RULES

OF THE

Supreme Court of the United States

ADOPTED SEPTEMBER 27, 2017

EFFECTIVE NOVEMBER 13, 2017

8. The Court, on its own motion or that of a party, may dispense with the requirement of a joint appendix and may permit a case to be heard on the original record (with such copies of the record, or relevant parts thereof, as the Court may require) or on the appendix used in the court below, if it conforms to the requirements of this Rule.

9. For good cause, the time limits specified in this Rule may be shortened or extended by the Court or a Justice, or by the Clerk under Rule 30.4.

Rule 27. Calendar

1. From time to time, the Clerk will prepare a calendar of cases ready for argument. A case ordinarily will not be called for argument less than two weeks after the brief on the merits for the respondent or appellee is due.

2. The Clerk will advise counsel when they are required to appear for oral argument and will publish a hearing list in advance of each argument session for the convenience of counsel and the information of the public.

3. The Court, on its own motion or that of a party, may order that two or more cases involving the same or related questions be argued together as one case or on such other terms as the Court may prescribe.

Rule 28. Oral Argument

1. Oral argument should emphasize and clarify the written arguments in the briefs on the merits. Counsel should assume that all Justices have read the briefs before oral argument. Oral argument read from a prepared text is not favored.

2. The petitioner or appellant shall open and may conclude the argument. A cross-writ of certiorari or cross-appeal will be argued with the initial writ of certiorari or appeal as one case in the time allowed for that one case, and the Court will advise the parties who shall open and close.

3. Unless the Court directs otherwise, each side is allowed one-half hour for argument. Counsel is not required to use all the allotted time. Any request for additional time to

argue shall be presented by motion under Rule 21 in time to be considered at a scheduled Conference prior to the date of oral argument and no later than 7 days after the respondent's or appellee's brief on the merits is filed, and shall set out specifically and concisely why the case cannot be presented within the half-hour limitation. Additional time is rarely accorded.

4. Only one attorney will be heard for each side, except by leave of the Court on motion filed in time to be considered at a scheduled Conference prior to the date of oral argument and no later than 7 days after the respondent's or appellee's brief on the merits is filed. Any request for divided argument shall be presented by motion under Rule 21 and shall set out specifically and concisely why more than one attorney should be allowed to argue. Divided argument is not favored.

5. Regardless of the number of counsel participating in oral argument, counsel making the opening argument shall present the case fairly and completely and not reserve points of substance for rebuttal.

6. Oral argument will not be allowed on behalf of any party for whom a brief has not been filed.

7. By leave of the Court, and subject to paragraph 4 of this Rule, counsel for an *amicus curiae* whose brief has been filed as provided in Rule 37 may argue orally on the side of a party, with the consent of that party. In the absence of consent, counsel for an *amicus curiae* may seek leave of the Court to argue orally by a motion setting out specifically and concisely why oral argument would provide assistance to the Court not otherwise available. Such a motion will be granted only in the most extraordinary circumstances.

8. Oral arguments may be presented only by members of the Bar of this Court. Attorneys who are not members of the Bar of this Court may make a motion to argue *pro hac vice* under the provisions of Rule 6.

dures used in promulgating these regulations. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

541 U.S. 774, 159 L.Ed.2d 84

CITY OF LITTLETON, COLORADO, Petitioner,

v.

Z.J. GIFTS D–4, L.L.C., a Limited Liability Company, dba Christal's.

No. 02–1609.

Argued March 24, 2004.

Decided June 7, 2004.

Background: Owner of store that sold adult books brought § 1983 action challenging city's adult business licensing ordinance as unconstitutional, and seeking declaratory and injunctive relief, attorney fees and damages. The United States District Court for the District of Colorado, Edward W. Nottingham, J., entered summary judgment in favor of city, and owner appealed. The Tenth Circuit Court of Appeals, Lucero, Circuit Judge, 311 F.3d 1220, affirmed in part and reversed in part. Certiorari was granted.

Holdings: The Supreme Court, Justice Breyer, held that:

(1) for an "adult business" licensing scheme to satisfy First Amendment requirements, it is not enough that licensing scheme provides only assurance of speedy access to courts for review of adverse licensing decisions, without also providing assurance of speedy court decision; but

(2) where city's "adult business" licensing scheme simply conditioned operation of adult business on compliance with neutral and nondiscretionary criteria and did not seek to censor content, language in ordinance providing for judicial review of adverse licensing decisions in accordance with state's ordinary review procedures was sufficient to satisfy First Amendment requirements.

Reversed.

Justice Stevens concurred in part and concurred in judgment and filed opinion.

Justice Souter concurred in part and concurred in judgment and filed opinion, in which Justice Kennedy joined.

Justice Scalia concurred in judgment and filed opinion.

1. Constitutional Law ⇨90.4(1)

For an "adult business" licensing scheme to satisfy First Amendment requirements, it is not enough that licensing scheme provides only assurance of speedy access to courts for review of adverse licensing decisions, without also providing assurance of speedy court decision; delay in issuing judicial decision, no less than delay in obtaining access to court, can prevent license for First Amendment-protected business from being issued within requisite reasonable period of time. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇨90.4(1)
Public Amusement and Entertainment ⇨9(1)

Where city's "adult business" licensing scheme simply conditioned operation of adult business on compliance with neutral and nondiscretionary criteria and did not seek to censor content, language in ordinance providing for judicial review of ad-

verse licensing decisions in accordance with state's ordinary review procedures was sufficient to satisfy First Amendment requirements, as long as courts remained sensitive to need to prevent First Amendment harms and administered those review procedures accordingly; whether courts have done so is matter normally fit for case-by-case determination rather than facial challenge. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐90.4(1)

Where regulation simply conditions operation of adult business on compliance with neutral and nondiscretionary criteria and does not seek to censor content, adult business is not entitled under First Amendment to unusually speedy judicial decision, of the *Freedman* type, on adverse licensing decision. U.S.C.A. Const.Amend. 1.

Syllabus *

Under petitioner city's "adult business license" ordinance, the city's decision to deny a license may be appealed to the state district court pursuant to Colorado Rules of Civil Procedure. Respondent Z.J. Gifts D–4, L.L.C. (hereinafter ZJ), opened an adult bookstore in a place not zoned for adult businesses. Instead of applying for a license, ZJ filed suit attacking the ordinance as facially unconstitutional. The Federal District Court rejected ZJ's claims, but the Tenth Circuit held, as relevant here, that state law does not assure the constitutionally required "prompt final judicial *decision.*"

Held: The ordinance meets the First Amendment's requirement that such a licensing scheme assure prompt judicial review of an administrative decision denying a license. Pp. 2222–2226.

(a) The Court rejects the city's claim that its licensing scheme need only provide prompt access to judicial review, but not a "prompt judicial determination," of an applicant's legal claim. The city concedes that *Freedman v. Maryland*, 380 U.S. 51, 59, 85 S.Ct. 734, 13 L.Ed.2d 649, in listing constitutionally necessary "safeguards" applicable to a motion picture censorship statute, spoke of the need to assure a "prompt final judicial decision," but adds that Justice O'CONNOR's controlling plurality opinion in *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603, which addressed an adult business licensing scheme, did not use the word "decision," instead speaking only of the "*possibility of prompt judicial review*," *id.*, at 228, 110 S.Ct. 596 (emphasis added). Justice O'CONNOR's *FW/PBS* opinion, however, points out that *Freedman's* "judicial review" safeguard is meant to prevent "undue delay," 493 U.S., at 228, 110 S.Ct. 596, which includes *judicial*, as well as *administrative*, delay. A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being "issued within a reasonable period of time." *Ibid.* Nothing in the opinion suggests the contrary. Pp. 2222–2224.

(b) However, the Court accepts the city's claim that Colorado law satisfies any "prompt judicial determination" requirement, agreeing that the Court should modify *FW/PBS*, withdrawing its implication that *Freedman's* special judicial review rules—*e.g.*, strict time limits—apply in this case. Colorado's ordinary "judicial review" rules suffice to assure 775 a prompt judicial *decision*, as long as the courts remain sensitive to the need to prevent First Amendment harms and administer

* 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, 26 S.Ct. 282, 50 L.Ed. 499.

those procedures accordingly. And whether the courts do so is a matter normally fit for case-by-case determination rather than a facial challenge. Four considerations support this conclusion. First, ordinary court procedural rules and practices give reviewing courts judicial tools sufficient to avoid delay-related First Amendment harm. Indeed, courts may arrange their schedules to "accelerate" proceedings, and higher courts may grant expedited review. Second, there is no reason to doubt state judges' willingness to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm. And federal remedies would provide an additional safety valve in the event of any such problem. Third, the typical First Amendment harm at issue here differs from that at issue in *Freedman,* diminishing the need in the typical case for procedural rules imposing special decisionmaking time limits. Unlike in *Freedman,* this ordinance does not seek to *censor* material. And its licensing scheme applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display. These criteria are simple enough to apply and their application simple enough to review that their use is unlikely in practice to suppress totally any specific item of adult material in the community. And the criteria's simple objective nature means that in the ordinary case, judicial review, too, should prove simple, hence expeditious. Finally, nothing in *FW/PBS* or *Freedman* requires a city or State to place judicial review safeguards all in the city ordinance that sets forth a licensing scheme. Pp. 2224–2226.

311 F.3d 1220, reversed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, THOMAS, and GINSBURG, JJ., joined, in which STEVENS, J., joined as to Parts I and II–B, and in which SOUTER and KENNEDY, JJ., joined except as to Part II–B. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 2226. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, in which KENNEDY, J., joined, *post,* p. 2227. SCALIA, J., filed an opinion concurring in the judgment, *post,* p. 2228.

J. Andrew Nathan, Denver, CO, for petitioner.

Douglas R. Cole, for Ohio, et al., as amici curiae, by special leave of the Court, supporting the petitioner.

Michael W. Gross, Denver, CO, for respondent.

J. Andrew Nathan, Counsel of Record, Heidi J. Hugdahl, Nathan, Bremer, Dumm & Myers P.C., Denver, CO, Larry W. Berkowitz, City Attorney, Brad D. Bailey, Assistant City Attorney, Littleton, CO, Scott D. Bergthold, Law Office of Scott D. Bergthold, P.L.L.C., Chattanooga, TN, for petitioner.

Arthur M. Schwartz, Counsel of Record, Michael W. Gross, Cindy D. Schwartz, Schwartz & Goldberg, P.C., Denver, Colorado, for Respondent.

For U.S. Supreme Court briefs, see:

2003 WL 22988870 (Pet.Brief)

2004 WL 188113 (Resp.Brief)

2004 WL 419436 (Reply.Brief)

Justice BREYER delivered the opinion of the Court.

|776In this case we examine a city's "adult business" licensing ordinance to determine whether it meets the First Amendment's requirement that such a licensing scheme assure prompt judicial review of an administrative decision denying a license. See *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 110

S.Ct. 596, 107 L.Ed.2d 603 (1990); cf. *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). We conclude that the ordinance before us, considered on its face, is consistent with the First Amendment's demands.

I

Littleton, Colorado, has enacted an "adult business" ordinance that requires an "adult bookstore, adult novelty store
777 or adult video store" to have an "adult business license." Littleton City Code §§ 3–14–2, 3–14–4 (2003), App. to Brief for Petitioner 13a–20a, 23a. The ordinance defines "adult business"; it requires an applicant to provide certain basic information about the business; it insists upon compliance with local "adult business" (and other) zoning rules; it lists eight specific circumstances the presence of which requires the city to deny a license; and it sets forth time limits (typically amounting to about 40 days) within which city officials must reach a final licensing decision. §§ 3–14–2, 3–14–3, 3–14–5, 3–14–7, 3–14–8, *id.*, at 13a–30a. The ordinance adds that the final decision may be "appealed to the [state] district court pursuant to Colorado rules of civil procedure 106(a)(4)." § 3–14–8(B)(3), *id.*, at 30a.

In 1999, the respondent, a company called Z.J. Gifts D–4, L.L.C. (hereinafter ZJ), opened a store that sells "adult books" in a place not zoned for adult businesses. Compare Tr. of Oral Arg. 13 (store "within 500 feet of a church and day care center") with § 3–14–3(B), App. to Brief for Petitioner 21a (forbidding adult businesses at such locations). Instead of applying for an adult business license, ZJ brought this lawsuit attacking Littleton's ordinance as unconstitutional on its face. The Federal District Court rejected ZJ's claims; but on appeal the Court of Appeals for the Tenth Circuit accepted two of them, 311 F.3d 1220, 1224 (2002). The court held that Colorado law "does not assure that [the city's] license decisions will be given expedited [judicial] review"; hence it does not assure the "prompt final judicial *decision*" that the Constitution demands. *Id.*, at 1238. It also held unconstitutional another ordinance provision (not now before us) on the ground that it threatened lengthy administrative delay—a problem that the city believes it has cured by amending the ordinance. Compare *id.*, at 1233–1234, with § 3–14–7, App. to Brief for Petitioner 27a–28a, and Brief for Petitioner 3. Throughout these proceedings, ZJ's store has continued to operate.

778 The city has asked this Court to review the Tenth Circuit's "judicial review" determination, and we granted certiorari in light of lower court uncertainty on this issue. Compare, *e.g.*, 311 F.3d, at 1238 (First Amendment requires prompt judicial *determination* of license denial); *Nightclubs, Inc. v. Paducah*, 202 F.3d 884, 892–893 (C.A.6 2000) (same); *Baby Tam & Co. v. Las Vegas*, 154 F.3d 1097, 1101–1102 (C.A.9 1998) (same); *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 998–1001 (C.A.4 1995) (en banc) (same), with *Boss Capital, Inc. v. Casselberry*, 187 F.3d 1251, 1256–1257 (C.A.11 1999) (Constitution requires only prompt *access* to courts); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (C.A.5 1994) (same); see also *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325–326, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002) (noting a Circuit split); *City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278, 281, 121 S.Ct. 743, 148 L.Ed.2d 757 (2001) (same).

II

The city of Littleton's claims rest essentially upon two arguments. First, this Court, in applying the First Amendment's

procedural requirements to an "adult business" licensing scheme in *FW/PBS,* found that the First Amendment required such a scheme to provide an applicant with "*prompt access*" to judicial review of an administrative denial of the license, but that the First Amendment did not require assurance of a "prompt judicial *determination*" of the applicant's legal claim. Second, in any event, Colorado law satisfies any "prompt judicial determination" requirement. We reject the first argument, but we accept the second.

A

The city's claim that its licensing scheme need not provide a "prompt judicial determination" of an applicant's legal claim rests upon its reading of two of this Court's cases, *Freedman* and *FW/PBS.* In *Freedman,* the Court considered the First Amendment's application to a "motion picture [779] censorship statute"—a statute that required an " 'owner or lessee' " of a film, prior to exhibiting a film, to submit the film to the Maryland State Board of Censors and obtain its approval. 380 U.S., at 52, and n. 1, 85 S.Ct. 734 (quoting Maryland statute). It said, "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.,* at 58, 85 S.Ct. 734. The Court added that those safeguards must include (1) strict time limits leading to a speedy administrative decision and minimizing any "prior restraint"-type effects, (2) burden of proof rules favoring speech, and (3) (using language relevant here) a "procedure" that will "*assure a prompt final judicial decision,* to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.,* at 58–59, 85 S.Ct. 734 (emphasis added).

In *FW/PBS,* the Court considered the First Amendment's application to a city ordinance that "regulates sexually oriented businesses through a scheme incorporating zoning, licensing, and inspections." 493 U.S., at 220–221, 110 S.Ct. 596. A Court majority held that the ordinance violated the First Amendment because it did not impose strict administrative time limits of the kind described in *Freedman.* In doing so, three Members of the Court wrote that "the full procedural protections set forth in *Freedman* are not required," but that nonetheless such a licensing scheme must comply with *Freedman's* "core policy"—including (1) strict administrative time limits and (2) (using language somewhat different from *Freedman's*) "*the possibility of prompt judicial review in the event that the license is erroneously denied.*" 493 U.S., at 228, 110 S.Ct. 596 (opinion of O'CONNOR, J.) (emphasis added). Three other Members of the Court wrote that all *Freedman's* safeguards should apply, including *Freedman's* requirement that "a prompt judicial determination must be available." 493 U.S., at 239, 110 S.Ct. 596 (Brennan, J., concurring in judgment). Three Members of the Court wrote in dissent that *Freedman's* requirements [780] did not apply at all. See 493 U.S., at 244–245, 110 S.Ct. 596 (White, J., joined by REHNQUIST, C. J., concurring in part and dissenting in part); *id.,* at 250, 110 S.Ct. 596 (SCALIA, J., concurring in part and dissenting in part).

The city points to the differing linguistic descriptions of the "judicial review" requirement set forth in these opinions. It concedes that *Freedman,* in listing constitutionally necessary "safeguards," spoke of the need to assure a "prompt final judicial decision." 380 U.S., at 59, 85 S.Ct. 734. But it adds that Justice O'CONNOR's controlling plurality opinion in *FW/PBS* did not use the word "decision," instead speaking only of the "*possibility of prompt judi-*

cial review." 493 U.S., at 228, 110 S.Ct. 596 (emphasis added); see also *id.,* at 229, 110 S.Ct. 596 ("an avenue for prompt judicial review"); *id.,* at 230, 110 S.Ct. 596 ("availability of prompt judicial review"). This difference in language between *Freedman* and *FW/PBS,* says the city, makes a major difference: The First Amendment, as applied to an "adult business" licensing scheme, demands only an assurance of speedy access to the courts, not an assurance of a speedy court decision.

[1] In our view, however, the city's argument makes too much of too little. While Justice O'CONNOR's *FW/PBS* plurality opinion makes clear that only *Freedman's* "core" requirements apply in the context of "adult business" licensing schemes, it does not purport radically to alter the nature of those "core" requirements. To the contrary, the opinion, immediately prior to its reference to the "judicial review" safeguard, says:

> "The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two *[Freedman]* safeguards are essential . . . ." 493 U.S., at 228, 110 S.Ct. 596.

781 These words, pointing out that *Freedman's* "judicial review" safeguard is meant to prevent "undue delay," 493 U.S., at 228, 110 S.Ct. 596, include *judicial,* as well as *administrative,* delay. A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being "issued within a reasonable period of time." *Ibid.* Nothing in the opinion suggests the contrary. Thus we read that opinion's reference to "prompt judicial review," together with the similar reference in Justice Brennan's separate opinion (joined by two other Justices), see *id.,* at 239, 110 S.Ct. 596, as encompassing a prompt judicial decision. And we reject the city's arguments to the contrary.

B

[2] We find the second argument more convincing. In effect that argument concedes the constitutional importance of assuring a "prompt" judicial decision. It concedes as well that the Court, illustrating what it meant by "prompt" in *Freedman,* there set forth a "model" that involved a "hearing one day after joinder of issue" and a "decision within two days after termination of the hearing." 380 U.S., at 60, 85 S.Ct. 734. But the city says that here the First Amendment nonetheless does not require it to impose 2– or 3–day time limits; the First Amendment does not require special "adult business" judicial review rules; and the First Amendment does not insist that Littleton write detailed judicial review rules into the ordinance itself. In sum, Colorado's ordinary "judicial review" rules offer adequate assurance, not only that *access* to the courts can be promptly obtained, but also that a judicial *decision* will be promptly forthcoming.

Littleton, in effect, argues that we should modify *FW/PBS,* withdrawing its implication that *Freedman's* special judicial review rules apply in this case. And we accept that argument. In our view, Colorado's ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer 782 those procedures accordingly. And whether the courts do so is a matter normally fit for case-by-case determination rather than a facial challenge. We reach this conclusion for several reasons.

First, ordinary court procedural rules and practices, in Colorado as elsewhere,

provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm. Indeed, where necessary, courts may arrange their schedules to "accelerate" proceedings. Colo. Rule Civ. Proc. 106(a)(4)(VIII) (2003). And higher courts may quickly review adverse lower court decisions. See, *e.g., Goebel v. Colorado Dept. of Institutions*, 764 P.2d 785, 792 (Colo.1988) (en banc) (granting "expedited review").

Second, we have no reason to doubt the willingness of Colorado's judges to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm. We presume that courts are aware of the constitutional need to avoid "undue delay result[ing] in the unconstitutional suppression of protected speech." *FW/PBS*, *supra*, at 228, 110 S.Ct. 596; see also, *e.g., Schlesinger v. Councilman*, 420 U.S. 738, 756, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975). There is no evidence before us of any special Colorado court-related problem in this respect. And were there some such problems, federal remedies would provide an additional safety valve. See Rev. Stat. § 1979, 42 U.S.C. § 1983.

Third, the typical First Amendment harm at issue here differs from that at issue in *Freedman*, diminishing the need in the typical case for special procedural rules imposing special 2– or 3–day decisionmaking time limits. *Freedman* considered a Maryland statute that created a Board of Censors, which had to decide whether a film was " 'pornographic,' " tended to " 'debase or corrupt morals,' " and lacked " 'whatever other merits.' " 380 U.S., at 52–53, n. 2, 85 S.Ct. 734 (quoting Maryland statute). If so, it denied the permit and the film could not be shown. Thus, in *Freedman*, the Court considered a scheme with rather subjective standards and where a denial likely meant complete censorship.

[7][8]In contrast, the ordinance at issue here does not seek to *censor* material. And its licensing scheme applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display. The ordinance says that an adult business license "*shall*" be denied if the applicant (1) is underage; (2) provides false information; (3) has within the prior year had an adult business license revoked or suspended; (4) has operated an adult business determined to be a state law "public nuisance" within the prior year; (5) (if a corporation) is not authorized to do business in the State; (6) has not timely paid taxes, fees, fines, or penalties; (7) has not obtained a sales tax license (for which zoning compliance is required, see Tr. of Oral Arg. 16–17); or (8) has been convicted of certain crimes within the prior five years. § 3–14–8(A), App. to Brief for Petitioner 28a–29a (emphasis added).

These objective criteria are simple enough to apply and their application simple enough to review that their use is unlikely in practice to suppress totally the presence of any specific item of adult material in the Littleton community. Some license applicants will satisfy the criteria even if others do not; hence the community will likely contain outlets that sell protected adult material. A supplier of that material should be able to find outlets; a potential buyer should be able to find a seller. Nor should zoning requirements suppress that material, for a constitutional zoning system seeks to determine *where*, not *whether*, protected adult material can be sold. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The upshot is that Littleton's "adult business" licensing scheme does "not present the grave 'dan-

gers of a censorship system.' " *FW/PBS,* 493 U.S., at 228, 110 S.Ct. 596 (opinion of O'CONNOR, J.) (quoting *Freedman, supra,* at 58, 85 S.Ct. 734). And the simple objective nature of the licensing criteria means that in the ordinary case, judicial review, too, should prove simple, hence expeditious. Where that is not so—where, for example, censorship of material, as well as delay [784] in opening an additional outlet, is improperly threatened—the courts are able to act to prevent that harm.

Fourth, nothing in *FW/PBS* or in *Freedman* requires a city or a State to place judicial review safeguards all in the city ordinance that sets forth a licensing scheme. *Freedman* itself said: "How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide." 380 U.S., at 60, 85 S.Ct. 734. This statement is not surprising given the fact that many cities and towns lack the state-law legal authority to impose deadlines on state courts.

[3] These four sets of considerations, taken together, indicate that Colorado's ordinary rules of judicial review are adequate—at least for purposes of this facial challenge to the ordinance. Where (as here and as in *FW/PBS*) the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria, cf. *post,* at 2226–2227 (STEVENS, J., concurring in part and concurring in judgment), and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type. Colorado's rules provide for a flexible system of review in which judges can reach a decision promptly in the ordinary case, while using their judicial power to prevent significant harm to First Amendment interests where circumstances require. Of course, those denied licenses in the future remain free to raise special problems of undue delay in individual cases as the ordinance is applied.

For these reasons, the judgment of the Tenth Circuit is

Reversed.

Justice STEVENS, concurring in part and concurring in the judgment.

There is an important difference between an ordinance conditioning the operation of a business on compliance with certain neutral criteria, on the one hand, and an ordinance [785] conditioning the exhibition of a motion picture on the consent of a censor. The former is an aspect of the routine operation of a municipal government. The latter is a species of content-based prior restraint. Cf. *Graff v. Chicago,* 9 F.3d 1309, 1330–1333 (C.A.7 1993) (Flaum, J., concurring).

The First Amendment is, of course, implicated whenever a city requires a bookstore, a newsstand, a theater, or an adult business to obtain a license before it can begin to operate. For that reason, as Justice O'CONNOR explained in her plurality opinion in *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 226, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), a licensing scheme for businesses that engage in First Amendment activity must be accompanied by adequate procedural safeguards to avert "the possibility that constitutionally protected speech will be suppressed." But Justice O'CONNOR's opinion also recognized that the full complement of safeguards that are necessary in cases that "present the grave 'dangers of a censorship system' " are "not required" in the ordinary adult-business licensing scheme. *Id.,* at 228, 110 S.Ct. 596 (quoting *Freedman v. Maryland,* 380 U.S. 51, 58, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)). In both contexts, "undue delay results in the unconstitutional suppression

of protected speech," 493 U.S., at 228, 110 S.Ct. 596, and *FW/PBS* therefore requires both that the licensing decision be made promptly and that there be "the possibility of prompt judicial review in the event that the license is erroneously denied," *ibid.* But application of neutral licensing criteria is a "ministerial action" that regulates speech, rather than an exercise of discretionary judgment that prohibits speech. *Id.,* at 229, 110 S.Ct. 596. The decision to deny a license for failure to comply with these neutral criteria is therefore not subject to the presumption of invalidity that attaches to the "direct censorship of particular expressive material." *Ibid.* Justice O'CONNOR's opinion accordingly declined to require that the licensor, like the censor, either bear the burden of going to court to effect the denial of a license or otherwise assume responsibility for ensuring |786a prompt judicial determination of the validity of its decision. *Ibid.*

The Court today reinterprets *FW/PBS*'s references to " '*the possibility of prompt judicial review*' " as the equivalent of *Freedman*'s "prompt judicial decision" requirement. *Ante,* at 2223–2224. I fear that this misinterpretation of *FW/PBS* may invite other, more serious misinterpretations with respect to the content of that requirement. As the Court applies it in this case, assurance of a " 'prompt' judicial decision" means little more than assurance of the *possibility* of a prompt decision—the same possibility of promptness that is available whenever a person files suit subject to "ordinary court procedural rules and practices." *Ante,* at 2224. That possibility will generally be sufficient to guard against the risk of undue delay in obtaining a remedy for the erroneous application of neutral licensing criteria. But the mere possibility of promptness is emphatically insufficient to guard against the dangers of unjustified suppression of speech presented by a censorship system of the type at issue in *Freedman,* and is certainly not what *Freedman* meant by " 'prompt' judicial decision."

Justice O'CONNOR's opinion in *FW/PBS* recognized that differences between ordinary licensing schemes and censorship systems warrant imposition of different procedural protections, including different requirements with respect to which party must assume the burden of taking the case to court, as well as the risk of judicial delay. I would adhere to the views there expressed, and thus do not join Part II–A of the Court's opinion. I do, however, join the Court's judgment and Parts I and II–B of its opinion.

Justice SOUTER, with whom Justice KENNEDY joins, concurring in part and concurring in the judgment.

I join the Court's opinion, except for Part II–B. I agree that this scheme is unlike full-blown censorship, *ante,* at 2224–2226, so that the ordinance does not need a strict timetable of |787the kind required by *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), to survive a facial challenge. I write separately to emphasize that the state procedures that make a prompt judicial determination possible need to align with a state judicial practice that provides a prompt disposition in the state courts. The emphasis matters, because although Littleton's ordinance is not as suspect as censorship, neither is it as innocuous as common zoning. It is a licensing scheme triggered by the content of expressive materials to be sold. See *Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 448, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (KENNEDY, J., concurring in judgment) ("These ordinances are content based, and we should call them so"); *id.,* at 455–457, 122 S.Ct. 1728 (SOUTER, J., dissenting). Because the sellers may be unpopular with local au-

thorities, there is a risk of delay in the licensing and review process. If there is evidence of foot dragging, immediate judicial intervention will be required, and judicial oversight or review at any stage of the proceedings must be expeditious.

Justice SCALIA, concurring in the judgment.

Were the respondent engaged in activity protected by the First Amendment, I would agree with the Court's disposition of the question presented by the facts of this case (though not with all of the Court's reasoning). Such activity, when subjected to a general permit requirement unrelated to censorship of content, has no special claim to priority in the judicial process. The notion that media corporations have constitutional entitlement to accelerated judicial review of the denial of zoning variances is absurd.

I do not believe, however, that Z.J. Gifts is engaged in activity protected by the First Amendment. I adhere to the view I expressed in *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 250, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (opinion concurring in part and dissenting in part): the pandering of sex is not protected by the First Amendment. "The Constitution does not require a State or municipality to permit a business that intentionally specializes in, and holds itself forth to the public as specializing in, performance or portrayal of sex acts, sexual organs in a state of arousal, or live human nudity." *Id.*, at 258, 110 S.Ct. 596. This represents the Nation's long understanding of the First Amendment, recognized and adopted by this Court's opinion in *Ginzburg v. United States*, 383 U.S. 463, 470–471, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966). Littleton's ordinance targets sex-pandering businesses, see Littleton City Code § 3–14–2 (2003); to the extent it could apply to constitutionally protected expression its excess is not so great as to render it substantially overbroad and thus subject to facial invalidation, see *FW/PBS*, 493 U.S., at 261–262, 110 S.Ct. 596. Since the city of Littleton "could constitutionally have proscribed the commercial activities that it chose instead to license, I do not think the details of its licensing scheme had to comply with First Amendment standards." *Id.*, at 253, 110 S.Ct. 596.

541 U.S. 1099, 159 L.Ed.2d 260

COLORADO GENERAL ASSEMBLY

v.

KEN SALAZAR, Attorney General of Colorado, et al.

No. 03–1082.

June 7, 2004.

Case below, 79 P.3d 1221.

The petition for writ of certiorari is denied.

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, dissenting.

As a result of the 2000 census, Congress allotted an additional seat in the House of Representatives to Colorado. The Colorado General Assembly failed to pass a congressional redistricting plan in time for the 2002 elections. In response to a suit brought by Colorado voters, a Colorado State District Court drew a congressional district map for the 2002 elections that took account of the new census figures and conformed to federal voting rights requirements. *Avalos v. Davidson*, No. 01–CV–2897, 2002 WL 1895406 (Jan. 25, 2002),

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

SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* CLOER

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

No. 12–236. Argued March 19, 2013—Decided May 20, 2013

The National Childhood Vaccine Injury Act of 1986 (NCVIA or Act) established a no-fault compensation system to stabilize the vaccine market and expedite compensation to injured parties. *Bruesewitz* v. *Wyeth LLC*, 562 U. S. ___, ___–___. Under the Act, "[a] proceeding for compensation" is "initiated" by "service upon the Secretary" of Health and Human Services and "the filing of a petition containing" specified documentation with the clerk of the Court of Federal Claims, who then "immediately" forwards the petition for assignment to a special master. 42 U. S. C. §300aa–11(a)(1). An attorney may not charge a fee for "services in connection with [such] a petition," §300aa–15(e)(3), but a court may award attorney's fees and costs "incurred [by a claimant] in any proceeding on" an unsuccessful "petition filed under section 300aa–11," if that petition "was brought in good faith and there was a reasonable basis for the claim for which the petition was brought," §300aa–15(e)(1).

In 1997, shortly after receiving her third Hepatitis-B vaccine, respondent Cloer began to experience symptoms that eventually led to a multiple sclerosis (MS) diagnosis in 2003. In 2004, she learned of a link between MS and the Hepatitis-B vaccine, and in 2005, she filed a claim for compensation under the NCVIA, alleging that the vaccine caused or exacerbated her MS. After reviewing the petition and its supporting documentation, the Chief Special Master concluded that Cloer's claim was untimely because the Act's 36-month limitations period began to run when she had her first MS symptoms in 1997. The Federal Circuit ultimately agreed that Cloer's petition was untimely. Cloer then sought attorney's fees and costs (collectively, fees). The en banc Federal Circuit found that she was entitled to recover

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fees on her untimely petition.

Held: An untimely NCVIA petition may qualify for an award of attorney's fees if it is filed in good faith and there is a reasonable basis for its claim. Pp. 6–13.

(a) As in any statutory construction case, this Court proceeds from the understanding that "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP America Production Co.* v. *Burton*, 549 U. S. 84, 91. Nothing in either the NCVIA's attorney's fees provision, which ties eligibility to "any proceeding on such petition" and refers specifically to "a petition filed under section 300aa–11," or the referenced §300aa–11 suggests that the reason for the subsequent dismissal of a petition, such as its untimeliness, nullifies the initial filing. As the term "filed" is commonly understood, an application is filed "when it is delivered to, and accepted by, the appropriate court officer for placement into the official record." *Artuz* v. *Bennett*, 531 U. S. 4, 8. Applying this ordinary meaning to the text at issue, it is clear that an NCVIA petition delivered to the court clerk, forwarded for processing, and adjudicated in a proceeding before a special master is a "petition filed under section 300aa–11." So long as it was brought in good faith and with a reasonable basis, it is eligible for an award of attorney's fees, even if it is ultimately unsuccessful. Had Congress intended otherwise, it could have easily limited fee awards to timely petitions.

The Government's argument that the 36-month limitations period is a statutory prerequisite for filing lacks textual support. First, there is no cross-reference to the Act's limitations provision in its fees provision, §300aa–15(e), or the referenced §300aa–11(a)(1). Second, reading the provision to provide that "no petition may be *filed* for compensation" late, as the Government asks, would require the Court to conclude that a petition like Cloer's, which was "filed" under that term's ordinary meaning but was later found to be untimely, was never filed at all. This Court's "inquiry ceases [where, as here,] 'the statutory language is unambiguous and "the statutory scheme is coherent and consistent."'" *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 450.

The Government's contrary position is also inconsistent with the fees provision's purpose, which was to avoid "limit[ing] petitioners' ability to obtain qualified assistance" by making awards available for "non-prevailing, good-faith claims." H. R. Rep. No. 99–908, pt. 1, p. 22. Pp. 6–10.

(b) The Government's two additional lines of argument for barring the award of attorney's fees for untimely petitions are unpersuasive. First, the canon of construction favoring strict construction of waivers of sovereign immunity, the presumption favoring the retention of fa-

Syllabus

miliar common-law principles, and the policy argument that the NCVIA should be construed so as to minimize complex and costly fees litigation must all give way when, as here, the statute's words "are unambiguous." *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254. Second, even if the NCVIA's plain text requires that special masters occasionally carry out "shadow trials" to determine whether late petitions were brought in good faith and with a reasonable basis, that is not such an absurd burden as to require departure from the words of the Act. This is especially true where Congress has specifically provided for such "shadow trials" by permitting the award of attorney's fees "in *any* proceeding [on an unsuccessful] petition" if such petition was brought in good faith and with a reasonable basis. §300aa–15(e)(1). Pp. 10–13.

675 F. 3d 1358, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, ALITO, and KAGAN, JJ., joined, and in which SCALIA and THOMAS, JJ., joined as to all but Part II–B.

SUPREME COURT OF THE UNITED STATES

No. 12–236

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER *v.* MELISSA CLOER

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

[May 20, 2013]

JUSTICE SOTOMAYOR delivered the opinion of the Court.*

The National Childhood Vaccine Injury Act of 1986 (NCVIA or Act), 100 Stat. 3756, 42 U. S. C. §300aa–1 *et seq.*, provides that a court may award attorney's fees and costs "incurred [by a claimant] in any proceeding on" an unsuccessful vaccine-injury "petition filed under section 300aa–11," if that petition "was brought in good faith and there was a reasonable basis for the claim for which the petition was brought." §300aa–15(e)(1). The Act's limitations provision states that "no petition may be filed for compensation" more than 36 months after the claimant's initial symptoms occur. §300aa–16(a)(2). The question before us is whether an untimely petition can garner an award of attorney's fees. We agree with a majority of the en banc Court of Appeals for the Federal Circuit that it can.

*JUSTICE SCALIA and JUSTICE THOMAS join all but Part II–B of this opinion.

I

A

The NCVIA "establishes a no-fault compensation program 'designed to work faster and with greater ease than the civil tort system.'" *Bruesewitz* v. *Wyeth LLC*, 562 U. S. ___, ___ (2011) (slip op., at 3) (quoting *Shalala* v. *Whitecotton*, 514 U. S. 268, 269 (1995)). Congress enacted the NCVIA to stabilize the vaccine market and expedite compensation to injured parties after complaints mounted regarding the inefficiencies and costs borne by both injured consumers and vaccine manufacturers under the previous civil tort compensation regime. 562 U. S., at ___–___ (slip op., at 2–3); H. R. Rep. No. 99–908, pt. 1, pp. 6–7 (1986) (hereinafter H. R. Rep.).

The compensation program's procedures are straightforward. First, "[a] proceeding for compensation under the Program for a vaccine-related injury or death shall be initiated by service upon the Secretary [for the Department of Health and Human Services] and the filing of a petition containing the matter prescribed by subsection (c) of this section with the United States Court of Federal Claims." 42 U. S. C. §300aa–11(a)(1). Subsection (c) provides in relevant part that a petition must include "an affidavit, and supporting documentation, demonstrating that the person who suffered such injury" was actually vaccinated and suffered an injury. §300aa–11(c)(1). Next, upon receipt of an NCVIA petition, "[t]he clerk of the United States Court of Federal Claims shall immediately forward the filed petition to the chief special master for assignment to a special master." §300aa–11(a)(1). This special master then "makes an informal adjudication of the petition." *Bruesewitz*, 562 U. S., at ___ (slip op., at 3) (citing §300aa–12(d)(3)). A successful claimant may recover medical costs, lost earning capacity, and an award for pain and suffering, 42 U. S. C. §300aa–15(a), with compensation paid out from a federal trust fund supported

by an excise tax levied on each dose of certain covered vaccines, see 26 U. S. C. §§4131, 4132, 9510; 42 U. S. C. §300aa–15(f)(4)(A). But under the Act's limitations provision, "no petition may be filed for compensation under the Program for [a vaccine-related] injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of" the alleged injury. §300aa–16(a)(2).

The Act also includes an unusual scheme for compensating attorneys who work on NCVIA petitions. See §300aa–15(e).[1] "No attorney may charge any fee for services in connection with a petition filed under section 300aa–11 of this title." §300aa–15(e)(3).[2] But a court may award attorney's fees in certain circumstances. In the case of successful petitions, the award of attorney's fees is automatic. §300aa–15(e)(1) ("In awarding compensation on a petition filed under section 300aa–11 of this title the special master or court shall also award as part of such compensation an amount to cover . . . reasonable attorneys' fees, and . . . other costs"). For unsuccessful petitions, "the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys'

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[1] The relevant paragraph provides:

"(1) In awarding compensation on a petition filed under section 300aa–11 of this title the special master or court shall also award as part of such compensation an amount to cover—

"(A) reasonable attorneys' fees, and

"(B) other costs,

"incurred in any proceeding on such petition. If the judgment of the United States Court of Federal Claims on such a petition does not award compensation, the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought." §300aa–15(e).

[2] For simplicity, we refer to attorney's fees and costs as simply attorney's fees.

fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought." *Ibid.* In other words, "[a]ttorney's fees are provided, not only for successful cases, but even for unsuccessful claims that are not frivolous." *Bruesewitz*, 562 U. S., at ___ (slip op., at 4).

B

Respondent, Dr. Melissa Cloer, received three Hepatitis-B immunizations from September 1996 to April 1997. Shortly after receiving the third vaccine, Dr. Cloer began to experience numbness and strange sensations in her left forearm and hand. She sought treatment in 1998 and 1999, but the diagnoses she received were inconclusive. By then, Dr. Cloer was experiencing numbness in her face, arms, and legs, and she had difficulty walking. She intermittently suffered these symptoms until 2003, when she began to experience the full manifestations of, and was eventually diagnosed with, multiple sclerosis (MS). In 2004, Dr. Cloer became aware of a link between MS and the Hepatitis-B vaccine, and in September 2005, she filed a claim for compensation under the NCVIA, alleging that the vaccinations she received had caused or exacerbated her MS.

Dr. Cloer's petition was sent by the clerk of the Court of Federal Claims to the Chief Special Master, who went on to adjudicate it. After reviewing the petition and its supporting documentation, the Chief Special Master concluded that Dr. Cloer's claim was untimely because the Act's 36-month limitations period began to run when she first experienced the symptoms of MS in 1997. *Cloer* v. *Secretary of Dept. of Health and Human Servs.*, No. 05–1002V, 2008 WL 2275574, *1, *10 (Fed. Cl., May 15, 2008) (opinion of Golkiewicz, Chief Special Master) (citing §300aa–

16(a)(2) (NCVIA's limitations provision)). Relying on Federal Circuit precedent, the Chief Special Master also rejected Dr. Cloer's argument that the NCVIA's limitations period should be subject to equitable tolling. *Id.,* at *9 (citing *Brice* v. *Secretary of Health and Human Servs.*, 240 F. 3d 1367, 1373 (2001)). A divided panel of the Federal Circuit reversed the Chief Special Master, concluding that the NCVIA's limitations period did not commence until "the medical community at large objectively recognize[d] a link between the vaccine and the injury." *Cloer* v. *Secretary of Health and Human Servs.*, 603 F. 3d 1341, 1346 (2010).

The en banc court then reversed the panel's decision, *Cloer* v. *Secretary of Health and Human Servs.*, 654 F. 3d 1322 (2011), cert. denied, 566 U. S. ___ (2012), and held that the statute's limitations period begins to run on "the calendar date of the occurrence of the first medically recognized symptom or manifestation of onset of the injury claimed by the petitioner." 654 F. 3d, at 1324–1325. The Court of Appeals also held that the Act's limitations provision was nonjurisdictional and subject to equitable tolling in limited circumstances, overruling its prior holding in *Brice*. 654 F. 3d, at 1341–1344. The court concluded, however, that Dr. Cloer was ineligible for tolling and that her petition was untimely. *Id.,* at 1344–1345.

Following this decision, Dr. Cloer moved for an award of attorney's fees. The en banc Federal Circuit agreed with her that a person who files an untimely NCVIA petition "assert[ing] a reasonable limitations argument" may recover fees and costs so long as "'the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.'" 675 F. 3d 1358, 1359–1361 (2012) (quoting §300aa–15(e)(1)). Six judges disagreed with this conclusion and instead read the NCVIA to bar such awards for untimely petitions. *Id.,* at 1364–1368 (Bryson, J., dissenting). We granted the Gov-

ernment's petition for writ of certiorari. 568 U. S. ___ (2012). We now affirm.

II

A

As in any statutory construction case, "[w]e start, of course, with the statutory text," and proceed from the understanding that "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP America Production Co.* v. *Burton*, 549 U. S. 84, 91 (2006). The Act's fees provision ties eligibility for attorney's fees broadly to "any proceeding on such petition," referring specifically to "a petition filed under section 300aa–11." 42 U. S. C. §§300aa–15(e)(1), (3). Section 300aa–11 provides that "[a] proceeding for compensation" is "initiated" by "service upon the Secretary" and "the filing of a petition containing" certain documentation with the clerk of the Court of Federal Claims who then "immediately forward[s] the filed petition" for assignment to a special master. §300aa–11(a)(1). See *supra,* at 2.

Nothing in these two provisions suggests that the reason for the subsequent dismissal of a petition, such as its untimeliness, nullifies the initial filing of that petition. We have explained that "[a]n application is 'filed,' as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record." *Artuz* v. *Bennett*, 531 U. S. 4, 8 (2000). When this ordinary meaning is applied to the text of the statute, it is clear that an NCVIA petition which is delivered to the clerk of the court, forwarded for processing, and adjudicated in a proceeding before a special master is a "petition filed under section 300aa–11." 42 U. S. C. §300aa–15(e)(1). And so long as such a petition was brought in good faith and with a reasonable basis, it is eligible for an award of attorney's fees, even if it is

ultimately unsuccessful. *Ibid.* If Congress had intended to limit fee awards to timely petitions, it could easily have done so. But the NCVIA instead authorizes courts to award attorney's fees for those unsuccessful petitions "brought in good faith and [for which] there was a reasonable basis." *Ibid.*[3]

The Government argues that the Act's limitations provision, which states that "no petition may be filed for compensation" 36 months after a claimant's initial symptoms began, §300aa–16(a)(2), constitutes "a statutory prerequisite to the filing of a petition 'for compensation under the Program,'" Brief for Petitioner 16. Thus, the Government contends, a petition that fails to comply with these time limits is not "a petition filed under section 300aa–11" and is therefore ineligible for fees under §300aa–15(e)(1). See 675 F. 3d, at 1364–1366 (Bryson, J., dissenting).

The Government's argument lacks textual support. First, as noted, there is no cross-reference to the Act's limitations provision in its fees provision, §300aa–15(e), or the other section it references, §300aa–11(a)(1). When these two linked sections are read in tandem they simply indicate that petitions filed with the clerk of the court are eligible for attorney's fees so long as they comply with the other requirements of the Act's fees provision. By its terms, the NCVIA requires nothing more for the award of attorney's fees. A petition filed in violation of the limitations period will not result in the payment of compensation, of course, but it is still a petition filed under §300aa–11(a)(1).[4]

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[3] The en banc dissent reasoned that a dismissal for untimeliness does not constitute a judgment on the merits of a petition. See 675 F. 3d 1358, 1365 (CA Fed. 2012) (opinion of Bryson, J.). That argument is not pressed here by the Government, which acknowledged at oral argument that dismissals for untimeliness result in judgment against the petitioner. Tr. of Oral Arg. 12–13.

[4] The Government suggests that giving the words of their statute

When the Act does require compliance with the limitations period, it provides so expressly. For example, §300aa–11(a)(2)(A) prevents claimants from bringing suit against vaccine manufacturers "unless a petition has been filed, *in accordance with section 300aa–16 of this title* [the limitations provision], for compensation under the Program for such injury or death." (Emphasis added.) We have long held that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates* v. *United States*, 522 U. S. 23, 29–30 (1997) (internal quotation marks omitted). The absence of any cross-reference to the limitations provision in either the fees provision, §300aa–15(e)(1), or the instructions for initiating a compensation proceeding, §300aa–11(a)(1), indicates that a petition can be "filed" without being "in accordance with [the limitations provision]." Tellingly, nothing in §300aa–11(a)(1) requires a petitioner to allege or demonstrate the timeliness of his or

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their plain meaning would produce incongruous results; notably, it might indicate that "a failure to comply with the limitations provision would not even bar recovery under the Compensation Program itself because 42 U. S. C. 300aa-13 ('Determination of eligibility and compensation') does not expressly cross-reference the limitations provision." Brief for Petitioner 18. The Government's argument assumes that both sections are equivalently affected by absence of a cross-reference. This is incorrect. The Government is right that because "the law typically treats a limitations defense as an affirmative defense," *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 133 (2008), a failure to apply the limitations provision to the section outlining the conditions under which compensation should be awarded would be "contrary to [the Act's] plain meaning and would produce an absurd result," *Milavetz, Gallop & Milavetz, P. A.* v. *United States*, 559 U. S. 229, 252 (2010). In contrast, giving the Act's fees provision its plain meaning would produce no such absurd result. It would simply allow petitioners to recover attorney's fees for untimely petitions.

her petition to initiate such a proceeding.[5]

Second, to adopt the Government's position, we would have to conclude that a petition like Dr. Cloer's, which was "filed" under the ordinary meaning of that term but was later found to be untimely, was never filed at all because, on the Government's reading, "no petition may be *filed* for compensation" late. §300aa–16(a)(2) (emphasis added). Yet the court below identified numerous instances throughout the NCVIA where the word "filed" is given its ordinary meaning, 675 F. 3d, at 1361, and the Government does not challenge this aspect of its decision. Indeed, the Government's reading would produce anomalous results with respect to these other NCVIA provisions. Consider §300aa–12(b)(2), which provides that "[w]ithin 30 days after the Secretary receives service of any petition filed under section 300aa–11 of this title the Secretary shall publish notice of such petition in the Federal Register." If the NCVIA's limitations provision worked to void the filing of an untimely petition, then one would expect the Secretary to make timeliness determinations prior to publishing such notice or to strike any petitions found to be untimely from the Federal Register. But there is no indication that the Secretary does either of these things.[6]

The Government asks us to adopt a different definition of the term "filed" for a single subsection so that for fees

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[5] If the NCVIA's limitations period were jurisdictional, then we might reach a different conclusion because the Chief Special Master would have lacked authority to act on Dr. Cloer's untimely petition in the first place. But the Government chose not to seek certiorari from the Federal Circuit's en banc decision holding that the period is nonjurisdictional, see *Cloer* v. *Secretary of Health and Human Servs.*, 654 F. 3d 1332, 1341–1344 (2011), and the Government now acknowledges that the NCVIA contains no "clear statement" that §300aa–16's filing deadlines carry jurisdictional consequences. See Reply Brief 7 (discussing *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. ___ (2013)).

[6] Dr. Cloer's petition was published, and remains, in the Federal Register. See 70 Fed. Reg. 73011, 73014 (2005).

purposes, and only for fees purposes, a petition filed out of time must be treated retroactively as though it was never filed in the first place. Nothing in the text or structure of the statute requires the unusual result the Government asks us to accept. In the NCVIA, the word "filed" carries its common meaning. See *Artuz*, 531 U. S., at 8. That "no petition may be filed for compensation" after the limitations period has run does not mean that a late petition was never filed at all.

Our "inquiry ceases [in a statutory construction case] if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 450 (2002) (internal quotation marks omitted). The text of the statute is clear: like any other unsuccessful petition, an untimely petition brought in good faith and with a reasonable basis that is filed with—meaning delivered to and received by—the clerk of the Court of Federal Claims is eligible for an award of attorney's fees.

B

The Government's position is also inconsistent with the goals of the fees provision itself. A stated purpose of the Act's fees scheme was to avoid "limit[ing] petitioners' ability to obtain qualified assistance" by making fees awards available for "non-prevailing, good-faith claims." H. R. Rep., at 22. The Government does not explain why Congress would have intended to discourage counsel from representing petitioners who, because of the difficulty of distinguishing between the initial symptoms of a vaccine-related injury and an unrelated malady, see, *e.g., Smith* v. *Secretary of Dept. of Health and Human Servs.*, No. 02–93V, 2006 WL 5610517, *6–*7 (Fed. Cl., July 21, 2006) (opinion of Golkiewicz, Chief Special Master), may have good-faith claims with a reasonable basis that will only later be found untimely.

III

The Government offers two additional lines of argument for barring the award of attorney's fees for untimely petitions. It first invokes two canons of construction: the canon favoring strict construction of waivers of sovereign immunity and the "'presumption favoring the retention of long-established and familiar [common-law] principles.'" Brief for Petitioner 32 (quoting *United States* v. *Texas*, 507 U. S. 529, 534 (1993)). Similarly, the Government also argues that the NCVIA should be construed so as to minimize complex and costly fees litigation. But as the Government acknowledges, such canons and policy arguments come into play only "[t]o the extent that the Vaccine Act is ambiguous." Brief for Petitioner 28. These "rules of thumb" give way when "the words of a statute are unambiguous," as they are here. *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992).

Second, the Government argues that permitting the recovery of attorney's fees for untimely petitions will force special masters to carry out costly and wasteful "shadow trials," with no benefit to claimants, in order to determine whether these late petitions were brought in good faith and with a reasonable basis. We reiterate that "when [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U. S. 1, 6 (2000) (internal quotation marks omitted). Consequently, even if the plain text of the NCVIA requires that special masters occasionally carry out such "shadow trials," that is not such an absurd burden as to require departure from the words of the Act. This is particularly true here because Congress has specifically provided for such "shadow trials" by permitting the award of attorney's fees "in *any* proceeding [on an unsuccessful] petition" if such petition was brought in good faith

and with a reasonable basis, 42 U. S. C. §300aa–15(e)(1) (emphasis added), irrespective of the reasons for the petition's failure, see, *e.g., Caves* v. *Secretary of Health and Human Servs.*, No. 07–443V, 2012 WL 6951286, *2, *13 (Fed. Cl., Dec. 20, 2012) (opinion of Moran, Special Master) (awarding attorney's fees despite petitioner's failure to prove causation).

In any event, the Government's fears appear to us exaggerated. Special masters consistently make fee determinations on the basis of the extensive documentation required by §300aa–11(c) and included with the petition.[7] Indeed, when adjudicating the timeliness of a petition, the special master may often have to develop a good sense of the merits of a case, and will therefore be able to determine if a reasonable basis exists for the petitioner's claim, including whether there is a good-faith reason for the untimely filing. In this case, for example, the Chief Special Master conducted a "review of the record as a whole," including the medical evidence that would have supported the merits of Dr. Cloer's claim, before determining that her petition was untimely. *Cloer*, 2008 WL 2275574, *1–*2, *10.

The Government also argues that permitting attorney's fees on untimely petitions will lead to the filing of more untimely petitions. But the Government offers no evidence to support its speculation. Additionally, this argument is premised on the assumption that in the pursuit of fees, attorneys will choose to bring claims lacking good faith or a reasonable basis in derogation of their ethical duties. There is no basis for such an assumption. Finally, the special masters have shown themselves more than

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[7] See, *e.g., Wells* v. *Secretary of Dept. of Health and Human Servs.*, 28 Fed. Cl. 647, 649–651 (1993); *Rydzewski* v. *Secretary of Dept. of Health and Human Servs.*, No. 99–571V, 2008 WL 382930, *2–*6 (Fed. Cl., Jan. 29, 2008) (opinion of Moran, Special Master); *Hamrick* v. *Secretary of Health and Human Servs.*, No. 99–683V, 2007 WL 4793152, *2–*3, *5–*9 (Fed. Cl., Nov. 19, 2007) (opinion of Moran, Special Master).

capable of discerning untimely claims supported by good faith and a reasonable basis from those that are specious. *Supra*, at 12.

* * *

We hold that an NCVIA petition found to be untimely may qualify for an award of attorney's fees if it is filed in good faith and there is a reasonable basis for its claim.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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

PENA-RODRIGUEZ *v.* COLORADO

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 15–606. Argued October 11, 2016—Decided March 6, 2017

A Colorado jury convicted petitioner Peña-Rodriguez of harassment and unlawful sexual contact. Following the discharge of the jury, two jurors told defense counsel that, during deliberations, Juror H. C. had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness. Counsel, with the trial court's supervision, obtained affidavits from the two jurors describing a number of biased statements by H. C. The court acknowledged H. C.'s apparent bias but denied petitioner's motion for a new trial on the ground that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying as to statements made during deliberations in a proceeding inquiring into the validity of the verdict. The Colorado Court of Appeals affirmed, agreeing that H. C.'s alleged statements did not fall within an exception to Rule 606(b). The Colorado Supreme Court also affirmed, relying on *Tanner* v. *United States*, 483 U. S. 107, and *Warger* v. *Shauers*, 574 U. S. ___, both of which rejected constitutional challenges to the federal no-impeachment rule as applied to evidence of juror misconduct or bias.

Held: Where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. Pp. 6–21.

(a) At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony. Some American jurisdictions adopted a more flexible version of the no-impeachment bar, known as the "Iowa rule," which prevented jurors from testifying only about their own subjective beliefs, thoughts, or motives during deliberations. An alternative approach, later referred to as the federal ap-

proach, permitted an exception only for events extraneous to the deliberative process. This Court's early decisions did not establish a clear preference for a particular version of the no-impeachment rule, appearing open to the Iowa rule in *United States* v. *Reid*, 12 How. 361, and *Mattox* v. *United States*, 146 U. S. 140, but rejecting that approach in *McDonald* v. *Pless*, 238 U. S. 264.

The common-law development of the rule reached a milestone in 1975 when Congress adopted Federal Rule of Evidence 606(b), which sets out a broad no-impeachment rule, with only limited exceptions. This version of the no-impeachment rule has substantial merit, promoting full and vigorous discussion by jurors and providing considerable assurance that after being discharged they will not be summoned to recount their deliberations or otherwise harassed. The rule gives stability and finality to verdicts. Pp. 6–9.

(b) Some version of the no-impeachment rule is followed in every State and the District of Columbia, most of which follow the Federal Rule. At least 16 jurisdictions have recognized an exception for juror testimony about racial bias in deliberations. Three Federal Courts of Appeals have also held or suggested there is a constitutional exception for evidence of racial bias.

In addressing the common-law no-impeachment rule, this Court noted the possibility of an exception in the "gravest and most important cases." *United States* v. *Reid*, *supra,* at 366; *McDonald* v. *Pless*, *supra,* at 269. The Court has addressed the question whether the Constitution mandates an exception to Rule 606(b) just twice, rejecting an exception each time. In *Tanner,* where the evidence showed that some jurors were under the influence of drugs and alcohol during the trial, the Court identified "long-recognized and very substantial concerns" supporting the no-impeachment rule. 483 U. S., at 127. The Court also outlined existing, significant safeguards for the defendant's right to an impartial and competent jury beyond post-trial juror testimony: members of the venire can be examined for impartiality during *voir dire*; juror misconduct may be observed the court, counsel, and court personnel during the trial; and jurors themselves can report misconduct to the court before a verdict is rendered. In *Warger*, a civil case where the evidence indicated that the jury forewoman failed to disclose a prodefendant bias during *voir dire*, the Court again put substantial reliance on existing safeguards for a fair trial. But the Court also warned, as in *Reid* and *McDonald,* that the no-impeachment rule may admit of exceptions for "juror bias so extreme that, almost by definition, the jury trial right has been abridged." 574 U. S., at ___–___, n. 3. *Reid*, *McDonald*, and *Warger* left open the question here: whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indi-

cate that racial animus was a significant motivating factor in his or her finding of guilt. Pp. 9–13.

(c) The imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments. "[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin* v. *Florida*, 379 U. S. 184, 192. Time and again, this Court has enforced the Constitution's guarantee against state-sponsored racial discrimination in the jury system. The Court has interpreted the Fourteenth Amendment to prohibit the exclusion of jurors based on race, *Strauder* v. *West Virginia*, 100 U. S. 303, 305–309; struck down laws and practices that systematically exclude racial minorities from juries, see, *e.g., Neal* v. *Delaware*, 103 U. S. 370; ruled that no litigant may exclude a prospective juror based on race, see, *e.g., Batson* v. *Kentucky*, 476 U. S. 79; and held that defendants may at times be entitled to ask about racial bias during *voir dire,* see, *e.g., Ham* v. *South Carolina*, 409 U. S. 524. The unmistakable principle of these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice," *Rose* v. *Mitchell*, 443 U. S. 545, 555, damaging "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State," *Powers* v. *Ohio*, 499 U. S. 400, 411. Pp. 13–15.

(d) This case lies at the intersection of the Court's decisions endorsing the no-impeachment rule and those seeking to eliminate racial bias in the jury system. Those lines of precedent need not conflict. Racial bias, unlike the behavior in *McDonald*, *Tanner*, or *Warger,* implicates unique historical, constitutional, and institutional concerns and, if left unaddressed, would risk systemic injury to the administration of justice. It is also distinct in a pragmatic sense, for the *Tanner* safeguards may be less effective in rooting out racial bias. But while all forms of improper bias pose challenges to the trial process, there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after a verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right. Pp. 15–17.

(e) Before the no-impeachment bar can be set aside to allow further judicial inquiry, there must be a threshold showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote

Syllabus

to convict. Whether the threshold showing has been satisfied is committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. The experience of those jurisdictions that have already recognized a racial-bias exception to the no-impeachment rule, and the experience of courts going forward, will inform the proper exercise of trial judge discretion. The Court need not address what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias or the appropriate standard for determining when such evidence is sufficient to require that the verdict be set aside and a new trial be granted. Standard and existing safeguards may also help prevent racial bias in jury deliberations, including careful *voir dire* and a trial court's instructions to jurors about their duty to review the evidence, deliberate together, and reach a verdict in a fair and impartial way, free from bias of any kind. Pp. 17–21.

350 P. 3d 287, reversed and remanded.

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

SUPREME COURT OF THE UNITED STATES

No. 15–606

MIGUEL ANGEL PENA-RODRIGUEZ, PETITIONER *v.* COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

[March 6, 2017]

JUSTICE KENNEDY delivered the opinion of the Court.

The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power. The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases. Over the long course its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The jury is a tangible implementation of the principle that the law comes from the people.

In the era of our Nation's founding, the right to a jury trial already had existed and evolved for centuries, through and alongside the common law. The jury was considered a fundamental safeguard of individual liberty. See The Federalist No. 83, p. 451 (B. Warner ed. 1818) (A. Hamilton). The right to a jury trial in criminal cases was part of the Constitution as first drawn, and it was restated in the Sixth Amendment. Art. III, §2, cl. 3; Amdt. 6. By operation of the Fourteenth Amendment, it is applicable to

the States. *Duncan* v. *Louisiana*, 391 U. S. 145, 149–150 (1968).

Like all human institutions, the jury system has its flaws, yet experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense. A general rule has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations. This principle, itself centuries old, is often referred to as the no-impeachment rule. The instant case presents the question whether there is an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict.

I

State prosecutors in Colorado brought criminal charges against petitioner, Miguel Angel Peña-Rodriguez, based on the following allegations. In 2007, in the bathroom of a Colorado horse-racing facility, a man sexually assaulted two teenage sisters. The girls told their father and identified the man as an employee of the racetrack. The police located and arrested petitioner. Each girl separately identified petitioner as the man who had assaulted her.

The State charged petitioner with harassment, unlawful sexual contact, and attempted sexual assault on a child. Before the jury was empaneled, members of the venire were repeatedly asked whether they believed that they could be fair and impartial in the case. A written questionnaire asked if there was "anything about you that you feel would make it difficult for you to be a fair juror." App.

14. The court repeated the question to the panel of prospective jurors and encouraged jurors to speak in private with the court if they had any concerns about their impartiality. Defense counsel likewise asked whether anyone felt that "this is simply not a good case" for them to be a fair juror. *Id.,* at 34. None of the empaneled jurors expressed any reservations based on racial or any other bias. And none asked to speak with the trial judge.

After a 3-day trial, the jury found petitioner guilty of unlawful sexual contact and harassment, but it failed to reach a verdict on the attempted sexual assault charge. When the jury was discharged, the court gave them this instruction, as mandated by Colorado law:

> "The question may arise whether you may now discuss this case with the lawyers, defendant, or other persons. For your guidance the court instructs you that whether you talk to anyone is entirely your own decision. . . . If any person persists in discussing the case over your objection, or becomes critical of your service either before or after any discussion has begun, please report it to me." *Id.,* at 85–86.

Following the discharge of the jury, petitioner's counsel entered the jury room to discuss the trial with the jurors. As the room was emptying, two jurors remained to speak with counsel in private. They stated that, during deliberations, another juror had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness. Petitioner's counsel reported this to the court and, with the court's supervision, obtained sworn affidavits from the two jurors.

The affidavits by the two jurors described a number of biased statements made by another juror, identified as Juror H. C. According to the two jurors, H. C. told the other jurors that he "believed the defendant was guilty because, in [H. C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to

believe they could do whatever they wanted with women." *Id.*, at 110. The jurors reported that H. C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, "'I think he did it because he's Mexican and Mexican men take whatever they want.'" *Id.,* at 109. According to the jurors, H. C. further explained that, in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.,* at 110. Finally, the jurors recounted that Juror H. C. said that he did not find petitioner's alibi witness credible because, among other things, the witness was "'an illegal.'" *Ibid.* (In fact, the witness testified during trial that he was a legal resident of the United States.)

After reviewing the affidavits, the trial court acknowledged H. C.'s apparent bias. But the court denied petitioner's motion for a new trial, noting that "[t]he actual deliberations that occur among the jurors are protected from inquiry under [Colorado Rule of Evidence] 606(b)." *Id.*, at 90. Like its federal counterpart, Colorado's Rule 606(b) generally prohibits a juror from testifying as to any statement made during deliberations in a proceeding inquiring into the validity of the verdict. See Fed. Rule Evid. 606(b). The Colorado Rule reads as follows:

> "(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any out-

> side influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying." Colo. Rule Evid. 606(b) (2016).

The verdict deemed final, petitioner was sentenced to two years' probation and was required to register as a sex offender. A divided panel of the Colorado Court of Appeals affirmed petitioner's conviction, agreeing that H. C.'s alleged statements did not fall within an exception to Rule 606(b) and so were inadmissible to undermine the validity of the verdict. ___ P. 3d ___, 2012 WL 5457362.

The Colorado Supreme Court affirmed by a vote of 4 to 3. 350 P. 3d 287 (2015). The prevailing opinion relied on two decisions of this Court rejecting constitutional challenges to the federal no-impeachment rule as applied to evidence of juror misconduct or bias. See *Tanner* v. *United States*, 483 U. S. 107 (1987); *Warger* v. *Shauers*, 574 U. S. ___ (2014). After reviewing those precedents, the court could find no "dividing line between different *types* of juror bias or misconduct," and thus no basis for permitting impeachment of the verdicts in petitioner's trial, notwithstanding H. C.'s apparent racial bias. 350 P. 3d, at 293. This Court granted certiorari to decide whether there is a constitutional exception to the no-impeachment rule for instances of racial bias. 578 U. S. ___ (2016).

Juror H. C.'s bias was based on petitioner's Hispanic identity, which the Court in prior cases has referred to as ethnicity, and that may be an instructive term here. See, *e.g., Hernandez* v. *New York*, 500 U. S. 352, 355 (1991) (plurality opinion). Yet we have also used the language of race when discussing the relevant constitutional principles in cases involving Hispanic persons. See, *e.g., ibid.*; *Fisher*

v. *University of Tex. at Austin*, 570 U. S. ___ (2013); *Rosales-Lopez* v. *United States*, 451 U. S. 182, 189–190 (1981) (plurality opinion). Petitioner and respondent both refer to race, or to race and ethnicity, in this more expansive sense in their briefs to the Court. This opinion refers to the nature of the bias as racial in keeping with the primary terminology employed by the parties and used in our precedents.

II

A

At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony. This rule originated in *Vaise* v. *Delaval*, 1 T. R. 11, 99 Eng. Rep. 944 (K. B. 1785). There, Lord Mansfield excluded juror testimony that the jury had decided the case through a game of chance. The Mansfield rule, as it came to be known, prohibited jurors, after the verdict was entered, from testifying either about their subjective mental processes or about objective events that occurred during deliberations.

American courts adopted the Mansfield rule as a matter of common law, though not in every detail. Some jurisdictions adopted a different, more flexible version of the no-impeachment bar known as the "Iowa rule." Under that rule, jurors were prevented only from testifying about their own subjective beliefs, thoughts, or motives during deliberations. See *Wright* v. *Illinois & Miss. Tel. Co.*, 20 Iowa 195 (1866). Jurors could, however, testify about objective facts and events occurring during deliberations, in part because other jurors could corroborate that testimony.

An alternative approach, later referred to as the federal approach, stayed closer to the original Mansfield rule. See *Warger*, *supra*, at ___ (slip op., at 5). Under this version of the rule, the no-impeachment bar permitted an exception only for testimony about events extraneous to the deliber-

ative process, such as reliance on outside evidence—newspapers, dictionaries, and the like—or personal investigation of the facts.

This Court's early decisions did not establish a clear preference for a particular version of the no-impeachment rule. In *United States* v. *Reid*, 12 How. 361 (1852), the Court appeared open to the admission of juror testimony that the jurors had consulted newspapers during deliberations, but in the end it barred the evidence because the newspapers "had not the slightest influence" on the verdict. *Id.,* at 366. The *Reid* Court warned that juror testimony "ought always to be received with great caution." *Ibid.* Yet it added an important admonition: "cases might arise in which it would be impossible to refuse" juror testimony "without violating the plainest principles of justice." *Ibid.*

In a following case the Court required the admission of juror affidavits stating that the jury consulted information that was not in evidence, including a prejudicial newspaper article. *Mattox* v. *United States*, 146 U. S. 140, 151 (1892). The Court suggested, furthermore, that the admission of juror testimony might be governed by a more flexible rule, one permitting jury testimony even where it did not involve consultation of prejudicial extraneous information. *Id.,* at 148–149; see also *Hyde* v. *United States*, 225 U. S. 347, 382–384 (1912) (stating that the more flexible Iowa rule "should apply," but excluding evidence that the jury reached the verdict by trading certain defendants' acquittals for others' convictions).

Later, however, the Court rejected the more lenient Iowa rule. In *McDonald* v. *Pless*, 238 U. S. 264 (1915), the Court affirmed the exclusion of juror testimony about objective events in the jury room. There, the jury allegedly had calculated a damages award by averaging the numerical submissions of each member. *Id.,* at 265–266. As the Court explained, admitting that evidence would

have "dangerous consequences": "no verdict would be safe" and the practice would "open the door to the most pernicious arts and tampering with jurors." *Id.*, at 268 (internal quotation marks omitted). Yet the Court reiterated its admonition from *Reid*, again cautioning that the no-impeachment rule might recognize exceptions "in the gravest and most important cases" where exclusion of juror affidavits might well violate "the plainest principles of justice." 238 U. S., at 269 (quoting *Reid*, *supra*, at 366; internal quotation marks omitted).

The common-law development of the no-impeachment rule reached a milestone in 1975, when Congress adopted the Federal Rules of Evidence, including Rule 606(b). Congress, like the *McDonald* Court, rejected the Iowa rule. Instead it endorsed a broad no-impeachment rule, with only limited exceptions.

The version of the rule that Congress adopted was "no accident." *Warger*, 574 U. S., at ___ (slip op., at 7). The Advisory Committee at first drafted a rule reflecting the Iowa approach, prohibiting admission of juror testimony only as it related to jurors' mental processes in reaching a verdict. The Department of Justice, however, expressed concern over the preliminary rule. The Advisory Committee then drafted the more stringent version now in effect, prohibiting all juror testimony, with exceptions only where the jury had considered prejudicial extraneous evidence or was subject to other outside influence. Rules of Evidence for United States Courts and Magistrates, 56 F. R. D. 183, 265 (1972). The Court adopted this second version and transmitted it to Congress.

The House favored the Iowa approach, but the Senate expressed concern that it did not sufficiently address the public policy interest in the finality of verdicts. S. Rep. No. 93–1277, pp. 13–14 (1974). Siding with the Senate, the Conference Committee adopted, Congress enacted, and the President signed the Court's proposed rule. The sub-

stance of the Rule has not changed since 1975, except for a 2006 modification permitting evidence of a clerical mistake on the verdict form. See 574 U. S., at ___.

The current version of Rule 606(b) states as follows:

> "(1) *Prohibited Testimony or Other Evidence*. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> "(2) *Exceptions*. A juror may testify about whether:
>
> "(A) extraneous prejudicial information was improperly brought to the jury's attention;
>
> "(B) an outside influence was improperly brought to bear on any juror; or
>
> "(C) a mistake was made in entering the verdict on the verdict form."

This version of the no-impeachment rule has substantial merit. It promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict. The rule gives stability and finality to verdicts.

B

Some version of the no-impeachment rule is followed in every State and the District of Columbia. Variations make classification imprecise, but, as a general matter, it appears that 42 jurisdictions follow the Federal Rule, while 9 follow the Iowa Rule. Within both classifications there is a diversity of approaches. Nine jurisdictions that

follow the Federal Rule have codified exceptions other than those listed in Federal Rule 606(b). See Appendix, *infra*. At least 16 jurisdictions, 11 of which follow the Federal Rule, have recognized an exception to the no-impeachment bar under the circumstances the Court faces here: juror testimony that racial bias played a part in deliberations. *Ibid.* According to the parties and *amici*, only one State other than Colorado has addressed this issue and declined to recognize an exception for racial bias. See *Commonwealth* v. *Steele*, 599 Pa. 341, 377–379, 961 A. 2d 786, 807–808 (2012).

The federal courts, for their part, are governed by Federal Rule 606(b), but their interpretations deserve further comment. Various Courts of Appeals have had occasion to consider a racial bias exception and have reached different conclusions. Three have held or suggested there is a constitutional exception for evidence of racial bias. See *United States* v. *Villar*, 586 F. 3d 76, 87–88 (CA1 2009) (holding the Constitution demands a racial-bias exception); *United States* v. *Henley*, 238 F. 3d 1111, 1119–1121 (CA9 2001) (finding persuasive arguments in favor of an exception but not deciding the issue); *Shillcutt* v. *Gagnon*, 827 F. 2d 1155, 1158–1160 (CA7 1987) (observing that in some cases fundamental fairness could require an exception). One Court of Appeals has declined to find an exception, reasoning that other safeguards inherent in the trial process suffice to protect defendants' constitutional interests. See *United States* v. *Benally*, 546 F. 3d 1230, 1240–1241 (CA10 2008). Another has suggested as much, holding in the habeas context that an exception for racial bias was not clearly established but indicating in dicta that no such exception exists. See *Williams* v. *Price*, 343 F. 3d 223, 237–239 (CA3 2003) (Alito, J.). And one Court of Appeals has held that evidence of racial bias is excluded by Rule 606(b), without addressing whether the Constitution may at times demand an exception. See *Martinez* v.

Food City, Inc., 658 F. 2d 369, 373–374 (CA5 1981).

C

In addressing the scope of the common-law no-impeachment rule before Rule 606(b)'s adoption, the *Reid* and *McDonald* Courts noted the possibility of an exception to the rule in the "gravest and most important cases." *Reid*, 12 How., at 366; *McDonald*, 238 U. S., at 269. Yet since the enactment of Rule 606(b), the Court has addressed the precise question whether the Constitution mandates an exception to it in just two instances.

In its first case, *Tanner*, 483 U. S. 107, the Court rejected a Sixth Amendment exception for evidence that some jurors were under the influence of drugs and alcohol during the trial. *Id.*, at 125. Central to the Court's reasoning were the "long-recognized and very substantial concerns" supporting "the protection of jury deliberations from intrusive inquiry." *Id.,* at 127. The *Tanner* Court echoed *McDonald*'s concern that, if attorneys could use juror testimony to attack verdicts, jurors would be "harassed and beset by the defeated party," thus destroying "all frankness and freedom of discussion and conference." 483 U. S., at 120 (quoting *McDonald*, *supra,* at 267–268). The Court was concerned, moreover, that attempts to impeach a verdict would "disrupt the finality of the process" and undermine both "jurors' willingness to return an unpopular verdict" and "the community's trust in a system that relies on the decisions of laypeople." 483 U. S., at 120–121.

The *Tanner* Court outlined existing, significant safeguards for the defendant's right to an impartial and competent jury beyond post-trial juror testimony. At the outset of the trial process, *voir dire* provides an opportunity for the court and counsel to examine members of the venire for impartiality. As a trial proceeds, the court, counsel, and court personnel have some opportunity to

learn of any juror misconduct. And, before the verdict, jurors themselves can report misconduct to the court. These procedures do not undermine the stability of a verdict once rendered. Even after the trial, evidence of misconduct other than juror testimony can be used to attempt to impeach the verdict. *Id.,* at 127. Balancing these interests and safeguards against the defendant's Sixth Amendment interest in that case, the Court affirmed the exclusion of affidavits pertaining to the jury's inebriated state. *Ibid.*

The second case to consider the general issue presented here was *Warger*, 574 U. S. ___. The Court again rejected the argument that, in the circumstances there, the jury trial right required an exception to the no-impeachment rule. *Warger* involved a civil case where, after the verdict was entered, the losing party sought to proffer evidence that the jury forewoman had failed to disclose prodefendant bias during *voir dire*. As in *Tanner*, the Court put substantial reliance on existing safeguards for a fair trial. The Court stated: "Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." 574 U. S., at ___ (slip op., at 10).

In *Warger*, however, the Court did reiterate that the no-impeachment rule may admit exceptions. As in *Reid* and *McDonald*, the Court warned of "juror bias so extreme that, almost by definition, the jury trial right has been abridged." 574 U. S., at ___–___, n. 3 (slip op., at 10–11, n. 3). "If and when such a case arises," the Court indicated it would "consider whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Ibid.*

The recognition in *Warger* that there may be extreme cases where the jury trial right requires an exception to

the no-impeachment rule must be interpreted in context as a guarded, cautious statement. This caution is warranted to avoid formulating an exception that might undermine the jury dynamics and finality interests the no-impeachment rule seeks to protect. Today, however, the Court faces the question that *Reid*, *McDonald*, and *Warger* left open. The Court must decide whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt.

III

It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments.

"[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964). In the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial. "Almost immediately after the Civil War, the South began a practice that would continue for many decades: All-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites, including Ku Klux Klan members, against blacks and Republicans." Forman, Juries and Race in the Nineteenth Century, 113 Yale L. J. 895, 909–910 (2004). To take one example, just in the years 1865 and 1866, all-white juries in Texas decided a total of 500 prosecutions of white defendants

charged with killing African-Americans. All 500 were acquitted. *Id.,* at 916. The stark and unapologetic nature of race-motivated outcomes challenged the American belief that "the jury was a bulwark of liberty," *id.,* at 909, and prompted Congress to pass legislation to integrate the jury system and to bar persons from eligibility for jury service if they had conspired to deny the civil rights of African-Americans, *id.,* at 920–930. Members of Congress stressed that the legislation was necessary to preserve the right to a fair trial and to guarantee the equal protection of the laws. *Ibid.*

The duty to confront racial animus in the justice system is not the legislature's alone. Time and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system. Beginning in 1880, the Court interpreted the Fourteenth Amendment to prohibit the exclusion of jurors on the basis of race. *Strauder* v. *West Virginia*, 100 U. S. 303, 305–309 (1880). The Court has repeatedly struck down laws and practices that systematically exclude racial minorities from juries. See, *e.g., Neal* v. *Delaware*, 103 U. S. 370 (1881); *Hollins* v. *Oklahoma*, 295 U. S. 394 (1935) (*per curiam*); *Avery* v. *Georgia*, 345 U. S. 559 (1953); *Hernandez* v. *Texas*, 347 U. S. 475 (1954); *Castaneda* v. *Partida*, 430 U. S. 482 (1977). To guard against discrimination in jury selection, the Court has ruled that no litigant may exclude a prospective juror on the basis of race. *Batson* v. *Kentucky*, 476 U. S. 79 (1986); *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991); *Georgia* v. *McCollum*, 505 U. S. 42 (1992). In an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*. *Ham* v. *South Carolina*, 409 U. S. 524 (1973); *Rosales-Lopez*, 451 U. S. 182; *Turner* v. *Murray*, 476 U. S. 28 (1986).

The unmistakable principle underlying these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice." *Rose* v. *Mitchell*, 443 U. S. 545, 555 (1979). The jury is to be "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *McCleskey* v. *Kemp*, 481 U. S. 279, 310 (1987) (quoting *Strauder*, *supra*, at 309). Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State." *Powers* v. *Ohio*, 499 U. S. 400, 411 (1991); cf. *Aldridge* v. *United States*, 283 U. S. 308, 315 (1931); *Buck* v. *Davis*, *ante,* at 22.

IV

A

This case lies at the intersection of the Court's decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system. The two lines of precedent, however, need not conflict.

Racial bias of the kind alleged in this case differs in critical ways from the compromise verdict in *McDonald*, the drug and alcohol abuse in *Tanner*, or the pro-defendant bias in *Warger*. The behavior in those cases is troubling and unacceptable, but each involved anomalous behavior from a single jury—or juror—gone off course. Jurors are presumed to follow their oath, cf. *Penry* v. *Johnson*, 532 U. S. 782, 799 (2001), and neither history nor common experience show that the jury system is rife with mischief of these or similar kinds. To attempt to rid the jury of every irregularity of this sort would be to expose it to unrelenting scrutiny. "It is not at all clear . . . that the jury system could survive such efforts to perfect it." *Tanner*, 483 U. S., at 120.

The same cannot be said about racial bias, a familiar and recurring evil that, if left unaddressed, would risk

systemic injury to the administration of justice. This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.

Racial bias is distinct in a pragmatic sense as well. In past cases this Court has relied on other safeguards to protect the right to an impartial jury. Some of those safeguards, to be sure, can disclose racial bias. *Voir dire* at the outset of trial, observation of juror demeanor and conduct during trial, juror reports before the verdict, and nonjuror evidence after trial are important mechanisms for discovering bias. Yet their operation may be compromised, or they may prove insufficient. For instance, this Court has noted the dilemma faced by trial court judges and counsel in deciding whether to explore potential racial bias at *voir dire*. See *Rosales-Lopez*, *supra*; *Ristaino* v. *Ross*, 424 U. S. 589 (1976). Generic questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations. Yet more pointed questions "could well exacerbate whatever prejudice might exist without substantially aiding in exposing it." *Rosales-Lopez*, *supra*, at 195 (Rehnquist, J., concurring in result).

The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case, as would have been required in *Warger*. It is quite another to call her a bigot.

The recognition that certain of the *Tanner* safeguards may be less effective in rooting out racial bias than other

kinds of bias is not dispositive. All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.

B

For the reasons explained above, the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. See 27 C. Wright & V. Gold, Federal Practice and Proce-

dure: Evidence §6076, pp. 580–583 (2d ed. 2007) (Wright); see also Variations of ABA Model Rules of Professional Conduct, Rule 3.5 (Sept. 15, 2016) (overview of state ethics rules); 2 Jurywork Systematic Techniques §13:18 (2016–2017) (overview of Federal District Court rules). These limits seek to provide jurors some protection when they return to their daily affairs after the verdict has been entered. But while a juror can always tell counsel they do not wish to discuss the case, jurors in some instances may come forward of their own accord.

That is what happened here. In this case the alleged statements by a juror were egregious and unmistakable in their reliance on racial bias. Not only did juror H. C. deploy a dangerous racial stereotype to conclude petitioner was guilty and his alibi witness should not be believed, but he also encouraged other jurors to join him in convicting on that basis.

Petitioner's counsel did not seek out the two jurors' allegations of racial bias. Pursuant to Colorado's mandatory jury instruction, the trial court had set limits on juror contact and encouraged jurors to inform the court if anyone harassed them about their role in the case. Similar limits on juror contact can be found in other jurisdictions that recognize a racial-bias exception. See, *e.g.,* Fla. Standard Jury Instrs. in Crim. Cases No. 4.2 (West 2016) ("Although you are at liberty to speak with anyone about your deliberations, you are also at liberty to refuse to speak to anyone"); Mass. Office of Jury Comm'r, Trial Juror's Handbook (Dec. 2015) ("You are not required to speak with anyone once the trial is over. . . . If anyone tries to learn this confidential information from you, or if you feel harassed or embarrassed in any way, you should report it to the court . . . immediately"); N. J. Crim. Model Jury Charges, Non 2C Charges, Dismissal of Jury (2014) ("It will be up to each of you to decide whether to speak about your service as a juror").

With the understanding that they were under no obligation to speak out, the jurors approached petitioner's counsel, within a short time after the verdict, to relay their concerns about H. C.'s statements. App. 77. A similar pattern is common in cases involving juror allegations of racial bias. See, *e.g., Villar*, 586 F. 3d, at 78 (juror e-mailed defense counsel within hours of the verdict); *Kittle* v. *United States*, 65 A. 3d 1144, 1147 (D. C. 2013) (juror wrote a letter to the judge the same day the court discharged the jury); *Benally*, 546 F. 3d, at 1231 (juror approached defense counsel the day after the jury announced its verdict). Pursuant to local court rules, petitioner's counsel then sought and received permission from the court to contact the two jurors and obtain affidavits limited to recounting the exact statements made by H. C. that exhibited racial bias.

While the trial court concluded that Colorado's Rule 606(b) did not permit it even to consider the resulting affidavits, the Court's holding today removes that bar. When jurors disclose an instance of racial bias as serious as the one involved in this case, the law must not wholly disregard its occurrence.

C

As the preceding discussion makes clear, the Court relies on the experiences of the 17 jurisdictions that have recognized a racial-bias exception to the no-impeachment rule—some for over half a century—with no signs of an increase in juror harassment or a loss of juror willingness to engage in searching and candid deliberations.

The experience of these jurisdictions, and the experience of the courts going forward, will inform the proper exercise of trial judge discretion in these and related matters. This case does not ask, and the Court need not address, what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial

bias. See 27 Wright 575–578 (noting a divergence of authority over the necessity and scope of an evidentiary hearing on alleged juror misconduct). The Court also does not decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted. Compare, *e.g., Shillcutt*, 827 F. 2d, at 1159 (inquiring whether racial bias "pervaded the jury room"), with, *e.g., Henley*, 238 F. 3d, at 1120 ("One racist juror would be enough").

D

It is proper to observe as well that there are standard and existing processes designed to prevent racial bias in jury deliberations. The advantages of careful *voir dire* have already been noted. And other safeguards deserve mention.

Trial courts, often at the outset of the case and again in their final jury instructions, explain the jurors' duty to review the evidence and reach a verdict in a fair and impartial way, free from bias of any kind. Some instructions are framed by trial judges based on their own learning and experience. Model jury instructions likely take into account these continuing developments and are common across jurisdictions. See, *e.g.,* 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal §10:01, p. 22 (6th ed. 2008) ("Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way"). Instructions may emphasize the group dynamic of deliberations by urging jurors to share their questions and conclusions with their colleagues. See, *e.g., id*., §20:01, at 841 ("It is your duty as jurors to consult with one another and to deliberate with one another with a view towards reaching an agreement if you can do so without violence to individual judgment").

Probing and thoughtful deliberation improves the likeli-

hood that other jurors can confront the flawed nature of reasoning that is prompted or influenced by improper biases, whether racial or otherwise. These dynamics can help ensure that the exception is limited to rare cases.

* * *

The Nation must continue to make strides to overcome race-based discrimination. The progress that has already been made underlies the Court's insistence that blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule. It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history. The Court now seeks to strengthen the broader principle that society can and must move forward by achieving the thoughtful, rational dialogue at the foundation of both the jury system and the free society that sustains our Constitution.

The judgment of the Supreme Court of Colorado is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX

Codified Exceptions in Addition to Those Enumerated in Fed. Rule Evid. 606(b)

See Ariz. Rules Crim. Proc. 24.1(c)(3), (d) (2011) (exception for evidence of misconduct, including verdict by game of chance or intoxication); Idaho Rule Evid. 606(b) (2016) (game of chance); Ind. Rule Evid. 606(b)(2)(A) (Burns 2014) (drug or alcohol use); Minn. Rule Evid. 606(b) (2014) (threats of violence or violent acts); Mont. Rule Evid. 606(b) (2015) (game of chance); N. D. Rule Evid. 606(b)(2)(C) (2016–2017) (same); Tenn. Rule Evid. 606(b) (2016) (quotient verdict or game of chance); Tex. Rule Evid. 606(b)(2)(B) (West 2016) (rebutting claim juror was unqualified); Vt. Rule Evid. 606(b) (Cum. Supp. 2016) (juror communication with nonjuror); see also 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence §6071, p. 447, and n. 66 (2d ed. 2007); *id.,* at 451, and n. 70; *id.,* at 452, and n. 72.

Judicially Recognized Exceptions for Evidence of Racial Bias

See *State* v. *Santiago*, 245 Conn. 301, 323–340, 715 A. 2d 1, 14–22 (1998); *Kittle* v. *United States*, 65 A. 3d 1144, 1154–1556 (D. C. 2013); *Fisher* v. *State*, 690 A. 2d 917, 919–921, and n. 4 (Del. 1996) (Appendix to opinion), *Powell* v. *Allstate Ins. Co.*, 652 So. 2d 354, 357–358 (Fla. 1995); *Spencer* v. *State*, 260 Ga. 640, 643–644, 398 S. E. 2d 179, 184–185 (1990); *State* v. *Jackson*, 81 Haw. 39, 48–49, 912 P. 2d 71, 80–81 (1996); *Commonwealth* v. *Laguer*, 410 Mass. 89, 97–98, 571 N. E. 2d 371, 376 (1991); *State* v. *Callender*, 297 N. W. 2d 744, 746 (Minn. 1980); *Fleshner* v. *Pepose Vision Inst., P. C.*, 304 S. W. 3d 81, 87–90 (Mo.

2010); *State* v. *Levitt*, 36 N. J. 266, 271–273, 176 A. 2d 465, 467–468 (1961); *People* v. *Rukaj*, 123 App. Div. 2d 277, 280–281, 506 N. Y. S. 2d 677, 679–680 (1986); *State* v. *Hidanovic*, 2008 ND 66, ¶¶21–26, 747 N. W. 2d 463, 472–474; *State* v. *Brown*, 62 A. 3d 1099, 1110 (R. I. 2013); *State* v. *Hunter*, 320 S. C. 85, 88, 463 S. E. 2d 314, 316 (1995); *Seattle* v. *Jackson*, 70 Wash. 2d 733, 738, 425 P. 2d 385, 389 (1967); *After Hour Welding, Inc.* v. *Laneil Management Co.*, 108 Wis. 2d 734, 739–740, 324 N. W. 2d 686, 690 (1982).

SUPREME COURT OF THE UNITED STATES

No. 15–606

MIGUEL ANGEL PENA-RODRIGUEZ, PETITIONER *v.* COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

[March 6, 2017]

JUSTICE THOMAS, dissenting.

The Court today holds that the Sixth Amendment requires the States to provide a criminal defendant the opportunity to impeach a jury's guilty verdict with juror testimony about a juror's alleged racial bias, notwithstanding a state procedural rule forbidding such testimony. I agree with JUSTICE ALITO that the Court's decision is incompatible with the text of the Amendment it purports to interpret and with our precedents. I write separately to explain that the Court's holding also cannot be squared with the original understanding of the Sixth or Fourteenth Amendments.

I

The Sixth Amendment's protection of the right, "[i]n all criminal prosecutions," to a "trial, by an impartial jury," is limited to the protections that existed at common law when the Amendment was ratified. See, *e.g., Apprendi* v. *New Jersey*, 530 U. S. 466, 500, and n. 1 (2000) (THOMAS, J., concurring); 3 J. Story, Commentaries on the Constitution of the United States §1773, pp. 652–653 (1833) (Story) (explaining that "the trial by jury in criminal cases" protected by the Constitution is the same "great privilege" that was "a part of that admirable common law" of England); cf. 5 St. G. Tucker, Blackstone's Commentaries 349,

n. 2 (1803). It is therefore "entirely proper to look to the common law" to ascertain whether the Sixth Amendment requires the result the Court today reaches. *Apprendi*, *supra,* at 500, n. 1.

The Sixth Amendment's specific guarantee of impartiality incorporates the common-law understanding of that term. See, *e.g.,* 3 W. Blackstone, Commentaries on the Laws of England 365 (1769) (Blackstone) (describing English trials as "impartially just" because of their "caution against all partiality and bias" in the jury). The common law required a juror to have "freedome of mind" and to be "indifferent as hee stands unsworne." 1 E. Coke, First Part of the Institutes of the Laws of England §234, p. 155a (16th ed. 1809); accord, 3 M. Bacon, A New Abridgment of the Law 258 (3d ed. 1768); cf. T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 319 (1868) ("The jury must be indifferent between the prisoner and the commonwealth"). Impartial jurors could "have no interest of their own affected, and no personal bias, or pre-possession, in favor [of] or against either party." *Pettis* v. *Warren*, 1 Kirby 426, 427 (Conn. Super. 1788).

II

The common-law right to a jury trial did not, however, guarantee a defendant the right to impeach a jury verdict with juror testimony about juror misconduct, including "a principal species of [juror] misbehaviour"—"notorious partiality." 3 Blackstone 388. Although partiality was a ground for setting aside a jury verdict, *ibid.,* the English common-law rule at the time the Sixth Amendment was ratified did not allow jurors to supply evidence of that misconduct. In 1770, Lord Mansfield refused to receive a juror's affidavit to impeach a verdict, declaring that such an affidavit "can't be read." *Rex* v. *Almon*, 5 Burr. 2687,

98 Eng. Rep. 411 (K. B.). And in 1785, Lord Mansfield solidified the doctrine, holding that "[t]he Court [could not] receive such an affidavit from any of the jurymen" to prove that the jury had cast lots to reach a verdict. *Vaise* v. *Delaval*, 1 T. R. 11, 99 Eng. Rep. 944 (K. B.).[1]

At the time of the founding, the States took mixed approaches to this issue. See *Cluggage* v. *Swan*, 4 Binn. 150, 156 (Pa. 1811) (opinion of Yeates, J.) ("The opinions of *American* judges . . . have greatly differed on the point in question"); *Bishop* v. *Georgia*, 9 Ga. 121, 126 (1850) (describing the common law in 1776 on this question as "in a *transition* state"). Many States followed Lord Mansfield's no-impeachment rule and refused to receive juror affidavits. See, *e.g., Brewster* v. *Thompson*, 1 N. J. L. 32 (1790) (*per curiam*); *Robbins* v. *Windover*, 2 Tyl. 11, 14 (Vt. 1802); *Taylor* v. *Giger*, 3 Ky. 586, 597–598 (1808); *Price* v. *McIlvain*, 2 Tread. 503, 504 (S. C. 1815); *Tyler* v. *Stevens*, 4 N. H. 116, 117 (1827); 1 Z. Swift, A Digest of the Laws of the State of Connecticut 775 (1822) ("In England, and in the courts of the United States, jurors are not permitted to be witnesses respecting the misconduct of the jury . . . and this is, most unquestionably, the correct principle"). Some States, however, permitted juror affidavits about juror misconduct. See, *e.g., Crawford* v. *State*, 10 Tenn. 60, 68 (1821); *Cochran* v. *Street*, 1 Va. 79, 81 (1792). And others initially permitted such evidence but quickly reversed course. Compare, *e.g., Smith* v. *Cheetham*, 3 Cai. R. 57,

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[1] Prior to 1770, it appears that juror affidavits were sometimes received to impeach a verdict on the ground of juror misbehavior, although only "with great caution." *McDonald* v. *Pless*, 238 U. S. 264, 268 (1915); see, *e.g., Dent* v. *The Hundred of Hertford*, 2 Salk. 645, 91 Eng. Rep. 546 (K. B. 1696); *Philips* v. *Fowler*, Barnes. 441, 94 Eng. Rep. 994 (K. B. 1735). But "previous to our Revolution, and at least as early as 1770, the doctrine in England was distinctly ruled the other way, and has so stood ever since." 3 T. Waterman, A Treatise on the Principles of Law and Equity Which Govern Courts in the Granting of New Trials in Cases Civil and Criminal 1429 (1855).

59–60 (N. Y. 1805) (opinion of Livingston, J.) (permitting juror testimony), with *Dana* v. *Tucker*, 4 Johns. 487, 488–489 (N. Y. 1809) (*per curiam*) (overturning *Cheetham*); compare also *Bradley's Lessee* v. *Bradley*, 4 Dall. 112 (Pa. 1792) (permitting juror affidavits), with, *e.g., Cluggage*, *supra,* at 156–158 (opinion of Yeates, J.) (explaining that *Bradley* was incorrectly reported and rejecting affidavits); compare also *Talmadge* v. *Northrop*, 1 Root 522 (Conn. 1793) (admitting juror testimony), with *State* v. *Freeman*, 5 Conn. 348, 350–352 (1824) ("The opinion of almost the whole legal world is adverse to the reception of the testimony in question; and, in my opinion, on invincible foundations").

By the time the Fourteenth Amendment was ratified, Lord Mansfield's no-impeachment rule had become firmly entrenched in American law. See Lettow, New Trial for Verdict Against Law: Judge-Jury Relations in Early-Nineteenth Century America, 71 Notre Dame L. Rev. 505, 536 (1996) ("[O]pponents of juror affidavits had largely won out by the middle of the century"); 8 J. Wigmore, Evidence in Trials at Common Law §2352, p. 697 (J. McNaughton rev. 1961) (Wigmore) (Lord Mansfield's rule "came to receive in the United States an adherence almost unquestioned"); J. Proffatt, A Treatise on Trial by Jury §408, p. 467 (1877) ("It is a well established rule of law that no affidavit shall be received from a juror to impeach his verdict"). The vast majority of States adopted the no-impeachment rule as a matter of common law. See, *e.g., Bull* v. *Commonwealth*, 55 Va. 613, 627–628 (1857) ("[T]he practice appears to be now generally settled, to reject the testimony of jurors when offered to impeach their verdict. The cases on the subject are too numerous to be cited"); *Tucker* v. *Town Council of South Kingstown*, 5 R. I. 558, 560 (1859) (collecting cases); *State* v. *Coupenhaver*, 39 Mo. 430 (1867) ("The law is well settled that a traverse juror cannot be a witness to prove misbehavior in the jury in

regard to their verdict"); *Peck* v. *Brewer*, 48 Ill. 54, 63 (1868) ("So far back as . . . 1823, the doctrine was held that the affidavits of jurors cannot be heard to impeach their verdict"); *Heffron* v. *Gallupe*, 55 Me. 563, 566 (1868) (ruling inadmissible "depositions of . . . jurors as to what transpired in the jury room"); *Withers* v. *Fiscus*, 40 Ind. 131, 131–132 (1872) ("In the United States it seems to be settled, notwithstanding a few adjudications to the contrary . . . , that such affidavits cannot be received").[2]

The Court today acknowledges that the States "adopted the Mansfield rule as a matter of common law," *ante,* at 6, but ascribes no significance to that fact. I would hold that it is dispositive. Our common-law history does not establish that—in either 1791 (when the Sixth Amendment was ratified) or 1868 (when the Fourteenth Amendment was ratified)—a defendant had the right to impeach a verdict with juror testimony of juror misconduct. In fact, it strongly suggests that such evidence was prohibited. In the absence of a definitive common-law tradition permitting impeachment by juror testimony, we have no basis to invoke a constitutional provision that merely "follow[s] out the established course of the common law in all trials for crimes," 3 Story §1785, at 662, to overturn Colorado's decision to preserve the no-impeachment rule, cf. *Boumediene* v. *Bush*, 553 U. S. 723, 832–833 (2008) (Scalia, J., dissenting).

* * *

Perhaps good reasons exist to curtail or abandon the no-impeachment rule. Some States have done so, see Appendix to majority opinion, *ante*, and others have not. Ulti-

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[2] Although two States declined to follow the rule in the mid-19th century, see *Wright* v. *Illinois & Miss. Tel. Co.*, 20 Iowa 195, 210 (1866); *Perry* v. *Bailey*, 12 Kan. 539, 544–545 (1874), "most of the state courts" had already "committed themselves upon the subject," 8 Wigmore §2354, at 702.

mately, that question is not for us to decide. It should be left to the political process described by JUSTICE ALITO. See *post,* at 5–7 (dissenting opinion). In its attempt to stimulate a "thoughtful, rational dialogue" on race relations, *ante,* at 21, the Court today ends the political process and imposes a uniform, national rule. The Constitution does not require such a rule. Neither should we.

I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 15–606

MIGUEL ANGEL PENA-RODRIGUEZ, PETITIONER *v.* COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

[March 6, 2017]

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

Our legal system has many rules that restrict the admission of evidence of statements made under circumstances in which confidentiality is thought to be essential. Statements made to an attorney in obtaining legal advice, statements to a treating physician, and statements made to a spouse or member of the clergy are familiar examples. See *Trammel* v. *United States*, 445 U. S. 40, 51 (1980). Even if a criminal defendant whose constitutional rights are at stake has a critical need to obtain and introduce evidence of such statements, long-established rules stand in the way. The goal of avoiding interference with confidential communications of great value has long been thought to justify the loss of important evidence and the effect on our justice system that this loss entails.

The present case concerns a rule like those just mentioned, namely, the age-old rule against attempting to overturn or "impeach" a jury's verdict by offering statements made by jurors during the course of deliberations. For centuries, it has been the judgment of experienced judges, trial attorneys, scholars, and lawmakers that allowing jurors to testify after a trial about what took place in the jury room would undermine the system of trial by jury that is integral to our legal system.

Juries occupy a unique place in our justice system. The other participants in a trial—the presiding judge, the attorneys, the witnesses—function in an arena governed by strict rules of law. Their every word is recorded and may be closely scrutinized for missteps.

When jurors retire to deliberate, however, they enter a space that is not regulated in the same way. Jurors are ordinary people. They are expected to speak, debate, argue, and make decisions the way ordinary people do in their daily lives. Our Constitution places great value on this way of thinking, speaking, and deciding. The jury trial right protects parties in court cases from being judged by a special class of trained professionals who do not speak the language of ordinary people and may not understand or appreciate the way ordinary people live their lives. To protect that right, the door to the jury room has been locked, and the confidentiality of jury deliberations has been closely guarded.

Today, with the admirable intention of providing justice for one criminal defendant, the Court not only pries open the door; it rules that respecting the privacy of the jury room, as our legal system has done for centuries, violates the Constitution. This is a startling development, and although the Court tries to limit the degree of intrusion, it is doubtful that there are principled grounds for preventing the expansion of today's holding.

The Court justifies its decision on the ground that the nature of the confidential communication at issue in this particular case—a clear expression of what the Court terms racial bias[1]—is uniquely harmful to our criminal

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[1]The bias at issue in this case was a "bias against Mexican men." App. 160. This might be described as bias based on national origin or ethnicity. Cf. *Hernandez* v. *New York*, 500 U. S. 352, 355 (1991) (plurality opinion); *Hernandez* v. *Texas*, 347 U. S. 475, 479 (1954). However, no party has suggested that these distinctions make a substantive

justice system. And the Court is surely correct that even a tincture of racial bias can inflict great damage on that system, which is dependent on the public's trust. But until today, the argument that the Court now finds convincing has not been thought to be sufficient to overcome confidentiality rules like the one at issue here.

Suppose that a prosecution witness gives devastating but false testimony against a defendant, and suppose that the witness's motivation is racial bias. Suppose that the witness admits this to his attorney, his spouse, and a member of the clergy. Suppose that the defendant, threatened with conviction for a serious crime and a lengthy term of imprisonment, seeks to compel the attorney, the spouse, or the member of the clergy to testify about the witness's admissions. Even though the constitutional rights of the defendant hang in the balance, the defendant's efforts to obtain the testimony would fail. The Court provides no good reason why the result in this case should not be the same.

I

Rules barring the admission of juror testimony to impeach a verdict (so-called "no-impeachment rules") have a long history. Indeed, they pre-date the ratification of the Constitution. They are typically traced back to *Vaise* v. *Delaval*, 1 T. R. 11, 99 Eng. Rep. 944 (K. B. 1785), in which Lord Mansfield declined to consider an affidavit from two jurors who claimed that the jury had reached its verdict by lot. See *Warger* v. *Shauers*, 574 U. S. ___, ___ (2014) (slip op., at 4). Lord Mansfield's approach "soon took root in the United States," *ibid.,* and "[b]y the beginning of [the 20th] century, if not earlier, the near-universal and firmly established common-law rule in the

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difference in this case.

United States flatly prohibited the admission of juror testimony to impeach a jury verdict," *Tanner* v. *United States*, 483 U. S. 107, 117 (1987); see 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence §6071, p. 431 (2d ed. 2007) (Wright & Gold) (noting that the Mansfield approach "came to be accepted in almost all states").

In *McDonald* v. *Pless*, 238 U. S. 264 (1915), this Court adopted a strict no-impeachment rule for cases in federal court. *McDonald* involved allegations that the jury had entered a quotient verdict—that is, that it had calculated a damages award by taking the average of the jurors' suggestions. *Id.*, at 265–266. The Court held that evidence of this misconduct could not be used. *Id.,* at 269. It applied what it said was "unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict." *Ibid.* The Court recognized that the defendant had a powerful interest in demonstrating that the jury had "adopted an arbitrary and unjust method in arriving at their verdict." *Id.*, at 267. "But," the Court warned, "let it once be established that verdicts . . . can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding." *Ibid.* This would lead to "harass[ment]" of jurors and "the destruction of all frankness and freedom of discussion and conference." *Id.*, at 267–268. Ultimately, even though the no-impeachment rule "may often exclude the only possible evidence of misconduct," relaxing the rule "would open the door to the most pernicious arts and tampering with jurors." *Id.*, at 268 (internal quotation marks omitted).

The firm no-impeachment approach taken in *McDonald* came to be known as "the federal rule." This approach categorically bars testimony about jury deliberations, except where it is offered to demonstrate that the jury was

subjected to an extraneous influence (for example, an attempt to bribe a juror). *Warger*, *supra*, at ___ (slip op., at 5); *Tanner*, *supra*, at 117;[2] see 27 Wright & Gold §6071, at 432–433.

Some jurisdictions, notably Iowa, adopted a more permissive rule. Under the Iowa rule, jurors were generally permitted to testify about any subject except their "subjective intentions and thought processes in reaching a verdict." *Warger*, *supra*, at ___ (slip op., at 4). Accordingly, the Iowa rule allowed jurors to "testify as to events or conditions which might have improperly influenced the verdict, even if these took place during deliberations within the jury room." 27 Wright & Gold §6071, at 432.

Debate between proponents of the federal rule and the Iowa rule emerged during the framing and adoption of Federal Rule of Evidence 606(b). Both sides had their supporters. The contending arguments were heard and considered, and in the end the strict federal approach was retained.

An early draft of the Advisory Committee on the Federal Rules of Evidence included a version of the Iowa rule, 51 F. R. D. 315, 387–388 (1971). That draft was forcefully criticized, however,[3] and the Committee ultimately pro-

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[2] As this Court has explained, the extraneous influence exception "do[es] not detract from, but rather harmonize[s] with, the weighty government interest in insulating the jury's deliberative process." *Tanner*, 483 U. S., at 120. The extraneous influence exception, like the no-impeachment rule itself, is directed at protecting jury deliberations against unwarranted interference. *Ibid.*

[3] In particular, the Justice Department observed that "[s]trong policy considerations continue to support" the federal approach and that "[r]ecent experience has shown that the danger of harassment of jurors by unsuccessful litigants warrants a rule which imposes strict limitations on the instances in which jurors may be questioned about their verdict." Letter from R. Kliendienst, Deputy Attorney General, to Judge A. Maris (Aug. 9, 1971), 117 Cong. Rec. 33648, 33655 (1971).

duced a revised draft that retained the well-established federal approach. *Tanner*, *supra*, at 122; see Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates 73 (Oct. 1971). Expressly repudiating the Iowa rule, the new draft provided that jurors generally could not testify "as to any matter or statement occurring during the course of the jury's deliberations." *Ibid.* This new version was approved by the Judicial Conference and sent to this Court, which adopted the rule and referred it to Congress. 56 F. R. D. 183, 265–266 (1972).

Initially, the House rejected this Court's version of Rule 606(b) and instead reverted to the earlier (and narrower) Advisory Committee draft. *Tanner*, *supra*, at 123; see H. R. Rep. No. 93–650, pp. 9–10 (1973) (criticizing the Supreme Court draft for preventing jurors from testifying about "quotient verdict[s]" and other "irregularities which occurred in the jury room"). In the Senate, however, the Judiciary Committee favored this Court's rule. The Committee Report observed that the House draft broke with "long-accepted Federal law" by allowing verdicts to be "challenge[d] on the basis of what happened during the jury's internal deliberations." S. Rep. No. 93–1277, p. 13 (1974) (S. Rep.). In the view of the Senate Committee, the House rule would have "permit[ted] the harassment of former jurors" as well as "the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors." *Id.*,

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And Senator McClellan, an influential member of the Senate Judiciary Committee, insisted that the "mischief in this Rule ought to be plain for all to see" and that it would be impossible "to conduct trials, particularly criminal prosecutions, as we know them today, if every verdict were followed by a post-trial hearing into the conduct of the juror's deliberations." Letter from Sen. J. McClellan to Judge A. Maris (Aug. 12, 1971), *id.,* at 33642, 33645.

at 14. This result would have undermined the finality of verdicts, violated "common fairness," and prevented jurors from "function[ing] effectively." *Ibid.* The Senate rejected the House version of the rule and returned to the Court's rule. A Conference Committee adopted the Senate version, see H. R. Conf. Rep. No. 93–1597, p. 8 (1974), and this version was passed by both Houses and was signed into law by the President.

As this summary shows, the process that culminated in the adoption of Federal Rule of Evidence 606(b) was the epitome of reasoned democratic rulemaking. The "distinguished, Supreme Court-appointed" members of the Advisory Committee went through a 7-year drafting process, "produced two well-circulated drafts," and "considered numerous comments from persons involved in nearly every area of court-related law." Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Geo. L. J. 125 (1973). The work of the Committee was considered and approved by the experienced appellate and trial judges serving on the Judicial Conference and by our predecessors on this Court. After that, the matter went to Congress, which "specifically understood, considered, and rejected a version of [the rule] that would have allowed jurors to testify on juror conduct during deliberations." *Tanner*, 483 U. S., at 125. The judgment of all these participants in the process, which was informed by their assessment of an empirical issue, *i.e.*, the effect that the competing Iowa rule would have had on the jury system, is entitled to great respect.

Colorado considered this same question, made the same judgment as the participants in the federal process, and adopted a very similar rule. In doing so, it joined the overwhelming majority of States. *Ante,* at 9. In the great majority of jurisdictions, strong no-impeachment rules continue to be "viewed as both promoting the finality of verdicts and insulating the jury from outside influences."

Warger, 574 U. S., at ___ (slip op., at 4).

II

A

Recognizing the importance of Rule 606(b), this Court has twice rebuffed efforts to create a Sixth Amendment exception—first in *Tanner* and then, just two Terms ago, in *Warger*.

The *Tanner* petitioners were convicted of committing mail fraud and conspiring to defraud the United States. 483 U. S., at 109–110, 112–113. After the trial, two jurors came forward with disturbing stories of juror misconduct. One claimed that several jurors "consumed alcohol during lunch breaks . . . causing them to sleep through the afternoons." *Id.*, at 113. The second added that jurors also smoked marijuana and ingested cocaine during the trial. *Id.*, at 115–116. This Court held that evidence of this bacchanalia could properly be excluded under Rule 606(b). *Id.*, at 127.

The Court noted that "[s]ubstantial policy considerations support the common-law rule against the admission of jury testimony to impeach a verdict." *Id.,* at 119. While there is "little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior," the Court observed, it is "not at all clear . . . that the jury system could survive such efforts to perfect it." *Id.*, at 120. Allowing such post-verdict inquiries would "seriously disrupt the finality of the process." *Ibid.* It would also undermine "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." *Id.*, at 120–121.

The *Tanner* petitioners, of course, had a Sixth Amendment right "to 'a tribunal both impartial and mentally competent to afford a hearing.'" *Id.*, at 126 (quoting *Jor-*

dan v. *Massachusetts*, 225 U. S. 167, 176 (1912)). The question, however, was whether they also had a right to an evidentiary hearing featuring "one particular kind of evidence inadmissible under the Federal Rules." 483 U. S., at 126–127. Turning to that question, the Court noted again that "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Id.*, at 127. By contrast, "[p]etitioners' Sixth Amendment interests in an unimpaired jury . . . [were] protected by several aspects of the trial process." *Ibid.*

The Court identified four mechanisms that protect defendants' Sixth Amendment rights. First, jurors can be "examined during *voir dire*." *Ibid.* Second, "during the trial the jury is observable by the court, by counsel, and by court personnel." *Ibid.* Third, "jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict." *Ibid.* And fourth, "after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct." *Ibid.* These "other sources of protection of petitioners' right to a competent jury" convinced the Court that the juror testimony was properly excluded. *Ibid.*

Warger involved a negligence suit arising from a motorcycle crash. 574 U. S., at ___ (slip op., at 1). During *voir dire*, the individual who eventually became the jury's foreperson said that she could decide the case fairly and impartially. *Id.,* at ___ (slip op., at 2). After the jury returned a verdict in favor of the defendant, one of the jurors came forward with evidence that called into question the truthfulness of the foreperson's responses during *voir dire*. According to this juror, the foreperson revealed during the deliberations that her daughter had once caused a deadly car crash, and the foreperson expressed the belief that a lawsuit would have ruined her daughter's life. *Ibid.*

In seeking to use this testimony to overturn the jury's verdict, the plaintiff's primary contention was that Rule 606(b) does not apply to evidence concerning a juror's alleged misrepresentations during *voir dire*. If otherwise interpreted, the plaintiff maintained, the rule would threaten his right to trial by an impartial jury.[4] The Court disagreed, in part because "any claim that Rule 606(b) is unconstitutional in circumstances such as these is foreclosed by our decision in *Tanner*." *Id.,* at ___ (slip op., at 10). The Court explained that "[e]ven if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by" two of the other *Tanner* safeguards: pre-verdict reports by the jurors and non-juror evidence. 574 U. S., at ___ (slip op., at 10).

Tanner and *Warger* fit neatly into this Court's broader jurisprudence concerning the constitutionality of evidence rules. As the Court has explained, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Holmes* v. *South Carolina*, 547 U. S. 319, 324 (2006) (internal quotation marks and alteration omitted). Thus, evidence rules of this sort have been invalidated only if they "serve no legitimate purpose or . . . are disproportionate to the ends that they are asserted to promote." *Id.,* at 326. *Tanner* and *Warger* recognized that Rule 606(b) serves vital purposes and does not impose a disproportionate burden on the jury trial right.

Today, for the first time, the Court creates a constitutional exception to no-impeachment rules. Specifically, the Court holds that no-impeachment rules violate the Sixth Amendment to the extent that they preclude courts

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[4] Although *Warger* was a civil case, we wrote that "[t]he Constitution guarantees both criminal and civil litigants a right to an impartial jury." 574 U. S., at ___ (slip op., at 9).

from considering evidence of a juror's racially biased comments. *Ante,* at 17. The Court attempts to distinguish *Tanner* and *Warger,* but its efforts fail.

Tanner and *Warger* rested on two basic propositions. First, no-impeachment rules advance crucial interests. Second, the right to trial by an impartial jury is adequately protected by mechanisms other than the use of juror testimony regarding jury deliberations. The first of these propositions applies regardless of the nature of the juror misconduct, and the Court does not argue otherwise. Instead, it contends that, in cases involving racially biased jurors, the *Tanner* safeguards are less effective and the defendant's Sixth Amendment interests are more profound. Neither argument is persuasive.

B

As noted above, *Tanner* identified four "aspects of the trial process" that protect a defendant's Sixth Amendment rights: (1) *voir dire*; (2) observation by the court, counsel, and court personnel; (3) pre-verdict reports by the jurors; and (4) non-juror evidence. 483 U. S., at 127.[5] Although the Court insists that that these mechanisms "may be compromised" in cases involving allegations of racial bias, it addresses only two of them and fails to make a sustained argument about either. *Ante,* at 16.

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First, the Court contends that the effectiveness of *voir dire* is questionable in cases involving racial bias because

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[5]The majority opinion in this case identifies a fifth mechanism: jury instructions. It observes that, by explaining the jurors' responsibilities, appropriate jury instructions can promote "[p]robing and thoughtful deliberation," which in turn "improves the likelihood that other jurors can confront the flawed nature of reasoning that is prompted or influenced by improper biases." *Ante,* at 20–21. This mechanism, like those listed in *Tanner*, can help to prevent bias from infecting a verdict.

pointed questioning about racial attitudes may highlight racial issues and thereby exacerbate prejudice. *Ibid.* It is far from clear, however, that careful *voir dire* cannot surmount this problem. Lawyers may use questionnaires or individual questioning of prospective jurors[6] in order to elicit frank answers that a juror might be reluctant to voice in the presence of other prospective jurors.[7] Moreover, practice guides are replete with advice on conducting effective *voir dire* on the subject of race. They outline a variety of subtle and nuanced approaches that avoid pointed questions.[8] And of course, if an attorney is con-

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[6] Both of those techniques were used in this case for other purposes. App. 13–14; Tr. 56–78 (Feb. 23, 2010, morning session).

[7] See *People* v. *Harlan*, 8 P. 3d 448, 500 (Colo. 2000) ("The trial court took precautions at the outset of the trial to foreclose the injection of improper racial considerations by including questions concerning racial issues in the jury questionnaire"); *Brewer* v. *Marshall,* 119 F. 3d 993, 996 (CA1 1997) ("The judge asked each juror, out of the presence of other jurors, whether they had any bias or prejudice for or against black persons or persons of Hispanic origin"); 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure §22.3(a), p. 92 (4th ed. 2015) (noting that "[j]udges commonly allow jurors to approach the bench and discuss sensitive matters there" and are also free to conduct "in chambers discussions").

[8] See, *e.g.*, J. Gobert, E. Kreitzberg, & C. Rose, Jury Selection: The Law, Art, and Science of Selecting a Jury §7:41, pp. 357–358 (3d ed. 2014) (explaining that "the issue should be approached more indirectly" and suggesting the use of "[o]pen-ended questions" on subjects like "the composition of the neighborhood in which the juror lives, the juror's relationship with co-workers or neighbors of different races, or the juror's past experiences with persons of other races"); W. Jordan, Jury Selection §8.11, p. 237 (1980) (explaining that "the whole matter of prejudice" should be approached "delicately and cautiously" and giving an example of an indirect question that avoids the word "prejudice"); R. Wenke, The Art of Selecting a Jury 67 (1979) (discussing questions that could identify biased jurors when "your client is a member of a minority group"); *id.*, at 66 (suggesting that instead of "asking a juror if he is 'prejudiced'" the attorney should "inquire about his 'feeling,' 'belief' or 'opinion'"); 2 National Jury Project, Inc., Jurywork: Systematic Tech-

cerned that a juror is concealing bias, a peremptory strike may be used.[9]

The suggestion that *voir dire* is ineffective in unearthing bias runs counter to decisions of this Court holding that *voir dire* on the subject of race is constitutionally required in some cases, mandated as a matter of federal supervisory authority in others, and typically advisable in any case

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niques §17.23 (E. Krauss ed., 2d ed. 2010) (listing sample questions about racial prejudice); A. Grine & E. Coward, Raising Issues of Race in North Carolina Criminal Cases, p. 8–14 (2014) (suggesting that attorneys "share a brief example about a judgment shaped by a racial stereotype" to make it easier for jurors to share their own biased views), http://defendermanuals.sog.unc.edu/race/8-addressing-race-trial (as last visited Mar. 3, 2017); *id*., at 8–15 to 8–17 (suggesting additional strategies and providing sample questions); T. Mauet, Trial Techniques 44 (8th ed. 2010) (suggesting that "likely beliefs and attitudes are more accurately learned through indirection"); J. Lieberman & B. Sales, Scientific Jury Selection 114–115 (2007) (discussing research suggesting that "participants were more likely to admit they were unable to abide by legal due process guarantees when asked open-ended questions that did not direct their responses").

[9]To the extent race does become salient during *voir dire*, there is social science research suggesting that this may actually combat rather than reinforce the jurors' biases. See, *e.g.*, Lee, A New Approach to *Voir Dire* on Racial Bias, 5 U. C. Irvine L. Rev. 843, 861 (2015) ("A wealth of fairly recent empirical research has shown that when race is made salient either through pretrial publicity, voir dire questioning of prospective jurors, opening and closing arguments, or witness testimony, White jurors are more likely to treat similarly situated Black and White defendants the same way"). See also Sommers & Ellsworth, White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom, 7 Psychology, Pub. Pol'y, & L. 201, 222 (2001); Sommers & Ellsworth, How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research, 78 Chi.-Kent L. Rev. 997, 1013–1014, 1027 (2003); Schuller, Kazoleas, & Kawakami, The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom, 33 Law & Human Behavior 320, 326 (2009); Cohn, Bucolo, Pride, & Somers, Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes, 39 J. Applied Soc. Psychology 1953, 1964–1965 (2009).

if a defendant requests it. See *Turner* v. *Murray*, 476 U. S. 28, 36–37 (1986); *Rosales-Lopez* v. *United States*, 451 U. S. 182, 192 (1981) (plurality opinion); *Ristaino* v. *Ross*, 424 U. S. 589, 597, n. 9 (1976). If *voir dire* were not useful in identifying racial prejudice, those decisions would be pointless. Cf. *Turner*, *supra*, at 36 (plurality opinion) (noting "the ease with which [the] risk [of racial bias] could have been minimized" through *voir dire*). Even the majority recognizes the "advantages of careful *voir dire*" as a "proces[s] designed to prevent racial bias in jury deliberations." *Ante,* at 20. And reported decisions substantiate that *voir dire* can be effective in this regard. *E.g.*, *Brewer* v. *Marshall,* 119 F. 3d 993, 995–996 (CA1 1997); *United States* v. *Hasting*, 739 F. 2d 1269, 1271 (CA7 1984); *People* v. *Harlan*, 8 P. 3d 448, 500 (Colo. 2000); see Brief for Respondent 23–24, n. 7 (listing additional cases). Thus, while *voir dire* is not a magic cure, there are good reasons to think that it is a valuable tool.

In any event, the critical point for present purposes is that the effectiveness of *voir dire* is a debatable empirical proposition. Its assessment should be addressed in the process of developing federal and state evidence rules. Federal and state rulemakers can try a variety of approaches, and they can make changes in response to the insights provided by experience and research. The approach taken by today's majority—imposing a federal constitutional rule on the entire country—prevents experimentation and makes change exceedingly hard.[10]

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[10] It is worth noting that, even if *voir dire* were entirely ineffective at detecting racial bias (a proposition no one defends), that still would not suffice to distinguish this case from *Warger* v. *Shauers*, 574 U. S. ___ (2014). After all, the allegation in *Warger* was that the foreperson had entirely circumvented *voir dire* by lying in order to shield her bias. The Court, nevertheless, concluded that even where "jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured"

The majority also argues—even more cursorily—that "racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." *Ante,* at 16. This is so, we are told, because it is difficult to "call [another juror] a bigot." *Ibid.*

Since the Court's decision mandates the admission of the testimony of one juror about a statement made by another juror during deliberations, what the Court must mean in making this argument is that jurors are less willing to report biased comments by fellow jurors prior to the beginning of deliberations (while they are still sitting with the biased juror) than they are after the verdict is announced and the jurors have gone home. But this is also a questionable empirical assessment, and the Court's seat-of-the-pants judgment is no better than that of those with the responsibility of drafting and adopting federal and state evidence rules. There is no question that jurors *do* report biased comments made by fellow jurors prior to the beginning of deliberations. See, *e.g., United States* v. *McClinton*, 135 F. 3d 1178, 1184–1185 (CA7 1998); *United States* v. *Heller*, 785 F. 2d 1524, 1525–1529 (CA11 1986); *Tavares* v. *Holbrook*, 779 F. 2d 1, 1–3 (CA1 1985) (Breyer, J.); see Brief for Respondent 31–32, n. 10; Brief for United States as *Amicus Curiae* 31. And the Court marshals no evidence that such pre-deliberation reporting is rarer than the post-verdict variety.

Even if there is something to the distinction that the Court makes between pre- and post-verdict reporting, it is debatable whether the difference is significant enough to merit different treatment. This is especially so because post-verdict reporting is both more disruptive and may be the result of extraneous influences. A juror who is ini-

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through other means. *Id.*, at ___ (slip op., at 10).

tially in the minority but is ultimately persuaded by other jurors may have second thoughts after the verdict is announced and may be angry with others on the panel who pressed for unanimity. In addition, if a verdict is unpopular with a particular juror's family, friends, employer, coworkers, or neighbors, the juror may regret his or her vote and may feel pressured to rectify what the jury has done.

In short, the Court provides no good reason to depart from the calculus made in *Tanner* and *Warger*. Indeed, the majority itself uses hedged language and appears to recognize that this "pragmatic" argument is something of a makeweight. *Ante,* at 16–17 (noting that the argument is "not dispositive"); *ante,* at 16 (stating that the operation of the safeguards "may be compromised, or they may prove insufficient").

III

A

The real thrust of the majority opinion is that the Constitution is less tolerant of racial bias than other forms of juror misconduct, but it is hard to square this argument with the nature of the Sixth Amendment right on which petitioner's argument and the Court's holding are based. What the Sixth Amendment protects is the right to an "impartial jury." Nothing in the text or history of the Amendment or in the inherent nature of the jury trial right suggests that the extent of the protection provided by the Amendment depends on the nature of a jury's partiality or bias. As the Colorado Supreme Court aptly put it, it is hard to "discern a dividing line between different *types* of juror bias or misconduct, whereby one form of partiality would implicate a party's Sixth Amendment right while another would not." 350 P. 3d 287, 293

(2015).[11]

Nor has the Court found any decision of this Court suggesting that the Sixth Amendment recognizes some sort of hierarchy of partiality or bias. The Court points to a line of cases holding that, in some narrow circumstances, the Constitution requires trial courts to conduct *voir dire* on the subject of race. Those decisions, however, were not based on a ranking of types of partiality but on the Court's conclusion that in certain cases racial bias was especially likely. See *Turner,* 476 U. S., at 38, n. 12 (plurality opinion) (requiring *voir dire* on the subject of race where there is "a particularly compelling need to inquire into racial prejudice" because of a qualitatively higher "risk of racial bias"); *Ristaino*, 424 U. S., at 596 (explaining that the requirement applies only if there is a "constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be [impartial]").[12] Thus, this line of cases does not advance the majority's argument.

It is undoubtedly true that "racial bias implicates unique historical, constitutional, and institutional concerns." *Ante,* at 16. But it is hard to see what that has to do with the scope of an *individual criminal defendant's* Sixth Amendment right to be judged impartially. The Court's efforts to reconcile its decision with *McDonald*,

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[11] The majority's reliance on footnote 3 of *Warger*, *ante,* at 12–13, is unavailing. In that footnote, the Court noted that some "cases of juror bias" might be "so extreme" as to prompt the Court to "*consider* whether the usual safeguards are or are not sufficient to protect the integrity of the process." 574 U. S., at ___–___, n. 3 (slip op., at 10–11, n. 3) (emphasis added). Considering this question is very different from adopting a constitutionally based exception to long-established no-impeachment rules.

[12] In addition, those cases did not involve a challenge to a long-established evidence rule. As such, they offer little guidance in performing the analysis required by this case.

Tanner, and *Warger* illustrate the problem. The Court writes that the misconduct in those cases, while "troubling and unacceptable," was "anomalous." *Ante,* at 15. By contrast, racial bias, the Court says, is a "familiar and recurring evil" that causes "systemic injury to the administration of justice." *Ante,* at 15–16.

Imagine two cellmates serving lengthy prison terms. Both were convicted for homicides committed in unrelated barroom fights. At the trial of the first prisoner, a juror, during deliberations, expressed animosity toward the defendant because of his race. At the trial of the second prisoner, a juror, during deliberations, expressed animosity toward the defendant because he was wearing the jersey of a hated football team. In both cases, jurors come forward after the trial and reveal what the biased juror said in the jury room. The Court would say to the first prisoner: "You are entitled to introduce the jurors' testimony, because racial bias is damaging to our society." To the second, the Court would say: "Even if you did not have an impartial jury, you must stay in prison because sports rivalries are not a major societal issue."

This disparate treatment is unsupportable under the Sixth Amendment. If the Sixth Amendment requires the admission of juror testimony about statements or conduct during deliberations that show one type of juror partiality, then statements or conduct showing any type of partiality should be treated the same way.

B

Recasting this as an equal protection case would not provide a ground for limiting the holding to cases involving racial bias. At a minimum, cases involving bias based on any suspect classification—such as national origin[13] or

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[13] See *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 440

religion[14]—would merit equal treatment. So, I think, would bias based on sex, *United States* v. *Virginia*, 518 U. S. 515, 531 (1996), or the exercise of the First Amendment right to freedom of expression or association. See *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540, 545 (1983). Indeed, convicting a defendant on the basis of any irrational classification would violate the Equal Protection Clause.

Attempting to limit the damage worked by its decision, the Court says that only "clear" expressions of bias must be admitted, *ante*, at 17, but judging whether a statement is sufficiently "clear" will often not be easy. Suppose that the allegedly biased juror in this case never made reference to Peña-Rodriguez's race or national origin but said that he had a lot of experience with "this macho type" and knew that men of this kind felt that they could get their way with women. Suppose that other jurors testified that they were certain that "this macho type" was meant to refer to Mexican or Hispanic men. Many other similarly suggestive statements can easily be imagined, and under today's decision it will be difficult for judges to discern the dividing line between those that are "clear[ly]" based on racial or ethnic bias and those that are at least somewhat ambiguous.

IV

Today's decision—especially if it is expanded in the ways that seem likely—will invite the harms that no-impeachment rules were designed to prevent.

First, as the Court explained in *Tanner*, "postverdict scrutiny of juror conduct" will inhibit "full and frank dis-

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(1985).

[14] See, *e.g.*, *United States* v. *Armstrong*, 517 U. S. 456, 464 (1996); *Burlington Northern R. Co.* v. *Ford*, 504 U. S. 648, 651 (1992); *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976) (*per curiam*).

cussion in the jury room." 483 U. S., at 120–121; see also *McDonald*, 238 U. S., at 267–268 (warning that the use of juror testimony about misconduct during deliberations would "make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference"). Or, as the Senate Report put it: "[C]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation." S. Rep., at 14.

Today's ruling will also prompt losing parties and their friends, supporters, and attorneys to contact and seek to question jurors, and this pestering may erode citizens' willingness to serve on juries. Many jurisdictions now have rules that prohibit or restrict post-verdict contact with jurors, but whether those rules will survive today's decision is an open question—as is the effect of this decision on privilege rules such as those noted at the outset of this opinion.[15]

Where post-verdict approaches are permitted or occur,

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[15] The majority's emphasis on the unique harms of racial bias will not succeed at cabining the novel exception to no-impeachment rules, but it may succeed at putting other kinds of rules under threat. For example, the majority approvingly refers to the widespread rules limiting attorneys' contact with jurors. *Ante*, at 17–18. But under the reasoning of the majority opinion, it is not clear why such rules should be enforced when they come into conflict with a defendant's attempt to introduce evidence of racial bias. For instance, what will happen when a lawyer obtains clear evidence of racist statements by contacting jurors in violation of a local rule? (Something similar happened in *Tanner*. 483 U. S., at 126.) It remains to be seen whether rules of this type—or other rules which exclude probative evidence, such as evidentiary privileges—will be allowed to stand in the way of the "imperative to purge racial prejudice from the administration of justice." *Ante*, at 13.

there is almost certain to be an increase in harassment, arm-twisting, and outright coercion. See *McDonald, supra*, at 267; S. Rep., at 14 (explaining that a laxer rule "would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors"); 350 P. 3d, at 293. As one treatise explains, "[a] juror who reluctantly joined a verdict is likely to be sympathetic to overtures by the loser, and persuadable to the view that his own consent rested on false or impermissible considerations, and the truth will be hard to know." 3 C. Mueller & L. Kirkpatrick, Federal Evidence §6:16, p. 75 (4th ed. 2013).

The majority's approach will also undermine the finality of verdicts. "Public policy requires a finality to litigation." S. Rep., at 14. And accusations of juror bias—which may be "raised for the first time days, weeks, or months after the verdict"—can "seriously disrupt the finality of the process." *Tanner*, *supra*, at 120. This threatens to "degrad[e] the prominence of the trial itself" and to send the message that juror misconduct need not be dealt with promptly. *Engle* v. *Isaac*, 456 U. S. 107, 127 (1982). See H. R. Conf. Rep. No. 93–1597, at 8 ("The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations").

The Court itself acknowledges that strict no-impeachment rules "promot[e] full and vigorous discussion," protect jurors from "be[ing] harassed or annoyed by litigants seeking to challenge the verdict," and "giv[e] stability and finality to verdicts." *Ante,* at 9. By the majority's own logic, then, imposing exceptions on no-impeachment rules will tend to defeat full and vigorous discussion, expose jurors to harassment, and deprive verdicts of stability.

The Court's only response is that some jurisdictions already make an exception for racial bias, and the Court

detects no signs of "a loss of juror willingness to engage in searching and candid deliberations." *Ante,* at 19. One wonders what sort of outward signs the Court would expect to see if jurors in these jurisdictions do not speak as freely in the jury room as their counterparts in jurisdictions with strict no-impeachment rules. Gathering and assessing evidence regarding the quality of jury deliberations in different jurisdictions would be a daunting enterprise, and the Court offers no indication that anybody has undertaken that task.

In short, the majority barely bothers to engage with the policy issues implicated by no-impeachment rules. But even if it had carefully grappled with those issues, it still would have no basis for exalting its own judgment over that of the many expert policymakers who have endorsed broad no-impeachment rules.

V

The Court's decision is well-intentioned. It seeks to remedy a flaw in the jury trial system, but as this Court said some years ago, it is questionable whether our system of trial by jury can endure this attempt to perfect it. *Tanner*, 483 U. S., at 120.

I respectfully dissent.

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

NELSON *v.* COLORADO

CERTIORARI TO THE COLORADO SUPREME COURT

No. 15–1256. Argued January 9, 2017—Decided April 19, 2017*

Petitioner Shannon Nelson was convicted by a Colorado jury of two felonies and three misdemeanors arising from the alleged sexual and physical abuse of her four children. The trial court imposed a prison term of 20 years to life and ordered her to pay $8,192.50 in court costs, fees, and restitution. On appeal, Nelson's conviction was reversed for trial error, and on retrial, she was acquitted of all charges.

Petitioner Louis Alonzo Madden was convicted by a Colorado jury of attempting to patronize a prostituted child and attempted sexual assault. The trial court imposed an indeterminate prison sentence and ordered him to pay $4,413.00 in costs, fees, and restitution. After one of Madden's convictions was reversed on direct review and the other vacated on postconviction review, the State elected not to appeal or retry the case.

The Colorado Department of Corrections withheld $702.10 from Nelson's inmate account between her conviction and acquittal, and Madden paid the State $1,977.75 after his conviction. In both cases, the funds were allocated to costs, fees, and restitution. Once their convictions were invalidated, both petitioners moved for return of the funds. Nelson's trial court denied her motion outright, and Madden's postconviction court allowed a refund of costs and fees, but not restitution. The Colorado Court of Appeals concluded that both petitioners were entitled to seek refunds of all they had paid, but the Colorado Supreme Court reversed. It reasoned that Colorado's Compensation for Certain Exonerated Persons statute (Exoneration Act or Act), Colo. Rev. Stat. §§13–65–101, 13–65–102, 13–65–103, provided the exclusive authority for refunds and that, because nei-

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*Together with *Madden* v. *Colorado*, also on certiorari to the same court (see this Court's Rule 12.4).

Syllabus

ther Nelson nor Madden had filed a claim under that Act, the courts lacked authority to order refunds. The Colorado Supreme Court also held that there was no due process problem under the Act, which permits Colorado to retain conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence.

Held: The Exoneration Act's scheme does not comport with the Fourteenth Amendment's guarantee of due process. Pp. 5–11.

(a) The procedural due process inspection required by *Mathews* v. *Eldridge*, 424 U. S. 319, governs these cases. *Medina* v. *California*, 505 U. S. 437, controls when state procedural rules that are part of the criminal process are at issue. These cases, in contrast, concern the continuing deprivation of property after a conviction has been reversed or vacated, with no prospect of reprosecution. Pp. 5–6.

(b) The three considerations balanced under *Mathews*—the private interest affected; the risk of erroneous deprivation of that interest through the procedures used; and the governmental interest at stake—weigh decisively against Colorado's scheme. Pp. 6–10.

(1) Nelson and Madden have an obvious interest in regaining the money they paid to Colorado. The State may not retain these funds simply because Nelson's and Madden's convictions were in place when the funds were taken, for once those convictions were erased, the presumption of innocence was restored. See, *e.g.*, *Johnson* v. *Mississippi*, 486 U. S. 578, 585. And Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions. Pp. 6–8.

(2) Colorado's scheme creates an unacceptable risk of the erroneous deprivation of defendants' property. The Exoneration Act conditions refund on defendants' proof of innocence by clear and convincing evidence, but defendants in petitioners' position are presumed innocent. Moreover, the Act provides no remedy for assessments tied to invalid misdemeanor convictions. And when, as here, the recoupment amount sought is not large, the cost of mounting a claim under the Act and retaining counsel to pursue it would be prohibitive.

Colorado argues that an Act that provides sufficient process to compensate a defendant for the loss of her liberty must suffice to compensate a defendant for the lesser deprivation of money. But Nelson and Madden seek the return of their property, not compensation for its temporary deprivation. Just as restoration of liberty on reversal of a conviction is not compensation, neither is the return of money taken by the State on account of the conviction. Other procedures cited by Colorado—the need for probable cause to support criminal charges, the jury-trial right, and the State's burden to prove guilt beyond a reasonable doubt—do not address the risk faced by a

Syllabus

defendant whose conviction has been overturned that she will not recover funds taken from her based solely on a conviction no longer valid. Pp. 8–10.

(3) Colorado has no interest in withholding from Nelson and Madden money to which the State currently has zero claim of right. The State has identified no equitable considerations favoring its position, nor indicated any way in which the Exoneration Act embodies such considerations. P. 10.

362 P. 3d 1070 (first judgment) and 364 P. 3d 866 (second judgment), reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment. THOMAS, J., filed a dissenting opinion. GORSUCH, J., took no part in the consideration or decision of the cases.

SUPREME COURT OF THE UNITED STATES

No. 15–1256

SHANNON NELSON, PETITIONER *v.* COLORADO

LOUIS A. MADDEN, PETITIONER *v.* COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

[April 19, 2017]

JUSTICE GINSBURG delivered the opinion of the Court.

When a criminal conviction is invalidated by a reviewing court and no retrial will occur, is the State obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction? Our answer is yes. Absent conviction of a crime, one is presumed innocent. Under the Colorado law before us in these cases, however, the State retains conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence. This scheme, we hold, offends the Fourteenth Amendment's guarantee of due process.

I

A

Two cases are before us for review. Petitioner Shannon Nelson, in 2006, was convicted by a Colorado jury of five counts—two felonies and three misdemeanors—arising from the alleged sexual and physical abuse of her four children. 362 P. 3d 1070, 1071 (Colo. 2015); App. 25–26.

The trial court imposed a prison sentence of 20 years to life and ordered Nelson to pay court costs, fees, and restitution totaling $8,192.50. 362 P. 3d, at 1071. On appeal, Nelson's conviction was reversed for trial error. *Ibid.* On retrial, a new jury acquitted Nelson of all charges. *Ibid.*

Petitioner Louis Alonzo Madden, in 2005, was convicted by a Colorado jury of attempting to patronize a prostituted child and attempted third-degree sexual assault by force. See 364 P. 3d 866, 867 (Colo. 2015). The trial court imposed an indeterminate prison sentence and ordered Madden to pay costs, fees, and restitution totaling $4,413.00. *Ibid.* The Colorado Supreme Court reversed one of Madden's convictions on direct review, and a post-conviction court vacated the other. *Ibid.* The State elected not to appeal or retry the case. *Ibid.*

Between Nelson's conviction and acquittal, the Colorado Department of Corrections withheld $702.10 from her inmate account, $287.50 of which went to costs and fees[1] and $414.60 to restitution. See 362 P. 3d, at 1071, and n. 1. Following Madden's conviction, Madden paid Colorado $1,977.75, $1,220 of which went to costs and fees[2] and $757.75 to restitution. See 364 P. 3d, at 867. The sole legal basis for these assessments was the fact of Nelson's and Madden's convictions.[3] Absent those convictions,

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[1] Of the $287.50 for costs and fees, $125 went to the victim compensation fund and $162.50 to the victims and witnesses assistance and law enforcement fund (VAST fund). See 362 P. 3d 1070, 1071, n. 1 (Colo. 2015).

[2] Of the $1,220 for costs and fees, $125 went to the victim compensation fund and $1,095 to the VAST fund ($1,000 of which was for the special advocate surcharge). See App. 79; 364 P. 3d 866, 869 (Colo. 2015).

[3] See Colo. Rev. Stat. §24–4.1–119(1)(a) (2005) (levying victim-compensation-fund fees for "each criminal action resulting in a conviction or in a deferred judgment and sentence"); §24–4.2–104(1)(a)(1)(I) (2005) (same, for VAST fund fees); §24–4.2–104(1)(a)(1)(II) (same, for special advocate surcharge); §18–1.3–603(1) (2005) (with one exception,

Colorado would have no legal right to exact and retain petitioners' funds.

Their convictions invalidated, both petitioners moved for return of the amounts Colorado had taken from them. In Nelson's case, the trial court denied the motion outright. 362 P. 3d, at 1071. In Madden's case, the postconviction court allowed the refund of costs and fees, but not restitution. 364 P. 3d, at 867–868.

The same Colorado Court of Appeals panel heard both cases and concluded that Nelson and Madden were entitled to seek refunds of all they had paid, including amounts allocated to restitution. See *People* v. *Nelson*, 369 P. 3d 625, 628–629 (2013); *People* v. *Madden*, 2013 WL 1760869, *1 (Apr. 25, 2013). Costs, fees, and restitution, the court held, must be "tied to a valid conviction," 369 P. 3d, at 627–628, absent which a court must "retur[n] the defendant to the status quo ante," 2013 WL 1760869, at *2.

The Colorado Supreme Court reversed in both cases. A court must have statutory authority to issue a refund, that court stated. 362 P. 3d, at 1077; 364 P. 3d, at 868. Colorado's Compensation for Certain Exonerated Persons statute (Exoneration Act or Act), Colo. Rev. Stat. §§13–65–101, 13–65–102, 13–65–103 (2016), passed in 2013, "provides the proper procedure for seeking a refund," the court ruled. 362 P. 3d, at 1075, 1077. As no other statute addresses refunds, the court concluded that the Exoneration Act is the "exclusive process for exonerated defendants

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"[e]very order of conviction . . . shall include consideration of restitution"). See also 362 P. 3d, at 1073 ("[T]he State pays the cost of criminal cases when a defendant is acquitted." (citing Colo. Rev. Stat. §16–18–101(1) (2015))). Under Colorado law, a restitution order tied to a criminal conviction is rendered as a separate civil judgment. See §18–1.3–603(4)(a) (2005). If the conviction is reversed, any restitution order dependent on that conviction is simultaneously vacated. See *People* v. *Scearce*, 87 P. 3d 228, 234–235 (Colo. App. 2003).

seeking a refund of costs, fees, and restitution." *Id.*, at 1078.[4] Because neither Nelson nor Madden had filed a claim under the Act, the court further determined, their trial courts lacked authority to order a refund. *Id.*, at 1075, 1078; 364 P. 3d, at 867.[5] There was no due process problem, the court continued, because the Act "provides sufficient process for defendants to seek refunds of costs, fees, and restitution that they paid in connection with their conviction." 362 P. 3d, at 1078.

Justice Hood dissented in both cases. Because neither petitioner has been validly convicted, he explained, each must be presumed innocent. *Id.*, at 1079 (*Nelson*); 364 P. 3d, at 870 (adopting his reasoning from *Nelson* in *Madden*). Due process therefore requires some mechanism "for the return of a defendant's money," Justice Hood maintained, 362 P. 3d, at 1080; as the Exoneration Act required petitioners to prove their innocence, the Act, he concluded, did not supply the remedy due process demands, *id.*, at 1081. We granted certiorari. 579 U. S. ___ (2016).

B

The Exoneration Act provides a civil claim for relief "to compensate an innocent person who was wrongly convicted." 362 P. 3d, at 1075. Recovery under the Act is available only to a defendant who has served all or part of a term of incarceration pursuant to a felony conviction, and whose conviction has been overturned for reasons other

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[4] While these cases were pending in this Court, Colorado passed new legislation to provide "[r]eimbursement of amounts paid following a vacated conviction." See Colo. House Bill 17–1071 (quoting language for Colo. Rev. Stat. §18–1.3–703, the new provision). That legislation takes effect September 1, 2017, and has no effect on the cases before us.

[5] Prior to the Exoneration Act, the Colorado Supreme Court recognized the competence of courts, upon reversal of a conviction, to order the refund of monetary exactions imposed on a defendant solely by reason of the conviction. *Toland* v. *Strohl*, 147 Colo. 577, 586, 364 P. 2d 588, 593 (1961).

than insufficiency of evidence or legal error unrelated to actual innocence. See §13–65–102. To succeed on an Exoneration Act claim, a petitioner must show, by clear and convincing evidence, her actual innocence of the offense of conviction. §§13–65–101(1), 13–65–102(1). A successful petitioner may recoup, in addition to compensation for time served,[6] "any fine, penalty, court costs, or restitution . . . paid . . . as a result of his or her wrongful conviction." *Id.*, at 1075 (quoting §13–65–103(2)(e)(V)).

Under Colorado's legislation, as just recounted, a defendant must prove her innocence by clear and convincing evidence to obtain the refund of costs, fees, and restitution paid pursuant to an invalid conviction. That scheme, we hold, does not comport with due process. Accordingly, we reverse the judgment of the Supreme Court of Colorado.

II

The familiar procedural due process inspection instructed by *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), governs these cases. Colorado argues that we should instead apply the standard from *Medina* v. *California*, 505 U. S. 437, 445 (1992), and inquire whether Nelson and Madden were exposed to a procedure offensive to a fundamental principle of justice. *Medina* "provide[s] the appropriate framework for assessing the validity of state procedural rules" that "are part of the criminal process." *Id.*, at 443. Such rules concern, for example, the allocation of burdens of

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[6] Compensation under the Exoneration Act includes $70,000 per year of incarceration for the wrongful conviction; additional sums per year served while the defendant is under a sentence of death, or placed on parole or probation or on a sex offender registry; compensation for child support payments due during incarceration; tuition waivers at state institutions of higher education for the exonerated person and for any children conceived or legally adopted before the incarceration; and reasonable attorney's fees for bringing an Exoneration Act claim. §13–65–103(2), (3) (2016).

proof and the type of evidence qualifying as admissible.[7] These cases, in contrast, concern the continuing deprivation of property after a conviction has been reversed or vacated, with no prospect of reprosecution. See *Kaley* v. *United States*, 571 U. S. ___, ___, n. 4 (2014) (ROBERTS, C. J., dissenting) (slip op., at 10–11, n. 4) (explaining the different offices of *Mathews* and *Medina*). Because no further criminal process is implicated, *Mathews* "provides the relevant inquiry." 571 U. S., at ___ (slip op., at 11, n. 4).

III

Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake. 424 U. S., at 335. All three considerations weigh decisively against Colorado's scheme.

A

Nelson and Madden have an obvious interest in regaining the money they paid to Colorado. Colorado urges, however, that the funds belong to the State because Nelson's and Madden's convictions were in place when the funds were taken. Tr. of Oral Arg. 29–31. But once those convictions were erased, the presumption of their innocence was restored. See, *e.g.*, *Johnson* v. *Mississippi*, 486 U. S. 578, 585 (1988) (After a "conviction has been reversed, unless and until [the defendant] should be retried,

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[7] See *Cooper* v. *Oklahoma*, 517 U. S. 348, 356–362 (1996) (standard of proof to establish incompetence to stand trial); *Dowling* v. *United States*, 493 U. S. 342, 343–344, 352 (1990) (admissibility of testimony about a prior crime of which the defendant was acquitted); *Patterson* v. *New York*, 432 U. S. 197, 198, 201–202 (1977) (burden of proving affirmative defense); *Medina* v. *California*, 505 U. S. 437, 443–446, 457 (1992) (burden of proving incompetence to stand trial).

he must be presumed innocent of that charge.").[8] "[A]xiomatic and elementary," the presumption of innocence "lies at the foundation of our criminal law." *Coffin* v. *United States*, 156 U. S. 432, 453 (1895).[9] Colorado may not retain funds taken from Nelson and Madden solely because of their now-invalidated convictions, see *supra*, at 2–3, and n. 3, for Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions.[10]

That petitioners prevailed on subsequent review rather than in the first instance, moreover, should be inconsequential. Suppose a trial judge grants a motion to set aside a guilty verdict for want of sufficient evidence. In that event, the defendant pays no costs, fees, or restitution. Now suppose the trial court enters judgment on a guilty verdict, ordering cost, fee, and restitution payments

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[8] Citing *Bell* v. *Wolfish*, 441 U. S. 520 (1979), Colorado asserts that "[t]he presumption of innocence applies only at criminal trials" and thus has no application here. Brief for Respondent 40, n. 19. Colorado misapprehends *Wolfish*. Our opinion in that case recognized that "under the Due Process Clause," a detainee who "has not been adjudged guilty of any crime" may not be punished. 441 U. S., at 535–536; see *id.*, at 535–540. *Wolfish* held only that the presumption does not prevent the government from "detain[ing a defendant] to ensure his presence at trial . . . so long as [the] conditions and restrictions [of his detention] do not amount to punishment, or otherwise violate the Constitution." *Id.*, at 536–537.

[9] Were *Medina* applicable, Colorado's Exoneration Act scheme would similarly fail due process measurement. Under *Medina*, a criminal procedure violates due process if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 505 U. S., at 445 (quoting *Patterson*, 432 U. S., at 202). The presumption of innocence unquestionably fits that bill.

[10] Colorado invites a distinction between convictions merely "voidable," rather than "void," and urges that the invalidated convictions here fall in the voidable category. See Brief for Respondent 32–33, and n. 11. As Justice Hood noted in dissent, however, "reversal is reversal," regardless of the reason, "[a]nd an invalid conviction is no conviction at all." 362 P. 3d, at 1080.

by reason of the conviction, but the appeals court upsets the conviction for evidentiary insufficiency. By what right does the State retain the amount paid out by the defendant? "[I]t should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient." *Burks* v. *United States*, 437 U. S. 1, 11 (1978). The vulnerability of the State's argument that it can keep the amounts exacted so long as it prevailed in the court of first instance is more apparent still if we assume a case in which the sole penalty is a fine. On Colorado's reasoning, an appeal would leave the defendant emptyhanded; regardless of the outcome of an appeal, the State would have no refund obligation. See Tr. of Oral Arg. 41, 44.[11]

B

Is there a risk of erroneous deprivation of defendants' interest in return of their funds if, as Colorado urges, the Exoneration Act is the exclusive remedy? Indeed yes, for the Act conditions refund on defendants' proof of innocence by clear and convincing evidence. §13–65–101(1)(a). But to get their money back, defendants should not be saddled with any proof burden. Instead, as explained *supra*, at 6–7, they are entitled to be presumed innocent.

Furthermore, as Justice Hood noted in dissent, the Act

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[11] The dissent echoes Colorado's argument. If Nelson and Madden prevailed at trial, the dissent agrees, no costs, fees, or restitution could be exacted. See *post*, at 6. But if they prevailed on appellate inspection, the State gets to keep their money. See *ibid.* Under Colorado law, as the dissent reads the Colorado Supreme Court's opinion, "moneys lawfully exacted pursuant to a valid conviction become public funds (or[, in the case of restitution,] the victims' money)." *Post*, at 3–4. Shut from the dissent's sights, however, the convictions pursuant to which the State took petitioners' money were *invalid*, hence the State had no legal right to retain their money. Given the invalidity of the convictions, does the Exoneration Act afford sufficient process to enable the State to retain the money? Surely, it does not.

provides no remedy at all for any assessments tied to invalid misdemeanor convictions (Nelson had three). 362 P. 3d, at 1081, n. 1; see §13–65–102(1)(a). And when amounts a defendant seeks to recoup are not large, as is true in Nelson's and Madden's cases, see *supra*, at 2, the cost of mounting a claim under the Exoneration Act and retaining a lawyer to pursue it would be prohibitive.[12]

Colorado argued on brief that if the Exoneration Act provides sufficient process to compensate a defendant for the loss of her liberty, the Act should also suffice "when a defendant seeks compensation for the less significant deprivation of monetary assessments paid pursuant to a conviction that is later overturned." Brief for Respondent 40. The comparison is inapt. Nelson and Madden seek restoration of funds they paid to the State, not compensation for temporary deprivation of those funds. Petitioners seek only their money back, not interest on those funds for the period the funds were in the State's custody. Just as the restoration of liberty on reversal of a conviction is not compensation, neither is the return of money taken by the State on account of the conviction.

Colorado also suggests that "numerous pre- and post-deprivation procedures"—including the need for probable cause to support criminal charges, the jury-trial right, and the State's burden to prove guilt beyond a reasonable doubt—adequately minimize the risk of erroneous deprivation of property. *Id.*, at 31; see *id.*, at 31–35. But Colorado misperceives the risk at issue. The risk here involved is not the risk of wrongful or invalid conviction *any* criminal defendant may face. It is, instead, the risk faced by a defendant whose conviction has already been overturned

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[12] A successful petitioner under the Exoneration Act can recover reasonable attorney's fees, §13–65–103(2)(e)(IV), but neither a defendant nor counsel is likely to assume the risk of loss when amounts to be gained are not worth the candle.

that she will not recover funds taken from her solely on the basis of a conviction no longer valid. None of the above-stated procedures addresses that risk, and, as just explained, the Exoneration Act is not an adequate remedy for the property deprivation Nelson and Madden experienced.[13]

C

Colorado has no interest in withholding from Nelson and Madden money to which the State currently has zero claim of right. "Equitable [c]onsiderations," Colorado suggests, may bear on whether a State may withhold funds from criminal defendants after their convictions are overturned. Brief for Respondent 20–22. Colorado, however, has identified no such consideration relevant to petitioners' cases, nor has the State indicated any way in which the Exoneration Act embodies "equitable considerations."

IV

Colorado's scheme fails due process measurement because defendants' interest in regaining their funds is high, the risk of erroneous deprivation of those funds under the Exoneration Act is unacceptable, and the State has shown no countervailing interests in retaining the amounts in question. To comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated.

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[13] Colorado additionally argues that defendants can request a stay of sentence pending appeal, thereby reducing the risk of erroneous deprivation. See Brief for Respondent 32; §§16–12–103, 18–1.3–702(1)(a) (2016). But the State acknowledged at oral argument that few defendants can meet the requirements a stay pending appeal entails. Tr. of Oral Arg. 33–34. And even when a stay is available, a trial court "may require the defendant to deposit the whole or any part of the . . . costs." Colo. App. Rule 8.1(a)(3) (2016).

* * *

The judgments of the Colorado Supreme Court are reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

No. 15–1256

SHANNON NELSON, PETITIONER *v.* COLORADO

LOUIS A. MADDEN, PETITIONER *v.* COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

[April 19, 2017]

JUSTICE ALITO, concurring in the judgment.

I agree that the judgments of the Colorado Supreme Court must be reversed, but I reach that conclusion by a different route.

I

The proper framework for analyzing these cases is provided by *Medina* v. *California*, 505 U. S. 437 (1992). *Medina* applies when we are called upon to "asses[s] the validity of state procedural rules which . . . are part of the criminal process," *id.*, at 443, and that is precisely the situation here. These cases concern Colorado's rules for determining whether a defendant can obtain a refund of money that he or she was required to pay pursuant to a judgment of conviction that is later reversed. In holding that these payments must be refunded, the Court relies on a feature of the criminal law, the presumption of innocence. And since the Court demands that refunds occur either automatically or at least without imposing anything more than "minimal" procedures, see *ante*, at 10, it appears that they must generally occur as part of the criminal case. For these reasons, the refund obligation is surely "part of the criminal process" and thus falls squarely within the scope of *Medina*. The only authority cited by the Court in support of its contrary conclusion is a footnote

in a dissent. See *ante*, at 6 (citing *Kaley* v. *United States*, 571 U. S. ___, ___, n. 4 (2014) (opinion of ROBERTS, C. J.) (slip op., at 10–11, n. 4)). Under *Medina*, a state rule of criminal procedure not governed by a specific rule set out in the Bill of Rights violates the Due Process Clause of the Fourteenth Amendment only if it offends a fundamental and deeply rooted principle of justice. 505 U. S., at 445. And "[h]istorical practice is probative of whether a procedural rule can be characterized as fundamental." *Id.*, at 446. Indeed, petitioners invite us to measure the Colorado scheme against traditional practice, reminding us that our "'first due process cases'" recognized that "'traditional practice provides a touchstone for constitutional analysis,'" Brief for Petitioners 26 (quoting *Honda Motor Co.* v. *Oberg*, 512 U. S. 415, 430 (1994)). Petitioners then go on to argue at some length that "[t]he traditional rule has always been that when a judgment is reversed, a person who paid money pursuant to that judgment is entitled to receive the money back." Brief for Petitioners 26; see *id.*, at 26–30. See also Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 4–14 (discussing traditional practice).

The Court, by contrast, turns its back on historical practice, preferring to balance the competing interests according to its own lights. The Court applies the balancing test set out in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), a modern invention "first conceived" to decide what procedures the government must observe before depriving persons of novel forms of property such as welfare or Social Security disability benefits. *Dusenbery* v. *United States*, 534 U. S. 161, 167 (2002). Because these interests had not previously been regarded as "property," the Court could not draw on historical practice for guidance. *Mathews* has subsequently been used more widely in civil cases, but we should pause before applying its balancing test in matters of state criminal procedure. "[T]he States

have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition." *Medina*, *supra*, at 445–446. Applying the *Mathews* balancing test to established rules of criminal practice and procedure may result in "undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina*, *supra*, at 443. Where long practice has struck a particular balance between the competing interests of the State and those charged with crimes, we should not lightly disturb that determination. For these reasons, *Medina*'s historical inquiry, not *Mathews,* provides the proper framework for use in these cases.[1]

II

Under *Medina*, the Colorado scheme at issue violates due process. American law has long recognized that when an individual is obligated by a civil judgment to pay money to the opposing party and that judgment is later reversed, the money should generally be repaid. See, *e.g., Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216, 219 (1891) ("The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period . . . "); *Bank*

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[1] In a footnote, the Court briefly opines on how a *Medina* analysis would come out in these cases. The Court's discussion of the issue, which is dictum, is substantially incomplete. The Court suggests that *Medina* would support its judgment because the presumption of innocence is deeply rooted and fundamental. *Ante*, at 7, n. 9. It is true, of course, that this presumption is restored when a conviction is reversed. But that says very little about the question at hand: namely, what must *happen* once that presumption is restored. Notably, the Court cites not a single case applying the presumption of innocence in the refund context. At the same time, the Court ignores cases that bear directly on the question in these cases and thus must be part of a proper *Medina* inquiry. See *infra*, at this page and 4–5.

of United States v. *Bank of Washington*, 6 Pet. 8, 17 (1832) ("On the reversal of an erroneous judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost"). This was "a remedy well known at common law," memorialized as "a part of the judgment of reversal which directed 'that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid.'" 2 Ruling Case Law §248, p. 297 (W. McKinney and B. Rich eds. 1914); *Duncan* v. *Kirkpatrick*, 13 Serg. & Rawle 292, 294 (Pa. 1825).

As both parties acknowledge, this practice carried over to criminal cases. When a conviction was reversed, defendants could recover fines and monetary penalties assessed as part of the conviction. Brief for Respondent 20–21, and n. 7; Reply Brief 7–8, 11; see, *e.g.,* Annot., Right To Recover Back Fine or Penalty Paid in Criminal Proceeding, 26 A. L. R. 1523, 1532, §VI(a) (1923) ("When a judgment imposing a fine, which is paid, is vacated or reversed on appeal, the court may order restitution of the amount paid . . . "); 25 C. J. §39, p. 1165 (W. Mack, W. Hale, & D. Kiser eds. 1921) ("Where a fine illegally imposed has been paid, on reversal of the judgment a writ of restitution may issue against the parties who received the fine").

The rule regarding recovery, however, "even though general in its application, [was] not without exceptions." *Atlantic Coast Line R. Co.* v. *Florida*, 295 U. S. 301, 309 (1935) (Cardozo, J.). The remedy was "equitable in origin and function," and return of the money was "'not of mere right,'" but "'rest[ed] in the exercise of a sound discretion.'" *Id.*, at 309, 310 (quoting *Gould* v. *McFall*, 118 Pa. 455, 456 (1888)). This was true in both civil and criminal cases. See, *e.g.*, 25 C. J., at 1165 (noting that "restitution [of fines paid on a conviction later reversed] is not necessarily a matter of right"); Annot., 26 A. L. R., at 1532, §VI(a) (Restitution for fines upon reversal of a conviction

"is not a matter of strict legal right, but rather one for the exercise of the court's discretion"). The central question courts have asked is whether "the possessor will give offense to equity and good conscience if permitted to retain [the successful appellant's money]." *Atlantic Coast Line*, *supra*, at 309.

This history supports the Court's rejection of the Colorado Exoneration Act's procedures. The Act places a heavy burden of proof on defendants, provides no opportunity for a refund for defendants (like Nelson) whose misdemeanor convictions are reversed, and excludes defendants whose convictions are reversed for reasons unrelated to innocence. Brief for Respondent 8, 35, n. 18. These stringent requirements all but guarantee that most defendants whose convictions are reversed have no realistic opportunity to prove they are deserving of refunds. Colorado has abandoned historical procedures that were more generous to successful appellants and incorporated a court's case-specific equitable judgment. Instead, Colorado has adopted a system that is harsh, inflexible, and prevents most defendants whose convictions are reversed from demonstrating entitlement to a refund. Indeed, the Colorado General Assembly made financial projections based on the assumption that only one person every five years would qualify for a financial award under the Exoneration Act. Colorado Legislative Council Staff Fiscal Note, State and Local Revised Fiscal Impact, HB 13–1230, p. 2 (Apr. 22, 2013), online at http://leg.colorado.gov (as last visited Apr. 17, 2017). Accordingly, the Exoneration Act does not satisfy due process requirements. See *Cooper* v. *Oklahoma*, 517 U. S. 348, 356 (1996) (A state rule of criminal procedure may violate due process where "a rule significantly more favorable to the defendant has had a long and consistent application").

III

Although long-established practice supports the Court's judgment, the Court rests its decision on different grounds. In its *Mathews* analysis, the Court reasons that the reversal of petitioners' convictions restored the presumption of their innocence and that "Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions." *Ante*, at 7. The implication of this brief statement is that under *Mathews*, reversal restores the defendant to the *status quo ante*, see *ante*, at 3. But the Court does not confront the obvious implications of this reasoning.

For example, if the *status quo ante* must be restored, why shouldn't the defendant be compensated for all the adverse economic consequences of the wrongful conviction?[2] After all, in most cases, the fines and payments that a convicted defendant must pay to the court are minor in comparison to the losses that result from conviction and imprisonment, such as attorney's fees, lost income, and damage to reputation. The Court cannot convincingly explain why *Mathews*' amorphous balancing test stops short of requiring a full return to the *status quo ante* when a conviction is reversed. But *Medina* does.

The American legal system has long treated compensation for the economic consequences of a reversed conviction very differently from the refund of fines and other payments made by a defendant pursuant to a criminal judgment. Statutes providing compensation for time

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[2]The Court's position is also at odds with other principles of our procedural due process jurisprudence. It is well settled, for example, that a plaintiff who is deprived of property with inadequate process is not entitled to be compensated if the defendant can prove the deprivation "would have occurred even if [the plaintiff] had been given due process." *Thompson* v. *District of Columbia*, 832 F. 3d 339, 346 (CADC 2016); see *Carey* v. *Piphus*, 435 U. S. 247, 260, 263 (1978). This principle is in obvious tension with the Court's holding.

wrongfully spent in prison are a 20th-century innovation: By 1970, only the Federal Government and four States had passed such laws. King, Compensation of Persons Erroneously Confined by the State, 118 U. Pa. L. Rev. 1091, 1109 (1970); *United States* v. *Keegan*, 71 F. Supp. 623, 626 (SDNY 1947) ("[T]here seems to have been no legislation by our Government on this subject" until 1938). Many other jurisdictions have done so since, but under most such laws, compensation is not automatic. Instead, the defendant bears the burden of proving actual innocence (and, sometimes, more). King*, supra*, at 1110 ("The burden of proving innocence in the compensation proceeding has from the start been placed upon the claimant"); see also Kahn, Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes, 44 U. Mich. J. L. Reform 123, 145 (2010) (Most U. S. compensation statutes "require that claimants prove their innocence either by a preponderance of the evidence or by clear and convincing evidence" (footnote omitted)). In construing the federal statute, courts have held that a compensation proceeding "is not . . . a criminal trial" and that the burden of proof can be placed on the petitioner. *United States* v. *Brunner*, 200 F. 2d 276, 279 (CA6 1952). As noted, Colorado and many other States have similar statutes designed narrowly to compensate those few persons who can demonstrate that they are truly innocent. The Court apparently acknowledges that these statutes pose no constitutional difficulty. That is the correct conclusion, but it is best justified by reference to history and tradition.

IV

The Court's disregard of historical practice is particularly damaging when it comes to the question of restitution. The Court flatly declares that the State is "obliged to refund . . . restitution" in just the same way as fees and

court costs. *Ante*, at 1. This conclusion is not supported by historical practice, and it overlooks important differences between restitution, which is paid to the victims of an offense, and fines and other payments that are kept by the State.

Although restitution may be included in a criminal judgment, it has many attributes of a civil judgment in favor of the victim. This is clear under Colorado law. Although the obligation to pay restitution is included in the defendant's sentence, restitution results in a final civil judgment against the defendant in favor of the State *and the victim*. Colo. Rev. Stat. §18–1.3–603(4)(a)(I) (2016). Entitlement to restitution need not be established beyond a reasonable doubt or in accordance with standard rules of evidence or criminal procedure. *People* v. *Pagan*, 165 P. 3d 724, 729 (Colo. App. 2006); Colo. Rev. Stat. §§18–1.3–603(2)–(3). And the judgment may be enforced either by the State or the victim. §§16–18.5–106(2), §§16–18.5–107(1)–(4).

The Court ignores the distinctive attributes of restitution, but they merit attention. Because a restitution order is much like a civil judgment, the reversal of the defendant's criminal conviction does not necessarily undermine the basis for restitution. Suppose that a victim successfully sues a criminal defendant civilly and introduces the defendant's criminal conviction on the underlying conduct as (potentially preclusive) evidence establishing an essential element of a civil claim. See, *e.g.*, 2 K. Broun, McCormick on Evidence §298, 473–477 (7th ed. 2013) (discussing the admissibility, and potential preclusive effect, of a criminal conviction in subsequent civil litigation). And suppose that the defendant's criminal conviction is later reversed for a trial error that did not (and could not) infect the later civil proceeding: for example, the admission of evidence barred by the exclusionary rule or a Confrontation Clause violation. It would be unprecedented to suggest that due

process requires unwinding the civil judgment simply because it rests in part on a criminal conviction that has since been reversed. And a very similar scenario could unfold with respect to a Colorado restitution judgment. The only salient difference would be that, in the Colorado case, the civil judgment would have been obtained as part of the criminal proceeding itself. It is not clear (and the Court certainly does not explain) why that formal distinction should make a substantive difference.[3]

It is especially startling to insist that a State must provide a refund after enforcing a restitution judgment on the victims' behalf in reliance on a *final* judgment that is then vacated on *collateral* review. Faced with this fact pattern, the Ninth Circuit declined to require reimbursement, reasoning that the Government was a mere "escrow agent" executing a then-valid final judgment in favor of a third party. *United States* v. *Hayes*, 385 F. 3d 1226, 1230 (2004).

The Court regrettably mentions none of this. Its treatment of restitution is not grounded in any historical analysis, and—save for a brief footnote, *ante*, at 2–3, n. 3—the Court does not account for the distinctive civil status of restitution under Colorado law (or the laws of the many other affected jurisdictions that provide this remedy to crime victims).

Nor does the Court consider how restitution's unique characteristics might affect the balance that it strikes under *Mathews*. *Ante,* at 10. The Court summarily rejects

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[3]The Court cites one intermediate appellate case for the proposition that when a conviction is reversed, any restitution order dependent on that conviction is simultaneously vacated. *Ante*, at 2–3, n. 3 (citing *People* v. *Scearce*, 87 P. 3d 228 (Colo. App. 2003)). *Scearce* did not discuss whether any payments had been made to victims or—if so—whether they would be recoverable from the State. More important, *Scearce* is hardly the last word on the question whether due process invariably requires the refund of restitution.

the proposition that "'equitable considerations'" might militate against a blanket rule requiring the refund of money paid as restitution, see *ibid.*, but why is this so? What if the evidence amply establishes that the defendant injured the victims to whom restitution was paid but the defendant's conviction is reversed on a ground that would be inapplicable in a civil suit? In that situation, is it true, as the Court proclaims, that the State would have "no interest" in withholding a refund? Would the Court reach that conclusion if state law mandated a refund from the recipients of the restitution? And if the States and the Federal Government are always required to foot the bill themselves, would that risk discourage them from seeking restitution—or at least from providing funds to victims until the conclusion of appellate review?

It was unnecessary for the Court to issue a sweeping pronouncement on restitution. But if the Court had to address this subject to dispose of these cases, it should have acknowledged that—at least in some circumstances—refunds of restitution payments made under later reversed judgments are not constitutionally required.

* * *

For these reasons, I concur only in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 15–1256

SHANNON NELSON, PETITIONER *v.* COLORADO

LOUIS A. MADDEN, PETITIONER *v.* COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

[April 19, 2017]

JUSTICE THOMAS, dissenting.

The majority and concurring opinions debate whether the procedural due process framework of *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), or that of *Medina* v. *California*, 505 U. S. 437 (1992), governs the question before us. But both opinions bypass the most important question in these cases: whether petitioners can show a *substantive* entitlement to a return of the money they paid pursuant to criminal convictions that were later reversed or vacated.

The Court assumes, without reference to either state or federal law, that defendants whose convictions have been reversed have a substantive right to any money exacted on the basis of those convictions. By doing so, the Court assumes away the real issue in these cases. As the parties have agreed, the existence of Colorado's obligation to provide particular procedures depends on whether petitioners have a substantive entitlement to the money. Colorado concedes that "if [petitioners] have a present entitlement" to the money—that is, if "it is their property"—"then due process requires [the State to accord] them some procedure to get it back." Tr. of Oral Arg. 52. And Colorado acknowledges that the procedural hurdles it could impose before returning the money "would be fairly minimal," *id.*, at 51, because petitioners would need to

prove only that their convictions had been reversed and that they had paid a certain sum of money, see *ibid.* Similarly, petitioners concede that if defendants in their position do *not* have a substantive right to recover the money—that is, if the money belongs to the State—then Colorado need not "provide any procedure to give it back." *Id.*, at 53. If defendants in their position have no entitlement to the money they paid pursuant to their reversed convictions, there would be nothing to adjudicate. In light of these concessions, I can see no justification for the Court's decision to address the procedures for adjudicating a substantive entitlement while failing to determine whether a substantive entitlement exists in the first place.

In my view, petitioners have not demonstrated that defendants whose convictions have been reversed possess a substantive entitlement, under either state law or the Constitution, to recover money they paid to the State pursuant to their convictions. Accordingly, I cannot agree with the Court's decision to reverse the judgments of the Colorado Supreme Court.

I

The Fourteenth Amendment provides that no State shall "deprive any person of *life, liberty, or property*, without due process of law." U. S. Const., Amdt. 14, §1 (emphasis added).[1] To show that Colorado has violated the

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[1] As I have previously observed, the Due Process Clause may have originally been understood to require only "that our Government . . . proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions"—before depriving someone of life, liberty, or property. *Johnson* v. *United States*, 576 U. S. ___, ___ (2015) (THOMAS, J., concurring in judgment) (slip op., at 17) (quoting *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 589 (2004) (THOMAS, J., dissenting)). Because Colorado does not advance that argument, and because it is unnecessary to resolve the issue in these cases. I assume that the Due Process Clause requires some baseline procedures regardless of the provisions of Colorado law.

Constitution's procedural guarantees, as relevant here, petitioners must first establish that they have been deprived of a protected property interest. See *Castle Rock* v. *Gonzales*, 545 U. S. 748, 756 (2005) ("The procedural component of the Due Process Clause does not protect everything that might be described as a benefit: To have a property interest in a benefit, a person clearly must have . . . a legitimate claim of entitlement to it" (internal quotation marks omitted)). "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 164 (1998) (quoting *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577 (1972)). Petitioners undoubtedly have an "interest in regaining the money they paid to Colorado." *Ante*, at 6. But to succeed on their procedural due process claim, petitioners must first point to a recognized *property* interest in that money, under state or federal law, within the meaning of the Fourteenth Amendment.

A

The parties dispute whether, under Colorado law, the petitioners or the State have a property interest in the money paid by petitioners pursuant to their convictions. Petitioners contend that the money remains their property under state law. Reply Brief 1–3; see also Tr. of Oral Arg. 52–54. Colorado counters that when petitioners paid the money pursuant to their convictions, the costs and fees became property of the State and the restitution became property of the victims. See *id.*, at 28–30; Brief for Respondent 41.

The key premise of the Colorado Supreme Court's holdings in these cases is that moneys lawfully exacted pursuant to a valid conviction become public funds (or the vic-

tims' money) under Colorado law. The Colorado Supreme Court explained in petitioner Shannon Nelson's case that "the trial court properly ordered [her] to pay costs, fees, and restitution pursuant to valid statutes" and that "the court correctly distributed th[ose] funds *to victims and public funds*, as ordered by the statutes." 362 P. 3d 1070, 1076 (2015) (emphasis added); accord, 364 P. 3d 866, 868–870 (2016) (applying the same analysis to petitioner Louis Madden's case). The Colorado Supreme Court further noted that, "[o]nce the state disburses restitution to the victims, the state no longer controls that money." 362 P. 3d, at 1077, n. 4.

The Colorado Supreme Court explained that "Colorado's constitution protects" the Colorado Legislature's "control over public money," and thus a "court may authorize refunds from public funds only pursuant to statutory authority." *Id.*, at 1076–1077. The Exoneration Act, the Colorado Supreme Court held, provides the only statutory authority for refunding costs, fees, and restitution when a defendant's conviction is overturned. *Id.*, at 1077–1078. Because petitioners had not sought a refund under the Exoneration Act, "the trial court lacked the authority to order a refund of Nelson's costs, fees, and restitution." *Id.*, at 1078; 364 P. 3d, at 867.

At no point in this litigation have petitioners attempted to demonstrate that they satisfy the requirements of the Exoneration Act. Under the Act, Colorado recognizes a substantive entitlement to the kind of property at issue in these cases only if, among other things, the defendant can prove that he is "actually innocent."[2] Colo. Rev. Stat.

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[2]More specifically, the Exoneration Act entitles an exonerated defendant to compensation if he was convicted of a felony, was incarcerated, and, among other requirements, can prove by clear and convincing evidence that he is "actually innocent," meaning that his "conviction was the result of a miscarriage of justice" or that he is factually innocent. Colo. Rev. Stat. §§13–65–101(1)(a), 13–65–102(1)(a) (2016); see

§§13–65–101, 13–65–102 (2016). It is the Exoneration Act alone which defines the scope of the substantive entitlement. This Court has interpreted the Due Process Clause to require that the States provide certain procedures, such as notice and a hearing, by which an individual can prove a substantive entitlement to (or defend against a deprivation of) property. But the Clause, properly understood, has nothing to say about the existence or scope of the substantive entitlement itself. See Part I–B, *infra*. If petitioners want this Court to rewrite the contours of the substantive entitlement contained in the Exoneration Act, they err in invoking *procedural* due process. See Reply Brief 1–2 ("Our argument sounds in *procedural* due process").

The majority responds by asserting, without citing any state law, that Colorado "had no legal right to retain [petitioners'] money" once their convictions were invalidated. *Ante*, at 8, n. 11. If this were true as a matter of state law, then certain provisions of the Exoneration Act—which require the State to return costs, fees, and restitution only in limited circumstances following a conviction's reversal—would be superfluous. Thus, to the extent the majority implicitly suggests that petitioners have a state-law right to an automatic refund (a point about which the majority is entirely unclear), it is plainly incorrect.

B

Because defendants in petitioners' position do not have a substantive right to recover the money they paid to Colorado under state law, petitioners' asserted right to an automatic refund must arise, if at all, from the Due Process Clause itself. But the Due Process Clause confers no substantive rights. *McDonald* v. *Chicago*, 561 U. S. 742,

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Nelson, 362 P. 3d, at 1075. "Insufficiency of the evidence or a legal error unrelated to the person's actual innocence cannot support either exoneration or subsequent compensation under the Act." *Ibid.*

811 (2010) (THOMAS, J., concurring in part and concurring in judgment) ("The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words"). And, in any event, petitioners appear to disavow any substantive due process right to a return of the funds they paid. See Reply Brief 1–2; Tr. of Oral Arg. 18–19. In the absence of any property right under state law (apart from the right provided by the Exoneration Act, which petitioners decline to invoke), Colorado's refusal to return the money is not a "depriv[ation]" of "property" within the meaning of the Fourteenth Amendment. Colorado is therefore not required to provide any process at all for the return of that money.

II

No one disputes that if petitioners had never been convicted, Colorado could not have required them to pay the money at issue. And no one disputes that Colorado cannot require petitioners to pay any additional costs, fees, or restitution now that their convictions have been invalidated. It does not follow, however, that petitioners have a property right in the money they paid pursuant to their then-valid convictions, which now belongs to the State and the victims under Colorado law. The Court today announces that petitioners have a right to an automatic refund because the State has "no legal right" to that money. *Ante*, at 8, n. 11. But, intuitive and rhetorical appeal aside, it does not seriously attempt to ground that conclusion in state or federal law. If petitioners' supposed right to an automatic refund arises under Colorado law, then the Colorado Supreme Court remains free on remand to clarify whether that right in fact exists. If it arises under substantive due process, then the Court's procedural due process analysis misses the point.

I respectfully dissent.

Syllabus

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

SUPREME COURT OF THE UNITED STATES

Syllabus

TEXAS *v.* NEW MEXICO ET AL.

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 141, Orig. Argued January 8, 2018—Decided March 5, 2018

To resolve their disputes over water rights in the Rio Grande, Colorado, New Mexico, and Texas, with Congress's approval, signed the Rio Grande Compact. The Compact requires Colorado to deliver a specified amount of water annually to New Mexico at the state line and directs New Mexico to deliver a specified amount of water to the Elephant Butte Reservoir. The Reservoir was completed in 1916 as part of the Federal Government's Rio Grande Project and plays a central role in fulfilling the United States's obligations to supply water under a 1906 treaty with Mexico as well as under several agreements with downstream water districts in New Mexico and Texas (Downstream Contracts).

Texas brought this original action complaining that New Mexico has violated the Compact by allowing downstream New Mexico users to siphon off water below the Reservoir in ways not anticipated in the Downstream Contracts. The United States intervened and filed a complaint with parallel allegations. The Special Master filed a report recommending that the United States's complaint be dismissed in part because the Compact does not confer on the United States the power to enforce its terms. This Court agreed to hear two exceptions to the report concerning the scope of the claims the United States can assert here: The United States says it may pursue claims for Compact violations; Colorado says the United States should be permitted to pursue claims only to the extent they arise under the 1906 treaty with Mexico.

Held: The United States may pursue the Compact claims it has pleaded in this original action. This Court, using its unique authority to mold original actions, see *Kansas* v. *Nebraska*, 574 U. S. ___, ___, has sometimes permitted the federal government to participate in compact suits to defend "distinctively federal interests" that a normal lit-

Syllabus

igant might not be permitted to pursue in traditional litigation, *Maryland* v. *Louisiana*, 451 U. S. 725, 745, n. 21. While this permission should not be confused with license, several considerations taken collectively lead to the conclusion that the United States may pursue the particular claims it has pleaded in this case. First, the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. Second, New Mexico has conceded in pleadings and at oral argument that the United States plays an integral role in the Compact's operation. Third, a breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations to Mexico. Fourth, the United States has asserted its Compact claims in an existing action brought by Texas, seeking substantially the same relief and without that State's objection. This case does not present the question whether the United States could initiate litigation to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States. Pp. 4–7.

United States's exception sustained; all other exceptions overruled; and case remanded.

GORSUCH, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 141, Orig.

STATE OF TEXAS, PLAINTIFF *v.* STATE OF NEW MEXICO AND STATE OF COLORADO

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

[March 5, 2018]

JUSTICE GORSUCH delivered the opinion of the Court.

Will Rogers reportedly called the Rio Grande "the only river I ever saw that needed irrigation." In its long journey from the Colorado Rockies to the Gulf of Mexico, many and sometimes competing demands are made on the river's resources. In an effort to reconcile some of those demands, Colorado, New Mexico, and Texas, acting with the federal government's assent, signed the Rio Grande Compact in the 1930s. In today's lawsuit, Texas claims that New Mexico has defied the Compact. But at this stage in the proceedings we face only a preliminary and narrow question: May the United States, as an intervenor, assert essentially the same claims Texas already has? We believe it may.

Like its namesake, the Rio Grande Compact took a long and circuitous route to ratification. Its roots trace perhaps to the 1890s, when Mexico complained to the United States that increasing demands on the river upstream left little for those below the border. The federal government responded by proposing, among other things, to build a reservoir and guarantee Mexico a regular and regulated release of water. Eventually, the government identified a

potential dam site near Elephant Butte, New Mexico, about 105 miles north of the Texas state line. The government presented this suggestion to representatives of Mexico and the affected States in a 1904 "'Irrigation Congress,'" where it was "'heartily endorse[d] and approve[d].'" Official Proceedings of the Twelfth National Irrigation Congress 107 (G. Mitchell ed. 1905). So, in 1906, the United States agreed by treaty to deliver 60,000 acre-feet of water annually to Mexico upon completion of the new reservoir. Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, 34 Stat. 2953. After obtaining the necessary water rights, the United States began construction of the dam in 1910 and completed it in 1916 as part of a broader infrastructure development known as the Rio Grande Project.

But that still left the problem of resolving similar disputes among the various States. After a number of interim agreements and impasses, the affected parties eventually (and nearly simultaneously) negotiated several agreements. And here again the Rio Grande Project and its Elephant Butte Reservoir played a central role. In the first set of agreements, the federal government promised to supply water from the Reservoir to downstream water districts with 155,000 irrigable acres in New Mexico and Texas. In turn, the water districts agreed to pay charges in proportion to the percentage of the total acres lying in each State—roughly 57% for New Mexico and 43% for Texas. We will call those agreements the "Downstream Contracts." Additionally, Colorado, New Mexico, and Texas concluded the Rio Grande Compact, which Congress approved in 1939. Act of May 31, 1939, 53 Stat. 785. In the Compact, the parties indicated that nothing in their agreement should be "construed as affecting" the federal government's treaty duties to deliver promised water to Mexico, but only as resolving disputes among themselves.

Id., at 792. Toward that end, the Compact required Colorado to deliver a specified amount of water annually to New Mexico at the state line. *Id.*, at 787–788. But then, instead of similarly requiring New Mexico to deliver a specified amount of water annually to the Texas state line, the Compact directed New Mexico to deliver water to the Reservoir. *Id.*, at 788.* In isolation, this might have seemed a curious choice, for a promise to deliver water to a reservoir more than 100 miles inside New Mexico would seemingly secure nothing for Texas. But the choice made all the sense in the world in light of the simultaneously negotiated Downstream Contracts that promised Texas water districts a certain amount of water every year from the Reservoir's resources.

Fast forward to this dispute. Texas filed an original action before this Court complaining that New Mexico has violated the Compact. According to Texas, New Mexico is effectively breaching its Compact duty to deliver water to the Reservoir by allowing downstream New Mexico users to siphon off water below the Reservoir in ways the Downstream Contracts do not anticipate. After we permitted the United States to intervene, it also filed a complaint with allegations that parallel Texas's. In response to these complaints, New Mexico filed a motion to dismiss. A Special Master we appointed to consider the case received briefing, heard argument, and eventually issued an interim report recommending that we deny New Mexico's motion to dismiss Texas's complaint. We accepted that recommendation. At the same time, the Master recom-

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*To be precise, the Compact originally required New Mexico to deliver water to a measuring station at San Marcial, New Mexico, upstream of the Elephant Butte Reservoir. 53 Stat. 788. But the Compact also established something called the Rio Grande Compact Commission and gave it the power to administer the Compact in various ways. *Id.*, at 791. In 1948, that Commission relocated the spot for measuring the delivery obligation from the measuring station to the Reservoir itself.

mended that we dismiss in part the complaint filed by the United States. The Master reasoned, in pertinent part, that the Compact does not confer on the United States the power to enforce its terms. In response to the Master's report, the parties filed a number of exceptions. We agreed to hear two of these exceptions—one by the United States and one by Colorado—concerning the scope of the claims the United States can assert in this original action. The United States says it may pursue claims for violations of the Compact itself; Colorado says the United States should be permitted to pursue claims only to the extent they arise under the 1906 treaty with Mexico.

Our analysis begins with the Constitution. Its Compact Clause provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State." Art. I, §10, cl. 3. Congress's approval serves to "prevent any compact or agreement between any two States, which might affect injuriously the interests of the others." *Florida* v. *Georgia,* 17 How. 478, 494 (1855). It also ensures that the Legislature can "check any infringement of the rights of the national government." 3 J. Story, Commentaries on the Constitution of the United States §1397, p. 272 (1833) (in subsequent editions, §1403). So, for example, if a proposed interstate agreement might lead to friction with a foreign country or injure the interests of another region of our own, Congress may withhold its approval. But once Congress gives its consent, a compact between States—like any other federal statute—becomes the law of the land. *Texas* v. *New Mexico*, 462 U. S. 554, 564 (1983).

Our role in compact cases differs from our role in ordinary litigation. The Constitution endows this Court with original jurisdiction over disputes between the States. See Art. III, §2. And this Court's role in these cases is to serve "'as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force.'"

Kansas v. *Nebraska*, 574 U. S. ___, ___ (2015) (slip op., at 6) (quoting *North Dakota* v. *Minnesota*, 263 U. S. 365, 372–373 (1923)). As a result, the Court may, "[i]n this singular sphere, . . . 'regulate and mould the process it uses in such a manner as in its judgment will best promote the purposes of justice.'" 574 U. S., at ___–___ (slip op., at 6–7) (quoting *Kentucky* v. *Dennison*, 24 How. 66, 98 (1861)).

Using that special authority, we have sometimes permitted the federal government to participate in compact suits to defend "distinctively federal interests" that a normal litigant might not be permitted to pursue in traditional litigation. *Maryland* v. *Louisiana*, 451 U. S. 725, 745, n. 21 (1981). At the same time, our permission should not be confused for license. Viewed from some sufficiently abstract level of generality, almost any compact between the States will touch on some concern of the national government—foreign affairs, interstate commerce, taxing and spending. No doubt that is the very reason why the Constitution requires congressional ratification of state compacts. But just because Congress enjoys a special role in approving interstate agreements, it does not necessarily follow that the United States has blanket authority to intervene in cases concerning the construction of those agreements.

Still, bearing in mind our unique authority to mold original actions, several considerations taken collectively persuade us that the United States may pursue the particular claims it has pleaded in this case:

First, the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to "effec[t] an equitable apportionment" of "the waters of the Rio Grande" between the affected States. 53 Stat. 785. Yet it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had

negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas. In this way, the United States might be said to serve, through the Downstream Contracts, as a sort of "'agent' of the Compact, charged with assuring that the Compact's equitable apportionment" to Texas and part of New Mexico "is, in fact, made." Texas's Reply to Exceptions to the First Interim Report of the Special Master 40. Or by way of another rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference. Cf. 11 R. Lord, Williston on Contracts §30:26 (4th ed. 2017). However described, it is clear enough that the federal government has an interest in seeing that water is deposited in the Reservoir consistent with the Compact's terms. That is what allows the United States to meet its duties under the Downstream Contracts, which are themselves essential to the fulfillment of the Compact's expressly stated purpose.

Second, New Mexico has conceded that the United States plays an integral role in the Compact's operation. Early in these proceedings, it argued that the federal government was an indispensable party to this lawsuit because it is "responsible for . . . delivery of . . . water" as required by the Downstream Contracts and anticipated by the Compact. Brief in Opposition 33; *ibid.* ("[T]he entry of a Decree in accordance with Texas' Prayer for Relief would necessarily affect the United States' interests in the [Rio Grande] Project" contract). And at oral argument, New Mexico contended that the federal government is so integrally a part of the Compact's operation that a State could sue the United States under the Compact for interfering with its operation. Tr. of Oral Arg. 59.

Third, a breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations. See *Sanitary Dist. of Chicago* v. *United States*, 266 U. S. 405, 423–425 (1925) (recognizing the strong interests

of the United States in preventing interference with its treaty obligations). Our treaty with Mexico requires the federal government to deliver 60,000 acre-feet of water annually from the Elephant Butte Reservoir. And to fill that Reservoir the Compact obliges New Mexico to deliver a specified amount of water to the facility. So a failure by New Mexico to meet its Compact obligations could directly impair the federal government's ability to perform its obligations under the treaty. Now the Compact says plainly that it may not be "construed as affecting the obligations of the United States of America to Mexico" under existing treaties. 53 Stat. 792. But that means only that the Compact seeks to avoid impairing the federal government's treaty obligations. Permitting the United States to proceed here will allow it to ensure that those obligations are, in fact, honored.

Fourth, the United States has asserted its Compact claims in an existing action brought by Texas, seeking substantially the same relief and without that State's objection. This case does not present the question whether the United States could initiate litigation to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States.

Taken together, we are persuaded these factors favor allowing the United States to pursue the Compact claims it has pleaded in this original action. Nothing in our opinion should be taken to suggest whether a different result would obtain in the absence of any of the considerations we have outlined or in the presence of additional, countervailing considerations. The United States's exception is sustained, all other exceptions are overruled, and the case is remanded to the Special Master for further proceedings consistent with this opinion.

It is so ordered.

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

MASTERPIECE CAKESHOP, LTD., ET AL. *v.* COLORADO CIVIL RIGHTS COMMISSION ET AL.

CERTIORARI TO THE COURT OF APPEALS OF COLORADO

No. 16–111. Argued December 5, 2017—Decided June 4, 2018

Masterpiece Cakeshop, Ltd., is a Colorado bakery owned and operated by Jack Phillips, an expert baker and devout Christian. In 2012 he told a same-sex couple that he would not create a cake for their wedding celebration because of his religious opposition to same-sex marriages—marriages that Colorado did not then recognize—but that he would sell them other baked goods, *e.g.,* birthday cakes. The couple filed a charge with the Colorado Civil Rights Commission (Commission) pursuant to the Colorado Anti-Discrimination Act (CADA), which prohibits, as relevant here, discrimination based on sexual orientation in a "place of business engaged in any sales to the public and any place offering services . . . to the public." Under CADA's administrative review system, the Colorado Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a state Administrative Law Judge (ALJ), who ruled in the couple's favor. In so doing, the ALJ rejected Phillips' First Amendment claims: that requiring him to create a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion. Both the Commission and the Colorado Court of Appeals affirmed.

Held: The Commission's actions in this case violated the Free Exercise Clause. Pp. 9–18.

(a) The laws and the Constitution can, and in some instances must, protect gay persons and gay couples in the exercise of their civil rights, but religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. See *Obergefell* v. *Hodges*, 576 U. S. ___, ___. While it is unexceptional

that Colorado law can protect gay persons in acquiring products and services on the same terms and conditions as are offered to other members of the public, the law must be applied in a manner that is neutral toward religion. To Phillips, his claim that using his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation, has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. His dilemma was understandable in 2012, which was before Colorado recognized the validity of gay marriages performed in the State and before this Court issued *United States* v. *Windsor*, 570 U. S. 744, or *Obergefell*. Given the State's position at the time, there is some force to Phillips' argument that he was not unreasonable in deeming his decision lawful. State law at the time also afforded storekeepers some latitude to decline to create specific messages they considered offensive. Indeed, while the instant enforcement proceedings were pending, the State Civil Rights Division concluded in at least three cases that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. Phillips too was entitled to a neutral and respectful consideration of his claims in all the circumstances of the case. Pp. 9–12.

(b) That consideration was compromised, however, by the Commission's treatment of Phillips' case, which showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection. As the record shows, some of the commissioners at the Commission's formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged Phillips' faith as despicable and characterized it as merely rhetorical, and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. No commissioners objected to the comments. Nor were they mentioned in the later state-court ruling or disavowed in the briefs filed here. The comments thus cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.

Another indication of hostility is the different treatment of Phillips' case and the cases of other bakers with objections to anti-gay messages who prevailed before the Commission. The Commission ruled against Phillips in part on the theory that any message on the requested wedding cake would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the cases involving requests for cakes depicting anti-gay marriage symbolism. The Division also considered that each bakery was willing to sell other products to the prospective customers, but the Commission found Phillips' willingness to do the same irrelevant. The State Court of

Syllabus

Appeals' brief discussion of this disparity of treatment does not answer Phillips' concern that the State's practice was to disfavor the religious basis of his objection. Pp. 12–16.

(c) For these reasons, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. The government, consistent with the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520. Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*, at 540. In view of these factors, the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of his religious beliefs. The Commission gave "every appearance," *id.*, at 545, of adjudicating his religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it, *id.*, at 537, but government has no role in expressing or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. The inference here is thus that Phillips' religious objection was not considered with the neutrality required by the Free Exercise Clause. The State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. But the official expressions of hostility to religion in some of the commissioners' comments were inconsistent with that requirement, and the Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. Pp. 16–18.

370 P. 3d 272, reversed.

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

SUPREME COURT OF THE UNITED STATES

No. 16–111

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS *v.* COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 4, 2018]

JUSTICE KENNEDY delivered the opinion of the Court.

In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages—marriages the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.

The Commission determined that the shop's actions violated the Act and ruled in the couple's favor. The Colorado state courts affirmed the ruling and its enforcement order, and this Court now must decide whether the Commission's order violated the Constitution.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek

goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.

One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.

The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. The reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions. The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might

have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside.

I

A

Masterpiece Cakeshop, Ltd., is a bakery in Lakewood, Colorado, a suburb of Denver. The shop offers a variety of baked goods, ranging from everyday cookies and brownies to elaborate custom-designed cakes for birthday parties, weddings, and other events.

Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian. He has explained that his "main goal in life is to be obedient to" Jesus Christ and Christ's "teachings in all aspects of his life." App. 148. And he seeks to "honor God through his work at Masterpiece Cakeshop." *Ibid.* One of Phillips' religious beliefs is that "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman." *Id.*, at 149. To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.

Phillips met Charlie Craig and Dave Mullins when they entered his shop in the summer of 2012. Craig and Mullins were planning to marry. At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their family and friends in Denver. To prepare for their celebration, Craig and Mullins visited the shop and told Phillips that they were interested in ordering a cake for "our wedding." *Id.*, at 152 (emphasis deleted). They did not mention the design of the cake they envisioned.

Phillips informed the couple that he does not "create" wedding cakes for same-sex weddings. *Ibid.* He explained, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." *Ibid.* The couple left the shop without further discussion.

The following day, Craig's mother, who had accompanied the couple to the cakeshop and been present for their interaction with Phillips, telephoned to ask Phillips why he had declined to serve her son. Phillips explained that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage, and also because Colorado (at that time) did not recognize same-sex marriages. *Id.*, at 153. He later explained his belief that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into." *Ibid.* (emphasis deleted).

B

For most of its history, Colorado has prohibited discrimination in places of public accommodation. In 1885, less than a decade after Colorado achieved statehood, the General Assembly passed "An Act to Protect All Citizens

in Their Civil Rights," which guaranteed "full and equal enjoyment" of certain public facilities to "all citizens," "regardless of race, color or previous condition of servitude." 1885 Colo. Sess. Laws pp. 132–133. A decade later, the General Assembly expanded the requirement to apply to "all other places of public accommodation." 1895 Colo. Sess. Laws ch. 61, p. 139.

Today, the Colorado Anti-Discrimination Act (CADA) carries forward the state's tradition of prohibiting discrimination in places of public accommodation. Amended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation as well as other protected characteristics, CADA in relevant part provides as follows:

> "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." Colo. Rev. Stat. §24–34–601(2)(a) (2017).

The Act defines "public accommodation" broadly to include any "place of business engaged in any sales to the public and any place offering services . . . to the public," but excludes "a church, synagogue, mosque, or other place that is principally used for religious purposes." §24–34–601(1).

CADA establishes an administrative system for the resolution of discrimination claims. Complaints of discrimination in violation of CADA are addressed in the first instance by the Colorado Civil Rights Division. The Division investigates each claim; and if it finds probable cause that CADA has been violated, it will refer the matter to the Colorado Civil Rights Commission. The Commission,

in turn, decides whether to initiate a formal hearing before a state Administrative Law Judge (ALJ), who will hear evidence and argument before issuing a written decision. See §§24–34–306, 24–4–105(14). The decision of the ALJ may be appealed to the full Commission, a seven-member appointed body. The Commission holds a public hearing and deliberative session before voting on the case. If the Commission determines that the evidence proves a CADA violation, it may impose remedial measures as provided by statute. See §24–34–306(9). Available remedies include, among other things, orders to cease-and-desist a discriminatory policy, to file regular compliance reports with the Commission, and "to take affirmative action, including the posting of notices setting forth the substantive rights of the public." §24–34–605. Colorado law does not permit the Commission to assess money damages or fines. §§24–34–306(9), 24–34–605.

C

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in August 2012, shortly after the couple's visit to the shop. App. 31. The complaint alleged that Craig and Mullins had been denied "full and equal service" at the bakery because of their sexual orientation, *id.*, at 35, 48, and that it was Phillips' "standard business practice" not to provide cakes for same-sex weddings, *id.*, at 43.

The Civil Rights Division opened an investigation. The investigator found that "on multiple occasions," Phillips "turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception" because his religious beliefs prohibited it and because the potential customers "were doing something illegal" at that time. *Id.*, at 76. The investigation found that Phillips had declined to sell custom wedding cakes to about six other

same-sex couples on this basis. *Id.*, at 72. The investigator also recounted that, according to affidavits submitted by Craig and Mullins, Phillips' shop had refused to sell cupcakes to a lesbian couple for their commitment celebration because the shop "had a policy of not selling baked goods to same-sex couples for this type of event." *Id.*, at 73. Based on these findings, the Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission. *Id.*, at 69.

The Commission found it proper to conduct a formal hearing, and it sent the case to a State ALJ. Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple's favor. The ALJ first rejected Phillips' argument that declining to make or create a wedding cake for Craig and Mullins did not violate Colorado law. It was undisputed that the shop is subject to state public accommodations laws. And the ALJ determined that Phillips' actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage as Phillips contended. App. to Pet. for Cert. 68a–72a.

Phillips raised two constitutional claims before the ALJ. He first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed. The ALJ rejected the contention that preparing a wedding cake is a form of protected speech and did not agree that creating Craig and Mullins' cake would force Phillips to adhere to "an ideological point of view." *Id.*, at 75a. Applying CADA to the facts at hand, in the ALJ's view, did not interfere with Phillips' freedom of speech.

Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First

Amendment. Citing this Court's precedent in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), the ALJ determined that CADA is a "valid and neutral law of general applicability" and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause. *Id.*, at 879; App. to Pet. for Cert. 82a–83a. The ALJ thus ruled against Phillips and the cakeshop and in favor of Craig and Mullins on both constitutional claims.

The Commission affirmed the ALJ's decision in full. *Id.*, at 57a. The Commission ordered Phillips to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples." *Ibid.* It also ordered additional remedial measures, including "comprehensive staff training on the Public Accommodations section" of CADA "and changes to any and all company policies to comply with . . . this Order." *Id.*, at 58a. The Commission additionally required Phillips to prepare "quarterly compliance reports" for a period of two years documenting "the number of patrons denied service" and why, along with "a statement describing the remedial actions taken." *Ibid.*

Phillips appealed to the Colorado Court of Appeals, which affirmed the Commission's legal determinations and remedial order. The court rejected the argument that the "Commission's order unconstitutionally compels" Phillips and the shop "to convey a celebratory message about same sex marriage." *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 283 (2015). The court also rejected the argument that the Commission's order violated the Free Exercise Clause. Relying on this Court's precedent in *Smith*, *supra*, at 879, the court stated that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability" on the ground that following the law would interfere with religious practice or belief. 370 P. 3d, at 289. The

court concluded that requiring Phillips to comply with the statute did not violate his free exercise rights. The Colorado Supreme Court declined to hear the case.

Phillips sought review here, and this Court granted certiorari. 582 U. S. ___ (2017). He now renews his claims under the Free Speech and Free Exercise Clauses of the First Amendment.

II

A

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell* v. *Hodges*, 576 U. S. ___ (2015), "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Id.*, at ___ (slip op., at 27). Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See *Newman* v. *Piggy Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 5 (1968) (*per curiam*); see also *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 572 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to

believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments").

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law. See Tr. of Oral Arg. 4–7, 10.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in

his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Phillips' dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. See Colo. Const., Art. II, §31 (2012); 370 P. 3d, at 277. At the time of the events in question, this Court had not issued its decisions either in *United States* v. *Windsor*, 570 U. S. 744 (2013), or *Obergefell*. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers' creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned

gay persons or gay marriages. See *Jack* v. *Gateaux, Ltd.*, Charge No. P20140071X (Mar. 24, 2015); *Jack* v. *Le Bakery Sensual, Inc.*, Charge No. P20140070X (Mar. 24, 2015); *Jack* v. *Azucar Bakery*, Charge No. P20140069X (Mar. 24, 2015).

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying "no goods or services will be sold if they will be used for gay marriages," something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

B

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission's formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the

state." Tr. 23. A few moments later, the commissioner restated the same position: "[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise." *Id.*, at 30. Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

> "I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others." Tr. 11–12.

To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetori-

cal—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's anti-discrimination law—a law that protects discrimination on the basis of religion as well as sexual orientation.

The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission's decision did not mention those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 540–542 (1993); *id.,* at 558 (Scalia, J., concurring in part and concurring in judgment). In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.

Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

As noted above, on at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the

words of the Division, the requested cake included "wording and images [the baker] deemed derogatory," *Jack* v. *Gateaux, Ltd.*, Charge No. P20140071X, at 4; featured "language and images [the baker] deemed hateful," *Jack* v. *Le Bakery Sensual, Inc.*, Charge No. P20140070X, at 4; or displayed a message the baker "deemed as discriminatory, *Jack* v. *Azucar Bakery*, Charge No. P20140069X, at 4.

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips' willingness to sell "birthday cakes, shower cakes, [and] cookies and brownies," App. 152, to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers' conscience-based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity

only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that "[t]his case is distinguishable from the Colorado Civil Rights Division's recent findings that [the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed" when they refused to create the requested cakes. 370 P. 3d, at 282, n. 8. In those cases, the court continued, there was no impermissible discrimination because "the Division found that the bakeries . . . refuse[d] the patron's request . . . because of the offensive nature of the requested message." *Ibid.*

A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. Just as "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. See *Matal* v. *Tam*, 582 U. S. ___, ___–___ (2017) (opinion of ALITO, J.) (slip op., at 22–23). The Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs. The court's footnote does not, therefore, answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.

C

For the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In *Church of Lukumi Babalu Aye, supra*, the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose

regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. *Id.*, at 534. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.*, at 547.

Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*, at 540. In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs. The Commission gave "every appearance," *id.*, at 545, of adjudicating Phillips' religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it. *Id.*, at 537. It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires.

While the issues here are difficult to resolve, it must be concluded that the State's interest could have been

weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

III

The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

The judgment of the Colorado Court of Appeals is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 16–111

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS
v. COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 4, 2018]

JUSTICE KAGAN, with whom JUSTICE BREYER joins, concurring.

"[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Ante*, at 9. But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views "neutral and respectful consideration." *Ante*, at 12. I join the Court's opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation. I write separately to elaborate on one of the bases for the Court's holding.

The Court partly relies on the "disparate consideration of Phillips' case compared to the cases of [three] other bakers" who "objected to a requested cake on the basis of conscience." *Ante*, at 14, 18. In the latter cases, a customer named William Jack sought "cakes with images that conveyed disapproval of same-sex marriage, along with religious text"; the bakers whom he approached refused to make them. *Ante*, at 15; see *post*, at 3 (GINSBURG, J., dissenting) (further describing the requested cakes). Those bakers prevailed before the Colorado Civil Rights Division and Commission, while Phillips—who objected for

religious reasons to baking a wedding cake for a same-sex couple—did not. The Court finds that the legal reasoning of the state agencies differed in significant ways as between the Jack cases and the Phillips case. See *ante,* at 15. And the Court takes especial note of the suggestion made by the Colorado Court of Appeals, in comparing those cases, that the state agencies found the message Jack requested "offensive [in] nature." *Ante*, at 16 (internal quotation marks omitted). As the Court states, a "principled rationale for the difference in treatment" cannot be "based on the government's own assessment of offensiveness." *Ibid.*

What makes the state agencies' consideration yet more disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious. The Colorado Anti-Discrimination Act (CADA) makes it unlawful for a place of public accommodation to deny "the full and equal enjoyment" of goods and services to individuals based on certain characteristics, including sexual orientation and creed. Colo. Rev. Stat. §24–34–601(2)(a) (2017). The three bakers in the Jack cases did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA's demand that customers receive "the full and equal enjoyment" of public accommodations irrespective of their sexual orientation. *Ibid.* The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious

belief.*

I read the Court's opinion as fully consistent with that view. The Court limits its analysis to the *reasoning* of the state agencies (and Court of Appeals)—"quite apart from whether the [Phillips and Jack] cases should ultimately be distinguished." *Ante*, at 15. And the Court itself recognizes the principle that would properly account for a difference in *result* between those cases. Colorado law, the Court

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*JUSTICE GORSUCH disagrees. In his view, the Jack cases and the Phillips case must be treated the same because the bakers in all those cases "would not sell the requested cakes to anyone." *Post*, at 4. That description perfectly fits the Jack cases—and explains why the bakers there did not engage in unlawful discrimination. But it is a surprising characterization of the Phillips case, given that Phillips routinely sells wedding cakes to opposite-sex couples. JUSTICE GORSUCH can make the claim only because he does not think a "wedding cake" is the relevant product. As JUSTICE GORSUCH sees it, the product that Phillips refused to sell here—and would refuse to sell to anyone—was a "cake celebrating same-sex marriage." *Ibid.*; see *post*, at 3, 6, 8–9. But that is wrong. The cake requested was not a special "cake celebrating same-sex marriage." It was simply a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike. See *ante*, at 4 (majority opinion) (recounting that Phillips did not so much as discuss the cake's design before he refused to make it). And contrary to JUSTICE GORSUCH'S view, a wedding cake does not become something different whenever a vendor like Phillips invests its sale to particular customers with "religious significance." *Post*, at 11. As this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait. See *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 5 (1968) (*per curiam*) (holding that a barbeque vendor must serve black customers even if he perceives such service as vindicating racial equality, in violation of his religious beliefs); *ante*, at 9. A vendor can choose the products he sells, but not the customers he serves—no matter the reason. Phillips sells wedding cakes. As to that product, he unlawfully discriminates: He sells it to opposite-sex but not to same-sex couples. And on that basis—which has nothing to do with Phillips' religious beliefs—Colorado could have distinguished Phillips from the bakers in the Jack cases, who did not engage in any prohibited discrimination.

says, "can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Ante*, at 10. For that reason, Colorado can treat a baker who discriminates based on sexual orientation differently from a baker who does not discriminate on that or any other prohibited ground. But only, as the Court rightly says, if the State's decisions are not infected by religious hostility or bias. I accordingly concur.

SUPREME COURT OF THE UNITED STATES

No. 16–111

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS *v.* COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 4, 2018]

JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring.

In *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, this Court held that a neutral and generally applicable law will usually survive a constitutional free exercise challenge. 494 U. S. 872, 878–879 (1990). *Smith* remains controversial in many quarters. Compare McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990), with Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992). But we know this with certainty: when the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 546 (1993).

Today's decision respects these principles. As the Court explains, the Colorado Civil Rights Commission failed to act neutrally toward Jack Phillips's religious faith. Maybe most notably, the Commission allowed three other bakers to refuse a customer's request that would have required them to violate their secular commitments. Yet it denied

the same accommodation to Mr. Phillips when he refused a customer's request that would have required him to violate his religious beliefs. *Ante,* at 14–16. As the Court also explains, the only reason the Commission seemed to supply for its discrimination was that it found Mr. Phillips's religious beliefs "offensive." *Ibid.* That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all. Because the Court documents each of these points carefully and thoroughly, I am pleased to join its opinion in full.

The only wrinkle is this. In the face of so much evidence suggesting hostility toward Mr. Phillips's sincerely held religious beliefs, two of our colleagues have written separately to suggest that the Commission acted neutrally toward his faith when it treated him differently from the other bakers—or that it could have easily done so consistent with the First Amendment. See *post,* at 4–5, and n. 4 (GINSBURG, J., dissenting); *ante,* at 2–3, and n. (KAGAN, J., concurring). But, respectfully, I do not see how we might rescue the Commission from its error.

A full view of the facts helps point the way to the problem. Start with William Jack's case. He approached three bakers and asked them to prepare cakes with messages disapproving same-sex marriage on religious grounds. App. 233, 243, 252. All three bakers refused Mr. Jack's request, stating that they found his request offensive to their secular convictions. *Id.*, at 231, 241, 250. Mr. Jack responded by filing complaints with the Colorado Civil Rights Division. *Id.*, at 230, 240, 249. He pointed to Colorado's Anti-Discrimination Act, which prohibits discrimination against customers in public accommodations because of religious creed, sexual orientation, or certain other traits. See *ibid.*; Colo. Rev. Stat. §24–34–601(2)(a)

(2017). Mr. Jack argued that the cakes he sought reflected his religious beliefs and that the bakers could not refuse to make them just because they happened to disagree with his beliefs. App. 231, 241, 250. But the Division declined to find a violation, reasoning that the bakers didn't deny Mr. Jack service because of his religious faith but because the cakes he sought were offensive to their own moral convictions. *Id.*, at 237, 247, 255–256. As proof, the Division pointed to the fact that the bakers said they treated Mr. Jack as they would have anyone who requested a cake with similar messages, regardless of their religion. *Id.*, at 230–231, 240, 249. The Division pointed, as well, to the fact that the bakers said they were happy to provide religious persons with other cakes expressing other ideas. *Id.*, at 237, 247, 257. Mr. Jack appealed to the Colorado Civil Rights Commission, but the Commission summarily denied relief. App. to Pet. for Cert. 326a–331a.

Next, take the undisputed facts of Mr. Phillips's case. Charlie Craig and Dave Mullins approached Mr. Phillips about creating a cake to celebrate their wedding. App. 168. Mr. Phillips explained that he could not prepare a cake celebrating a same-sex wedding consistent with his religious faith. *Id.,* at 168–169. But Mr. Phillips offered to make other baked goods for the couple, including cakes celebrating other occasions. *Ibid.* Later, Mr. Phillips testified without contradiction that he would have refused to create a cake celebrating a same-sex marriage for any customer, regardless of his or her sexual orientation. *Id.,* at 166–167 ("I will not design and create wedding cakes for a same-sex wedding regardless of the sexual orientation of the customer"). And the record reveals that Mr. Phillips apparently refused just such a request from Mr. Craig's mother. *Id.,* at 38–40, 169. (Any suggestion that Mr. Phillips was willing to make a cake celebrating a same-sex marriage for a heterosexual customer or was not willing to sell other products to a homosexual customer,

then, would simply mistake the undisputed factual record. See *post,* at 4, n. 2 (GINSBURG, J., dissenting); *ante,* at 2–3, and n. (KAGAN, J., concurring)). Nonetheless, the Commission held that Mr. Phillips's conduct violated the Colorado public accommodations law. App. to Pet. for Cert. 56a–58a.

The facts show that the two cases share all legally salient features. In both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction. To be sure, the bakers *knew* their conduct promised the effect of leaving a customer in a protected class unserved. But there's no indication the bakers actually *intended* to refuse service *because of* a customer's protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). So, for example, the bakers in the first case would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. And the bakers in the first case were generally happy to sell to persons of faith, just as the baker in the second case was generally happy to sell to gay persons. In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.

The distinction between intended and knowingly accepted effects is familiar in life and law. Often the purposeful pursuit of worthy commitments requires us to accept unwanted but entirely foreseeable side effects: so, for example, choosing to spend time with family means the foreseeable loss of time for charitable work, just as opting for more time in the office means knowingly forgoing time

at home with loved ones. The law, too, sometimes distinguishes between intended and foreseeable effects. See, *e.g.,* ALI, Model Penal Code §§1.13, 2.02(2)(a)(i) (1985); 1 W. LaFave, Substantive Criminal Law §5.2(b), pp. 460–463 (3d ed. 2018). Other times, of course, the law proceeds differently, either conflating intent and knowledge or presuming intent as a matter of law from a showing of knowledge. See, *e.g.,* Restatement (Second) of Torts §8A (1965); *Radio Officers* v. *NLRB*, 347 U. S. 17, 45 (1954).

The problem here is that the Commission failed to act neutrally by applying a consistent legal rule. In Mr. Jack's case, the Commission chose to distinguish carefully between intended and knowingly accepted effects. Even though the bakers knowingly denied service to someone in a protected class, the Commission found no violation because the bakers only intended to distance themselves from "the offensive nature of the requested message." *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 282, n. 8 (Colo. App. 2015); App. 237, 247, 256; App. to Pet. for Cert. 326a–331a; see also Brief for Respondent Colorado Civil Rights Commission 52 ("Businesses are entitled to reject orders for any number of reasons, including because they deem a particular product requested by a customer to be 'offensive'"). Yet, in Mr. Phillips's case, the Commission dismissed this very same argument as resting on a "distinction without a difference." App. to Pet. for Cert. 69a. It concluded instead that an "intent to disfavor" a protected class of persons should be "readily . . . presumed" from the knowing failure to serve someone who belongs to that class. *Id.,* at 70a. In its judgment, Mr. Phillips's intentions were "inextricably tied to the sexual orientation of the parties involved" and essentially "irrational." *Ibid.*

Nothing in the Commission's opinions suggests any neutral principle to reconcile these holdings. If Mr. Phillips's objection is "inextricably tied" to a protected class,

then the bakers' objection in Mr. Jack's case must be "inextricably tied" to one as well. For just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic. In the end, the Commission's decisions simply reduce to this: it *presumed* that Mr. Phillip harbored an intent to discriminate against a protected class in light of the foreseeable effects of his conduct, but it declined to presume the same intent in Mr. Jack's case even though the effects of the bakers' conduct were just as foreseeable. Underscoring the double standard, a state appellate court said that "no such showing" of actual "animus"—or intent to discriminate against persons in a protected class—was even required in Mr. Phillips's case. 370 P. 3d, at 282.

The Commission cannot have it both ways. The Commission cannot slide up and down the *mens rea* scale, picking a mental state standard to suit its tastes depending on its sympathies. Either actual proof of intent to discriminate on the basis of membership in a protected class is required (as the Commission held in Mr. Jack's case), or it is sufficient to "presume" such intent from the knowing failure to serve someone in a protected class (as the Commission held in Mr. Phillips's case). Perhaps the Commission could have chosen either course as an initial matter. But the one thing it can't do is apply a more generous legal test to secular objections than religious ones. See *Church of Lukumi Babalu Aye,* 508 U. S., at 543–544. That is anything but the neutral treatment of religion.

The real explanation for the Commission's discrimination soon comes clear, too—and it does anything but help

its cause. This isn't a case where the Commission self-consciously announced a change in its legal rule in all public accommodation cases. Nor is this a case where the Commission offered some persuasive reason for its discrimination that might survive strict scrutiny. Instead, as the Court explains, it appears the Commission wished to condemn Mr. Phillips for expressing just the kind of "irrational" or "offensive . . . message" that the bakers in the first case refused to endorse. *Ante,* at 16. Many may agree with the Commission and consider Mr. Phillips's religious beliefs irrational or offensive. Some may believe he misinterprets the teachings of his faith. And, to be sure, this Court has held same-sex marriage a matter of constitutional right and various States have enacted laws that preclude discrimination on the basis of sexual orientation. But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will ever survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise. Just as it is the "proudest boast of our free speech jurisprudence" that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive. See *Matal* v. *Tam*, 582 U. S. ___, ___ (2017) (plurality opinion) (slip op., at 25) (citing *United States* v. *Schwimmer*, 279 U. S. 644, 655 (1929) (Holmes, J., dissenting)). Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom. See *Church of Lukumi Babalu Aye, supra*, at 547; *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 715–716 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205, 223–224 (1972); *Cantwell* v. *Connecticut*, 310 U. S. 296, 308–310 (1940).

Nor can any amount of after-the-fact maneuvering by

our colleagues save the Commission. It is no answer, for example, to observe that Mr. Jack requested a cake with text on it while Mr. Craig and Mr. Mullins sought a cake celebrating their wedding without discussing its decoration, and then suggest this distinction makes all the difference. See *post,* at 4–5, and n. 4 (GINSBURG, J., dissenting). It is no answer either simply to slide up a level of generality to redescribe Mr. Phillips's case as involving only a wedding cake like any other, so the fact that Mr. Phillips would make one for some means he must make them for all. See *ante,* at 2–3, and n. (KAGAN, J., concurring). These arguments, too, fail to afford Mr. Phillips's faith neutral respect.

Take the first suggestion first. To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in Mr. Jack's case while penalizing Mr. Phillips—is irrational. Not even the Commission or court of appeals purported to rely on that distinction. Imagine Mr. Jack asked only for a cake with a symbolic expression against same-sex marriage rather than a cake bearing words conveying the same idea. Surely the Commission would have approved the bakers' intentional wish to avoid participating in that message too. Nor can anyone reasonably doubt that a wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding. See 370 P. 3d, at 276 (stating that Mr. Craig and Mr. Mullins "requested that Phillips design and create a *cake to celebrate their same-sex wedding*") (emphasis added). Like "an emblem or flag," a cake for a same-sex wedding is a symbol that serves as "a short cut from mind to mind," signifying approval of a specific "system, idea, [or] institution." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 632 (1943). It is precisely that approval that Mr. Phillips intended to withhold in keeping

with his religious faith. The Commission denied Mr. Phillips that choice, even as it afforded the bakers in Mr. Jack's case the choice to refuse to advance a message they deemed offensive to their secular commitments. That is not neutral.

Nor would it be proper for this or any court to suggest that a person must be forced to write words rather than create a symbol before his religious faith is implicated. Civil authorities, whether "high or petty," bear no license to declare what is or should be "orthodox" when it comes to religious beliefs, *id.,* at 642, or whether an adherent has "correctly perceived" the commands of his religion, *Thomas, supra,* at 716. Instead, it is our job to look beyond the formality of written words and afford legal protection to any sincere act of faith. See generally *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 569 (1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression," which are "not a condition of constitutional protection").

The second suggestion fares no better. Suggesting that this case is only about "wedding cakes"—and not a wedding cake celebrating a same-sex wedding—actually points up the problem. At its most general level, the cake at issue in Mr. Phillips's case was just a mixture of flour and eggs; at its most specific level, it was a cake celebrating the same-sex wedding of Mr. Craig and Mr. Mullins. We are told here, however, to apply a sort of Goldilocks rule: describing the cake by its ingredients is *too general*; understanding it as celebrating a same-sex wedding is *too specific*; but regarding it as a generic wedding cake is *just right*. The problem is, the Commission didn't play with the level of generality in Mr. Jack's case in this way. It didn't declare, for example, that because the cakes Mr. Jack requested were just cakes about weddings generally, and all such cakes were the same, the bakers had to pro-

duce them. Instead, the Commission accepted the bakers' view that the specific cakes Mr. Jack requested conveyed a message offensive to their convictions and allowed them to refuse service. Having done that there, it must do the same here.

Any other conclusion would invite civil authorities to gerrymander their inquiries based on the parties they prefer. Why calibrate the level of generality in Mr. Phillips's case at "wedding cakes" exactly—and not at, say, "cakes" more generally or "cakes that convey a message regarding same-sex marriage" more specifically? If "cakes" were the relevant level of generality, the Commission would have to order the bakers to make Mr. Jack's requested cakes just as it ordered Mr. Phillips to make the requested cake in his case. Conversely, if "cakes that convey a message regarding same-sex marriage" were the relevant level of generality, the Commission would have to respect Mr. Phillips's refusal to make the requested cake just as it respected the bakers' refusal to make the cakes Mr. Jack requested. In short, when the same level of generality is applied to both cases, it is no surprise that the bakers have to be treated the same. Only by adjusting the dials *just right*—fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views—can you engineer the Commission's outcome, handing a win to Mr. Jack's bakers but delivering a loss to Mr. Phillips. Such results-driven reasoning is improper. Neither the Commission nor this Court may apply a more specific level of generality in Mr. Jack's case (a cake that conveys a message regarding same-sex marriage) while applying a higher level of generality in Mr. Phillips's case (a cake that conveys no message regarding same-sex marriage). Of course, under *Smith* a vendor cannot escape a public accommodations law just because his religion frowns on it. But for any law to comply with the First Amendment and

Smith, it must be applied in a manner that treats religion with neutral respect. That means the government must apply the *same* level of generality across cases—and that did not happen here.

There is another problem with sliding up the generality scale: it risks denying constitutional protection to religious beliefs that draw distinctions more specific than the government's preferred level of description. To some, all wedding cakes may appear indistinguishable. But *to Mr. Phillips* that is not the case—his faith teaches him otherwise. And his religious beliefs are entitled to no less respectful treatment than the bakers' secular beliefs in Mr. Jack's case. This Court has explained these same points "[r]epeatedly and in many different contexts" over many years. *Smith*, 494 U. S. at 887. For example, in *Thomas* a faithful Jehovah's Witness and steel mill worker agreed to help manufacture sheet steel he knew might find its way into armaments, but he was unwilling to work on a fabrication line producing tank turrets. 450 U. S., at 711. Of course, the line Mr. Thomas drew wasn't the same many others would draw and it wasn't even the same line many other members of the same faith would draw. Even so, the Court didn't try to suggest that making steel is just making steel. Or that to offend his religion the steel needed to be of a particular kind or shape. Instead, it recognized that Mr. Thomas alone was entitled to define the nature of his religious commitments—and that those commitments, as defined by the faithful adherent, not a bureaucrat or judge, are entitled to protection under the First Amendment. *Id.,* at 714–716; see also *United States* v. *Lee*, 455 U. S. 252, 254–255 (1982); *Smith*, *supra,* at 887 (collecting authorities). It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons

sacramental bread is *just* bread or a kippah is *just* a cap.

Only one way forward now remains. Having failed to afford Mr. Phillips's religious objections neutral consideration and without any compelling reason for its failure, the Commission must afford him the same result it afforded the bakers in Mr. Jack's case. The Court recognizes this by reversing the judgment below and holding that the Commission's order "must be set aside." *Ante,* at 18. Maybe in some future rulemaking or case the Commission could adopt a new "knowing" standard for all refusals of service and offer neutral reasons for doing so. But, as the Court observes, "[h]owever later cases raising these or similar concerns are resolved in the future, . . . the rulings of the Commission and of the state court that enforced the Commission's order" in *this* case "must be invalidated." *Ibid.* Mr. Phillips has conclusively proven a First Amendment violation and, after almost six years facing unlawful civil charges, he is entitled to judgment.

SUPREME COURT OF THE UNITED STATES

No. 16–111

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS *v.* COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 4, 2018]

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part and concurring in the judgment.

I agree that the Colorado Civil Rights Commission (Commission) violated Jack Phillips' right to freely exercise his religion. As JUSTICE GORSUCH explains, the Commission treated Phillips' case differently from a similar case involving three other bakers, for reasons that can only be explained by hostility toward Phillips' religion. See *ante,* at 2–7 (concurring opinion). The Court agrees that the Commission treated Phillips differently, and it points out that some of the Commissioners made comments disparaging Phillips' religion. See *ante,* at 12–16. Although the Commissioners' comments are certainly disturbing, the discriminatory application of Colorado's public-accommodations law is enough on its own to violate Phillips' rights. To the extent the Court agrees, I join its opinion.

While Phillips rightly prevails on his free-exercise claim, I write separately to address his free-speech claim. The Court does not address this claim because it has some uncertainties about the record. See *ante,* at 2. Specifically, the parties dispute whether Phillips refused to create a *custom* wedding cake for the individual respondents, or whether he refused to sell them *any* wedding cake (including a premade one). But the Colorado Court of Appeals

resolved this factual dispute in Phillips' favor. The court described his conduct as a refusal to "design and create a cake to celebrate [a] same-sex wedding." *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 276 (2015); see also *id.,* at 286 ("designing and selling a wedding cake"); *id.,* at 283 ("refusing to create a wedding cake"). And it noted that the Commission's order required Phillips to sell "'*any* product [he] would sell to heterosexual couples,'" including custom wedding cakes. *Id.,* at 286 (emphasis added).

Even after describing his conduct this way, the Court of Appeals concluded that Phillips' conduct was not expressive and was not protected speech. It reasoned that an outside observer would think that Phillips was merely complying with Colorado's public-accommodations law, not expressing a message, and that Phillips could post a disclaimer to that effect. This reasoning flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak. It should not pass without comment.

I

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits state laws that abridge the "freedom of speech." When interpreting this command, this Court has distinguished between regulations of speech and regulations of conduct. The latter generally do not abridge the freedom of speech, even if they impose "incidental burdens" on expression. *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 567 (2011). As the Court explains today, public-accommodations laws usually regulate conduct. *Ante,* at 9–10 (citing *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 572 (1995)). "[A]s a general matter," public-accommodations laws do not "target speech" but instead prohibit "the *act* of discriminating against individuals in the provision of publicly available goods, privileges,

and services." *Id.,* at 572 (emphasis added).

Although public-accommodations laws generally regulate conduct, particular applications of them can burden protected speech. When a public-accommodations law "ha[s] the effect of declaring . . . speech itself to be the public accommodation," the First Amendment applies with full force. *Id.*, at 573; accord, *Boy Scouts of America* v. *Dale*, 530 U. S. 640, 657–659 (2000). In *Hurley*, for example, a Massachusetts public-accommodations law prohibited "'any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation.'" 515 U. S., at 561 (quoting Mass. Gen. Laws §272:98 (1992); ellipsis in original). When this law required the sponsor of a St. Patrick's Day parade to include a parade unit of gay, lesbian, and bisexual Irish-Americans, the Court unanimously held that the law violated the sponsor's right to free speech. Parades are "a form of expression," this Court explained, and the application of the public-accommodations law "alter[ed] the expressive content" of the parade by forcing the sponsor to add a new unit. 515 U. S., at 568, 572–573. The addition of that unit compelled the organizer to "bear witness to the fact that some Irish are gay, lesbian, or bisexual"; "suggest . . . that people of their sexual orientation have as much claim to unqualified social acceptance as heterosexuals"; and imply that their participation "merits celebration." *Id.,* at 574. While this Court acknowledged that the unit's exclusion might have been "misguided, or even hurtful," *ibid.*, it rejected the notion that governments can mandate "thoughts and statements acceptable to some groups or, indeed, all people" as the "antithesis" of free speech, *id.,* at 579; accord, *Dale*, *supra,* at 660–661.

The parade in *Hurley* was an example of what this Court has termed "expressive conduct." See 515 U. S., at 568–569. This Court has long held that "the Constitution

looks beyond written or spoken words as mediums of expression," *id.*, at 569, and that "[s]ymbolism is a primitive but effective way of communicating ideas," *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 632 (1943). Thus, a person's "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Texas* v. *Johnson*, 491 U. S. 397, 404 (1989). Applying this principle, the Court has recognized a wide array of conduct that can qualify as expressive, including nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag.[1]

Of course, conduct does not qualify as protected speech simply because "the person engaging in [it] intends thereby to express an idea." *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968). To determine whether conduct is sufficiently expressive, the Court asks whether it was "intended to be communicative" and, "in context, would reasonably be understood by the viewer to be communicative." *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 294 (1984). But a "'particularized message'" is not required, or else the freedom of speech "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U. S., at 569.

Once a court concludes that conduct is expressive, the

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[1] *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 565–566 (1991); *Texas* v. *Johnson*, 491 U. S. 397, 405–406 (1989); *Spence* v. *Washington*, 418 U. S. 405, 406, 409–411 (1974) (*per curiam*); *Schacht* v. *United States*, 398 U. S. 58, 62–63 (1970); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 505–506 (1969); *Brown* v. *Louisiana*, 383 U. S. 131, 141–142 (1966) (opinion of Fortas, J.); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 633–634 (1943); *Stromberg* v. *California*, 283 U. S. 359, 361, 369 (1931).

Constitution limits the government's authority to restrict or compel it. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'" and "tailor" the content of his message as he sees fit. *Id.,* at 573 (quoting *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 16 (1986) (plurality opinion)). This rule "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*, *supra*, at 573. And it "makes no difference" whether the government is regulating the "creati[on], distributi[on], or consum[ption]" of the speech. *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786, 792, n. 1 (2011).

II

A

The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive. Phillips considers himself an artist. The logo for Masterpiece Cakeshop is an artist's paint palate with a paintbrush and baker's whisk. Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas. Phillips takes exceptional care with each cake that he creates—sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding. Examples of his creations can be seen on Masterpiece's website. See http://masterpiececakes.com/wedding-cakes (as last visited June 1, 2018).

Phillips is an active participant in the wedding celebration. He sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ensure that each cake reflects the couple

who ordered it. In addition to creating and delivering the cake—a focal point of the wedding celebration—Phillips sometimes stays and interacts with the guests at the wedding. And the guests often recognize his creations and seek his bakery out afterward. Phillips also sees the inherent symbolism in wedding cakes. To him, a wedding cake inherently communicates that "a wedding has occurred, a marriage has begun, and the couple should be celebrated." App. 162.

Wedding cakes do, in fact, communicate this message. A tradition from Victorian England that made its way to America after the Civil War, "[w]edding cakes are so packed with symbolism that it is hard to know where to begin." M. Krondl, Sweet Invention: A History of Dessert 321 (2011) (Krondl); see also *ibid.* (explaining the symbolism behind the color, texture, flavor, and cutting of the cake). If an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding. The cake is "so standardised and inevitable a part of getting married that few ever think to question it." Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 95 (1987). Almost no wedding, no matter how spartan, is missing the cake. See *id.,* at 98. "A whole series of events expected in the context of a wedding would be impossible without it: an essential photograph, the cutting, the toast, and the distribution of both cake and favours at the wedding and afterwards." *Ibid.* Although the cake is eventually eaten, that is not its primary purpose. See *id.,* at 95 ("It is not unusual to hear people declaring that they do not like wedding cake, meaning that they do not like to eat it. This includes people who are, without question, having such cakes for their weddings"); *id.,* at 97 ("Nothing is made of the eating itself"); Krondl 320–321 (explaining that wedding cakes have long been described as "inedible"). The cake's purpose is to mark the beginning of a

new marriage and to celebrate the couple.[2]

Accordingly, Phillips' creation of custom wedding cakes is expressive. The use of his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message—certainly more so than nude dancing, *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 565–566 (1991), or flying a plain red flag, *Stromberg* v. *California*, 283 U. S. 359, 369 (1931).[3] By forcing Phillips to create custom wedding cakes for same-

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[2]The Colorado Court of Appeals acknowledged that "a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage," depending on its "design" and whether it has "written inscriptions." *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 288 (2015). But a wedding cake needs no particular design or written words to communicate the basic message that a wedding is occurring, a marriage has begun, and the couple should be celebrated. Wedding cakes have long varied in color, decorations, and style, but those differences do not prevent people from recognizing wedding cakes as wedding cakes. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 96 (1987). And regardless, the Commission's order does not distinguish between plain wedding cakes and wedding cakes with particular designs or inscriptions; it requires Phillips to make any wedding cake for a same-sex wedding that he would make for an opposite-sex wedding.

[3]The dissent faults Phillips for not "submitting . . . evidence" that wedding cakes communicate a message. *Post,* at 2, n. 1 (opinion of GINSBURG, J.). But this requirement finds no support in our precedents. This Court did not insist that the parties submit evidence detailing the expressive nature of parades, flags, or nude dancing. See *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 568–570 (1995); *Spence*, 418 U. S., at 410–411; *Barnes*, 501 U. S., at 565–566. And we do not need extensive evidence here to conclude that Phillips' artistry is expressive, see *Hurley*, 515 U. S., at 569, or that wedding cakes at least communicate the basic fact that "this is a wedding," see *id.,* at 573–575. Nor does it matter that the couple also communicates a message through the cake. More than one person can be engaged in protected speech at the same time. See *id.*, at 569–570. And by forcing him to provide the cake, Colorado is requiring Phillips to be "intimately connected" with the couple's speech, which is enough to implicate his First Amendment rights. See *id.,* at 576.

sex weddings, Colorado's public-accommodations law "alter[s] the expressive content" of his message. *Hurley*, 515 U. S., at 572. The meaning of expressive conduct, this Court has explained, depends on "the context in which it occur[s]." *Johnson*, 491 U. S., at 405. Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are "weddings" and suggest that they should be celebrated—the precise message he believes his faith forbids. The First Amendment prohibits Colorado from requiring Phillips to "bear witness to [these] fact[s]," *Hurley*, 515 U. S., at 574, or to "affir[m] . . . a belief with which [he] disagrees," *id.,* at 573.

B

The Colorado Court of Appeals nevertheless concluded that Phillips' conduct was "not sufficiently expressive" to be protected from state compulsion. 370 P. 3d, at 283. It noted that a reasonable observer would not view Phillips' conduct as "an endorsement of same-sex marriage," but rather as mere "compliance" with Colorado's public-accommodations law. *Id.,* at 286–287 (citing *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 64–65 (2006) (*FAIR*); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 841–842 (1995); *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 76–78 (1980)). It also emphasized that Masterpiece could "disassociat[e]" itself from same-sex marriage by posting a "disclaimer" stating that Colorado law "requires it not to discriminate" or that "the provision of its services does not constitute an endorsement." 370 P. 3d, at 288. This reasoning is badly misguided.

1

The Colorado Court of Appeals was wrong to conclude that Phillips' conduct was not expressive because a rea-

sonable observer would think he is merely complying with Colorado's public-accommodations law. This argument would justify any law that compelled protected speech. And, this Court has never accepted it. From the beginning, this Court's compelled-speech precedents have rejected arguments that "would resolve every issue of power in favor of those in authority." *Barnette*, 319 U. S., at 636. *Hurley*, for example, held that the application of Massachusetts' public-accommodations law "requir[ed] [the organizers] to alter the expressive content of their parade." 515 U. S., at 572–573. It did not hold that reasonable observers would view the organizers as merely complying with Massachusetts' public-accommodations law.

The decisions that the Colorado Court of Appeals cited for this proposition are far afield. It cited three decisions where groups objected to being forced to provide a forum for a third party's speech. See *FAIR*, *supra*, at 51 (law school refused to allow military recruiters on campus); *Rosenberger*, *supra*, at 822–823 (public university refused to provide funds to a religious student paper); *PruneYard*, *supra*, at 77 (shopping center refused to allow individuals to collect signatures on its property). In those decisions, this Court rejected the argument that requiring the groups to provide a forum for third-party speech also required them to endorse that speech. See *FAIR*, *supra*, at 63–65; *Rosenberger*, *supra*, at 841–842; *PruneYard*, *supra*, at 85–88. But these decisions do not suggest that the government can force speakers to alter their *own* message. See *Pacific Gas & Elec.*, 475 U. S., at 12 ("Notably absent from *PruneYard* was any concern that access . . . might affect the shopping center owner's exercise of his own right to speak"); *Hurley*, *supra*, at 580 (similar).

The Colorado Court of Appeals also noted that Masterpiece is a "for-profit bakery" that "charges its customers." 370 P. 3d, at 287. But this Court has repeatedly rejected the notion that a speaker's profit motive gives the gov-

ernment a freer hand in compelling speech. See *Pacific Gas & Elec.*, *supra*, at 8, 16 (collecting cases); *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 761 (1976) (deeming it "beyond serious dispute" that "[s]peech . . . is protected even though it is carried in a form that is 'sold' for profit"). Further, even assuming that most for-profit companies prioritize maximizing profits over communicating a message, that is not true for Masterpiece Cakeshop. Phillips routinely sacrifices profits to ensure that Masterpiece operates in a way that represents his Christian faith. He is not open on Sundays, he pays his employees a higher-than-average wage, and he loans them money in times of need. Phillips also refuses to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween—even though Halloween is one of the most lucrative seasons for bakeries. These efforts to exercise control over the messages that Masterpiece sends are still more evidence that Phillips' conduct is expressive. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256–258 (1974); *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. ___, ___ (2015) (slip op., at 15).

2

The Colorado Court of Appeals also erred by suggesting that Phillips could simply post a disclaimer, disassociating Masterpiece from any support for same-sex marriage. Again, this argument would justify any law compelling speech. And again, this Court has rejected it. We have described similar arguments as "beg[ging] the core question." *Tornillo*, *supra*, at 256. Because the government cannot compel speech, it also cannot "require speakers to affirm in one breath that which they deny in the next." *Pacific Gas & Elec.*, 475 U. S., at 16; see also *id.,* at 15, n. 11 (citing *PruneYard*, 447 U. S., at 99 (Powell, J., con-

curring in part and concurring in judgment)). States cannot put individuals to the choice of "be[ing] compelled to affirm someone else's belief" or "be[ing] forced to speak when [they] would prefer to remain silent." *Id.,* at 99.

III

Because Phillips' conduct (as described by the Colorado Court of Appeals) was expressive, Colorado's public-accommodations law cannot penalize it unless the law withstands strict scrutiny. Although this Court sometimes reviews regulations of expressive conduct under the more lenient test articulated in *O'Brien*,[4] that test does not apply unless the government would have punished the conduct regardless of its expressive component. See, *e.g., Barnes*, 501 U. S., at 566–572 (applying *O'Brien* to evaluate the application of a general nudity ban to nude dancing); *Clark*, 468 U. S., at 293 (applying *O'Brien* to evaluate the application of a general camping ban to a demonstration in the park). Here, however, Colorado would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage. In cases like this one, our precedents demand "'the most exacting scrutiny.'" *Johnson*, 491 U. S., at 412; accord, *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 28 (2010).

The Court of Appeals did not address whether Colorado's law survives strict scrutiny, and I will not do so in the first instance. There is an obvious flaw, however, with

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[4] "[A] government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968).

one of the asserted justifications for Colorado's law. According to the individual respondents, Colorado can compel Phillips' speech to prevent him from "'denigrat[ing] the dignity'" of same-sex couples, "'assert[ing] [their] inferiority,'" and subjecting them to "'humiliation, frustration, and embarrassment.'" Brief for Respondents Craig et al. 39 (quoting *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 142 (1994); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 292 (1964) (Goldberg, J., concurring)). These justifications are completely foreign to our free-speech jurisprudence.

States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, *supra*, at 414. A contrary rule would allow the government to stamp out virtually any speech at will. See *Morse* v. *Frederick*, 551 U. S. 393, 409 (2007) ("After all, much political and religious speech might be perceived as offensive to some"). As the Court reiterates today, "it is not . . . the role of the State or its officials to prescribe what shall be offensive." *Ante,* at 16. "'Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.'" *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 55 (1988); accord, *Johnson*, *supra*, at 408–409. If the only reason a public-accommodations law regulates speech is "to produce a society free of . . . biases" against the protected groups, that purpose is "decidedly fatal" to the law's constitutionality, "for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley*, 515 U. S., at 578–579; see also *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000) ("Where the designed benefit of a content-based speech

restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails"). "[A] speech burden based on audience reactions is simply government hostility . . . in a different guise." *Matal* v. *Tam*, 582 U. S. ___, ___ (2017) (KENNEDY, J., concurring in part and concurring in judgment) (slip op., at 4).

Consider what Phillips actually said to the individual respondents in this case. After sitting down with them for a consultation, Phillips told the couple, "'I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings.'" App. 168. It is hard to see how this statement stigmatizes gays and lesbians more than blocking them from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say "God Hates Fags"—all of which this Court has deemed protected by the First Amendment. See *Hurley*, *supra*, at 574–575; *Dale*, 530 U. S., at 644; *Snyder* v. *Phelps*, 562 U. S. 443, 448 (2011). Moreover, it is also hard to see how Phillips' statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions. Concerns about "dignity" and "stigma" did not carry the day when this Court affirmed the right of white supremacists to burn a 25-foot cross, *Virginia* v. *Black*, 538 U. S. 343 (2003); conduct a rally on Martin Luther King Jr.'s birthday, *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123 (1992); or circulate a film featuring hooded Klan members who were brandishing weapons and threatening to "'Bury the niggers,'" *Brandenburg* v. *Ohio*, 395 U. S. 444, 446, n. 1 (1969) (*per curiam*).

Nor does the fact that this Court has now decided *Obergefell* v. *Hodges*, 576 U. S. ___ (2015), somehow diminish Phillips' right to free speech. "It is one thing . . . to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share [that view] as bigoted" and unentitled to

express a different view. *Id.*, at ___ (ROBERTS, C. J., dissenting) (slip op., at 29). This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to disagree about the correctness of *Obergefell* and the morality of same-sex marriage. *Obergefell* itself emphasized that the traditional understanding of marriage "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Id.*, at ___ (majority opinion) (slip op., at 4). If Phillips' continued adherence to that understanding makes him a minority after *Obergefell*, that is all the more reason to insist that his speech be protected. See *Dale*, *supra*, at 660 ("[T]he fact that [the social acceptance of homosexuality] may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view").

* * *

In *Obergefell*, I warned that the Court's decision would "inevitabl[y] . . . come into conflict" with religious liberty, "as individuals . . . are confronted with demands to participate in and endorse civil marriages between same-sex couples." 576 U. S., at ___ (dissenting opinion) (slip op., at 15). This case proves that the conflict has already emerged. Because the Court's decision vindicates Phillips' right to free exercise, it seems that religious liberty has lived to fight another day. But, in future cases, the freedom of speech could be essential to preventing *Obergefell* from being used to "stamp out every vestige of dissent" and "vilify Americans who are unwilling to assent to the new orthodoxy." *Id.,* at ___ (ALITO, J., dissenting) (slip op., at 6). If that freedom is to maintain its vitality, reasoning like the Colorado Court of Appeals' must be rejected.

SUPREME COURT OF THE UNITED STATES

No. 16–111

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS *v.* COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 4, 2018]

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.

There is much in the Court's opinion with which I agree. "[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Ante,* at 9. "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Ante,* at 10. "[P]urveyors of goods and services who object to gay marriages for moral and religious reasons [may not] put up signs saying 'no goods or services will be sold if they will be used for gay marriages.' " *Ante,* at 12. Gay persons may be spared from "indignities when they seek goods and services in an open market." *Ante,* at 18.[1] I

[1] As JUSTICE THOMAS observes, the Court does not hold that wedding cakes are speech or expression entitled to First Amendment protection. See *ante,* at 1 (opinion concurring in part and concurring in judgment). Nor could it, consistent with our First Amendment precedents. JUSTICE THOMAS acknowledges that for conduct to constitute protected expression, the conduct must be reasonably understood by an observer to be communicative. *Ante,* at 4 (citing *Clark* v. *Community for Creative*

strongly disagree, however, with the Court's conclusion that Craig and Mullins should lose this case. All of the above-quoted statements point in the opposite direction.

The Court concludes that "Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires." *Ante,* at 17. This conclusion rests on evidence said to show the Colorado Civil Rights Commission's (Commission) hostility to religion. Hostility is discernible, the Court maintains, from the asserted "disparate consideration of Phillips' case compared to the cases of" three other bakers who refused to make cakes requested by William Jack, an *amicus* here. *Ante,* at 18. The Court also finds hostility in statements made at two public hearings on Phillips' appeal to the Commission. *Ante,* at 12–14. The different outcomes the Court features

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Non-Violence, 468 U. S. 288, 294 (1984)). The record in this case is replete with Jack Phillips' own views on the messages he believes his cakes convey. See *ante,* at 5–6 (THOMAS, J., concurring in part and concurring in judgment) (describing how Phillips "considers" and "sees" his work). But Phillips submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker's, rather than the marrying couple's. Indeed, some in the wedding industry could not explain what message, or whose, a wedding cake conveys. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 100–101 (1987) (no explanation of wedding cakes' symbolism was forthcoming "even amongst those who might be expected to be the experts"); *id.,* at 104–105 (the cake cutting tradition might signify "the bride and groom . . . as appropriating the cake" from the bride's parents). And Phillips points to no case in which this Court has suggested the provision of a baked good might be expressive conduct. Cf. *ante,* at 7, n. 2 (THOMAS, J., concurring in part and concurring in judgment); *Hurley* v. *Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 568–579 (1995) (citing previous cases recognizing parades to be expressive); *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 565 (1991) (noting precedents suggesting nude dancing is expressive conduct); *Spence* v. *Washington*, 418 U. S. 405, 410 (1974) (observing the Court's decades-long recognition of the symbolism of flags).

do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below.

I

On March 13, 2014—approximately three months after the ALJ ruled in favor of the same-sex couple, Craig and Mullins, and two months before the Commission heard Phillips' appeal from that decision—William Jack visited three Colorado bakeries. His visits followed a similar pattern. He requested two cakes

> "made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red 'X' over the image. On one cake, he requested [on] one side[,] . . . 'God hates sin. Psalm 45:7' and on the opposite side of the cake 'Homosexuality is a detestable sin. Leviticus 18:2.' On the second cake, [the one] with the image of the two groomsmen covered by a red 'X' [Jack] requested [these words]: 'God loves sinners' and on the other side 'While we were yet sinners Christ died for us. Romans 5:8.' " App. to Pet. for Cert. 319a; see *id.,* at 300a, 310a.

In contrast to Jack, Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.

One bakery told Jack it would make cakes in the shape of Bibles, but would not decorate them with the requested messages; the owner told Jack her bakery "does not discriminate" and "accept[s] all humans." *Id.*, at 301a (internal quotation marks omitted). The second bakery owner

told Jack he "had done open Bibles and books many times and that they look amazing," but declined to make the specific cakes Jack described because the baker regarded the messages as "hateful." *Id.*, at 310a (internal quotation marks omitted). The third bakery, according to Jack, said it would bake the cakes, but would not include the requested message. *Id.*, at 319a.[2]

Jack filed charges against each bakery with the Colorado Civil Rights Division (Division). The Division found no probable cause to support Jack's claims of unequal treatment and denial of goods or services based on his Christian religious beliefs. *Id.*, at 297a, 307a, 316a. In this regard, the Division observed that the bakeries regularly produced cakes and other baked goods with Christian symbols and had denied other customer requests for designs demeaning people whose dignity the Colorado Antidiscrimination Act (CADA) protects. See *id.*, at 305a, 314a, 324a. The Commission summarily affirmed the Division's no-probable-cause finding. See *id.,* at 326a–331a.

The Court concludes that "the Commission's consideration of Phillips' religious objection did not accord with its treatment of [the other bakers'] objections." *Ante,* at 15. See also *ante,* at 5–7 (GORSUCH, J., concurring). But the cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack's requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries' refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips' refusal to serve Craig and Mullins: Phillips would *not* sell

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[2]The record provides no ideological explanation for the bakeries' refusals. Cf. *ante,* at 1–2, 9, 11 (GORSUCH, J., concurring) (describing Jack's requests as offensive to the bakers' "secular" convictions).

to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied. Cf. *ante,* at 3–4, 9–10 (GORSUCH, J., concurring). Colorado, the Court does not gainsay, prohibits precisely the discrimination Craig and Mullins encountered. See *supra,* at 1. Jack, on the other hand, suffered no service refusal on the basis of his religion or any other protected characteristic. He was treated as any other customer would have been treated—no better, no worse.[3]

The fact that Phillips might sell other cakes and cookies to gay and lesbian customers[4] was irrelevant to the issue Craig and Mullins' case presented. What matters is that Phillips would not provide a good or service to a same-sex

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[3] JUSTICE GORSUCH argues that the situations "share all legally salient features." *Ante,* at 4 (concurring opinion). But what critically differentiates them is the role the customer's "statutorily protected trait," *ibid.*, played in the denial of service. Change Craig and Mullins' sexual orientation (or sex), and Phillips would have provided the cake. Change Jack's religion, and the bakers would have been no more willing to comply with his request. The bakers' objections to Jack's cakes had nothing to do with "religious opposition to same-sex weddings." *Ante,* at 6 (GORSUCH, J., concurring). Instead, the bakers simply refused to make cakes bearing statements demeaning to people protected by CADA. With respect to Jack's second cake, in particular, where he requested an image of two groomsmen covered by a red "X" and the lines "God loves sinners" and "While we were yet sinners Christ died for us," the bakers gave not the slightest indication that religious words, rather than the demeaning image, prompted the objection. See *supra,* at 3. Phillips did, therefore, discriminate *because of* sexual orientation; the other bakers did not discriminate *because of* religious belief; and the Commission properly found discrimination in one case but not the other. Cf. *ante,* at 4–6 (GORSUCH, J., concurring).

[4] But see *ante,* at 7 (majority opinion) (acknowledging that Phillips refused to sell to a lesbian couple cupcakes for a celebration of their union).

couple that he would provide to a heterosexual couple. In contrast, the other bakeries' sale of other goods to Christian customers was relevant: It shows that there were no goods the bakeries would sell to a non-Christian customer that they would refuse to sell to a Christian customer. Cf. *ante,* at 15.

Nor was the Colorado Court of Appeals' "difference in treatment of these two instances . . . based on the government's own assessment of offensiveness." *Ante,* at 16. Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display. As the Court recognizes, a refusal "to design a special cake with words or images . . . might be different from a refusal to sell any cake at all." *Ante,* at 2.[5] The Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division's finding that messages

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[5]The Court undermines this observation when later asserting that the treatment of Phillips, as compared with the treatment of the other three bakeries, "could reasonably be interpreted as being inconsistent as to the question of whether speech is involved." *Ante,* at 15. But recall that, while Jack requested cakes with particular text inscribed, Craig and Mullins were refused the sale of any wedding cake at all. They were turned away before any specific cake design could be discussed. (It appears that Phillips rarely, if ever, produces wedding cakes with words on them—or at least does not advertise such cakes. See Masterpiece Cakeshop, Wedding, http://www.masterpiececakes.com/wedding-cakes (as last visited June 1, 2018) (gallery with 31 wedding cake images, none of which exhibits words).) The Division and the Court of Appeals could rationally and lawfully distinguish between a case involving disparaging text and images and a case involving a wedding cake of unspecified design. The distinction is not between a cake with text and one without, see *ante,* at 8–9 (GORSUCH, J., concurring); it is between a cake with a particular design and one whose form was never even discussed.

in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distinguished the cases on the ground that Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination. See App. to Pet. for Cert. 20a, n. 8 ("The Division found that the bakeries did not refuse [Jack's] request because of his creed, but rather because of the offensive nature of the requested message. . . . [T]here was no evidence that the bakeries based their decisions on [Jack's] religion . . . [whereas Phillips] discriminat[ed] on the basis of sexual orientation."). I do not read the Court to suggest that the Colorado Legislature's decision to include certain protected characteristics in CADA is an impermissible government prescription of what is and is not offensive. Cf. *ante,* at 9–10. To repeat, the Court affirms that "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Ante,* at 10.

II

Statements made at the Commission's public hearings on Phillips' case provide no firmer support for the Court's holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. See App. to Pet. for Cert. 5a–6a. First, the Division had to find probable cause that Phillips violated CADA. Second, the ALJ entertained the parties' cross-motions for summary judgment. Third, the Commission heard Phillips' appeal. Fourth, after the Commission's ruling, the Colo-

rado Court of Appeals considered the case *de novo*. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips' case is thus far removed from the only precedent upon which the Court relies, *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993), where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council, see *id.,* at 526–528.

* * *

For the reasons stated, sensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals' judgment. I would so rule.