when Congress has failed (as it often does) to manifest an explicit preemptive intent. *Id.,* at 31. "*In that event*, courts must consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent." *Ibid.* (emphasis added). *Barnett Bank* nowhere holds that we can ignore strong indicia of congressional intent whenever a state law arguably trenches on national bank powers. After all, the case emphasized that the question of preemption "is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State?" *Id.,* at 30. The answer here is a resounding no.

Even if it were appropriate to delve into the significant impairment question, the history of this very case confirms that neither the Mortgage Brokers, Lenders, and Services Licensing Act, Mich. Comp. Laws Ann. §445.1651 *et seq*. (West 2002 and Supp. 2006), nor the Secondary Mortgage Loan Act, §493.51 *et seq*. (West 2005), conflicts with "the letter or the general objects and purposes of Congressional legislation." *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 290 (1896). Enacted to protect consumers from mortgage lending abuses, the Acts require mortgage brokers, mortgage servicers, and mortgage lenders to register with the State, §§445.1652(1) (West Supp. 2006), 493.52(1) (West 2005), to submit certain financial statements, §§445.1657(2) (West 2002), 493.56a(2) (West 2005), and to submit to state visitorial oversight, §§445.1661 (West 2002), 493.56b (West 2005). Because the Acts expressly provide that they do not apply to "depository financial institution[s]," §445.1675(a) (West 2002), neither national nor state banks are covered.[17] The statute therefore covers only nonbank companies incorporated under state law.[18]

[17] While the Court at one point observes that "the Michigan provisions at issue exempt national banks from coverage," see *ante*, 8, that is because they are "banks," not because they are "national." See *ante,* at 2–3 (noting that "Michigan's statutory regime exempts banks, *both national and state*, from state mortgage lending regulation" (emphasis added)).



Respondent Wachovia Mortgage Corporation has never engaged in the core banking business of accepting deposits. In 1997, when Wachovia Mortgage was first licensed to do business in Michigan, it was owned by a holding company that also owned the respondent Wachovia Bank, N. A. (Neither the holding company nor the Bank did business in Michigan.) There is no evidence, and no reason to believe, that compliance with the Michigan statutes imposed any special burdens on Wachovia Mortgage's activities, or that the transfer in 2003 of its ownership from the holding company to the Bank required it to make any changes whatsoever in its methods of doing business. Neither before nor after that transfer was there any discernible federal interest in granting the company immunity from regulations that applied evenhandedly to its competitors. The mere fact that its activities may also be performed by its banking parent provides at best a feeble justification for immunizing it from state regulation. And it is a justification that the longstanding congressional "policy of competitive equality" clearly outweighs. See *Plant City*, 396 U. S., at 133.

Again, however, it is beside the point whether in the Court's judgment the Michigan laws will hamper national banks' ability to carry out their banking functions through operating subsidiaries. It is *Congress'* judgment that matters here, and Congress has in the NBA preempted

[18] The Michigan laws focus on consumer protection, whereas the OCC regulations quoted by the Court focus on protection of bank depositors. See *ante,* at 7, n. 4, and 11, n. 8.

only those laws purporting to lodge with state authorities visitorial power over national banks. 12 U. S. C. §484(a). In my view, the Court's eagerness to infuse congressional silence with preemptive force threatens the vitality of most state laws as applied to national banks—a result at odds with the long and unbroken history of dual state and federal authority over national banks, not to mention our federal system of government. It is especially troubling that the Court so blithely preempts Michigan laws designed to protect consumers. Consumer protection is quintessentially a "field which the States have traditionally occupied," *Rice*, 331 U. S., at 230;[19] the Court should therefore have been all the more reluctant to conclude that the "clear and manifest purpose of Congress" was to set aside the laws of a sovereign State, *ibid*.

IV

Respondents maintain that even if the NBA lacks preemptive force, the GLBA's use of the phrase "same terms and conditions" reflects a congressional intent to preempt state laws as they apply to the mortgage lending activities of operating subsidiaries. See 12 U. S. C. §24a(g)(3). Indeed, the Court obliquely suggests as much, salting its analysis of the NBA with references to the GLBA. See *ante*, at 13, 15. Even a cursory review of the GLBA's text shows that it cannot bear the preemptive weight respondents (and perhaps the Court) would assign to it.

The phrase "same terms and conditions" appears in the *definition* of "financial subsidiary," not in a provision of the statute conferring national bank powers. Even there, it serves only to describe what a financial subsidiary is not. See §24a(g)(3) (defining financial subsidiary as any

[19] See also *General Motors Corp.* v. *Abrams*, 897 F. 2d 34, 41–43 (CA2 1990) ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area").



subsidiary "other than a subsidiary that . . . engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks"). Apart from this slanting reference, the GLBA *never mentions* operating subsidiaries. Far from a demonstration that the "clear and manifest purpose of Congress" was to preempt the type of law at issue here, *Rice*, 331 U. S., at 230, the "same terms and conditions" language at most reflects an uncontroversial acknowledgment that operating subsidiaries of national banks are subject to the same federal oversight as their national bank parents.[20] It has nothing to do with preemption.

Congress in fact disavowed any such preemptive intent. Section 104 of the GLBA is titled "Operation of State Law," 113 Stat. 1352, and it devotes more than 3,000 words to explaining which state laws Congress meant the GLBA to preempt. Leave aside the oddity of a Congress that addresses preemption in exquisite detail in one provision of the GLBA but (according to respondents) uses only four words to express a preemptive intent elsewhere in the statute. More importantly, §104(d)(4) provides that "*[n]o State statute . . . shall be preempted*" by the GLBA unless that statute has a disparate impact on federally chartered depository institutions, "*prevent[s]* a depository institution or affiliate thereof from engaging in activities authorized or permitted by this Act," or "conflict[s] with the intent of this Act generally to permit affiliations that are authorized or permitted by Federal law." *Id.*, at 1357 (emphasis added) (codified at 15 U. S. C. §6701(d)(4)). No one claims that the Michigan laws at issue here are discriminatory, forbid affiliations, or "prevent" any operating subsidiary

[20] See 31 Fed. Reg. 11460 (noting that OCC maintains regulatory oversight of operating subsidiaries).

from engaging in banking activities. It necessarily follows that the GLBA does not preempt them.

Even assuming that the phrase has something to do with preemption, it is simply not the case that the nonencroachment of state regulation is a "term and condition" of engagement in the business of banking. As a historical matter, state laws have always applied to national banks and have often encroached on the business of banking. See *National Bank*, 9 Wall., at 362 (observing that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation"). The Court itself acknowledges that state usury, contract, and property law govern the activities of national banks and their subsidiaries, *ante*, at 6, notwithstanding that they vary across "all States in which the banks operate," *ante,* at 8. State law has always provided the legal backdrop against which national banks make real estate loans, and "[t]he fact that the banking agencies maintain a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency does not make federal banking regulation all-pervasive." *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 352 (1963).

V

In my view, the most pressing questions in this case are whether Congress has delegated to the Comptroller of the Currency the authority to preempt the laws of a sovereign State as they apply to operating subsidiaries, and if so, whether that authority was properly exercised here. See 12 CFR §7.4006 (2006) ("State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank"). Without directly answering either question, the Court concludes that preemption is the "necessary consequence" of various congressional statutes. *Ante*, at 15. Because I read those



statutes differently, I must consider (as did the four Circuits to have addressed this issue) whether an administrative agency can assume the power to displace the duly enacted laws of a state legislature.

To begin with, Congress knows how to authorize executive agencies to preempt state laws.[21] It has not done so here. Nor does the statutory provision authorizing banks to engage in certain lines of business that are "incidental" to their primary business of accepting and managing the funds of depositors expressly or implicitly grant the OCC the power to immunize banks or their subsidiaries from state regulation.[22] See 12 U. S. C. §24 Seventh. For there is a vast and obvious difference between rules authorizing or regulating conduct and rules granting immunity from regulation. The Comptroller may well have the authority to decide whether the activities of a mortgage broker, a real estate broker, or a travel agent should be characterized as "incidental" to banking, and to approve a bank's

[21] See, *e.g.*, 47 U. S. C. §§253(a), (d) (authorizing the Federal Communications Commission to preempt "any [state] statute, regulation, or legal requirement" that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service"); 30 U. S. C. §1254(g) (preempting any statute that conflicts with "the purposes and the requirements of this chapter" and permitting the Secretary of the Interior to "set forth any State law or regulation which is preempted and superseded"); 49 U. S. C. §5125(d) (authorizing the Secretary of Transportation to decide whether a state or local statute that conflicts with the regulation of hazardous waste transportation is preempted).

[22] Congress did make an indirect reference to regulatory preemption in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, §114, 108 Stat. 2367 (codified at 12 U. S. C. §43(a)). The Riegle-Neal Act requires the OCC to jump through additional procedural hoops (specifically, notice and comment, even for opinion letters and interpretive rules) before "conclud[ing] that Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches." *Ibid.* By its own terms, however, this provision *granted* no preemption authority to the OCC.

entry into those businesses, either directly or through its subsidiaries. See, *e.g.*, *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 258 (1995) (upholding the OCC's interpretation of the "incidental powers" provision to permit national banks to serve as agents in annuity sales). But that lesser power does not imply the far greater power to immunize banks or their subsidiaries from state laws regulating the conduct of their competitors.[23] As we said almost 40 years ago, "the congressional policy of competitive equality with its deference to state standards" is not "open to modification by the Comptroller of the Currency." *Plant City*, 396 U. S., at 138.[24]

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[23] In a recent adoption of a separate preemption regulation, the OCC located the source of its authority to displace state laws in 12 U. S. C. §§93a and 371. See 69 Fed. Reg. 1908 (2004). Both provisions are generic authorizations of rulemaking authority, however, and neither says a word about preemption. See 12 U. S. C. §93a ("[T]he Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office"); §371(a) (authorizing national banks to make real estate loans "subject to . . . such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order"). Needless to say, they provide no textual foundation for the OCC's assertion of preemption authority.

[24] This conclusion does not touch our cases holding that a properly promulgated agency regulation can have a preemptive *effect* should it conflict with state law. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 713 (1985) ("We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes"); see also *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 154–159 (1982) (holding that a regulation authorizing federal savings-and-loan associations to include due-on-sale clauses in mortgage contracts conflicted with a state-court doctrine that such clauses were unenforceable); *City of New York* v. *FCC*, 486 U. S. 57, 59, 65–70 (1988) (finding that the FCC's adoption of "regulations that establish technical standards to govern the quality of cable television signals" preempted local signal quality standards). My analysis is rather confined to agency regulations (like the one at issue here) that "purpor[t] to settle the scope of federal preemption" and "reflec[t] an agency's effort to transform the preemption question from a judicial inquiry into an administrative *fait accompli*." See Note, The Unwarranted Regulatory Preemption of Predatory Lending Laws, 79 N. Y. U. L. Rev. 2274, 2289 (2004).



Were I inclined to assume (and I am not) that congressional silence should be read as a conferral of preemptive authority, I would not find that the OCC has actually exercised any such authority here. When the agency promulgated 12 CFR §7.4006, it explained that "[t]he section itself *does not effect preemption of any State law;* it reflects the conclusion we believe a Federal court would reach, even in the absence of the regulation . . . ." 66 Fed. Reg. 34790 (2001) (emphasis added). Taking the OCC at its word, then, §7.4006 has no preemptive force of its own, but merely predicts how a federal court's analysis will proceed.

Even if the OCC did intend its regulation to preempt the state laws at issue here, it would still not merit *Chevron* deference. No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance. To be sure, expert agency opinions as to which state laws conflict with a federal statute may be entitled to "some weight," especially when "the subject matter is technical" and "the relevant history and background are complex and extensive." *Geier* v. *American Honda Motor Co.*, 529 U. S. 861, 883 (2000). But "[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad preemption ramifications for state law." *Id.,* at 908 (STEVENS, J., dissenting).[25] For that reason, when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something

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[25] See also Mendelson, *Chevron* and Preemption, 102 Mich. L. Rev. 737, 779–790 (2003–2004) (arguing that agencies are generally insensitive to federalism concerns).

less than *Chevron* deference. See 529 U. S., at 911–912; see also *Medtronic,* 518 U. S., at 512 (O'Connor, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference").

In any event, neither of the two justifications the OCC advanced when it promulgated 12 CFR §7.4006 withstand *Chevron* analysis. First, the OCC observed that the GLBA "expressly acknowledged the authority of national banks to own subsidiaries" that conduct national bank activities "'subject to the same terms and conditions that govern the conduct of such activities by national banks.'" 66 Fed. Reg. 34788 (quoting 12 U. S. C. §24a(g)(3)). The agency also noted that it had folded the "'same terms and conditions'" language into an implementing regulation, 66 Fed. Reg. 34788 (citing 12 CFR §5.34(e)(3) (2001)). According to the OCC, "[a] fundamental component of these descriptions of the characteristics of operating subsidiaries in GLBA and the OCC's rule is that state laws apply to operating subsidiaries to the same extent as they apply to the parent national bank." 66 Fed. Reg. 34788.

This is incorrect. As explained above, the GLBA's offhand use of the "same terms and conditions" language says nothing about preemption. See *supra*, at 15–17. Nor can the OCC's incorporation of that language into a regulation support the agency's position: "Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute." *Gonzales* v. *Oregon*, 546 U. S. 243, 257 (2006). The OCC's argument to the contrary is particularly surprising given that when it promulgated its "same terms and conditions" regulation, it said not one word about preemption or the federalism implications of its rule—an inexplicable elision if a "fundamental component" of the phrase is the need to operate unfettered by state oversight. Compare 65 Fed. Reg.



12905–12910 (2000), with Exec. Order No. 13132, §§2, 4, 64 Fed. Reg. 43255, 43257 (1999) (requiring agencies to explicitly consider the "federalism implications" of their chosen policies and to hesitate before preempting state laws).

Second, the OCC describes operating subsidiaries "as the equivalent of departments or divisions of their parent banks," 66 Fed. Reg. 34788, which, through the operation of 12 U. S. C. §484(a), would not be subject to state visitorial powers. The OCC claims that national banks might desire to conduct their business through operating subsidiaries for the purposes of "controlling operations costs, improving effectiveness of supervision, more accurate determination of profits, decentralizing management decisions [and] separating particular operations of the bank from other operations." Brief for United States as *Amicus Curiae* 19 (quoting 31 Fed. Reg. 11460). It is obvious, however, that a national bank could realize *all* of those benefits through the straightforward expedient of dissolving the corporation and making it in fact a "department" or a "division" of the parent bank.

Rather, the primary advantage of maintaining an operating subsidiary as a separate corporation is that it shields the national bank from the operating subsidiaries' liabilities. *United States* v. *Bestfoods*, 524 U. S. 51, 61 (1998) ("It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiary" (internal quotation marks omitted)). For that reason, the OCC's regulation is about far more than mere "corporate structure," *ante*, at 13, or "internal governance," *ante,* at 17 (citing *Wells Fargo Bank, N. A.* v. *Boutris*, 419 F. 3d 949, 960 (CA9 2005)); see also *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 474 (2003) ("In issues of corporate law structure often matters"). It is about whether a *state* corporation can avoid complying with *state* regulations,

yet nevertheless take advantage of *state* laws insulating its owners from liability. The federal interest in protecting depositors in national banks from their subsidiaries' liabilities surely does not justify a grant of immunity from laws that apply to competitors. Indeed, the OCC's regulation may drive companies seeking refuge from state regulation into the arms of federal parents, harm those state competitors who are not lucky enough to find a federal benefactor, and hamstring States' ability to regulate the affairs of state corporations. As a result, the OCC's regulation threatens both the dual banking system and the principle of competitive equality that is its cornerstone.

VI

The novelty of today's holding merits a final comment. Whatever the Court says, this is a case about an administrative agency's power to preempt state laws. I agree with the Court that the Tenth Amendment does not preclude the exercise of that power. But the fact that that Amendment was included in the Bill of Rights should nevertheless remind the Court that its ruling affects the allocation of powers among sovereigns. Indeed, the reasons for adopting that Amendment are precisely those that undergird the well-established presumption against preemption.

With rare exception, we have found preemption only when a federal statute commanded it, see *Cipollone,* 505 U. S., at 517, when a conflict between federal and state law precluded obedience to both sovereigns, see *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or when a federal statute so completely occupied a field that it left no room for additional state regulation, see *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 613 (1926). Almost invariably the finding of preemption has been based on this Court's interpretation of statutory language or of regulations plainly authorized by Congress. Never before have we endorsed administrative



action whose sole purpose was to preempt state law rather than to implement a statutory command.

Accordingly, I respectfully dissent.