Worthington

Law Review

Volume I
Issue 1
2018

Published by

FHE PRESS

Furst Higher Education
1200 Brickell Ave S 1950
Miami, FL 33131
USA

press@furst.education
http:// journals.furst.education

Published online in Miami
September 2018

ISSN 2640-1185

DISCLAIMER:

All views expressed in these Journal are those of the authors and do not necessarily represent the views of, and should not be attributed to, the Furst Higher Education or any of its affiliates.

The publishers do not warrant that the information in this publication is free from errors or omissions. The publishers do not accept any form of liability, be it contractual, tortuous, or otherwise, for the contents of this publication for any consequences arising from its use or any reliance place on it. The information, opinions and advice contained in this publication may not relate to, be relevant to, a reader‘s particular interest.

About us

The Worthington Law Review is a student-run publication under a Faculty supervision whose primary purpose is to publish a journal of legal scholarship.

Mission

The Worthington Law Review encourages reflection among scholars and students, as well as practicing lawyers and sitting judges and Justices. The Review aims at shaping discussion of the most important and relevant legal issues and is based on a rigorous scholarship selection of submitted papers and editing process.

The Bluebook

The Bluebook is the definitive style guide for legal citation in the United States, and it is compiled by the editors of the Harvard Law Review, the Columbia Law Review, the University of Pennsylvania Law Review, and the Yale Law Journal.

The Bluebook is available for purchase in hard copy, or online (including a mobile version for the iPad, iPhone, or iPod Touch) at www.legalbluebook.com.

Worthington Law Review

Volume 1

Editorial Board

TABLE OF CONTENTS

THE RELEVANCE OF INTERNATIONAL COMMERCIAL ARBITRATION AS AN ALTERNATIVE METHOD OF DISPUTE RESOLUTION: A Study on the Structure of International Arbitral Tribunals and Business Demands

Cássio Jorge Tristão Guedes
cassio.guedes.tjes.jus.br

1. INTRODUCTION

In the contemporary world, in which the economy is constantly accelerating, stimulating not only one nation‟s trade practices, but of the world as a whole, Private International Law has become one of the branches of law that most increase in importance and meaning. As a direct consequence of that fact, there is an interest of the people who operate in this area to find and resort to alternative or unconventionals “legal pathways” that may align with the business expansions that we are today testifying. Modern international commercial relations demand a quick and efficient way to solve mitigations, notably in cases where the positive law is incapable of provide an indisputable answer. Given this reality, arbitration emerges as a solution.

Arbitration is, in the scope of international commercial relations, an irreplaceable vehicle for conflict resolutions, satisfactorily exercising a judicial function in complex transactions in international trade. Born from the need of parties domiciled in different states to achieve an immediate, yet safe, denouement in a controversy arising from businesses or contracts of supra or ultra-national sphere, it is, today, essential for the dynamism of the International Private Law thanks to to their characteristics of confidentiality, speed and flexibility.

The option of allowing an arbitrator, chosen by the parts and whose verdict they accept the commitment to observe, to end a conflict has proved to be a preferential practice among traders or industrialists due to, as mentioned it, being a modality of quick and effective response, what reduce costs derived from lengthy legal proceedings, typical when more than one country are involved. We can say arbitration takes on a special importance, replacing the State's responsibility to provide legal security and social peace in particularly cases.

In other words, the solution negotiated by arbitration, by "de facto judges" chosen by the parties and with the technical knowledge for a predetermined case, aims to occupy a space ordinary reserved to the States‟ jurisdiction in favor of security and maximum commercial or industrial justice. While there is no doubt that the decision of the legal system of a sovereign nation has more certainty and institutional importance, the celerity of the business world is many times incompatible with the deterrence associated with it. In choosing commercial arbitration, the parties waive this delayed judicial certainty in favor of the operative, quicker and fair certainty of a negotiation, whose possible gains compensate a lack of assurance.

Thus, arbitration with its own rules is an alternative equivalent to judicial deliberation and, as such, once the arbitration award has been issued, the controversy is usually extinguished. For this reason, national legal systems have generally accepted the development of arbitration bodies as a means of settling disputes with the same power and normative force as the provisions of ordinary courts, that can only comply to it): the international arbitral courts.

Now, someone might say that the existence of arbitration and international mechanisms dedicated to perform this form of conflict resolution may represent a derogation of the force of the States. Nonetheless, it is quite the opposite: by protecting and enhancing the solution chosen by their citizens and their companies they are, deliberately, promoting peace and legal security, two of the most important values of a nation‟s Law. But, more important, by accepting the validity of these institutions that does not mean that the States will also accept whatever decision achieved through arbitration; an arbitral court only operates with the consent of the countries that indirectly give it the power to extinguish controversies. If for whatever reason these nations decide to withdraw this power (what happens when, for instance, the arbitration ruling conflicts with their own internal legal systems), they can and probably will not absorb it decision.

In addition, international commercial arbitration must obey international rules stipulated in treaties, such as the New York Convention, and standardizations promoted by the United Nations through their Commission on International Trade Law. By formulating and agreeing with these commandments, the signatory States give legitimacy to arbitrations that obey them and also exercise their sovereign power dictating what they consider valid in these acts of judgment.

Nowadays, this notion that there is not a conflict between international arbitration and a nation sovereignty, but that they should complement each other to assure to the global community access to an efficient justice that can promote directly and indirectly the development of a wealth society is fundamental to imbue individuals with the “trust” to resort to the International Chamber of Commerce, the American Arbitration Association or any other international arbitral organization capable of offer the quick and solid solutions that the modern global trade relations demands. The flexibility, inherent to these courts and based on the possibility of the parties agreeing on certain prerogatives, making their proceedings less formalistic, but no less effective or devoided of credibility, it is essential in the present day economy. Therefore, these organizations should not be avoided because of some sort of jingoism or positivist rigor that may be attached to the idea that only a territorial legal system has the strength to solve permanently a dispute, but stimulated in favor of a better and more integrated international order. That is the lesson of Susan Franck:

> Arbitration does not occur in a vacuum, and the existence of investment treaty arbitration

> does not eliminate the need to encourage the development of a court system where rights are adjudicated in an impartial, fair and predictable manner. Investment treaty arbitration and national courts have a symbiotic relationship. Fostering the development of the rule of law in national courts nor only develops local judicial institutions, but it also promotes confidence in the overall process of resolving investments disputes.[1]

Recognizing the importance of arbitration, however, the need to comprehend the structures that allow it to be effectively realized arises. How the international courts dedicated to arbitration are organized, what is the range of a decision in an international commercial arbitration; these are all questions that need to be answer to make this method of conflict resolution the most transparent to all interested parties. After all, people will only resort to judicial solutions that they feel safe with, especially when dealing with international trade practices.

The objective of this essay is exactly that: by examining the main aspects of arbitration in the international and commercial field and examples of international arbitral courts and the proceedings that they adopt, we will try to explain how efficient this method of dispute settlement is and what possible obstacles it might face when operating in the scope of Private International Law. At the end, hopefully we will have evidenced how arbitration has brought considerable diversity to preexisting jurisdictional forms, which systematically represents evolution from the more obvious manners of jurisdiction provision, incompatible with the dynamism of the modern world.

2. ARBITRATION IN INTERNATIONAL COMMERCIAL LAW

2.1. Definition and Relevance

The constantly increasing globalization and the tendency of countries to form trading blocs helped to solidify the idea that economy, nowadays, cannot limit itself to a nation or territory‟s borders. As a result of this new global commercial order, the need for legal measures to ensure a quick, economic, confidential and technical answer for conflict of interests born from these new international relationships arise. Notably in order to ensure equitable treatment between parties uncertainty about the impartiality of a local court[2] in disputes between nationals and foreigners involved in an transnational controversy, the modern system of arbitration that we have today has developed.

Arbitration is, thus, “a judicial, but non-judicial way of peaceful settlement of international disputes” [3]. The parties, free willing, must chose an arbitrator, describe the dispute and delimitate the applicable law. This arbitrator, who possess the confidence of the parties, adjudicates a decision that binds them. This ruling tends to be fast, fair, will be known only by the ones involved in the question and is cheaper than the one derived from a typical long judicial litigation, all interests of a modern commercial trader.

---

[1]FRANCK, Susan. D. *Foreign Direct Investments, Investment Treaty Arbitration and the Rule of Law.* Pac: McGeorge Global Bus. & Dev, L. J. 337, 2007. p. 368.

[2]Allowing, even, choice of forum or the law to be applied to a specific case.

[3]REZEK, José Francisco. *Direito Internacional Público*, 2ª ed., São Paulo: Saraiva, 2004. p. 352.

The conditions for its existence basically are: the arbitration commitment[4] or the arbitration clause[5], the arbitration organ and the arbitration procedure[6]. The parties agree to submit, previously when establishing the transaction or after a possible contention emerges, the conflict to an individual or organization that, corroborated by rules also accepted by the parties, will utter a sentence that they must abide. The adjudication of an arbitration is final and unappealable (since is not inserted in a traditional judicial structure), therefore, definitive and obligatory[7].

The international experience has shown that more than ever this alternative method to settle a dispute is being used by actors of the global order, precisely because of these numerous advantages above mentioned. And, so, several entities work for its implementation. Among other, we can mention the American Arbitration Association, based in New York, The International Chamber of Commerce in Paris, and the London Court of International Arbitration. Even in Latin America, where along history the global community experimented difficulties to implement an effective arbitration system, nowadays we can see efforts to overcome the locals‟ formal and cultural barriers.

Also, interested in regulate this new practice, innumerous international legislations on arbitration were instituted by the States, with the first being the Geneva Protocol in 1923, the New York Convention in 1958, the Panama Convention in 1975 and the Model Law on International Commercial Arbitration of the UN in 1985.

As an example of the relevance of arbitration as an alternative solution to commercial conflicts, we have what occurs in NAFTA, where the solution of controversies is a responsibility of the Free Trade Commission: when prevention, consultation or mediation is not successful to avoid a dispute, the parties are submitted to arbitration and the decision within achieved is final.

The World Trade Organization (WTO) is another expressive institution that deserves attention for its methods regarding arbitration. It has a system of solution of contentions that begins with preliminary consultations and, then, the establishment of an arbitration panel who will rule on the case. It is possible to an unsatisfied party to appeal to the Appellate Body. If there is no spontaneous
fulfillment of the arbitration adjudication, the WTO can impose compensatory measures to the defeated.

It is important to note that, although a valid and useful procedure adopted by some of the major global organizations, arbitration cannot substitute for every type of court proceeding. It is a prerogative of a sovereign nation, by their legal systems, to limit the scope of subjects that may be submitted to arbitration. Even though the boundaries of arbitrability are progressively expanding, the legal landscape in this regard is not completely harmonized yet: while some subject matters are

---

[4]The arbitration is established with the determination of the dispute to be settled in sight.

[5]The parties in advance accept the arbitration as the method to solve possible controversy.

[6]Freely chosen by the parties or the one adopted by the elected arbitration organ.

[7]The exception being when the arbitration organ has its own appealing system, such as in the case of the OMC.

almost universally considered arbitrable (such as monetary claims deriving from a commercial relationship) and others are clearly not arbitrable (such as criminal cases), different jurisdictions take different approaches, especially as far as „grey areas" of uncertainty are concerned. As examples of these, we may mention employment and family-law disputes. Some countries historically have refuse to allow even the arbitration of antitrust
claims.[8]

2.2. Procedure

In order to be able to ascertain in what consist the procedure in an arbitration, it is necessary to take into account the concept of procedure itself. This can be conceptualized as being a set of rules, systematically listed, stipulating the predetermination of acts to be practiced within a certain process.[9]

Based on this concept, at first, the judicial and arbitral procedures seem to be equivalent. Notwithstanding, a deeper analysis will reveal that some acts are exclusive of the judicial route, while others are inherent to arbitrations. Here, we will explore both the process and the jurisdiction of the latter.

The arbitration begins when the disputing parties choose an arbitrator that will analyze the concrete case (or, as mentioned before, choose to use the previously agreed clause that refers to an arbitrator to mitigate a controversy). It is his responsibility to confirm the validity of the arbitration agreement and, after, initiate the proceedings of litigation that, at the risk of offending basal procedural rules, must respect some global accepted principals: the adversarial principle, the equality of the parties and the independence and impartiality of the judge.

As long as these norms are observed, the procedural rite adopted to conclude the arbitration can be much less formalistic than the one normally associated with a common judicial claim. Devoid of traditional legal "rigidity", the parties have the possibility to express more freely their opinion, within the limits that the chosen arbitral institute stipulates, to the arbitrator. About this procedure, the Brazilian professor Sebastião José Roque:

> The ad hoc judgment is exercised by a court established by the arbitration agreement to examine a particularly question. The parties establish whether only one arbitrator or one collegiate will function and who will be the arbitrators, where and when will the trial occur and what are the applicable law and procedural steps to be adopted. It is up to them to adopt other measures that they seem fit. After the judgment, the arbitration will be extinguished. If the same parties have another divergence, they may institute another arbitration, with a brand new procedure."[10]

2.2.1. Domestic Arbitration x International Arbitration

It is, however, important when dealing with this theme to differentiate some of the

---

[8] BORN, Gary B. International Commercial Arbitration, 2ª ed., Kluwer Law International, 2001, p. 246-247.

[9] CAMARA, Alexandre de Freitas. *Lições de Direito Processual Civil*, 12ª ed, Rio de Janeiro: Lumen Iuris, 2012, p. 83.

[10] ROQUE, Sebastião José. *Arbitragem: a solução viável*. 3ª ed. São Paulo: Ícone, 1997. p. 72.

particularities between domestic and international arbitration procedures.

The arbitrator faced with a domestic arbitration dispute, for instance, will generally be in the same position as a judge, as the arbitrator is bound to apply the domestic laws of the country in question, its public policy and mandatory rules. It usually consist of claims brought by private individuals and the amount in dispute will be small in most cases (although that is not a mandatory rule).[11]

Though there is not an internationally accepted definition of the term "international", when used to characterize an arbitration it implies a conflict settlement procedure that transcends national boundaries. This definition has important consequences: where international arbitration is used, its only connection with a country will be regarding the arbitration taking place within the territory of that country; as consequence, in most cases, the parties involved in international arbitration will be more than just mere individuals; they will be supra-nationals corporations or States entities.

Generally speaking, two criteria are used to define an international arbitration: the first concerns the nature of the dispute, as thereof involves the interests of international trade or the dispute has an international character. The second criterion concerns the parties themselves, their nationality or habitual place of residence, or the seat of a corporate body‟s "central control or management" because that (the place of arbitration) will be the factor that gives the arbitration an international character or connection.[12]

Nonetheless, different entities and institutions have adopted their own criteria for determining if a dispute has this "international character". The International Chamber of Commerce[13], for example, places great importance on the nature of the dispute as to cover "disputes that contained a foreign element" and "business disputes of an international character"[14]. By referring to a "foreign element", the organ gives a wide interpretation to the term "international"; the parties, for instance, may not have separate nationalities to resort to the court (the agreement, however, must show an transnational element). The United Nations Commission on International Trade Law (UNCITRAL) Model Law, in its turn, determines that arbitration will be regarded as international if the parties have different nationalities or if the dispute has an international element[15] (the parties‟ agreement on a foreign seat of arbitration being able sometimes to reflect this international element).

Regarding the legislation to guide an arbitration, sometimes the same may be applicable to

---

[11]BLACKABY, Nigel and PARTASIDES Constantine. *Redfern and Hunter on International Arbitration*. 5ª ed. London: Oxford University Press, 2004. p. 12.

[12]VENTER, Debra. *UNICITRAL: International Commercial Arbitration*. Saarbrucken: LAP Lampert, 2012. p. 26.

[13] The International Chamber of Commerce‟s International Court of Arbitration supervises the proceedings and administration of arbitral tribunals conducting arbitration under the ICC Arbitration Rules. We will talk more about this organism posteriorly in this essay.

[14] BLACKABY, Nigel and PARTASIDES Constantine. *Redfern and Hunter on International Arbitration*. 5ª ed. London: Oxford University Press, 2004. p. 14.

[15]UNICITRAL Model Law, Article 1, (3).

both domestic and international transactions. There are cases, however, that some set of rules only applies to international transactions as the result of certain countries adopting a separate regime for international procedures (due to a specific State‟s position on some legal instruments) and distinguishing between domestic and international arbitration within their legislation.[16] This will mostly be evidenced in international commercial law matters.

2.2.2. International Commercial Arbitration

Within the sphere of international arbitration, the commercial branch of the subject deserves a particular attention. After all, due to their individual natures, different rules of law and legislation are applied if we are dealing with noncommercial or commercial questions.

Particularly, we believe that the term "commercial" should not be given a limited interpretation; it should govern all relationships with a commercial nature or character, as expressed in UNCITRAL Model Law:

> The term "commercial" should be given a wide interpretation as to cover matters arising from all relationships of a commercial nature, whether contractual or not.[17]

Regardless, this definition is not unanimously accepted by all nations and international organisms, so the term "commercial" must be taken in consideration with the national law relevant to the specific contract in mind.

Independently of the concept adopted, howsoever, arbitration is, in our opinion, the most favorable method whereby commercial disputes are resolved: as a result of the final and binding nature of the arbitrator‟s decision, disputes will not be dragged out by placing the matter on appeal. In addition, the flexibility of arbitration gives it a very attractive lure for parties wishing to mold the proceedings to their liking.[18]

For that advantages, international commercial arbitration has being a fast growing dispute resolution method used when the parties are from different nationalities. This increase in relevance even has made several countries to amend their arbitration legislation to include it in their law, making it more attractive from trading practices standpoint.[19]

This ongoing progressive interest in international commercial arbitration showed by these adaptations is an indication that countries are willingness to respect arbitration as an alternative to

---

[16] VENTER, Debra. *UNICITRAL: International Commercial Arbitration. Saarbrucken*: LAP: Lampert, 2012. p. 27.

[17] UNICITRAL Model Law, Article 1, (1), footnote 2.

[18] BERGER, Klaus Peter. *The Settlement Privilege – A General Principleof International ADRLaw*" in: Arbitration International, The Journal of the London Court of International Arbitration, Vol. 24, Nr. 2, London, 2008. p. 254.

[19] By including international commercial arbitration within their arbitration legislation, countries are increasingly competing with another countries striving to offer the best one and, by doing so, securing future business for them. Better and more effective arbitration legislation equals more arbitration business for the country. (CROOK, John R. *Applicable Law in International Commercial Arbitration: The Iran-US-Claims Tribunal Experience*. 83 AJIL, 1989, p. 278.

court-based litigation. And, for this, we can say that, today, international commercial arbitration has a "hybrid nature": it evolves from a private agreement between the parties and, though it happens through privately chosen proceedings, ends in a public nature – the award made will have legal force, will be binding and will have effect in the courts of most nations.

2.3. International Commercial Arbitration Ruling and Its Effects in The States

But how this effects will be assimilated by the nations that accept the arbitrator decision in an international commercial dispute? Well, to promote a proper analysis, a priori it is useful to distinguish among the three kinds of effect that a general international ruling might have.

First, a ruling might have enforcement effect: a domestic court might compel a party to abide by the ruling in a domestic litigation (if an arbitration panel awards damages in a breach of contract, a domestic court might enforce this decision by forcing the losing party to pay, for example). Second, a ruling might have a precedential effect: not only the ruling will bind the involved parties in the controversy, but also different parties involved in similar situations. And, finally, aruling might have persuasive effect: a domestic court might decide that, although not necessarily binding, the international solution is based on convincing arguments that the court should adopt as its own.[20]

When dealing with international commercial arbitration – from now on, referred as ICA – only the first of these three effects is significant. That is logical. ICA panels are usually ephemeral and their decisions confidential, leaving little record of their work, so it will be impossible to use them as precedential material.[21] Similarly, this confidentially and the ad hoc character of much ICA makes difficult for a judge to betake their ruling as reasoning for its own decision.

Most states nowadays, however, do grant ICA awards a powerful enforcement effect. This began with the New York Convention, the most important treaty about the matter, with roughly 140 Member-States, which contains a strong proenforcement presumption, presumption that, as mentioned before, was slowly incorporated by the signatories‟ legal systems. In understanding this proenforcement idea, it is useful to look at two main points in the arbitration process: a domestic court‟s decision whether to enforce an arbitration agreement, and its decision to enforce an award rendered in a different country.

At both points, a domestic court must decide to whether or not to defer to the ICA regime. And in both situations, contemporary principles routinely require courts to defer. In deciding whether to enforce an arbitration agreement, a domestic court has two options. The court can either enforce the agreement and send the parties to an international arbitral panel or scrap the agreement

---

[20] MOVSESIAN, Mark. *International Commercial Arbitration and International Courts.* Faculty Publications: 2008. Paper 98. p. 426. Can be found in http://scholarship.law.stjohns.edu/faculty_publications/98.

[21] Even major and permanent international arbitration institutes can‟t be used as a reliable source of material since they normally receive thousands of fillings a year, making impossible to coordinate all of their data in a way useful for domestic courts.

and force the parties to litigate in the domestic forum.[22] The New York Convention, in its Article II, 3,[23] favors the first option (excepting cases in which the subject object of litigation cannot be settle through arbitration according to the domestic law). Most countries do not object this rule.

The decision whether to enforce an award presents a similar choice. The domestic court can defer to the international panel and require the parties to comply with the award or ignore the panel's ruling and require the parties to litigate again in the domestic forum. And, likewise, the international principles favors the first solution. The New York Convention, this time under its Article 5, forbids the domestic court of a signatory to ignore the international ruling, except in specific cases mostly related to procedural mistakes or incompatibility of the adjudication with the public policy of the State in question. It is impossible to a domestic court to refuse to enforce an award simply because it believes the arbitral panel decided the case incorrectly.

This tendency to valorize the ICA is, in this modern era, present in the national arbitration laws of most developed countries. There are reasons why. First, this position does not raise concerns about legitimacy in these sovereignties. In liberal democracies, legitimacy turns on the process by which law is made, which means that, to be legitimate, law must be made by actors who are publicly accountable, directly or indirectly.[24] This is the case in ICA contexts. Especially because the ruling has very little domestic impact, nations have relatively little interest in policing such disputes. Therefore, the freedom that it is allowed to the parties to choose the procedure and the arbitrator that will adjudicate is by them respected, as long does not offend any cardinal rule of their legal systems.

Second, by making the arbitration regime more effective, the pro-enforcement presumption creates significant economic benefits for States. It is simples: ICA facilitates international commerce by reducing intangible barriers to cross- border trade. Although contract law does not differ that much from nation to nation, there remains a risk that local courts will treat outsiders unfairly. By providing a neutral forum for resolving disputes, ICA helps minimize this danger.[25]

And, finally, the national companies involved in international transactions support a legal system that is pro-enforcement. They do it for two main reasons: a-), since foreign countries will probably not enforce awards against their own citizens unless other countries reciprocate, they have an incentive to make sure that their governments do not oppose enforcement; b-) a pro-enforcement regime helps to reassure foreign parties that they will be able to collect against the companies in the

---

[22] MOVSESIAN, Mark. *International Commercial Arbitration and International Courts.* Faculty Publications: 2008. Paper 98. p. 426. Can be found in http://scholarship.law.stjohns.edu/faculty_publications/98.

[23] "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

[24]BRADLEY, Curtis A. *International Delegation, the Structural Constitution, and Self Execution*, Stanford: L. REV, 2003. p. 1557-1558.

[25]YA-WEI Li. *Note, Dispute Resolution Clauses in International Contracts: An Empirical Study*, Cornell: INT'L L.J, 2006. p 789.

event of a dispute, making more attractive business partners.[26]

In sum, the determinant characteristic of an ICA‟s adjudication is its enforcement effect. And it is this obligation of a State to respect the decision rendered by arbitrator or an organ of arbitration in an international dispute that makes the institute so advantageous, both to the parties involved as well as to the nations who comply; the former because they can benefit from a fast, fair, effective and cheap procedure to solve a controversy, the latter because the international ruling has limited impact on domestic law and, at the same time, with the increasing modern globalization, benefits the nation‟s economy considerably.

3. INTERNATIONAL COMMERCIAL ARBITRAL INSTITUTES

With a better understanding of the concept of arbitration – with an emphasis in its international and commercial strand – its purposes, procedures and advantages, we can turn our study to some of the courts dedicated to implement it.

Since it is impossible to consider all international arbitral institutes, we will, first, expatiate about the United Nations Commission on International Trade Law (UNCITRAL) and its Model Law on International Commercial Arbitration, the foundation to most ICAs systems that exist today. Then, we can focus on three of the most important ones: the London Court of International Arbitration, the International Chamber of Commerce and the American Arbitration Association. They have the most relevance for the modern economy and globalization and, as predecessors to the more recent courts, fostered some of the major rules that end up being adopted by them and by other ad hoc ICAs.

3.1. United Nations Commission on International Trade Law – UNICITRAL

Established in 1966 by the General Assembly of the United Nations, UNICITRAL was born when the international order recognized that there was a lack of similarity between the national laws of different countries governing international trade law and that this disparities created obstacles to international commerce.[27] It was realized that there was a need for a global set of standards and improved legal framework to further the progressive harmonization, modernizations and unification of the existing national regulations that governed international trade up until then. UNICITRAL was a way to fix that and, maybe more important, substantiate a more active presence of the UN in the international trade sphere.

Seen today as the core legal body of that institution, UNICITRAL consists of a diverse composition of sixty Member-States elected by the General Assembly and has the primary objective of harmonize and unify international commercial trade through formulating rules and texts that equate citizens, corporations and even nations that are usually disparate in this sphere.

---

[26]MOVSESIAN, Mark. *International Commercial Arbitration and International Courts.* Faculty Publications: 2008. Paper 98. p. 437. Can be found in http://scholarship.law.stjohns.edu/faculty_publications/98.

[27] VENTER, Debra. UNICITRAL: International Commercial Arbitration. Saarbrucken: LAP: Lampert, 2012. p. 33.

One of its most important accomplishments is the 1985‟s UNICITRAL Model Law on International Commercial Arbitration. Since a relevant number of countries at the time did not have in their domestic legislation standards to implement or ratify settlements obtained through ICAs, the institute offered a template that, by being adopted and incorporated in their legal systems by the States, could fill this void.

This Model Law was widely accepted and end up forming the basis for modern ICAs. It was a procedural in nature, as provided various procedures and articles to be observed, and very comprehensive, since followed normal phases and principles already common in the global community. And even though amendments to the text by the States were not encouraged (since that would difficult its main goal of international unification), it did inspire various countries to modify their arbitration legislation towards a more universal accept procedure.[28]

The main characteristics of the Model Law was associated with the freedom and autonomy that it grants to the party interested in resort to international arbitration. For example, the Model Law allow the parties to choose the rules of law that will be applicable regarding the substance or merit of a dispute, not binding them to a specific national legal system. In fact, its text limits the involvement of national courts in the arbitration proceedings, handing them the task of only implement the adjudication in their jurisdiction.[29] Parties are given a maximum degree of freedom when making use of the Model Law: they can conduct the arbitration in accordance with their own needs and expectations, being restricted solely when circumstances deem it necessary to ensure a fair dispute.

It is important to remember that, even though the Model Law became maybe the most important piece of legislation regarding ICA, being adopted not only by several countries, but also by even international arbitral tribunal, the UNICITRAL itself never took on the responsibility to execute it. It does not act as an arbitral organ, an administrator of arbitrations proceedings or even assist in the interpretation of laws about the matter; it is not within the mandate of its Commission to get involved in any dispute.

That being said, it did draft the Model Law in a way to potentialize the global use thereof, making it easier for countries and international organizations to understand and apply its rules and principles own their own. Was written using phrases and legal jargons of common knowledge, without any State or specific legal system in mind, making it a real universal piece of legislation. For that reason is so efficient not only to regulate and orient ICAs, but also as a good framework for domestic arbitration, as it embodies all the necessary and relevant provisions required to ensure that an arbitration proceedings run effectively.[30]

3.2. The London Court of International Arbitration - LCIA

---

[28] VENTER, Debra. UNICITRAL: International Commercial Arbitration. Saarbrucken: LAP: Lampert, 2012. p. 40.

[29] McNERNY, Mary E. and ESPLUGUES, Carlos A. I*nternational Commercial Arbitration: The UNCITRAL Model Law*, 9 B.C. Int'l & Comp. L. Rev. 47, 1986. p. 47-48. Found in http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1395&context=iclr.

[30]VENTER, Debra. UNICITRAL: International Commercial Arbitration. Saarbrucken: LAP: Lampert, 2012. p. 44.

One of the longest established of the major international commercial arbitral institutions in the world (what it would become today was founded in 1883), the LCIA, even though is named after a specific city, is truly a global organization, being responsible perhaps to some of the most important economic wise arbitrations ever accomplished. Its own set of rules and procedures are so well known and respected that are frequently adopted in ad hoc arbitrations even where the institution itself is not involved.

Formed as a not-for-profit company limited by guarantee, the LCIA operates under a three-tier structure, comprising the Company, the Arbitration Court and the Secretariat. The Court is made up of up to thirty-five members, selected to provide and maintain a balance of leading practitioners in commercial arbitration, from the major trading areas of the world, and it is the final authority for the proper application of the LCIA Rules.

The current set of arbitration norms used by the LCIA became effective in 2014 and are detailed, though complex. For instance, the Article 1 of the Rules establishes a long series of documents needed for someone request its operation[31], creating requirements that sometimes makes almost impossible even to large corporations to fulfill. The Article 7 indicates that, by choosing the LCIA Court, the parties will not have full control over appointment of arbitrators.[32] The Article 22 presents a series of provisions relating to the additional powers of the Tribunal have that in some occasions may surpass the ones previously agreed by the parties.[33] Even its jurisdiction‟s rules are overpowering when compared to a typical ICA:

> 23.1 The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement.
> 23.2 For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail (of itself) the non-existence, invalidity or ineffectiveness of the arbitration clause.

3.2. The International Chamber of Commerce – ICC

[31] Among them, the full name and all the contact details of the parties of the arbitration (Article 1.1, “I”), a statement briefly summarizing the nature and circumstances of the dispute, its estimated monetary amount or value, the transaction(s) at issue and the claim advanced by the Claimant against any other party to the arbitration (“iii”), and a statement of any procedural

[32] “If the parties have agreed howsoever that any arbitrator is to be appointed by one or more of them or by any third person (other than the LCIA Court), that agreement shall be treated under the Arbitration Agreement as an agreement to nominate an arbitrator for all purposes. Such nominee may only be appointed by the LCIA Court as arbitrator subject to that nominee‟s compliance with Articles 5.3 to 5.5; and LCIA Court shall refuse to appoint any nominee if it determines that the nominee is not so compliant or is otherwise unsuitable.”

[33] As example we present the text of the Article 22, “c”: “The Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views: (c) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and the law(s) or rules of law applicable to the arbitration, the merits of the parties' dispute and the Arbitration Agreement.”

Based in Paris, France, The International Chamber of Commerce (ICC) is arguably the largest, most representative business organization in the world. It has three main activities: rule setting, dispute resolution, and policy advocacy.[34] And to achieve this goals, one of its main organs is the Court of Arbitration.

Established in 1923, the ICC‟S International Court of Arbitration, according to its website, "pioneered international commercial arbitration as it is known today. The Court took the lead in securing the worldwide acceptance of arbitration as the most effective way of resolving international commercial disputes. Since its creation, the Court has administered well over 13,000 international arbitration cases involving parties and arbitrators from more than 100 countries and territories. Demand for its services grows in line with the expansion of international trade and the rapid globalization of the world economy."[35] It is an administrative body who, assisted by the Secretariat of the Court, is responsible to guide and watch over ICAs resolutions submitted to it, but, as mentioned in the Article 1 of its Rules, that do not resolve disputes itself.[36]

This is an important distinction as this particularity makes the ICC‟s Court of Arbitration more of a guardian than a typical ruler, despite its name. Specifically, its functions include: a-) fixing the place of arbitration; b-) assessing whether there is a prima facie ICC Arbitration agreement; c-) taking certain necessary decisions in complex multi-party or multi-contract arbitrations; d-) confirming, appointing and replacing arbitrators; e-) deciding on any challenges filed against arbitrators; f-) monitoring the arbitral process; g-) scrutinizing and approving all arbitral awards; h-) setting, managing and, if necessary, adjusting costs of the arbitration; i-) overseeing emergency arbitrator proceedings.

Although efficient in fulfill this objectives, the ICC‟s system is not free from criticism, the main one referring the content of the Article 34 of its Rules:

> Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

This unique feature of ICC arbitration demands that all its awards, before becoming effective, must be submit to the Court for a final scrutiny. The organ cannot change the decision substantially, but, if realize that something shall be modified, can return it to the original arbitrators to promote alterations, a procedure prolong the arbitration longer than usually desired by the parties.[37]

---

[34] CONNERTY, Anthony. *A Manual of International Dispute Resolution*. London: Commonwealth Secretariat, 2006. p. 240.

[35] Found in https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration.

[36] Article 1, (1): The Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC (the "Rules"). The Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules.

[37] MOSES, Margareth. *The principles and practice of International Commercial Arbitration*. 2ª ed, London: Cambridge, 2012. p. 255.

However, it is reasonable to argue that exactly the scrutiny provisions are what ensure the so intended high standard of ICC awards. To those corporations involved in transnational disputes who seek it, the ICC's stamp of approval on an international arbitral award is beyond any doubt a matter of importance and value, no matter how long it take it to obtain it.

3.2.3. The American Arbitration Association – AAA

The American Arbitration Association is another institution with a respectful tradition in the field. Founded in 1926, is the leading arbitral organization in the United States and, as such, deals with an expressive volume of cases compatible with the major economy of modern world. It is a not-for-profit organization dedicated to not only arbitration, but to several alternative dispute resolutions, providing services to individuals and organizations who wish to resolve conflicts out of court.

In the 1990s the AAA promulgated its International Arbitration Rules, which are largely based on an administered version of the UNCITRAL Arbitration Rules, and established its international division: the International Centre for Dispute Resolution (ICDR). With offices in New York, Miami, Houston, Dublin, Mexico City (through a cooperative agreement with the Commission of the Mexico City National Chamber of Commerce) and Singapore (due to a joint venture with the Singapore International Arbitration Centre), the ICDR‟s international system, as stated in his own website, "is premised on its ability to move the matter forward, facilitate communications, ensure that qualified arbitrators and mediators are appointed, control costs, understand cultural sensitivities, resolve procedural impasses and properly interpret and apply its International Arbitration and Mediation Rules".[38]

Because its regulation, as stated above, is heavily inspired in the UNCITRAL Arbitration Rules, the procedure adopted by the AAA is more "generic" than its equivalent in the LCIA and in ICC. For instance, the awards have the same characteristics as most of ICAs: are made by a majority of arbitrators, are final and binding the parties undertake to carry it out without delay, and may be made public only with the consent of the parties or as required by the law.[39]When describing how the arbitration should be conducted, the legislation is concise, being limited to only present general rules.[40]

This option for a more accessible dispute settlement procedure makes it possible for a greater number of individuals to reach to the AAA as alternative to judicial litigation to solve their contentions. However, for lacking the same rigor (or, one might say, the same austerity) associated with some of the other grand international arbitral organisms, this organ not always can provide the

---

[38] Found in https://www.icdr.org/about_icdr.

[39] Articles 29 and 30.

[40] Example: while the LCIA‟s Arbitration Rules, in its Article 14.1, establishes that "the parties and the Arbitral Tribunal are encouraged to make contact (…) as soon as practicable but no later than 21 days from receipt of the Registrar‟s written notification of the formation of the Arbitral Tribunal", the ICDR‟s Arbitration Rules only mention, in its Article 20 (2), that "(…) the tribunal may, promptly after being constituted, conduct a preparatory conference with the parties for the purpose of organizing, scheduling, and agreeing to procedures", without setting fixed deadlines to manage the parties and the procedure.

safe and quick resolution expected by the parties.[41]

4. CONCLUSION

As modern economy and the phenomenon of globalization expands, it is only logical to presume that litigations, disputes and controversies in the international commercial field will increase and become more complex at the same rate.

Tribunals and domestic courts simply are not prepare to offer quick, technically proper and efficient answers to all of them. It is, therefore, necessary to one interested in follow this changes and developments to abandon the "attachment" to solutions only provided by national laws and resort to alternative methods of conflict resolutions.

Reckon in the institute of international commercial arbitrations as one of these unconventional pathways may present one the best options to the actors of this new global order.

As an efficient extrajudicial manner to offer a fair conclusion to transnationals disputes, arbitration represents a progressive view that jurisdiction should not be limited to prosecution and adjudication of issues in a traditional "coercive" and "positivist" path, but rather by the willingness of the parties involved, the ones truly interested in the outcome. That way, not only they are able to extinguish a controversy in a quicker, more effective and even cheaper way (all adjectives much appreciate by traders), but also release some of the burden felt by domestic courts, each day more overloaded with excessive work.

As here exposed, to appreciate this method does not mean that the parties or the States that validate its adjudications are agreeing with a "free of formalities" territory; with sets rules provided, if not by domestic legislations, by the UNICITRAL Model Law for International Arbitration and by the codes or regulations of international arbitral courts, arbitrations must obey some standards, destined mostly to guarantee equality and the due process for all the parties involved. Though through this method the freedom of the individuals to establish how, when, where and by who a dispute shall be solved, ICAs only could achieve the respectability and the solidity that has today because its foundation assures that the final result will be fair.

At the same time, by no means this represents an attack or a crack in the sovereignty of nations. In fact, only the manifestation of this sovereignty by the acquiescence with conventions and treaties that aim to harmonize and unify domestic and internationals rules about the theme gave to arbitrations in the commercial field the effectiveness necessary to be this truly necessary instrument to the global society. In return, the States interested in promote it – through enforcement of international adjudications and the modernization of its own dispute settlement systems to include arbitral decisions – have being realizing the economic and financial benefits attached to it with little to no impact in their laws.

The truth is that, in an economic field where "borders" is a concept that mean everyday less, it is necessary the establishment of international apparatus that can provide what domestic legislation cannot, especially in the area of dispute settlement. As we saw, institutes like the London

---

[41] The average time frame from commencement of an arbitration to the issue of an award in na ICDR-administered arbitration is superior to a year (CONNERTY, Anthony. A Manual of International Dispute Resolution. London: Commonwealth Secretariat, 2006. p. 251).

Court to International Arbitration, the International Chamber of Commerce and the American Arbitration Association has supplied the actors of the new global order with the mechanisms to keep trade relationships in constant growth, without the need to be put on halt until the judge or the court of a country can manifest its opinion about some controversy that may arise from this commercial relation.

Arbitration, in sum, is not only an advantage; it is a necessity to the modern and fast-paced economy. And as more countries realize that, directly and indirectly encouraging its practices, greater is the chance for the Private International Law become current and dynamic as expected in this era.

5. BIBLIOGRAPHY

BERGER, Klaus Peter. The Settlement Privilege – A General Principle of International ADR-Law" in: Arbitration International, The Journal of the London Court of International Arbitration, Vol. 24, Nr. 2, London, 2008.

BLACKABY, Nigel and PARTASIDES Constantine. Redfern and Hunter on International Arbitration. 5ª ed. London: Oxford University Press, 2004.

BORN, Gary B. International Commercial Arbitration, 2ª ed., Kluwer Law International, 2001.

BRADLEY, Curtis A. International Delegation, the Structural Constitution, and Self Execution, Stanford: L. REV, 2003.

CAMARA, Alexandre de Freitas. Lições de Direito Processual Civil, 12ª ed, Rio de Janeiro: Lumen Iuris, 2012.

CONNERTY, Anthony. A Manual of International Dispute Resolution. London: Commonwealth Secretariat, 2006.

FRANCK, Susan. D. Foreign Direct Investments, Investment Treaty Arbitration and the Rule of Law. Pac: McGeorge Global Bus. & Dev, L. J. 337, 2007.

GUERREIRO, José Alexandre Tavares. Fundamentos da arbitragem do comércio internacional. São Paulo: Saraiva, 1993. McNERNY, Mary E. and ESPLUGUES, Carlos A. International Commercial Arbitration: The UNCITRAL Model Law, 9 B.C. Int'l & Comp. L. Rev. 47, 1986.
p. 47-48. Found in http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1395&context=iclr.

MOSES, Margareth. The principles and practice of International Commercial Arbitration. 2ª ed, London: Cambridge, 2012.

MOVSESIAN, Mark. International Commercial Arbitration and International Courts. Faculty Publications: 2008. Paper 98. p. 426. Found in http://scholarship.law.stjohns.edu/faculty_publications/98.

REZEK, José Francisco. Direito Internacional Público, 2ª ed., São Paulo: Saraiva, 2004.

ROQUE, Sebastião José. Arbitragem: a solução viável. 3ª ed. São Paulo: Ícone, 1997.

VENTER, Debra. UNICITRAL: International Commercial Arbitration. Saarbrucken: LAP Lampert, 2012.

YA-WEI Li. Note, Dispute Resolution Clauses in International Contracts: An Empirical Study, Cornell: INT'L L.J, 2006.

ANTICORRUPTION COMPLIANCE IN CORPORATIONS: WICH NECESSARY STEPS MUST BE DONE

Carlos Alexandre Gutmann
carlosgutmann@terra.com.br

1) INTRODUCTION

The present study has the purpose of analyzing Compliance, corruption and its relationship with Corporations and what needs to be done.
There has been growing concern in recent years about the proper functioning of markets and the fight against harmful conduct in society, with free trade and the elimination of corruption being prioritized.

In the context of the fight against corruption, for a long time the practice of paying bribes and kickbacks to foreign agents was clearly tolerated by several countries. This position arose from the understanding that corruption would be a "necessary evil", including its inevitability in certain emerging markets[42]

The strengthening of control institutions and mechanisms for the detection of illicit activities will not be sufficient if we do not involve civil society and the private sector in this struggle. The preventive aspects and implementation of corporate integrity programs that can mitigate risks and identify deviations are fundamental to the success of the anticorruption policy.

In this sense, it is necessary to seek effective and committed practices, through laws and regulations, implementation of Compliance programs, Code of Conduct and Ethics and Process Policies in the organization of the Corporations, in order to maintain fair competition and fight against corruption.

---

[42] Mendes, Francisco Schertel. Compliance [livro eletrônico]: concorrência e combate à corrupção – São Paulo: Trevisan Editora, 2017. 15 Mb; ePUB. Position 132.

In one way or another, if a company's behavior affects one's daily lives, this makes the corporate ethics relevant along with the codes that formalize their standards. On these codes, there is much to be discussed: to what extent are they necessary, what should be standardized, what recurring rules can we identify as being part of the best market practices.[43]

2) COMPLIANCE

2.1 DEFINITON

The word compliance comes from the English, which means to comply. In summary, a compliance program is one that seeks compliance with the law. If this clarifies the concept, it says very little about how properly such programs are structured.[44]

The term compliance, in fact, is being widely commented and has been used in many different ways.

We can say that Compliance is the process of identifying and managing the regulatory and conduct risks that a firm is exposed to. Regulatory and conduct risks arise both from exposure to external requirements, such as the rules applied by regulators, and internal requirements, such as the policies and procedures that have been established and put in place by a firm.[45]

A long time ago, when the term was adopted as a principle (especially in banking institutions), compliance was only synonymous with legal adequacy. Over time, it was realized that it was impossible to implement compliance procedures without full knowledge of internal processes, work methodologies used, inventory policies, people management strategies, continuous improvement techniques, accounting harmonization, etc. Thus, today the concept has been enriched with the systemic approach, from the "floor" of the factory to the room of the company president. It is much more extensive than simply "interpreting laws."

2.2 COMPLIANCE PROGRAM

A compliance program is something organized, composed of several components, that interacts with other components of other processes and other topics, something that depends on a more complex structure that includes people, processes, electronic systems, documents, actions and ideas.[46]

---

[43] Pimentel, Helio. Código de Conduta – Ética corporativa – Compliance – Governança corporativa. 2017 – Posição 140.

[44] Mendes, Francisco Schertel. Compliance [livro eletrônico]: concorrência e combate à corrupção – São Paulo: Trevisan Editora, 2017. 15 Mb; ePUB. Posição 404.

[45] Lewis, Daniel S. Compliance – A concise guide to the role of the compliance function in financial services firms. 2016 – Contents 77.

[46] Serpa, Alexandre da Cunha. Compliance Descomplicado. 2016. Posição 185.

The minimum components of a compliance program are[47]:

a) Risk assessment and determination of risk responses;

b) Definition of policies and procedures;
c) Support from Senior Management;
d) Communication and training;
e) Due diligence of third parties;
f) monitoring and auditing of the operation of the program;
g) Providing a mechanism for reporting or aid, anonymously and / or confidentially, in relation to conduct, or suspected conduct, criminal;
h) Investigation of, and responses to, conduct inconsistent with the objectives of the program;
i) Continuous improvement (restart the cycle from item a).

A compliance program cannot be isolated within the compliance area or department. The program relies on all of the organization's employees to function. It depends a lot on the support and actions of all other areas of the organization, but much more directly and clearly from the control areas (such as finance and auditing), the legal area and the areas of human resources and training, as these are areas that support, in a direct way, the implementation and operation of the pillars of a compliance program mentioned above.

If compliance seeks to comply with the law, even though it recognizes that it is impossible to completely avoid any kind of violation, and if it is a tool that leaves the inspection activity in the hands of the corporations, it is clear that a compliance program depends, of the particular structure of each entity.

Therefore, there is no single model for compliance programs, and the development of an appropriate program depends on the in-depth study of the structure of the organization, its corporate culture, the laws that apply to its activity among others.

2.2.1 REASONS FOR IMPLEMENTING THE PROGRAM

It is known that currently the regulatory norms of economic activities have been developed in a more complex and rigorous way, so that the compliance programs have become essential investments for the Corporations.

In extreme situations, the legal, financial and reputational wear and tear generated by non-compliance with sectoral legislation and regulation can cause large companies with a centuries-old tradition to close their doors. In this context, the main reason for investing in the construction of a robust and effective compliance program is that it is an essential tool to address the real risks that all companies face due to the greater complexity of both their activities and their regulations. Among the risks, we can highlight: broadening of the legal forms of accountability; imposition of new types

[47] 2010 Federal Sentencing Guidelines Manual – http://www.ussc.gov/guidelines-manual/2010/2010-chapter8

of penalties and internationalization and expansion of the competent jurisdictions[48]

2.2.2. BENEFITS OF IMPLEMENTATION

One of the first benefits of implementing the compliance program is to avoid imposing sanctions. As stated earlier, regulatory standards are complex and rigorous. The program organizes business activities and creates a control mechanism for compliance with legislation, reducing the risks of convictions and penalties arising from sanctions.

One can also mention the ease in making agreements with regulatory authorities. The programs help companies to identify unlawful conduct, making it capable of reporting the offense to the investigating authority, as well as recognizing others involved, providing information and documents proving the offense, and cooperating with the investigation.

The positive impact on the Corporation's reputation should be highlighted. Public opinion is closely linked to investigations and allegations of corruption, and the implementation of a compliance program has a positive impact on the reputation of the company, having an effect on its valuation within the market.

The existence of an internal compliance control system can contribute to the improvement of the processes developed, guaranteeing efficiency and operational efficiency, identifying current failures and difficulties and suggesting improvements to the deficiencies found in processes and procedures.

Focused on specific objectives, identifying flaws in current processes, analyzing the routine of internal controls and suggesting improvements for any deficiencies found in the processes, compliance plays a very important role for a company.

3) ANTICORRUPTION COMPLIANCE IN CORPORATIONS

3.1 ANTICORRUPTION LAW

Anti-bribery and corruption compliance — and the mitigation of associated risk — continue to be some of the main challenges that companies are facing, both in their domestic markets and abroad. On a global level, we see more and more countries promulgating new and more sophisticated anti-bribery and corruption legislation as well as aggressive enforcement by government regulators. Enforcement agencies of different countries are also increasingly cooperating in their fight against corruption. In addition, more countries are introducing individual criminal liability for bribery related offences.

With globalization, corruption has ceased to be a local problem of the countries and has become a topic of global concern, leading to actions by various United Nations (UN) Committees in order to unite as many countries as possible engaged in combating which is a typical political

[48] Mendes, Francisco Schertel. Compliance [livro eletrônico]: concorrência e combate à corrupção – São Paulo: Trevisan Editora, 2017. Contents 462

cancer of the world.

A number of international treaties have been created to address this issue: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Organization for Economic Co-operation and Development - OECD; the Inter-American Convention against Corruption of the Organization of American States (OAS); and the United Nations Convention against Corruption, adopted by the United Nations General Assembly on October 31, 2003.

The United Nations Convention against Corruption, ratified on 31 October 2003 by the UN General Assembly, was the first legal instrument to combat corruption with global legal-political reach, with the support of 178 signatory states.

The binding nature of a number of provisions of the Convention, combined with the worldwide scale of its impact, has made it one of the most important instruments in the fight against corruption in the international community.

3.1.1 FCPA

O *Foreign Corrupt Practices Act* (FCPA), the American Anti-Corruption Act, is an American law enacted by the US Congress in 1977 to create civil, administrative, and criminal sanctions in the fight against international commercial corruption. This law applies to American individuals and companies who, in commercial activity abroad, use corruption in the foreign public power to obtain or retain commercial transactions in that country. Likewise, this law creates an administrative structure to combat the practice of corruption in international business transactions[49].

Until mid 1997, there was no international consensus on the illegality of this type of conduct, the payment of bribes to foreign public authorities was even encouraged in many countries, including developed nations. For example, the French tax code allowed French companies to deduct from their income tax any expenses they owed abroad, including those intended to "grease palms" of foreign government officials. It was only with the introduction of Article 39-2a that the Code Général des Impôts[50] began to prohibit such deduction.

The FCPA was approved following extensive investigation that pointed to massive and widespread corruption in business involving the interests of the United States overseas. Congress was especially concerned that the United States oil companies had made large payments to government officials in Japan, the Netherlands, and Italy. In addition to reducing the damage caused by corporate corruption, the FCPA also sought to improve the United States' image abroad and strengthen relations with allies.

The Securities and Exchange Commission (SEC) is responsible for the civil enforcement of the FCPA, including its anti-bribery provisions and about books and records. The Department of Justice (DOJ) is responsible for all criminal enforcement of the statute and for the application of

---

[49] https://www.conjur.com.br/2012-abr-11/fcpa-cria-sancoes-combate-corrupcao-comercial-internacional.

[50] General Tax Code.

anti-bribery provisions against non-issuers.[51]

The FCPA aims to curb two illicit business activities: bribery and false or inaccurate accounting. The FCPA anti-corruption provisions prohibit payments made with "corrupt intent" to obtain or maintain business with "foreign officials" operating on their "official capacity".

In the current global market, Foreign Corrupt Practices Act risk needs to be on the radar screen of most companies[52] – large and small, public and private, and across industry sectors. Given the current enforcement theories of the Department of Justice and Securities and Exchange Commission, FCPA risk is not always apparent from reading the statute. There is no way for business organizations to truly eliminate FCPA risk, but such risk can be effectively managed and minimized through pro-active policies and procedures and other means of risk assessment.

3.1.2 UKBA

The UK's Bribery Act 2010 (the Act) which came into force on 1 July 2011 represents a strengthening of the UK position on bribery and corruption and an important development in global anti-bribery legislation. In keeping with the US Foreign Corrupt Practices Act (FCPA), the current global benchmark, the Act makes bribery of foreign public officials an offense and extends beyond company employees to include the behavior of third parties acting on behalf of a company.

However, in certain respects the Act goes further than the FCPA. The Act:[53]

a) Covers all bribery, not just those that involve public officials

b) Makes no exception for facilitation payments made to expedite routine governmental actions

c) Makes it a corporate offense to fail to prevent bribery

d) Makes it an offense not only to give but also to receive a bribe

Most compliance practitioners are keenly aware of its application to UK based companies or subsidiaries for bribery of governmental officials and private.[54] Many companies have understood that these types of activities are illegal under the Foreign Corrupt Practices Act (FCPA) in connection with foreign governments and foreign and foreign governmental officials and some companies focused on these types of schemes when they involve private, nongovernmental actors. However, the Bribery Act prohibitions apply to inbound schemes that involve bribery as well. These include bribery of UK Company or subsidiary's employees. Most companies focus on the outbound schemes so we thought it might be a propitious time to review the different types of fraud schemes that might be covered by the Bribery Act for inbound actions.

---

[51] FOREIGN CORRUPT PRACTICES ACT: A BRIEF ANALYSIS OF THE LAW THAT GAVE RISE TO THE INTERNATIONAL FIGHT AGAINST CORRUPTION. NUNO M. M. S. COELHO.

[52] Best Practices Under the FCPA and Bribery Act – How to Create a First Class Compliance Program – Contents 140.

[53] The UK Bribery Act Developing an anti-corruption compliance framework – from http://www.ey.com/Publication/vwLUAssets/UK_Bribery_Act_Developing_an_anticorruption_compliance_framework/$FILE/EY_UK_Bribery_Act_-_Developing_anticorruption_compliance_framework.pdf

[54] Best Practices Under the FCPA and Bribery Act – How to Create a First Class Compliance Program – Contents 2910.

3.2. SOME EXAMPLES IN THE EU

3.2.1 GERMANY

The German Criminal Code neither imposes criminal liability on legal entities nor expressly allows for compliance programs to mitigate or eliminate liability. However, legal entities may mitigate the risk of being exposed to fines under the German Administrative Offence Act[55].

The German Criminal Code does not recognize the absence of a compliance program as a crime. However, failure to implement adequate measures to supervise the company and its employees and to prevent illegal conduct may constitute an administrative offense by the company and the company representatives. If misconduct known to the management continues, there is a risk that failure in stopping the misconduct can be viewed as aiding and abetting by the management and thus, could cause its criminal liability.

German civil courts are in the process of establishing a best practice. The District Court in Munich recently handed down a decision that defines the compliance-related duties of the board of directors of a German stock corporation. The key points of the decision are the following:

(a) As a consequence of his duty of legality, each board member is obliged to organize and monitor the company in a way that no violations of law such as bribe payments to foreign public officials or foreign private persons occur. A board member violates his duties if he implements a deficient compliance system and if he does not sufficiently monitor the compliance system.

(b) In case of a respective risk exposure, a board member only complies with his organizational duty if he implements a compliance organization aiming at damage prevention and risk control. Decisive factors for the extent of the compliance organization are type, size and organization of the company, applicable laws, geographical presence and previous compliance incidents.

(c) The adherence to the duty of legality and therefore the implementation of an effective compliance system are joint obligations of all board members. The board is obliged to obtain on a continuous basis comprehensive information about known compliance incidents. The board must assess whether the implemented compliance system is adequate to prevent violations against compulsory laws.

(d) Cross-border bribe payments constitute violations of the law and may not be justified by arguing that economic success in corrupt markets would otherwise not be possible. Strict rules apply to the implementation of a compliance system to prevent bribe payments.

3.2.2 ITALY

Companies may be held directly liable for certain crimes listed under Decree 231[56] that are

---

[55] https://globalcompliancenews.com/anti-corruption/anti-corruption-laws-around-the-world/

[56] Law 231/2001 regarding administrative liability of companies – and advise on actions to be taken.

committed on behalf of, or for the benefit of, the company by individuals who have operational and/ or representative authority. This category includes: (i) individuals who represent or manage the company or any relevant autonomous business unit or de facto manage and control the company ("Representatives"); and (ii) individuals who are subject to the direction and supervision of the Representatives.

A company's liability under Decree 231 is assessed by the criminal judge in the same trial for the prosecution of the individual who allegedly committed the crime, and the sanctions set forth by Decree 231 are usually applied to the company by the same criminal court's decision upon the request of the public prosecutor.

The relevant courts may apply, among others, the following relevant sanctions:

> • Temporary suspension from conducting business.
> • Suspension or revocation of any authorizations, licenses or permits held by the legal entity with respect to the business unit connected with the crime.
> • Prohibition from negotiating and entering into contracts with public administration entities, except for contracts relating to public services.
> • Pecuniary fines quantified as quotas and ranging from a minimum of 100 quotas to a maximum of 1,000 quotas; since the amount of each quota ranges from a minimum of EUR 258 to a maximum of EUR 1,549, pursuant to Decree 231, the relevant Courts may therefore apply pecuniary fines ranging from a minimum of EUR 25,800 to a maximum of EUR 1,549,000.

Companies may avoid the risk of incurring liability pursuant to Decree 231, provided they adopt an effective compliance program, that is, a Model of Organization, Management and Control that is able to prevent and detect the commission of crimes (the "Model"), and ensure that the Model and related internal procedures are actually implemented. Therefore, the Model, if correctly implemented and constantly updated, would have the effect of exempting the company from liability arising from crimes committed by its Representatives.

3.2.3 SWEDEN

The Swedish Penal Code does not specifically recognize compliance programs as instruments to mitigate or eliminate the liability of legal entities before the crime of corruption has been committed. However, legal entities could partly mitigate their criminal liability if they adopt an effective compliance program.

As described above, a company that is found not to have done what could be reasonably expected to prevent bribery may receive a corporate fine. By adopting a compliance program, a legal entity reduces the risk of not having done what can reasonably be expected to prevent bribery from taking place and thereby, the risk of receiving a corporate fine is reduced. However, a compliance program is not an effective defense if the bribery has been committed by individuals in leading positions or with special responsibility for supervision. If a corporate fine is issued, the existence of a compliance program may reduce the amount of the fine.

3.2.4 AUSTRIA

Legal entities may be held responsible for a criminal offense committed by a decision maker

or by an employee if the offense was committed for the benefit of the company or the commission of the offense violated legal obligations of the association.

It is in the event that a criminal offense is committed by an employee that compliance programs may help mitigate or eliminate criminal liability. The law states that companies may only be held liable for criminal offenses committed by their employees if the commission of the offense was made possible (or essentially facilitated) due to the fact that the decision makers disregarded reasonable and necessary diligence. This is possible through a flaw in the implementation of essential technical, organizational or staff-related measures for the prevention of such crimes. These measures include, for example, guidelines, trainings and controls. Which measures are considered necessary have to be assessed on a case-by-case basis, depending on the size, structure, sector, etc. However, an effective compliance program may constitute a mitigating/eliminating factor.

Pursuant to the VbVG[57], the prosecution also has discretion on whether or not to prosecute associations or conditionally withdraw from the prosecution. In deciding whether to apply these measures, the prosecution will take into account, inter alia, the conduct of the entity after the offense and will factor in the taking of preventive measures. The adoption of a compliance system will be considered as such a preventive measure.

3.3 MEASURES TO BE IMPLEMENTED

In the organizational environment, the Compliance area, the exercise of its function, should not be seen as a "sheriff", but as an area that advises, guides, anticipates potential risks based on the regulatory, codes and policies defined by the disseminated to all Stakeholders and Shareholders. Compliance should be seen as a "guardian", whose mission is to ensure the balance and sustainability of the company and to value organization and people[58].

As most States do not provide for criminal liability for the absence of a compliance program, ideally there would be a provision in the legislation of that program. It is a way of minimizing and / or avoiding corruption in corporations.

Designing an effective anticorruption compliance program that meets the requirements of many different jurisdictions appears to be a difficult task. Multinational companies must take note of the broad global consensus that has developed around what governments and international organizations expect from corporate anticorruption compliance programs. While there is no one-size-fits-all program - and one company should keep in mind the applicable local laws - this global standard is a necessary measure.

The commonly accepted core components of an effective anti-corruption program include:[59]

> § Support and commitment from the top. Senior management and boards of directors should create a "tone at the top" that promotes a culture of compliance. In evaluating a company's compliance, U.S. authorities say they will consider "whether senior management has clearly articulated company standards, communicated them in unambiguous terms,

[57] Association Liability Law.

[58] Guia Prático Sobre Compliance, Lei Anticorrupção e PLD/FT – Andrea Carvalho – Contents 109.

[59] http://www.fcpablog.com/blog/2014/5/1/anti-corruption-compliance-meeting-the-global-standard.html

adhered to them scrupulously, and disseminated them throughout the organization.

§ A clearly articulated and visible corporate policy. According to the FCPA Guide, written anti-corruption policies and/or codes should be clear, concise, and accessible to all employees and to those conducting business on the company's behalf.

§ Making compliance the duty of individuals at all levels of the company. While "tone at the top" and written policies are necessary components of a compliance program, they are not sufficient in and of themselves. A commitment to compliance must be reinforced by middle-management and others throughout the organization, as the OECD[60] Guide and World Bank Guidelines emphasize.

§ *Oversight by the senior corporate officers with autonomy, resources and authority*. The responsible corporate officer (or officers) "must have appropriate authority within the organization, adequate autonomy from management, and sufficient resources to ensure that the company's compliance program is implemented effectively," the FCPA Guide states. Indeed, Russian law requires the designation of an officer and a department or structural unit responsible for the prevention of corruption and related offenses. In other countries, like Canada, companies are expected to establish "direct reporting obligation to independent monitoring bodies," which oversee compliance with applicable standards of conduct.

§ *Generally applicable compliance measures focused on high-risk areas*. The OECD Guidance recognizes there is no standard compliance program: an effective program, "should be developed on the basis of a risk assessment addressing the individual circumstances of a company." High-risk areas, the OECD says, include: "gifts; hospitality, entertainment and expenses; customer travel; political contributions; charitable donations and sponsorships; facilitation payments; and solicitation and extortion." The FCPA Guide similarly underscores that companies should design a compliance program that takes into account relevant risk factors.

§ *Ensuring the compliance of third parties*. A compliance program should not be limited to mitigating risks presented by a company's direct employees. The OECD advises multinational companies to perform documented due diligence of business partners, inform business partners of the company's commitment to compliance, seek a reciprocal commitment, and monitor compliance.

§ *Financial and accounting procedures, including a system of internal controls*. Brazil's new Clean Company Act, when applying penalties, considers the existence of internal controls, including audits, that ensure the integrity of a company's operations. The FCPA Guide emphasizes that internal controls are especially important where corruption risks are high -- so a financial services company would be expected to devise and employe different internal controls than a manufacturer.

§*Periodic communication and documented training*. Anti-corruption training is not a one-time event, and, as the The FCPA Guide suggests, training sessions include hypothetical situations that are specific to the trainee's day-to-day work experiences.

§ *Encouragement and positive support for compliance*. Companies also should reward their employees for good behavior. For example, the FCPA Guide recommends incorporating adherence to compliance as a "significant metric for managements" bonuses.

§ *Appropriate disciplinary procedures to address violations*. Just as carrots are important to an anti-corruption compliance program, so are sticks. Anti-corruption rules are only effective is they are enforced.

§ *Guidance, advice, confidential reporting and whistleblower protections*. An effective program must provide resources for company employees and relevant third parties to obtain compliance information, help answer questions, and be able to report potential or actual

[60] Organisation for Economic Co-operation and Development.

misconduct.

§ *Periodic reviews*. A compliance program that remains static is likely to become ineffective as risks shift. The FCPA Guide therefore suggests that companies may: (1) use "employee surveys to measure their compliance culture and strength of internal controls, identify best practices and detect new risk areas and/or (2) "targeted audits to make certain that controls on paper are working in practice."

3.3.1 RISK PREVENTION

Risks are events with negative impacts on achieving an objective. Risks are potential, not certain, events.[61]

As well as defining the risks, it is important to define the prioritization of risks. With this, you can plan the application of resources in the treatment of those risks that are most relevant to the company at a given moment, directing what to do in each of the risks with strategies and risk management.[62]

After assessing the risks and identifying the applicable rules, it is necessary to create compliance policies and procedures, such as:

a) A "Code of Conduct" document is essential to serve as a starting point and to introduce, in a simple and direct way, the various components of the Compliance Program;

b) Each of the policies and procedures must, of necessity, be linked to an already constant theme in the code of conduct;

c) All policies and procedures should be available in a centralized or decentralized repository - physical or electronic, and should be readily available when needed;

d) The language used in the policies and procedures should be clear, accessible and easy to understand for all company employees.[63]

3.3.2 CODE OF CONDUCT

The Code of Conduct in companies is a set of rules that establishes values and guides the actions of a certain group of employees according to the principles of the organization.
Business ethics comes to be the attempt to achieve the highest degree of realization within the company of the values in which its members believe, by conviction, generating external and internal responsibility on the part of the top management and the entire business community for the possible

---

[61] COSO Enterprise Risk Management – Integrated Framework, Executive Summary – https:/www.coso.org/documents/coso_erm_executivessummary.pdf

[62] Serpa, Alexandre da Cunha. Compliance Descomplicado. 2016. Contents 317.

[63] Serpa, Alexandre da Cunha. Compliance Descomplicado. 2016. Contents 436.

consequences of each action.[64]

In practice, the set of rules adopted by an organization is often called a code of ethics, code of conduct, or code of ethics and conduct.

One way to make the organization's adherence to rules explicit and formal is to create a code of conduct. The main idea of the code is to make it clear to every employee that the company cares and cares about the law and wants to be an environment for creating and expanding corporate culture that reflects that desire.[65]

Compliance and corporate governance are two concepts closely linked to corporate ethics. Being in compliance is, first and foremost, to follow the legislation. Corporate governance refers to transparency. It is the system by which companies and other organizations are directed, monitored and encouraged, involving relationships between partners, board of directors, board of executive officers, supervisory and control bodies and other stakeholders.[66]

In this way, the company and its employees must strictly follow the legislation. If you are not sure how to proceed in a specific situation, the employee should call the ethics committee to indicate the correct way of acting, advised by the legal department always necessary.

In corporate governance, the company and its employees always seek the accuracy of their accounting records, both for the legal aspects and for the necessary transparency regarding management and shareholders.

The creation of a specific pipeline manual is a viable alternative and is within reach of any company. No matter how comprehensive an organization's code of conduct may be, it will never be able to anticipate all risk situations to which its employees and employees will be exposed because of the business reality of the legal provisions.

The ideal is to promote a true commitment between employees and codes of conduct, by investing in specialized training and by setting goals and standards of conduct. In this respect, the International Chamber of Commerce (ICC) practical compliance guide points out some interesting strategies for promoting and disseminating the integrity culture in the company, among which:[67]

a) Adoption of an annual "compliance day" to reaffirm the company's commitment message with its code of conduct.

b) Elaboration of booklets and guides on its compliance program, in order to raise awareness

---

[64] MARINHO, L.H.L. Controle Gerancial: padrões de conduta ética nos negócios em uma empresa multinacional – um estudo de caso. 1999. 134p.

[65] Mendes, Francisco Schertel. Compliance [livro eletrônico]: concorrência e combate à corrupção – São Paulo: Trevisan Editora, 2017. Contents 1782.

[66] Código de Conduta – Ética Corporative Compliance Governança corporativa – Helio Pimentel – 2017. Contents 441.

[67] International Chamber Of Commerce. ICC Antitrust Compliance Toolkit.

among its employees beyond what already exists in the code of conduct.

c) Use of examples from the media (newspapers, websites) about damage to the reputation of companies that did not adopt compliance practices (companies convictions by Cade, or by corruption, for example).

d) Didactic presentation of successful compliance experiences, especially what can be extracted from them to improve the company's performance.

3.3.3 COMMUNICATION AND TRAINING

In implementing any compliance program, an in-house communication channel is essential. The purposes are guidance to employees, as well as communicating potential illicit.

The Compliance Program would not work if it were not effectively communicated to everyone. It is extremely important that the Code of Conduct and other documents and issues related to the Compliance Program are communicated and available in easily accessible locations.

Principles and codes of ethics are seldom sufficient in themselves. They must be accompanied by dissemination actions, promoting the development of a corporate culture through a consistent strategy. It is in this context that the training of employees, through communication and training, is a strategic tool for prevention and guidance so that professionals act in an ethical manner and in accordance with the laws and standards of the company. The objective is to deepen the employees' knowledge of legal requirements and responsibilities, as well as corporate guidelines, enabling them to identify, prevent, treat and communicate situations of risk or with signs of irregularities.

The credibility and reputation of an organization are also a direct reflection of the performance of its employees. Rather than having compliance policies aligned with strategic objectives, companies should focus on the human aspect, since the development of integrity in business practices is more linked to behavioral changes than to corporate ethics and compliance guidelines and guidelines.

Training and communication efforts can involve trainings, campaigns, forums, videos and training of multiplier agents to identify, treat and communicate risk situations. Strategies vary according to company profile, but engagement is essential for a culture of integrity within organizations.

The program implemented by Siemens[68] is a good example of active concern with open channels of communication, not only with the internal public, but with any external agents that somehow relate to the company, such as suppliers, partner companies and joint ventures. The program titled Tell us is a direct line for informers who wish to communicate possible illicit, whether they are employees of Siemens or not.

---

[68] Mendes, Francisco Schertel. Compliance [livro eletrônico]: concorrência e combate à corrupção – São Paulo: Trevisan Editora, 2017. Contents 1862.

The informant may have the identity concealed and must be protected by any retaliation from his superiors. It is a 24-hour-a-day channel, open in almost all languages, with worldwide reach, and operated by a Siemens independent body, which ensures that anonymity is guaranteed to informers. This independent body is responsible for transferring the information directly and integrally to the Legal Compliance Department for careful analysis.

3.3.5 COMMITMENT TO ETHICS

Ethics is the part of philosophy responsible for researching the principles that motivate, distort, discipline or guide human behavior, especially reflecting on the essence of norms, values, prescriptions and exhortations present in any social reality.[69]

Business ethics is focused on ethical and transparent behavior between the company and all its stakeholders, that is, it is the good and sincere relationship between the organization and all its stakeholders. In the same way that ethics establishes the laws that determine the moral conduct of personal and collective life, business ethics determines the moral conduct of a company, whether public or private.[70]

The Code of Ethics and the commitment of top management to its dissemination and compliance are bases of the socially responsible company. Formalizing the company's ethical commitments is important so that it can communicate consistently with all partners. Given the dynamism of the social context, it isnecessary to create mechanisms to update the code of ethics and to promote the participation of all involved.

The existence of ethical standards alone does not guarantee ethical behavior. They must be publicized and monitored in companies, so that the rules of conduct are known and well understood by all who work in them.

To this end, companies must establish an ethics committee with educational and monitoring responsibility. This will be the development of strategies and policies to promote ethics, as well as its dissemination, training, and orientation, to apply the rules of conduct to the routine of employees.

Members of the Ethics Committee should have in-depth knowledge of the company's policy - its standards, rules, goals and targets - and be aware of the responsibility of its work, as well as maintaining an unblemished reputation.

The commitment of a company to ethical values and principles depends, essentially, on the conduct adopted by its employees and other agents acting on its behalf. Thus, the company's efforts to disseminate values and ethical principles are important in order to achieve a change of behavior.

---

[69] HOUAISS, 2012.

[70] http://www.administradores.com.br/artigos/negocios/a-importancia-da-etica-empresarial-como-fator-competitivo-para-o-mercado/103308/

4) CONCLUSION

Both for financial costs and social costs, corruption is one of the greatest obstacles to the development of each state, affecting public and private institutions, intensifying political instability, distorting competition, affecting competitiveness and free market mechanisms, deteriorating the quality of products and services, mitigating trust in economic agents, and ultimately increasing transaction costs.

There is no way we can effectively fight corruption if we do not think of a collective commitment to overcome this complex phenomenon, which considers not only social and cultural aspects, but also the way in which states, companies and individuals face the issue. Its harmful effects directly impact the lives of thousands of people who do not have access to quality services, jobs, health and decent work, among others.

The need to combat corruption has led companies to worry about measures to be implemented to avoid being held hostage.

If everyone is committed to this culture, it is certain that damage to reputation, legal sanctions, financial loss, and compromise of business continuity will be far from organizational reality.[71]

There is much to be done by companies. The important thing is to be committed and aware that implementing measures to combat corruption is a matter of business survival. It is necessary to find qualified and qualified professionals to act in areas of compliance.

Paul McNulty, a former US attorney general, said: "If you think compliance is expensive, try not to be."

In fact, the losses are great for corporations that do not follow a compliance program. Corruption can be costly if the new standard is to be worth it. The company can be held liable for acts of corruption committed by employees and suppliers, regardless of the proven guilty, and the value of the fines can reach very high values.

5) REFERENCE LIST

MENDES, Francisco Schertel. Compliance [livro eletrônico]: concorrência e combate à corrupção – São Paulo: Trevisan Editora, 2017. 15 Mb; ePUB. ISBN: 978-85-9545-007-3
PIMENTEL, Helio. Código de Conduta – Ética corporativa – Compliance – Governança corporativa. 2017.

LEWIS, Daniel S. Compliance – A concise guide to the role of the compliance function in financial services firms. 2016.

---

[71] Guia Prático Sobre Compliance, Lei Anticorrupção e PLD/FT – Andrea Carvalho – Contents 118.

SERPA, Alexandre da Cunha. Compliance Descomplicado. 2016.

FOX, Thomas. Best Practices Under the FCPA and Bribery Act – How to Create a First Class Compliance Program – 2013. ISBN – 13:978-1482632453.

COELHO, Nuno M.M.S. FOREIGN CORRUPT PRACTICES ACT: A BRIEF ANALYSIS OF THE LAW THAT GAVE RISE TO THE INTERNATIONAL FIGHT AGAINST CORRUPTION. - Revista Jurídica - vol. 01, n°. 46, Curitiba, 2017. pp. 164-187 DOI: 10.6084/m9.figshare.5172382

Global Overview of Anti-Corruption Laws 2017 - from https://globalcompliancenews.com/anti-corruption/anti-corruption-laws-around-the-world/

The FCPA Blog – from http://www.fcpablog.com/blog/2014/5/1/anti-corruption-compliance-meeting-the-global-standard.html

COSO Enterprise Risk Management – Integrated Framework, Executive Summary – https:/ www.coso.org/documents/coso_erm_executivessummary.pdf

MARINHO, L.H.L. Controle Gerancial: padrões de conduta ética nos negócios em uma empresa multinacional – um estudo de caso. 1999. 134p. Dissertação (Mestrado em Administração) – Instituto de Pós Graduação e Pesquisa em Administração – COPPEAD, Universidade Federal do Rio de Janeiro, Rio de Janeiro, 1999.

CARVALHO, Andrea. Guia Prático Sobre Compliance, Lei Anticorrupção e PLD/FT – disponível em www.cec-rhconsult.com.br.

International Chamber Of Commerce. ICC Antitrust Compliance Toolkit – from www.iccwbo.org/ Data/Policies/2013/ICC-Antitrust-Compliance-Toolkit-English.

The UK Bribery Act Developing an anti-corruption compliance framework – from http:// www.ey.com/Publication/vwLUAssets/UK_Bribery_Act_-_Developing_an_anti-corruption_compliance_framework/$FILE/ EY_UK_Bribery_Act_Developing_anticorruption_compliance_framework.pdf

HOUAISS. 2012 – Dicionário Houaiss. São Paulo: Objetiva.

BATISTA, Fabio. From http://www.administradores.com.br/artigos/negocios/a-importancia-da-etica-empresarial-como-fator-competitivo-para-o-mercado/103308/

THE DISREGARD OF LEGAL ENTITY IN THE EUROPEAN UNION PERSPECTIVE

DANILO DE ARAÚJO CARNEIRO
danilo@ccdm.adv.br

1. INTRODUCTION

The economic and social advances of the last centuries caused an important transformation in the way that economic activity is executed, which turned to be even more complex and global[72]. In addition to that, the European Union assumed an essential role in the world economic development, creating a strong united market without economic frontiers and with the free circulation of goods, people, services and capitals[73].

As an attempt to follow the new and complicated scenarios created by the business dynamism, the company law, specially the European, find itself in a constant mutation and fit to the factual reality – towards beyond the traditional corporation model, the European Union is facing a challenge of regulating the new corporate groups and the resulting legal consequences

In this context, several EU directives that regulates a corporate legal personality, focused in maintaining one of its main advantages, which is the limitation of the associates equity

---

[72] EMBID IRUJO, José Miguel. *Sobre el derecho de sociedades de nuestro tiempo*: Crisis *económica y ordenamiento societario*. Granada: Editorial Comares, 2003, p. 16.

[73] ARNOLD Rainer. Basics of European Law: Introduction to General Structures of EU Law, EU Institutions, EU Legal Order and Fundamental Freedoms – Knowledge Base -. In: ARNOLD Rainer; FAIX, Werner G.; FELDBAUM, Eva; KISGEN, Stefanie. International Business Law. Steinbeis Edition, 2015, p.69.

responsibility, therefore the assets of the partners are not confused with those of the company, with the fundamental intent of creating a safer environment for investors and facilitating global business by developing a more dynamic and efficient economy.

However, the autonomy created - with limited liability to the assets of the company - has also become an instrument to commit fraudulent and abusive activities in the corporate management, leading the institute of legal personality to be used to harm creditors, as when the members and their personal assets are hidden.

Therefore, concerned with the dissemination of the mentioned practice, European states, mainly through their courts, have come to envisage o institute of disregard of legal entity[74], which allows, in specific cases and within legal limits, to hold accountable the partner personally, reaching his personal property, when he commits unlawful acts.

Considering that each EU Member State has its own legislation on the subject and applies institute of disregard on the limits of its law and its jurisprudential understanding, the following questions have arisen: Is there a specific rule of the European Community, valid for all Member States, about piercing the corporate veil? What is the role of the Court of Justice of the European Union (CJEU) in the application and standardization of the institute?

The present paper intends, throughout its chapters, to seek answers to the aforementioned questions and to foster reflections on the theme. To that end, it is necessary, *a priori*, to briefly examine the concept of legal personality, its advantages and disadvantages, in order to understand the need, in certain cases, for its application. Afterwards it will be defined the institute of disregard and its application in European countries, in order to briefly analyze the European Union legislation on company law and the role of the CJEU in the defense of this legislation.

2. THE DISREGARD OF LEGAL ENTITY

2.1 Corporate legal personality: its economic advantages.

The legal personality of the corporate society was erected by law as a way to foster the development of economic activities by providing more security to a company associates and investors[75]. In other words, the collective personality encourages and facilitates business by assigning the company a distinct identity and autonomy from its people[76].
Society then becomes the holder of rights and duties and, consequently, a subject of rights able to respond with its own equity for the debts contracted - exempting the members from responding with

---

74 In this paper we have chosen to use, preferably, the term “Disregard of Legal Entity”, however, also used the terms: “to lift the corporate”; “piercing the corporate veil”; among others.

75 It was necessary to establish a clear barrier between the company and its shareholders, so that the investors were not reached by third parties with rights or debt derived from the businesses done by the company.

76 EMBID IRUJO, José Miguel, 2003, p. 16.

their personal patrimony[77].

Thus, the essence of a limited liability company (L.L.C.) lies precisely in the fact that it has a distinct legal personality from the persons who constitutes it[78], with the separation of personal and business assets, what European doctrine calls "entity shielding", as David Kershaw clarifies "The term entity shielding refers to rules that protect assets from the personal creditors of this owners"[79].

It should be emphasized that the limited liability is of the partners, not of the company, since "they must pay all of their debts, just as anyone else must (unless, in either event, they receive absolution in bankruptcy). To say 'limited' means that the investors in the Corporation are not liable for more than the amount they chip in"[80].

The limited liability of members is, therefore, a commercial law maneuver, acting as a stimulant of economic activity, reducing the risks of commercial ventures. The main objectives of this limitation are: (i) to protect the partner by limiting his responsibility to the invested equity in the company; and (ii) protect the company so that no partner can use the assets of the company for its own benefit[81].

Indeed, it is undeniable that the responsibility mode discussed here has led to the emergence of a large number of legal entities, developing commercial activity and industry, generating more jobs and wealth. Due to the separation of individual and social assets, it is possible to invest with limited responsibilities and, consequently, increased risk-taking capability and capital efficiency, providing a safer business environment[82].

Limited liability has also proved to be an effective tool for limiting business risks and a great attractive for the creation of group of companies[83], according to European Union (EU) jurisprudence, such as a parent and its subsidiary or a parent with several subsidiaries. A strong "consideration in favour of a group structure is that each company in the network is a separate legal person and its shareholders have limited liability"[84].

---

77 The Company assumes its own legal personality with its due registration. KERSHAW, David. Company Law in Context: text and materials, 2 ed. Oxford: Oxford University Press, 2012, p. 30

78 DINE, Janet; KOUTSIAS, Marios. Company Law, 7 ed. Palgrave Macmillan Law Masters, 2009, p. 15

79 KERSHAW, David, 2012, p. 20

80 EASTERBROOK, Frank; FISCHEL, Daniel. The economic structure of corporate law. Cambridge, Massachusetts: Harvard University Press, 1998, p. 40.

81 ZANINI, Carlos Klein. *A responsabilidade da sociedade controladora pelas dívidas da controlada.* In ESTEVEZ, André Fernandes; JOBIM, Marcio Felix [coord.]. *Estudos de Direito Empresarial. Homenagem aos 50 anos de docência do Professor Peter Walter Ashton*. São Paulo: Saraiva, 2012. p. 388 - 393.

82 YAZICI, Alper Hakkı. Lifting the Corporate Veil in Group of Companies: Would the Single Economic Unit Doctrine of EU Competition Law set a Precedent?. Law & Justice Review, Year:5, Issue:9, December 2014, p. 131-132

83 GALGANO, Francesco. *Le Società – I Gruppi di Società*. Torino: UTET, 2001, p. 1.

84 FERRAM, Eilís. *Company law and corporate finance.* New York: Oxford University Press, 1999, p. 27.

The ease generated by the separation of personal and corporate assets has also resulted in fraudulent and unfair practices - characterized by abuse of legal personality - by partners[85], to the detriment, above all, of the rights of creditors. In this sense, institute of disregard of legal entity arises, as the best way to protect third parties and seeking justice in the concrete case.

2.2 Definition of the disregard of the legal entity: the personal accountability of the associate(s).

To Lift the Corporate Veil is the procedure by which the legal entity of a company is ignored in order to reach the natural persons responsible for the corporation. Thus, the purpose of disregard is to overcome the legal barrier imposed by the commercial society and to allow, in specific situations, to move from the collective to the individual mode, ignoring the formal presence of the collective person[86].

Before this reality, the theory of disregard arose with the clear purpose of preventing the misapplication of corporate legal entity, in order to punish the partner who, using his limited liability, commits unlawful acts.

The exceptionality is a fundamental attribute of the disregard theory, always prevailing the notion of legal entity with autonomous personality while the delimitations imposed by the law for creation and use of society are respected[87]. Based on the aforementioned, the application of the disregard of legal entity can never occur in an unrestricted manner and without observance of the imposed rules, either by the legislative or by the judiciary.

Thus, the rule of responsibility limitation is not absolute, it finds limits that, when disrespected, raise the lifting of the corporate veil; the derogation of the so-called "Separation Principle" (*Trennungsprinzip*)[88].

The main reasons that lead to the abuse of collective personality and, consequently, its dissolution are: i) Confusion over Ownership (when it becomes difficult to distinguish what is owned by the partners and by the company); ii) material undercapitalization (when a company does not have the financial resources to carry out its activity, because it has not been built with enough capital); iii) decapitalization caused by members[89].

There are many arguments against the disregard of legal entity. The main allegation lies in

---

85 DINE, Janet; KOUTSIAS, Marios, 2009, p. 15

86 MOTA PINTO, Carlos Alberto da. *Teoria Geral do Direito Civil*. 4 ed. Coimbra: Coimbra Editora, 2012, p. 141.

87 ABREU, Jorge Manuel Coutinho. *Curso de Direito Comercial. Das Sociedades*. 5 ed. Coimbra: Almedina, 2016, p. 166.

88 Ibidem

89 I*bidem*, p. 166-170.

the uncertainty[90] surrounding the instinct, given the legislations complexity, of anticipating all possibilities for its application. Being left to the courts, after a thorough analysis of the case, to put into effect this theory, when this is the only viable way of obtaining justice.

Another criticism is the complex application of this principle in cases of business groups. In this case, "EU Courts' case law has thus developed an economic unit doctrine of legal personality under Article 101 TFEU that interacts in various ways with the doctrines of legal personality followed under otherwise applicable national laws[91]", enabling accountability to the parent company, or its partners for practices performed through the other companies of the group, when decreed by the court, as will be better analyzed further on this paper.

Therefore, usually, disregard of legal entity is carried out by the judiciary power, the accountable for the development of the Disregard Doctrine, since its emergence in the English[92] and American[93] court.

In this scenario, through court decisions, the courts of several countries aim to balance the protection between the associates and the creditors safeguard, allowing partner's personal liability the partner only in specific cases, with the purpose of correcting situations against the legal system[94]. Protecting, therefore, legally relevant values such as good faith and loyalty.

Regarding the European Union, in the absence of an express uniform rule determining in which cases it will be allowed to mitigate the principle of property separation between partner and society, it is up to each Member State, given its sovereignty, to determine in which circumstances the disregard of the legal entity will be applied.

2.2.1 A brief reflection about the disregard of legal entity in European countries: the autonomy of Member States.

The doctrinal and jurisprudential movement, with respect to disregard the collective personality, has been adopted by several European countries, according to Hisaei Ito and Hiroyuki Watanabe[95], when enumerating the mold of application of this theory in some countries:

---

[90] This uncertainty is more evident when it comes to companies with operations in different countries, subject to different laws and possibilities of disregarding legal personality.

[91] CORTESE, Bernardo. Piercing the Corporate Veil in EU Competition Law: The Parent Subsidiary Relationship and Antitrust Liability. Alphen aan den Rijn: Kluwer Law International, 2014, p.74.

[92] The English case Salomon Vs. Salomon and Co., judged in 1897, was known as the landmark of the beginning of the application of Disregard Doctrine, and was even quoted by some authors as the true and proper leading case of this theory.

[93] In 1939, for instance, the partner's personal accountability was discussed by the US Supreme Court in the famous "Deep Rock" case.

[94] FERRAM, Eilís, 1999, p. 31.

[95] ITO, Hisaei; WATANABE, Hiroyuki. Piercing the Corporate Veil. In CABRELLI, David; SIMES, Mathias. Comparative Company Law: A Case-Based Approach.1 ed. Oxford: Hart Publishing, 2013, p. 190.

> "*German case law has developed categories of undercapitalization*, '*intermingling' of private and company capital and destruction of the economic basis of the company. The Spanish solution also mentions undercapitalization or abuse of law. In the UK, veil piercing is only allowed if a company is a 'mere façade' [..] Finnish and Italian law only seem to accept veil piercing in cases of groups of companies, while Polish and Latvian solutions indicate that courts have not yet developed a veil-piercing doctrine*".

Among the European countries, England stands out as the first to approach the subject, and Germany, due to the relevant commitment of its jurists to study deeply the incidence hypotheses of the theory of disregard of legal entity.

England, in 1897, was already discussing the possibility of the partner shouldering personally to the company's debts, in the emblematic case *Salomon v. Salomon & Co (1897)*. In the case in question, the fraudulent act of Aaron Salomon regarding the personality of the society was proved, justifying the disregard of his personality by the inferior instances of the English justice. However, although Salomon used the company as a shield to harm creditors, the House of Lords, England's highest court, reformed the decisions of the lower courts, considering the arguments of the defense, to enforce the principle of patrimonial liability[96].

Although old, this case continues to be used as a reference in the United Kingdom, as can be seen in the *Prest v Recursos Petrodel Ltd*[97] case, judged in 2013, in which the Supreme Court, upon verifying the exceptional nature of the disregard of legal entity alludes that "when we speak of piercing the corporate veil, we are not (or should not be) speaking of any of these situations, but only of those cases which are true exceptions to the rule in *Salomon v A Salomon and Co Ltd* [1897] AC 22 i.e. where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control"[98].

Moreover, the Supreme Court of the United Kingdom recognizes the distress in disregard the legal entity due to the breadth of the term "façade company", which requires a close examination by the courts in order to build sound case law[99].

On the other hand, Germany stands out for its great contribution, doctrinal and jurisprudential, in the conceptualization and study of the disregard of legal entity phenomenon, referred to as "Durchgriffshaftung".

The greatest German collaboration came from Rolf Serick, an important name in the consolidation and definition of the Disregard Doctrine, with his thesis about the personal accountability of the partner when there is abuse of the commercial society, i.e. the judge can rule out the separation principle between the partner property and the company's. To Serick, when the company is used by partners as means to avoid fulfilling a legal or contractual obligation, as well as

---

[96] Salomon v. Salomon & Com

[97] Case Prest v Petrodel Resources Ltd & Ors

[98] Case Prest v Petrodel Resources Ltd & Ors

[99] *Ibidem*.

harming third parties, through bad faith[100].

Notwithstanding the doctrinal work to define disregarding application cases, the Germany' courts are reluctant to ignore the limited liability principle, only disregarding legal personality in exceptional cases, when it is essential to maintain the fairness and the good faith in the concrete case[101].

In general, this shows a resilience of the European countries in overcoming the collective personality[102], and the exceptionality of the theory is a feature of extreme relevance. That's because "there has always been a judicial concern not to cread commercial uncertainty and undermine the benefits of incorporation. Having incorporated, shareholders have a legitimate expectation, as do those who deal with the incorporated entity, that the courts will respect the status of the entity"[103].

Although there is agreement on the exceptional nature of disregard, its criteria and application ways are far from being a consensus in the European Union, mainly because of the autonomy that each country has to regulate and give efficiency to the concept. In this way, companies, specially multinationals, are subject to several rules, which causes legal uncertainty and, consequently, reduces risk-taking and the companies' investment.

The different criteria for the disregard application, depending on the country in which the company is operating, may lead to the weakening of other theories, even more important, such as legal personality and limited liability. Therefore, to avoid the inappropriate use of disregard legal entity, it is vital to understand the European Union rules which surround businesses and the EU Court of Justice' role in the implementation of the principle.

3. THE LEGISLATION OF THE EUROPEAN UNION: GENERAL RULES FOR THE PROTECTION OF CREDITORS AND PARTNERS OF LIMITED LIABILITY COMPANIES.

European Union, formed by 28 countries, is considered the most powerful economic area of the world and is regulated by a supranational legal order that influences - in addition to the economic, political and legislative sphere of the Member States - the entire global community[104].

The main objective of the EU is to foster the economy and, to do it, must establish and "keep up an internal market which is a market without economic frontiers and essentially based on

---

[100] ALTING, Carsten. Piercing the Corporate Veil in American and German Law - Liability of Individuals and Entities: A Comparative View, 2 Tulsa J. Comp. & Int'l L. 187 (1994), p. 198.

[101] ALTING, Carsten, p. 198.

[102] ABREU, Jorge Manuel Coutinho, 1999, p. 273-277.

[103] HANNIGAN, Brenda, 2016, p. 47.

[104] ARNOLD Rainer, 2015, p. 69

the so-called fundamental freedoms"[105]. The consolidation of a strong united market requires the European Union, through its legislation and its courts, prevent any obstacle (not justified) the economic activity.

In this context, European Union policy largely replaces the policy of the Member States, by primary law, - as the Treaty on the Functioning of the European Union – and secondary law - such as the Directives, Regulations and Decisions. That way, it is of the utmost importance to understand the EU's legislative and judicial contribution to companies and their institutes, such as limited liability and its possible restrictions[106].

Therefore, the second paragraph of Article 54, of the Treaty on the Functioning of the European Union (TFEU), understands that "Companies or firms means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making"[107]. In the absence of a more specific definition of the company by TFEU, the Court of Justice of the European Union defines as "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity"[108].

Thus, the EU has opted for a functional approach to business, focusing on economic and non-legal identity, which means that anyone involved in economic activity can be subject to EU laws. This functional approach enable a company to be constituted of a single person (physical or legal) or a group of persons (physical or legal)[109].

The various forms of company are ensured by the European Community, through several Directives which aimed at, above all, to coordinate the rules on limited liability companies and avoid any restriction on freedom of establishment.

3.1. The main directives in the field of company law: freedom of Member States to establish exceptions to limited liability.

---

[105] *Ibidem*.

[106] *Ibidem*, p. 73

[107] Second paragraph of Article 54, of The Treaty on the Functioning of the European Union

[108] Case *Klaus Höfner and Fritz Elser v. Macrotron GmbH* (C-41/90)

[109] Ezrachi, Arial. EU Competition Law: An Analytical Guide to the Leading Cases. Third Edition, Oxford: Hart Publishing, 2012, p. 1-4,

In order to ensure freedom of establishment on the basis of Article 50 (1) and (2) (g)[110], was developed the First Council Directive 68/151/ EEC, of March 9th 1968, to coordinate the safeguards which, for the protection of the member`s interests and others, are required in the Member States from the companies.

The coordination is of paramount importance in making such safeguards equivalent throughout the European Community, specially in the case of companies limited by shares or otherwise having limited liability, since the activities of such firms often extend beyond national territory.

Therefore, by "limited liability company", the EU understands to be "a company with share capital and having **legal personality**, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees such as are provided for by Directive 68/151/EEC for the protection of the interests of members and others"[111].

Hence, companies with limited liability must comply with certain rules - of publicity, of undertaken validity of obligations and of company' nullity - provided for in the Directive. This is because, to protect the interests of third parties, these companies **only offer as safeguard their corporate patrimony[112]**.

Furthermore, the Directive of 1968, demonstrates the EU's concern of the application of limited liability to harm creditors, which is why it ensures that: "the basic documents of the company should be disclosed in order that third parties may be able to ascertain their contents and other information concerning the company, especially particulars of the persons who are authorised to bind the company; and [...] the protection of third parties must be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid."[113].

In this framework, the First Directive clarifies, that the understanding about the partners personal accountability in situations of practicing before creating of partnership as predicted by the art. 7º, in the following terms: "If, before a company being formed has acquired legal personality, action has been carried out in its name and the company does not assume the obligations arising from such action, the persons who acted shall, without limit, be jointly and severally liable therefor, unless otherwise agreed"[114].

---

[110] Article 50: 1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives. 2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union;

[111] Art. 2, the Directive 2005/56/EC

[112] Ibidem.

[113] Art. 7 of Directive 68/151/EEC.

[114] Art. 7 of Directive 68/151/EEC.

However, in the aforementioned scenario the acts were practiced before the formation of the society, that is, before acquiring legal personality. Thus, although the members respond with their personal assets, we are not facing the classic case of disregarding the legal entity.

In sequence, in 1976 the Second Council Directive (77/91/EEC[115]) was promulgated, in accordance with the First Directive, to establish rules in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, aiming to make such safeguards equivalent throughout the Community. In 1978, was developed the Third Council Directive 78/855/EEC, concerning mergers of public limited liability companies, supplemented and repealed by the Directive 2011/35/EU, of 5 April de 2011[116].

Directive 2011/35 / EU highlights the concern with creditors - including debenture holders, and persons having other claims on the merging companies - by obligating the Member States to protect them to avoid that the merge does not affect their interests. Concluding that, in cases of invalidity of the merge, all participating companies are jointly and severally liable in respect of the obligations of the acquiring company[117].

Also noteworthy:

> "**Fourth Council Directive 78/660/EEC** of 25 July 1978 […] on the annual accounts of certain types of companies and **Seventh Council Directive 83/349/EEC of 13 June 1983** […] on consolidated accounts, respectively concerning disclosure, the validity of commitments, nullity, annual accounts and consolidated accounts, apply to all share-capital companies […] and **Sixth Council Directive 82/891/EEC** of 17 December 1982, concerning the division of public limited liability companies, relating respectively to formation and capital, mergers and divisions, apply only to public limited liability companies[118]"

Regarding other types of partnership covered by the EU, Directive 2009/102/EC, deals with single-member private limited liability companies. In these cases, the European Community accentuate that "legal instrument is required allowing the limitation of liability of the individual entrepreneur throughout the Community, without prejudice to the laws of the Member States, which, in exceptional circumstances, require that entrepreneur to be liable for the obligations of his undertaking"[119].

Still, a private limited liability company "may be a single member company from the time of its formation, or may become one because its shares have come to be held by a single shareholder"[120]. Consequently, when this type of company is under discussion the EU allows

---

115 This Directive was subsequently repealed by Directive 2012/30 / EU.

116 In this sense, it is also the Directive 2005/56/EC, on cross-border mergers of limited liability companies.

117 Art. 22, 1, h, da Directive 2011/35/EU, (7).

118 Directive 2009/102/EC

119 Directive 2009/102/EC

120 Ibidem.

Member States to lay down rules for personal liability of the sole shareholder, ignoring the legal personality of the company, mainly because the risks to creditors - with the practice of unlawful acts - is relatively greater.

Finally, to highlight the recent Directive (EU) 2017/1132 of the European Parliament and of the Council, of 14 June 2017, related to certain aspects of company law.

This Directive reaffirms the need to ensure a minimum equivalence in the protection for both shareholders and creditors of public limited liability companies, in order to coordinate national rules concerning the composition of such companies, as well as the preservation, increase and reduction of their capital.

Therefore, the Directive emphasizes the importance of Member States to limit, as far as possible, the causes of invalidity[121] of the obligations undertaken on behalf of limited liability companies, so that they comply with commitments made with third parties. Safeguarding the right of creditors, if not reimbursed by society, to seek their rights through the competent administrative or judicial authority[122].

The transposition of the Directives by all Member States is essential to avoid diverging regulations on certain matters, which could jeopardize the competitiveness of European business, legal certainty, trade between Member States and increase in global economy – priorities of the agenda of Europe 2020, thus contributing to an exit from the global economic and financial crisis[123].

In summary, the European Union is more concerned with limited liability companies, where the creditor's warranty is limited to corporate equity. By strictly protecting this type of company, the EU recognizes that the exemption of the personal liability of partners can be used to harm third parties by abusing of the legal personality.

However, although it has repeatedly affirmed the need to standardize the rules on commercial companies, the EU did not regulate the possibility of disregard of legal entity when members, using the restricted liability to the assets of the company, commit unlawful acts. In other words, the EU chose not to standardize the rules on this concept, being up to each Member State, in the use of its sovereignty, to define the cases in which the disregard, given the personal responsibility of the partner, will be applied.

By not predicting a general rule for disregarding legal entity cases, the EU provides deviations in the Member States laws can disturb the exercise of the right of establishment, due to

---

[121] In this regard, Directive 2011/35 / EU (10) provides that: “To ensure certainty in the law as regards relations between the companies concerned, between them and third parties, and between the members, it is necessary to limit the cases in which nullity can arise by providing that defects be remedied wherever that is possible and by restricting the period within which nullification proceedings may be commenced”.

[122] Directive (EU) 2017/1132. The possibility of appeal the judiciary is also guaranteed by the Article 13 at Directiva 2011/35/EU and at Directive 2012/30/EU.

[123] Directive (EU) 2017/1132

the theory malpractices by a country, which is forbidden, as stated by the art. 49º do TFEU and in the Directive 2017/1132 when states that none of the dispositions and formalities of internal right can introduce restrictions to the free establishment or capital circulation[124]. Still, the Directive itself recognize that, in exceptional cases, these restrictions can occur when justify by the TJCEU jurisprudence and by general interests[125].

The omission of the European Parliament and the Council, it is essential to examine the understanding of the CJEU - the judicial authority of the European Union, responsible for ensuring uniform application and interpretation of EU' law - about the disregard of legal entity.

4. THE IMPORTANCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION TO RESOLVE CONFLICTS AND STANDARDIZE THE RULES ON DISREGARD OF LEGAL ENTITY.

The main mission of the Court of Justice of the European Union since its creation in 1952[126] is to ensure that European law is interpreted and applied in the same way in all countries of the European Union. Within this mission, the CJEU: "reviews the legality of the acts of the institutions of the European Union; ensures that the Member States comply with obligations under the Treaties, and interprets European Union law at the request of the national courts and tribunals"[127].

Thus, if national legislation, in the application of the Disregard of Legal Entity, infringes the provisions of the European Union - such as freedom of establishment or free competition - or cause discrepancies between decisions taken by Member States, it is for the CJEU to resolve the conflicts and to adjust, in concrete case, the national rules with the supranational ones.[128]

In this context, as early as 1962, in the case *Acciaierie Ferriere e Fonderie di Modena v. High Authority of the European Coal and Steel Community* (C-16/61)[129], the Court was asked about the legality of the payment by the partners of the company's debts through its personal assets. Regarding this matter, the Advocate-General, referring to the disregard of legal entity, alludes:

> "As is known, jurisprudence tries to arrive at a satisfactory assessment of such factors and

---

[124] Directive (EU) 2017/1132

[125] *Ibidem*

[126] "The Court of Justice of the European Union includes the Court of Justice (consisting of one judge from each member state, assisted by nine Advocates General, appointed for six years by common accord of the member states governments), the General Court (Tribunal of first instance) and specialized courts". ARNOLD Rainer,2015, p. 72

[127] Court of Justice of the European Union. General Presentation. Available in: <https://curia.europa.eu/jcms/jcms/Jo2_6999/pt/>.

[128] Stressing that the CJEU acts in a subsidiary way - only when the matter is not resolved at national level - and its decisions are binding, and must be implemented through the Member States' duty of cooperation. CASSESSE. Antonio. *International Law*. 1ed. Oxford: Oxford University Press, 2001, p. 269.

[129] Case *Acciaierie Ferriere e Fonderie di Modena v. High Authority of the European Coal and Steel Community* (C-16/61)

> in particular asks to what extent it is possible to disregard the juridical structure of bodies corporate and have recourse against the natural persons who compose them, that is to say, under what conditions can the natural persons controlling a body corporate be identified with the actions of the latter? American case law in this connexion has recourse to the doctrine of 'disregard of legal entity', for example where someone who is subject to a legal prohibition pursues the activity prohibited through the agency of a legal person which he controls. Serick has examined this question in German law by studies in comparative law and despite Strong reservations comes to conclusions from which it is possible to draw guidance with regard to the economic law of the Community. On page 207 of his book he writes: 'For example, the evasion of a prohibition of competition imposed by statute or contract by means of the device of a legal person leads to its identification with the member who controls it and uses it for unlawful purposes and hence to the extension of the prohibition to the legal person. To give another example, if a person wishes to procure for himself illegally, a secret commission by causing it to be paid to a legal person which he controls, he must be treated as if he had received the money himself. In my opinion we should proceed in the same way in the present case. It seems to me in particular that there is no reason why the identification of legal persons with their members should be restricted to 'one-man companies".

More recently, in 2010, the institute of disregard was discussed more sharply in the case C-81/09. The CJEU has examined the reference for a preliminary ruling from the *Simvoulio tis Epikratias* (Greece), based on Article 234 EC. The application was presented in the context of a dispute between *Idryma Typou AE* (limited company whose registered office is in Athens) and *Ipourgos Tipou kai Meson Mazikis Enimerosis*, (Minister for the Press and the Mass Media)[130].

According to the Minister, the company has violated the rules governing the operation of television channels in Greece and should therefore be subject to the penalties laid down in Article 4 of Law 2328/1995, paragraph 1, to be applied under the paragraph 3 of the same article: "the fines provided for in the preceding paragraphs shall be imposed jointly and severally on the company and **personally on its legal representative or representatives, on all the members of its board of directors and on all its shareholders** with a holding of over 2.5%."[131].

The referring court therefore asked the CJEU about the compatibility of Article 4 (3) of Law 2328/1995 with Directive 68/151 / EEC. Which means that the reference of a preliminary ruling from Greece examined whether the disregard of legal entity, with the personal liability of the shareholder, infringed the economic freedom – as stated in the European Union Directive – as well as the fundamental characteristics of a public limited company as: "(a) the strict distinction between the company's assets and those of the shareholders, and (b) the absence of personal liability of shareholders for company debts, given that the shareholders are required only to pay their capital contribution, which corresponds to the ratio of their equity participation in the total company capital"[132].

The CJUE, stated that there is no EU rule prohibiting the imputation of responsibility to the shareholders, jointly with the legal entity that is the company. The Court took into account the arguments of the majority of the *Simvoulio tis Epikratias*, namely:

---

[130] Case *Idryma Typou AE* v *Ipourgos Tipou kai Meson Mazikis Enimerosis (C-81/09)*

[131] Ibidem.

[132] Case *Idryma Typou AE* v *Ipourgos Tipou kai Meson Mazikis Enimerosis (C-81/09)*

> "European Union law does not prevent the national legislature either from introducing new types of companies which do not fall within the field of application of the directives relating to companies or from establishing (special) public limited companies to which provisions diverging from European Union law on public limited companies will apply, in so far, of course, as those divergent provisions are not contrary to specific provisions of the directives relating to companies or of European Union law generally [...]the fact that European Union law does not guarantee that the shareholders of a public limited company will not be liable for the legal person's debts is apparent from the fact that the principle of lifting the corporate veil, which results under certain conditions in liability being attributed to the shareholder for the obligations of a public limited company, has been established for decades in the legal systems of numerous Member States, above all through case-law, without the question of that principle conflicting with European Union law being raised, and also from the fact that no steps have been taken to harmonise the conditions for such lifting of the corporate veil"[133].

After all, the CJEU considered that the interpretation of Greek legislation does not transgress the prescripts of the Frist Directive, and concluded "that in the majority of cases shareholders of the companies listed in Article 1 of the First Directive **are not required to be personally answerable for the debts of a company limited by shares or otherwise having limited liability**, **it cannot be concluded therefrom that this is a general principle of company law applicable in all circumstances and without exception**"[134].

In 2017, the Court of Justice considered a reference for a preliminary ruling in the proceedings brought by *Antonio Miravitlles Ciurana*, *Alberto Marina Lorente*, *Jorge Benito García* and *Juan Gregorio Benito García* against *Contimark SA* and its administrator, *Jordi Socías Gispert*, concerning arrears of wages and other restitutions that the company was doomed to pay to the employees[135].

In this process, the CJEU examined the adequacy of European Union Directives with the Articles of the Spanish Companies Act (*Ley de Sociedades de Capital*), which allow the personal responsibility of the administrator (director) of the company, when the latter commits acts contrary to the law or the statute, or does not fulfill a duty inherent to its function. In the final analysis, the Court decided, it differently from that in Case C-81/90, that, in the present case, EU Directives "must be interpreted as **not conferring on employees, who are creditors of a public limited liability company** as a result of the termination of their employment contract, a right to bring, before the same social court as that having jurisdiction over their action for recognition of their wage claims, **an action to establish the liability of the director of that company"[136]**

In the case of groups of companies, they are considered due to disregarding the legal entity as a "single economic unit" that enable a parent company or others in the group hierarchy to become accountable, even though they are not related to the infraction performed. This was clarified in the

---

[133] *Ibidem.*

[134] *Ibidem.* However, Court has concluded that the Greek legislation is very generic in stipulating "any shareholder that has 2.5% of the shares", since the fact of having 2.5% of the shares does not necessarily mean that the shareholder exercises the profession of journalist or has some control over the company's decisions. Hence, it has determined that the national norm is opposed to articles 49 TFEU, on freedom of establishment, and 63 TFEU in the free movement of capital.

[135] Case *Antonio Miravitlles Ciurana and others v Contimark SA and Jordi Socías Gispert (C-243/16)*

[136] *Ibidem*.

Case 90/09, nos seguintes termos:

> "In the light of those considerations, it cannot therefore be excluded that a holding company may be held jointly and severally liable for the infringements of EU competition law committed by a subsidiary of its group whose capital it does not hold directly, in so far as that holding company exercises decisive influence over that subsidiary, even indirectly via an interposed company. That is the case, in particular, where the subsidiary does not determine its conduct independently on the market in relation to that interposed company, which does not operate autonomously on the market either, but essentially acts in accordance with the instructions given to it by the holding company. In such a situation, the holding company, the interposed company and the last subsidiary in the group form part of the same economic unit and, therefore, constitute a single undertaking for the purposes of EU competition law"[137]

Thereby, with regard to the application of the institute disregard of legal entity by the CJEU, it was clear that the Court examines the specifics of each case and its adequacy with the rules laid down by the European Union. Moreover, the understanding of the Member States are freed to establish rules to limit the separation between the personal property of the partners and the society, when needed – even though it restricts the establishment and the capital circulation freedom – which "may be justified where it serves overriding requirements relating to the public interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it"[138].

5. CONCLUSÃO

Since the end of the nineteenth century, the European countries, through their courts, have established the institute of disregard of legal entity, but with some reluctance. For most countries, simple corporate default or insolvency does not, in and of itself, authorize the redirection of debt collection to its shareholders or managers.

The disregard should only occur in exceptional cases, when it has been established, after a thorough examination of the specific case, that the partner has abused the legal personality of the company, by fraudulent law or by its statute, for its own benefit and loss to the creditors.

It is noted throughout the present work that the rules on the institute studied are at the discretion of each Member State, i.e., the European Union has chosen not to standardize and coordinate rules on the disregard of legal entity throughout the Community. Contrarily, it preferred, as seen in the Directives, a preventive normalization, with rigid guarantees, to be adopted by all EU countries, on the formation and maintenance of companies, as well as on the limitation of cases of invalidity of obligations assumed by companies especially those with limited liability, which deserve special attention in the protection of members and creditors.

However, by not providing for a general rule for piercing the corporate veil cases, the EU makes it possible for divergences in Member States' legislation to disrupt the exercise of the right of establishment, because of the possibility of inappropriate and trivial use of the institute by a

---

137 *General Química and Others v Commission* (C-90/09)

138 Case *Commission of the European Communities v Italian Republic* (C-518/06)

country. The role of the Court of Justice of the European Union is therefore essential to prevent non-compliance with EU rules, to avoid abuse of company's personality and to standardize, through jurisprudence, the use of disregard of legal entity.

In line with the principles of the European Union on economic development, the CJEU is concerned, and could not be different, not to create commercial uncertainty and to undermine the benefits arising from the incorporation of companies. The continuity of commercial activity is of utmost importance for the creation of a highly competitive market economy, which is why the EU recognizes that with the incorporation, shareholders (as well as investors and third parties) have a legitimate expectation of that national and regional courts will respect the status of society by removing it in exceptional cases in the name of legal certainty.

6. BIBLIOGRAPHY

ABREU, Jorge Manuel Coutinho. *Curso de Direito Comercial. Das Sociedades*. 5 ed. Coimbra: Almedina, 2016.

ALTING, Carsten. Piercing the Corporate Veil in American and German Law - Liability of Individuals and Entities: A Comparative View, 2 Tulsa J. Comp. & Int'l L. 187 (1994).

ARNOLD Rainer. Basics of European Law: Introduction to General Structures of EU Law, EU Institutions, EU Legal Order and Fundamental Freedoms – Knowledge Base -. In: ARNOLD Rainer; FAIX, Werner G.; FELDBAUM, Eva; KISGEN, Stefanie. International Business Law. Steinbeis Edition, 2015.

CASSESSE. Antonio. *International Law*. 1ed. Oxford: Oxford University Press, 2001.
CORTESE, Bernardo. Piercing the Corporate Veil in EU Competition Law: The Parent Subsidiary Relationship and Antitrust Liability. Alphen aan den Rijn: Kluwer Law International, 2014.

Court of Justice of the European Union. General Presentation. Available in: <https://curia.europa.eu/jcms/jcms/Jo2_6999/pt/>.
DINE, Janet; KOUTSIAS, Marios. Company Law, 7 ed. Palgrave Macmillan Law Masters, 2009.

EASTERBROOK, Frank; FISCHEL, Daniel. The economic structure of corporate law. Cambridge, Massachusetts: Havard University Press, 1998.

EMBID IRUJO, José Miguel. *Sobre el derecho de sociedades de nuestro tiempo*: Crisis *económica y ordenamiento societario*. Granada: Editorial Comares, 2003.

EUROPEAN UNION. The Treaty on the Functioning of the European Union. Available in: <https://europa.eu/european-union/law/treaties_en>.

EZRACHI, Arial. EU Competition Law: An Analytical Guide to the Leading Cases. Third Edition. Oxford: Hart Publishing, 2012.

FERRAM, Eilís. *Company law and corporate finance.* New York: Oxford University Press, 1999, p. 27.

GALGANO, Francesco. *Le Società – I Gruppi di Società*. Torino: UTET, 2001.

HANNIGAN, Brenda. Company Law. Fourth Edition, Oxford: University Press, 2016.

ITO, Hisaei; WATANABE, Hiroyuki. Piercing the Corporate Veil. In CABRELLI, David; SIMES, Mathias. Comparative Company Law: A Case-Based Approach.1 ed. Oxford: Hart Publishing, 2013.

KERSHAW, David. Company Law in Context: text and materials, 2 ed. Oxford: Oxford University Press, 2012.

MOTA PINTO, Carlos Alberto da. *Teoria Geral do Direito Civil*. 4 ed. Coimbra: Coimbra Editora, 2012.

YAZICI, Alper Hakkı. Lifting the Corporate Veil in Group of Companies: Would the Single Economic Unit Doctrine of EU Competition Law set a Precedent?. Law & Justice Review, Year:5, Issue:9, December 2014.

ZANINI, Carlos Klein. *A responsabilidade da sociedade controladora pelas dívidas da controlada.* In ESTEVEZ, André Fernandes; JOBIM, Marcio Felix [coord.]. *Estudos de Direito Empresarial. Homenagem aos 50 anos de docência do Professor Peter Walter Ashton*. São Paulo: Saraiva, 2012.

6.1 Legislation

Directive (EU) 2017/1132.
Directive 2005/56/EC
Directive 2009/102/EC
Directive 2011/35 / EU
Directive 2012/30 / EU.
Directive 68/151/EEC
The Treaty on the Functioning of the European Union

6.2 Jurisprudence

Case *Acciaierie Ferriere e Fonderie di Modena v. High Authority of the European Coal and Steel Community* (C-16/61)
Case *Antonio Miravitlles Ciurana and others v Contimark SA and Jordi Socías Gispert (C-243/16)*
Case *Commission of the European Communities v Italian Republic* (C-518/06)
Case *General Química and Others v Commission* (C-90/09)
Case *Idryma Typou AE* v *Ipourgos Tipou kai Meson Mazikis Enimerosis (C-81/09)*
Case *Idryma Typou AE* v *Ipourgos Tipou kai Meson Mazikis Enimerosis (C-81/09)*
Case *Klaus Höfner and Fritz Elser v. Macrotron GmbH* (C-41/90)

Case Prest v Petrodel Resources Ltd & Ors [2013] UKSC 34 (12 June 2013)
Case Salomon vs. Salomon e Co

Fundamental Rights of commercial companies in a comparative view

Bernardo Alcuri de Souza
bernardo.alcuri@gmail.com

1. Introduction

The fundamental rights are the human rights guaranteed by the positive legal order, arranged in most cases in their constitutional regulations. (Kretz, 2005, p.50)

For Luiz Carlos Forguieri Guimarães (2017, p.14), there is no consensus in the doctrine to define fundamental rights. The above-mentioned author conceptualizes fundamental rights as public-subjective rights of natural and legal persons, since the Constitution has chosen some rights as fundamental with the objective of promoting the dignity of the human person and limiting the power, although these are not always the unique criteria because there are fundamental rights that guide other fundamental principles.

At first fundamental rights were created to regulate the relationship between state-individual (vertical effectiveness of human rights), with the aim of ensuring the protection of citizens' rights in the face of the harmful state interference to their rights. However, with the emergence of the Social States, taking into consideration the participation of civil society in the exercise of power, another emphasis was placed on fundamental rights, applying these rights in the scope of private law (horizontal effectiveness of human rights). (Polarini, 2012, pp. 42/43)

As the horizontal effectiveness of fundamental rights was recognized, there was a rupture of old concepts that delimited public and private law, using fundamental rights to regulate interpersonal rights. New concepts, new methods, new values, and legal institutes try to cover a complex society, and they are forced to abandon, or use a differentiated term, the old liberal dichotomy between public and private rights. (Vale, 2004, p.57)

There is no doubt that individuals are the holders of fundamental rights, and that norms have been created to protect them. But with the evolution of society, the question if only natural persons would be the recipients of these rights has been raised. (Mendes & Branco, 2011, p.195).

This paper will analyze the possibility of ownership of fundamental rights by companies / corporations (legal persons).

In this article, some of the fundamental rights of companies will also be individualized.

2. Do companies (legal persons) hold fundamental rights?

The fundamental rights have been enacted in the legal order due to their historical relevancy and they evince a special protection, since they are legal norms connected, in most cases, with the limitation of power and the principle of the dignity of the individual. (Guimarães, 2017, p.11/13)

Primarily, fundamental rights were created having citizens as the ultimate target, for the protection against state's abusive attitudes. However, with the evolution of society, fundamental rights began to link not only the Public Power, but also private legal relations - the so-called horizontal effectiveness of fundamental rights. (Padilha, 2014, p.92)

Thus, if in private relations fundamental rights must also be observed, can it be said that companies would also be entitled to this right?

For Norberto Bobbio, human rights went through a process of universalization and multiplication as they sought their affirmation in history and in time. In this "multiplication", men ownership of rights was extended to other elements. (Bobbio, 1992, p.33)

> "This multiplication (I was saying "proliferation") occurred in three ways: a) because it increased the amount of goods considered to be worthy of guardianship; b) because the ownership of certain typical rights has been extended to several subjects of man; c) because man himself is no longer considered as a generic entity, or man in the abstract, but is seen in the specificity or concreteness of his various ways of being in society, as a child, an elderly, an invalid, etc. In substance: more goods, more subjects, more status of the individual ". (Bobbio, 1992, p.33)

What can be drawn from the thought of Bobbio is that humanity has become aware of its fundamental values, using the past as an inspiration for the future, where it is evident that the phenomenon of the universalization of fundamental rights will progress effectively.

With the evolution of society, the doctrine came to understand that fundamental rights are applicable to other diverse subjects the human being. New production techniques, the transformations of social, economic and political conditions have demonstrated the needs and thus new demands of freedoms and powers. (Lopes, 2011, p.13)

Before analyzing the possibility of the company owning fundamental rights, it is necessary to verify its legal nature as well as the importance of corporations to the modern world.

The theory about business creation has evolved, and it has been recognized that the legal person has a different personality from its partners, enabling companies to be the subjects of rights and obligations. The formation of a legal personality depends on the will of the human being, and it is based on the principle of autonomy of the will. The creation of companies enables them to create obligations, enter into contracts, and incur debt, being rights holders. (Vale, 2016, p.1)

The legal person exists in that it allows individuals to develop their activities. In addition to individual goals, which are exhausted in the existence of human life, there are collective goals, which transcend individualized existences and that take place in legal persons; these - legal entities - serve to the realization of collective and permanent interests, which is why they are endowed with personality. (Godoy & Mello, 2016, p.96)

The legal person represents an instrument set by the Law to be available to natural people, so that, when grouping the efforts, it can use it to comply with social wishes. With the rise of the popular masses, it would be difficult to show individual enterprise. It became necessary, therefore, the collectivization of ideals. And in order to organize them, a legally recognized instrument was needed to represent them in the legal world. Here, then, is the legal person, representing a strong social instrument. (Ferreira, 2014, p.52)

The company is not only economics' object of study; it is increasingly studied in several other areas, and especially in the legal field. In view of the importance that companies currently have, it is possible to separate it from the law, for the law regulates society. Companies change and influence society's behavior in many aspects: social, political, legal and economic. (Giraldi & Silva, 2017, p.118)

There are several theories that describe the nature of companies. Peter Oliver (2015, p.663) describes three out of the various existing theories:

a - the artificial entity theory, which views the corporation as a creature of the State so that the State is free to curtail its rights at will;

b - the aggregate entity theory, which views the corporation as an aggregate of its members or shareholders;

c - real entity theory, which views the corporation as a separate entity.

Today, the doctrine is united in affirming that the companies, because they have legal personality of their own and because of their importance for society, are also holders of fundamental rights.

Companies are essential for the realization of social rights and, therefore, they must be empowered to better pursue their purposes. One way to achieve this is by guaranteeing ownership of fundamental rights, taking into account, however, some intrinsic impossibility, due to the very nature of moral or collective persons. (Godoy & Mello, 2016, p.94)

"Companies are legal constructs created for the benefit of human beings-not merely of the stakeholders, but of society as a whole, since a modern economy could not exist without them." (Oliver, 2015, p.664)

The company, and there is no other way to understand it in this subject, is an institutional arrangement that has the purpose of meeting human needs. The legal person does not have a distinct, independent essence, to the point of not needing the individual to concretely exist.

Collective people only exist because there are human people. This obviousness also translates into the admission that legal persons are holders of fundamental rights, precisely, and insofar as they are expressions of the existence of human persons. (Godoy & Mello, 2016, p.99)

The extension of the ownership of fundamental rights to legal entities has the greater purpose of protecting the rights of individuals, in addition, in many cases, it is through the legal person guardianship that better protection of individuals is achieved. It should be noted that the formation of companies or other collective entities are the result of the individual's exercise of certain fundamental rights - right of assembly and association. (Sarlet, 2018, p.231)

Granting the ownership of fundamental rights to the legal person actually represents the concession of a guarantee to the individuals who are behind the company as well as to the legal entity itself.

The corporate body of private law has the social function of reducing the demand for jobs, as well as producing essential affluence for the State. Denying an effective protection to the private collective entity will ultimately affect the individual right of the citizen, including those referred to fundamental such as employment, food and dignified life. It is a sequence of facts: attaining the greater being, causing sequels in the lesser being, which is the human being. Hence it is that the objective fundamental right is a reinforcement of the subjective fundamental right and, through the objective fundamental right, the collective person is protected and respected and, as a consequence, it is granted protection to the legal sphere of the individual, individually considered. (Schmitt, 2000, p.58)

If the exercise of several fundamental rights depends on the legal person, then excluding it from protection implies in seriously affecting certain individual rights that are realized through the legal person. (Steinmetz & Pindur, 2006, p.8)

It should not be forgotten that the ultimate recipient of a fundamental right is the human person. This perception requires hermeneutical vector that understands that the legal person exists in function of the human person. The company is nothing more than an effort that brings together individuals and therefore reflects these personal existences, Therefore, for its empowerment, it varies also the strengthening of human persons, core of fundamental rights, based on the recognition of their respective dignities. (Godoy & Mello, 2016, p.108)

According to the teachings of Dimoulis and Martins (2014), "for the purposes of the ownership of fundamental rights, legal persons are treated as natural persons, when the exercise of a right is compatible with the structural peculiarities of the legal person and, especially, with its biological inexistence or artificial character ".

In Europe, with the publication of the Convention for the Protection of Human Rights and Fundamental Freedoms and its updates (Council of Europe, 1950), it is possible to verify that some of the rights listed in that convention were directed to companies. Article 10 mentions directly the right of freedom of expression, and the possibility of the State requiring licensing from the media companies. Article 34 grants the "non-governmental organization" the right to submit applications to the Courts.

There is no legal impediment for legal persons to come to be considered holders of fundamental rights, although these, originally, refer to the individual. The doctrine that fundamental rights are addressed only to human persons is superseded. Fundamental rights, by their very nature, may be exercised and held by legal persons. Legal persons can not be denied the consequences of the principle of equality, the right of reply, the right to property, the right to honor, secrecy of correspondence, inviolability of domicile, guarantees of acquired right. (Mendes & Branco, 2011, p. 195).

The doctrine, in its majority, states that fundamental rights apply to legal persons, provided they are compatible with their (legal persons) nature. (Cavalcanti Filho, 2013, p.16)

It is interesting to mention the teachings of Hamanda Ferreira (2014, pp. 27/28), who understands that with the development and complexity of social relations, fundamental rights have an open definition of breadth of protection, regardless of who is being targeted "Interference" to the fundamental right, making it possible to harmonize the content of fundamental rights and their ownership by legal entities.

To a certain point, the extension of fundamental rights and the equality between individuals, both natural and legal persons, and the consequent recognition by some Western Constitutions of the ownership of fundamental rights by legal persons, has led to an extension of the scope of fundamental rights, as well as a series of questions. (Duarte Júnior, 2016)

The first legal-constitutional system to deal specifically with the possibility of legal persons holding fundamental rights was the German system. (Schmitt, 2000, p.59)

The German Basic Law expressly recognizes the ownership of fundamental rights by companies, while limiting the application of rights to the nature of the company.

> "Article 19
> [Restriction of basic rights - Legal remedies]
> (...)
> (3) The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits. "(German Parliamentary Council, 1949).

The Constitution of the United States establishes some fundamental rights, which are applicable to companies (recognized by decisions of the Supreme Court). American law recognizes companies the right to property, freedom of speech, the right of the "hearer", protection against unreasonable searches and seizures, right to privacy, the rule against double jeopardy, due process of law, equal protection clause, freedom of contract, etc. (Oliver, 2015, pp. 665/666)

It is interesting to note that the Portuguese Constitution of 1976 (Constituent Assembly) also contains an express clause (Article 12, 2), which guarantees the ownership of fundamental rights to collective entities:

> "PART I
> Fundamental Rights and Duties
> TITLE I
> General principles

Article 12
Principle of universality
1. All citizens shall enjoy the rights and shall be subject to the duties set forth in the Constitution.
2. Legal persons enjoy the rights and are subject to duties compatible with their nature. "

The Brazilian Federal Constitution does not expressly recognize companies ownership of fundamental rights (as in the Portuguese Constitution and the German Basic Law), but this has not prevented doctrine and jurisprudence from recognizing such possibility. (Sarlet, 2018, p.230)

The Brazilian Constitution of 1988 (Brazilian National Congress, 1988) establishes in Article 5, XVIII (creation of associations and cooperatives), XIX (dissolution of associations and cooperatives), XXI (authorization for associations to represent their members judicially), article 8, III (right of the union to represent the interests of the category), article 17 (rights of political parties), rights that can only be exclusively enjoyed by legal persons. This, however, does not exclude the possibility that other fundamental rights may be applicable to companies.

Thus, the doctrine recognizes that the legal person, as well as the natural person, is the holder of fundamental rights, albeit with certain limitations of meaning and scope.

It is understood that the fundamental rights of corporations, in certain cases, may suffer limitations due to the status of legal person (Sarlet, 2018, p. 230), the ownership of rights in the case depends on the compatibility of the right with the nature of person as provided for in the German Basic Law and the Portuguese Constitution (cited above).

Peter Oliver teaches, "the fundamental rights of companies should in many cases be more limited than those of human beings, in some instances it would be wrong to treat them less favorably than natural persons." (Oliver, 2015, p 662)

It is important to mention that although the doctrine ensures that companies have fundamental rights, this does not prevent the legislator from establishing certain distinctions or limitations on the exercise of such rights (Sarlet, 2018, p.231)

In Brazil, despite the fact that the doctrine recognizes the possibility of the companies being holders of fundamental rights, the jurisprudence understands that due to the nature of the legal person, some of these rights can suffer limitations or even be enjoyed by such people.

As an example of a limitation of fundamental rights on the part of the companies, it is possible to mention the use of the constitutional action of *habeas corpus*, which is a fundamental right with the purpose to guarantee the freedom of the people. In Brazil, such legal-constitutional instrument can be used when someone suffers or is threatened with violence or coercion in their freedom of movement, by illegality or abuse of power. (Article 5, LXVIII of the Brazilian Federal Constitution, National Constituent Assembly, 1988).

In Brazil, Federal Law No. 9,605, of February 12, 1998 (Brazilian National Congress), which regulates criminal sanctions derived from conduct of activities harmful to the environment and establishes environmental crimes, describes in Article 3 that legal persons will be held accountable administratively, civil and criminally in cases where the offense is committed by

decision of its legal representative.

From the analysis of this legislation, it can be verified that the intention of the legislator was to penalize criminally the action of the company involved in an environmental crime.

For some time in Brazil, the possibility of using *habeas corpus* in cases involving environmental crimes practiced by companies was discussed.

However, the Federal Supreme Court, which is the Brazilian Constitutional Court, has ruled on the matter, and understood that because of the nature of the companies, it is not possible for them to use the aforementioned fundamental right, since the freedom of movement of a legal person can not be arrested or restricted.

It is important to note, excerpt from the decision of the Brazilian Supreme Court: "Legal Entity that can only be punished with a fine and restrictive penalty of rights. In other words: the freedom of movement of the aggravating party is not, not even indirectly, threatened or restricted. " (STF, 12 April 2018)

Thus, by the interpretation of Brazilian jurisprudence in relation to the fundamental rights of corporations, it is clear that the Brazilian Constitutional Court, following the constant descriptions in the German Fundamental Law and in the Portuguese Constitution, restricts the set of fundamental rights on the part of the companies due to its nature.

After verifying the acceptance of the ownership of fundamental rights by the companies, let us see how the doctrine and jurisprudence manifest themselves with respect to some specific rights.

2.1 Right to property

Brazilian law guarantees everyone the right to property (Article 5, XXII of the Brazilian Federal Constitution, 1998, National Constituent Assembly).

Numerous laws have been issued in the country, with the purpose of guaranteeing companies' property rights protection.

In the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, a product of the Council of Europe's member nations (1950), the right to property was protected in Article 1, and mentioned protection for natural and legal persons.

The Fourth and Fifth American Constitutional Amendments (1791), describe the protection of property rights.

In Brazil, the right to property gives the owner (natural or legal person) the right to use and enjoy the property, and the right to recover it from the power of whoever unjustly owns or holds it. (Article 1,228 of the Brazilian Civil Code, Federal Law, 10,406, 2002, Brazilian National Congress) Brazilian legislation grants protection to the right to property, whether material or immaterial, in the Civil Code (2002, Brazilian National Congress) and in the Penal Code (1940, President of the

Brazilian Republic).

Special legislation was issued (Federal Law No. 9,279, Brazilian National Congress, 1996) to protect the industrial property of companies, in order to avoid any misuse of trademarks, patents and industrial designs.

It is relevant for the State to issue rules for the protection of industrial property, since it is indispensable to assure the investor the exclusive right of economic exploitation of the object of his creativity.

Intellectual property is a decisive factor for the sustainable economic and social development of a country. To add to its competitiveness, a country needs to create a business environment in order to provide companies with investment protection and to stimulate innovation and technological empowerment. To this end, there is a need for legal support through current legislation on trademark and patent rules and intellectual property. (Pedroni, 2016, p.1)

Brazilian law also granted copyright protection for intellectual, artistic orscientific works belonging to companies (books, films and music), through Federal Law 9,610 (1998, Brazilian National Congress); protection of computer programs (Federal Law 9,609, 1998, Brazilian National Congress); and Cultivars protection (new variety of plants created in laboratories - Federal Law No. 9,456, 1997, Brazilian National Congress).

The Copyright Act of 1976 regulates the matter in the United States. Congress on the basis of Article I, paragraph 8, clause 8, of the American Constitution, produced the rule. According to the aforementioned excerpt from the United States Constitution, it is incumbent upon Congress to promote the progress of the sciences and the arts by assuring authors for a limited period of exclusive right in respect of their writings and discoveries. Literary, dramatic, scientific, musical, artistic, architectural works, as well as computer programs, are subject to copyright law. Originality is the requirement for protection. (Godoy, 2011, p.33)

The European Union has an agency (The European Union Intellectual Property Office - EUIPO), created to offer IP rights to businesses and innovators across the European Union (EU) and beyond. There are several Regulations and Directives aimed at unifying and protecting trademarks, intellectual property rights and industrial property in Europe (Example: Regulation - EU – 2017/1001 of the European Parliament of 14 June 2017 on the European Union trademark).

Thus, it can be verified that the fundamental right of ownership of the company is widely recognized in the Democratic States of Law.

2.2 Protection of honor and image

The Brazilian Constitution of 1988 - Article 5, item V and X (National Constituent Assembly, 1998), describes as one of the fundamental rights the protection of intimacy, honor and image.

It is argued that the legal person may or may not be a passive subject of moral damage, a

stormy question that provokes controversy in both doctrine and jurisprudence.

> "In Alien Law, we can mention the renowned masters Josserand and the Mazeaud brothers, orienting themselves to recognize the violation of the privacy of legal persons, which would cause a moral prejudice to them. However, the issue still provokes controversies in comparative law, although, according to Aguiar Dias, the jurisprudence is pacified in order to protect the honor of collective bodies. Contrary to the thesis we can refer to the doctrinal position of Larenz and von Tuhr. " (Schmitt, 2000, p.64)

In Brazil, jurisprudence has already pacified the understanding, through the issuance of the summary 227 of the Superior Court of Justice (STJ, 1999), concluding that the legal person can suffer moral damages.

The Superior Court of Justice, when editing the above-mentioned summary, understood that legal persons are also invested with rights analogous to the rights of the personality, and their existence is necessarily linked to the human personality.

In addition, the Court (STJ) based the understanding, stating that there may be an offense to the name and reputation of the company, which, in commercial relations, reach large proportions due to the influence and the concept that the company exercises. The mantle of the right of manifestation does not tolerate abuse in the use of expressions that offend the rights of the personality, extendable, according to Brazilian law, to legal entities.

In the case in question, it is assumed that there is a distinction between subjective moral damage and objective moral damage in order to come to the understanding that the legal person in private law may suffer objective moral damage because of the negative financial influences that the bad reputation may cause. (Duarte Júnior, 2016).

Subjective honor is the sense of dignity and decency that each person has about him/herself. It's the self-esteem. Objective honor is the reputation, the good image that each person enjoys in the social environment in which one lives. (Conception, 2016, p.369). The companies have an objective honor, and on this basis, the Brazilian courts grant compensation for moral damages, to those corporations that have a reputation unduly shattered.

The improper use of the trademark, according to the understanding of the Brazilian Superior Court of Justice, causes moral damages. For this court, the reputation, credibility and image of the company are affected by the whole market (customers, suppliers, partners, shareholders and the community in general), as well as compromising the prestige and quality of the products or services offered, characterizing evident impairment of its rights, assets and interests. (STJ, 2017)

As he studied the Portuguese doctrine and jurisprudence, Julio Ribeiro (2013, p.101) found that the Portuguese Superior Court has already ruled that a legal person (known as a collective person in Portugal) may suffer damages of a nonpecuniary nature and be entitled to claim financial compensation, as legal persons retain some personality rights.

The protection of the company's honor, in Brazil, also deserves provisions I criminal law. The Federal Supreme Court (STF, 2003) has already decided that a legal person may be the victim

of defamation, but not the victim of being publically accused of a crime or of an injury, as it may suffer damage to its objective honor.

The Brazilian Penal Code (1940) provides in article 139, that it is constituted a crime to defame someone, imputing him/her offensive fact to his/her reputation. The crime of defamation seeks to protect the objective honor of companies, trying to safeguard the reputation and concept of the legal person before the collectivity.

Although the Brazilian Constitutional Court has already decided on the possibility of the company being a victim of the crime of defamation, even today, some Brazilian legal doctrine and jurisprudence have a different position, stating that the crime of defamation can only be applied when the victim is a natural person. Such conflicting positions have been demonstrated in the work written by the doctrine Gustavo Nehls Pinheiro (2014), and demonstrate that Brazilian scholars and courts do not yet have a unified thought about the configuration of the crime of defamation, when the victim is a company.

2.3. Due process of law

The Fifth and Fourteenth Amendments to the United States Constitution (1791 and 1868) contain a due process clause. The American Supreme Court in conducting the Santa Clara County v. Southern Pacific Railroad in 1886, acknowledged that the due process clause applies to corporations.

The Constitutional Assembly of Portugal (1976) assures everyone the right of access to the courts, for the protection of personal rights, freedoms and personal guarantees; the law assures citizens of judicial procedures characterized by speed and priority, in order to obtain protection in a timely and effective manner against threats or violations of those rights.

The Fundamental Law of the Federal Republic of Germany (Parliamentary Council, 1949), in Article 19 (4), mentions that any person whose rights are violated may have recourse to the judicial system, thereby ensuring the use of existing legal principles in the German procedural rule.

The Brazilian Federal Constitution (National Constituent Assembly, 1998) has many fundamental rights listed in Article 5 et seq., and among them, some rights related to procedural guarantees.

The Brazilian Constitutional Charter enumerates numerous principles that should be observed in the course of a judicial process, among them:

- Principle of access to justice (Article 5, XXXV);
- Principle of legality or due process of law (Article 5, LIV);
- Principle of state jurisdiction (Article 5, XXXV);
- Principle of the right of action and defense (Article 5, LV);
- Principle of equality of the parties (Article 5 "caput");
- Principle of the natural judge (Article 5, XXXVII and LIII);
- Principle of adversary proceedings (Article 5, LV);
- Principle of isonomy (Article 5 "caput") and
- Principle of the publication of judicial acts (Article 93, IX);

Such constitutional principles benefit not only the natural person, and must be observed when companies are also litigants in judicial and administrative proceedings.

Brazilian doctrine and jurisprudence understands that legal persons also hold the constitutional rights and constitutional guarantees of due process of law. (STF, 2014).

The Brazilian Constitution (Constituent Assembly, 1998), in article 5 , LXXIV, confers the right to free legal aid. This benefit is regulated by Federal Law No. 1,060 (Brazilian National Congress), from February 5, 1950, and by the Brazilian Civil Procedure Code in articles 98 to 102 (Federal Law No. 13,105, Brazilian National Congress, 2015).

Also the fees and procedural costs are free of charge, including expert examinations, attorney's fees, experts, interpreters and translators (Article 98, Federal Law 13.105, Brazilian National Congress, 2015).

Before the new Civil Procedure Code was published, there were doubts about whether companies could use such benefit. However, in the year 2015, with the edition of the new Brazilian Code of Civil Procedure (Article 98, Federal Law 13.105, Brazilian National Congress, 2015), the legislation became clear in affirming that legal persons, with insufficient resources, have the right to free justice.

The exercise of this fundamental right by certain legal persons is often essential for their existence, since there are civilian societies of humanitarian ends that live on funds and contributions and do not seek profit or economic growth. The collection of legal costs and legal fees of these entities could lead, in a certain process, to its extinction. (Schmitt, 2000, p.65)

In this way, it can be verified that both the constitutions of democratic countries and doctrine have the understanding that procedural rules should be interpreted in such a way as to grant free access to justice to companies, granting them the same procedural guarantees and benefits of natural persons.

2.4. Freedom of expression

The right to freedom of expression is described in numerous important Charters scattered throughout the world, such as the American Constitution (First Amendment - Congress, 1791), the European Union Charter of Human Rights (Article 11 - European Parliament, 2000) and the German Basic Law (Article 5 - Parliamentary Council, 1949).

It is not different in Brazil, the Constitution gives citizens the right to freedom of expression, in article 5, IX. (National Constituent Assembly, 1998) The right of companies to market and advertise their products derives from the right to freedom of expression. The Brazilian Federal Constitution, in article 220 (National Constituent Assembly, 1998), in describing on social communication, provides that the manifestation of thought, creation, expression and information in any form, process or means will not be restricted, subject to the limitations imposed by the same Charter.

This way the Brazilian Constituent Assembly granted companies the right to advertise their products freely, in existing communication vehicles.

However, the Brazilian Constitutional Charter (National Constituent Assembly, 1998) has restricted, on article 220, (3 and 4), the advertisement of products and services that are harmful to health and the environment. Commercial advertising of tobacco, alcoholic beverages, pesticides, medicines and therapies shall be subject to legal restrictions, and shall contain, whenever necessary, a warning of the harm arising from its use.

In analyzing the concepts and consequences of freedom of expression, it should be understood that such a right should not be interpreted narrowly, of having only the right of liberality to express thoughts. In fact, freedom of expression must be interpreted as a freedom to communicate in society. (Alexander, 2001, p.5)

A commercial speech was defined as the expression "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." (Krzeminska-Vamvaka, 2008, p. 06)

In Brazil, the national legislators are inclined to restrict the possibility of realizing some types of propaganda (tobacco, alcoholic beverages, pesticides, medicines and therapies), preventing companies from using their freedom of expression in full. Brazilian law and regulatory bodies, on the grounds of protecting the health of citizens, determine certain limitations for advertisements. (Costa & Costa, 2008, p. 51)

There has always been an attempt to curtail freedom of expression, for countless reasons, when faced with other existing rights.

It is interesting to cite a decision of the American Supreme Court of 1939, mentioned by Larry Alexander (2001, p.22) - Schneider v. State, 308 U.S. 147, where one of the counties tried to block the advertising in the form of a pamphlet of the city, in order to reduce the amount of garbage in the streets and the costs of maintaining the city. The US Supreme Court, however, overturned such law, stating that there are diverse alternatives to lower the costs of maintaining cities without restricting the right to freedom of expression. The purpose to keep the streets clean and neat is insufficient to justify an ordinance that prohibits a person rightfully on a public street from handing literature to one willing to receive it.

Authors, such as Moshe Cohen-Eliya and Yoav Hammer (2004, p. 24), suggest limiting the right of corporate publicity by the publication of norms that prevent the realization of stereotyping and disadvantaged groups advertisement, aiming to protect minorities and avoid humiliation.

Obviously abusive advertising involving discriminatory, racist, sexist has to be expurgated, either by legislation or by judicial decisions, but this does not constitute a direct affront to freedom of expression, a right that must be enjoyed in a way that respects the other fundamental rights.

There are many situations to be analyzed since the way in which the companies display their advertisement is reason for analysis and legislative restrictions in several western countries.

It is interesting to describe the situation of companies financing campaigns. As will be seen below, there are authors who understand that as a result of the right to freedom of expression companies would have the right to financially support political parties and candidates who represent their thoughts.

In the United States, companies are allowed to be donors of political parties, on the grounds that this would be an extension of corporations' right to freedom of expression.

Peter Oliver (2015, pp. 668/671) describes the existence of countless American Court decisions, which recognize that it has been established that political donation is a form of 'speech' for these purposes, including for corporations, being the decisions based on the interpretation of the First Amendment of the American Constitution. In addition, the author mentioned a few other American Court judges who consider in certain situations that limiting the value of donation to the parties would also confront the established right of freedom of expression of companies.

In the European Union, since the publication of Regulation (EC) No. 2004/2003 and subsequent amendments (European Parliament and Council, 2003), there is a possibility for companies to donate money to political parties, while respecting certain limits imposed by article 6 of that Regulation.

In Brazil, however, the Constitutional Court understands that it is unacceptable for companies to donate money to political parties or candidates. In deciding the question, it did not take into account, or even mentioned, the right of freedom of expression of companies. (Godoy & Mello, 2016, p.102)

Brazilian companies cannot finance political parties and candidates, as legal persons do not participate in the democratic process - they do not enjoy citizenship. The Federal Supreme Court, guardian of the Brazilian Federal Constitution, understands that to admit that corporations could finance the electoral process would violate one of the foundations of the Democratic State of Law, namely, that of popular sovereignty. (Godoy & Mello, 2016, p.107)

2.5 Freedom of association

The freedom of association simply means that the person has the right to associate, not with whomever he chooses, but with whoever is willing to associate with him. Inherent in the right to associate is the right not to associate. Anyone has the right to associate with whomever he chooses. (Vance, 2012)

Closely related to freedom of expression (in a collective way) and to the democratic system of government, the right to free association was recognized for the first time in the Universal Declaration of Human Rights of 1948, article 20, supported by the International Covenant on Civil and Political Rights of 1966, in its articles 22 and following. Freedom of association reverberates, therefore, only after World War II, repeating itself in the international treaties on human rights that took place during the twentieth century. (Camargo, 2014)

The European Convention on Human Rights (European Parliament, 2000) describes in Article 11 the right of free association and assembly, and there are restrictions on these rights, in the case of risks to national security, public safety, the prevention of crime, the protection of health or morals, or the protection of the rights and freedoms of others.

In the United States of America, the right of association was legitimized through the First Amendment of the Constitution:

> "Congress shall make in the law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. "

In Brazil, the right to free association is described in the Federal Constitution (Constituent Assembly, 1998), in article 5, paragraphs XVII and XX, and there is a restriction on the right of association, only when the association is paramilitary.

In examining the merits of freedom of association, it is clear that this right is fully applicable to undertakings.

Corporations are constituted to provide their members with better means for them to achieve the common goal of profiting from the exploitation of an economic activity. The freedom of association to be full must not only ensure that people interested in uniting around legitimate common goals can do so without finding legal obstacles, but also to prevent anyone from being forced to associate against the will, or to be unable to dissociate himself when he wants. (Mourão, 2016)

The right that is being analyzed has a direct influence on the companies, since the corporations are formed by the association of natural or legal persons, and to authorize the free association, is to authorize the free operation of the companies.

When an analysis is made under the Brazilian economic approach, it can be affirmed that the right of association is reduced to the recognition that individuals will be able to explore economic activities, which are guaranteed and limited both in the Constitution and in infra-constitutional and self-regulatory norms. There is, thus, a constitutional perspective that must be considered to regulate the interests of economic agents. (Camargo, 2014)

2.6 Other fundamental rights of companies

Due to the nature of this article, it was not possible to analyze in detail and in depth all the fundamental rights of companies. It is known that in addition to the above-mentioned rights, there are several others which, although not listed above, are extremely important for the full functioning of companies (contractual freedom, free initiative, the right of the "hearer", protection against unreasonable searches and seizures, right to privacy, the rule against double jeopardy, among others).

3. Conclusions

It can be seen from the study carried out that states have given fundamental rights to companies, given their relevant role in social, political, legal and economic relations.

Some international treaties, Constitutions and internal laws, give corporations fundamental rights, which can be enjoyed, with the purpose of guaranteeing the regular functioning of business societies.

> "As should be clear from this survey, corporations must enjoy certain fundamental rights, without which they can not operate. At the same time the dangers of extending their rights are far too plain: not only does this result in acquiring exorbitant rights, but it also leads to other distortions. "(Oliver, 2015, p.695)

It was found that, although the companies are holders of fundamental rights, these are limited according to the legal nature of the company (as explained in the Portuguese Constitution and the German Basic Law).

> "Companies must enjoy the fundamental rights essential to their functions and purpose, namely the right to property and the right to run a business (where such a right exists) as well as the right to a fair trial. Moreover, it is in the interest of third parties or in the public interest for them to hold certain other rights, perhaps the most obvious example being the freedom of expression. However, even where companies do enjoy fundamental rights, those rights are not necessarily as extensive as those of natural persons or non-profit entities."(Oliver, 2015, p.695)

The ownership of fundamental rights depends on the compatibility of the right with the nature of the legal person.

REFERENCES

ALEXANDER, Larry. Freedom of Expression as a Human Right. September 2001. University of San Diego Public Law Research Paper No. 23. Available at https://ssrn.com/abstract=285432 or http://dx.doi.org/10.2139/ssrn.285432, last checked on 24 april 2018.

Amendment I - Constitution of the United States. National Congress. 1791. Available at https://www.senate.gov/civics/constitution_item/constitution.htm#amendments, last checked on 23 april 2018.

Amendment IV - Constitution of the United States. National Congress. 1791. Available at https://www.senate.gov/civics/constitution_item/constitution.htm#amendments, last checked on 23 april 2018.

Amendment V - Constitution of the United States. National Congress. 1791. Available at https://www.senate.gov/civics/constitution_item/constitution.htm#amendments, last checked on 23 april 2018.

Amendment XIV - Constitution of the United States. National Congress. 1868. Available at https://www.senate.gov/civics/constitution_item/constitution.htm#amendments, last checked on 23 april

2018.

Basic Law for the Federal Republic of Germany. Parliamentary Council. May 1949. Available at https://www.btg-bestellservice.de/pdf/80201000.pdf, last checked on 23 april 2018.

BOBBIO, Norberto. A ERA DOS DIREITOS. 1992. Translation: Carlos Nelson Coutinho. Nova. Rio de Janeiro: Elsevier, 2004.

CAMARGO, Andre Antunes Soares de. Aspectos gerais da liberdade de associação no Brasil. Revista Consultor Jurídico. 3 july 2014. Available at https://www.conjur.com.br/2014-jul-03/andre-camargo-aspectos-geraisliberdade- associacao-brasil, last checked on 03 may 2018.

CAVALCANTI FILHO, João Trindade. Teoria dos direitos fundamentais. 2013. Available at http://www.stf.jus.br/repositorio/cms/portaltvjustica/portaltvjusticanoticia/anexo/joao_trindadade__teoria_geral_dos_direitos_fundamentais.pdf, last checked on 02 April 2018.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION. 2000/C 364/01. Parlamento Europeu. 2000. Available at http://www.europarl.europa.eu/charter/pdf/text_pt.pdf, last checked on 23 april 2018.

COHEN-ELIYA, Moshe and HAMMER, Yoav, Advertisements. Stereotypes, and Freedom of Expression. Journal of Social Philosophy, Vol. 35, No. 2, June 2004. Available at https://ssrn.com/abstract=520043, last checked on 24 april 2018.

Constitution of the Federative Republic of Brazil. 1988. Brazilian National Congress. Available online at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm., last checked on 02 April 2018.

Constitution of the Portuguese Republic. Constituent Assembly of Portugal. 2 April 1976. Available at https://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortugues a.aspx, last checked on 05 april 2018.

Constitution of the United States. National Congress. 1787. Available at https://www.senate.gov/civics/constitution_item/constitution.htm#amendments, last checked on 23 april 2018.

Convention for the Protection of Human Rights and Fundamental Freedoms. Concil of Europe. 1950. Available at https://www.echr.coe.int/Documents/Convention_ENG.pdf, last checked on 27 march 2018.

COSTA, Henrique Araújo & COSTA, Alexandra Araújo. Direito da Publicidade. Editora Thesaurus, 2008. Brasília. Available at http://www.arcos.org.br/download.php?codigoArquivo=60, last checked on 17 april 2018.

Decreto Lei N.º 2.848 (Penal Code), 07/12/1940. President of the Republic of Brazil. Available online at http://www.planalto.gov.br/ccivil_03/decretolei/ Del2848compilado.htm, last checked on 16 april 2018.

DIMOULIS, Dimitri & MARTINS, Leonardo. Teoria geral dos direitos fundamentais. 5 edition. São Paulo: Atlas, 2014.

DUARTE JR., Ricardo. A titularidade de direitos fundamentais pelas pessoas jurídicas de direito público. October 2016. Available at https://jus.com.br/artigos/51896, last check on 7 march 2018.
Federal Law n.º 1.060, 05/02/1950.

Brazilian National Congress. Available online at http://www.planalto.gov.br/CCivil_03/leis/L9605.htm, last checked on 12 april 2018.

Federal Law n.º 10.406 (Civil Code), 16/01/2002. Brazilian National Congress. Available online at http://www.planalto.gov.br/ccivil_03/leis/2002/l10406.htm, last checked on 16 april 2018.

Federal Law n.º 13.105, 16/03/2015. Brazilian National Congress. Available online at http://www.planalto.gov.br/ccivil_03/_ato2015- 2018/2015/lei/l13105.htm, last checked on 12 april 2018.

Federal Law n.º 9.279, 14/05/1996. Brazilian National Congress. Available online at http://www.planalto.gov.br/ccivil_03/leis/l9279.htm, last checked on 16 april 2018.

Federal Law n.º 9.456, 25/04/1997. Brazilian National Congress. Available online at http://www.planalto.gov.br/ccivil_03/Leis/L9456.htm, last checked on 16 april 2018.

Federal Law n.º 9.605, 12/02/1998. Brazilian National Congress. Available online at http://www.planalto.gov.br/CCivil_03/leis/L1060.htm, last checked on 16 april 2018.

Federal Law n.º 9.609, 19/02/1998. Brazilian National Congress. Available online at http://www.planalto.gov.br/ccivil_03/leis/l9609.htm, last checked on 16 april 2018.

Federal Law n.º 9.610, 19/02/1998. Brazilian National Congress. Available online at http://www.planalto.gov.br/ccivil_03/leis/l9610.htm, last checked on 16 april 2018.

FERREIRA, Hamada Rafaela Leite. O ESTADO COMO TITULAR DE DIREITOS FUNDAMENTAIS: (im)possibilidade e consequências da atribuição de direitos fundamentais às pessoas jurídicas de direito público. 2014. Available at http://repositorio.unb.br/bitstream/10482/16106/3/2014_HamandaRafaelaLeiteF erreira.pdf, last checked on 10 march 2018.

GIRALDI, Stephanie Caroline & SILVA, Maria Heloiza Santos. A importância econômica das empresas na sociedade moderna e o direito economico. 2017. Available at https://www.webartigos.com/artigos/a-importancia-das-empresasna- sociedade-moderna-e-o-direito-economico/130551, last checked on 21 march 2018.

GODOY, Arnaldo Sampaio de Moraes & MELLO, Patrícia Perrone Campos. A titularidade dos direitos fundamentais por parte de pessoas jurídicas. A empresa como agente de efetivação dos direirtos sociais: notas introdutórias ao direito empresarial constitucional Legal persons and the

ownership of fundamental rights. The corporation as an agent of enactment of social rights: introductory remarks to constitucional business law. Revista Brasileira de Políticas Públicas. Volume 6. Number 3. Dez. 2016. p. 99-119. Available at http://www.publicacoesacademicas.uniceub.br/RBPP/article/view/4414, last check on 11 April 2018.

GODOY, Arnaldo Sampaio de Moraes. Direito Econômico nos EUA dita regras de propriedadeRevista Consultor Jurídico. 29 june 2011. Available at https://www.conjur.com.br/2011-jun-29/direito-economico-eua-dita-regrasdireito- propriedade, last checked on 06 may 2018.

GUIMARÃES, Luiz Carlos Froguieri. Direito Bancário: a eficácia horizontal dos direitos fundamentais e os precedentes vinculantes. 2017. Letras Jurídicas. São Paulo, SP, Brazil.

KRETZ, Andrietta. Autonomia da vontade e eficácia horizontal dos direitos fundamentais. 2005. Momento Atual. Florianópolis, SC, Brazil.

KRZEMINSKA-VAMVAKA, Joanna. Freedom of Commercial Speech in Europe (August 1, 2008). Verlag Dr Kovac, Studien zum Völker- und Europarecht, Vol. 58, p. 292, Hamburg 2008. Available at https://ssrn.com/abstract=1443922 or http://dx.doi.org/10.2139/ssrn.1443922, last checked on 24 april 2018.

LOPES, Ana Maria D'Ávila. A era dos direitos de Bobbio. Entre a historicidade e atemporalidade. 2011. Revista de Informação Legislativa. Brasília a. 48 n. 192 out./dez. 2011. Available at http://www2.senado.leg.br/bds/handle/id/242925, last checked on 16 April 2018.

MENDES, Gilmar Ferreira & BRANCO, Paulo Gustavo Gonet. Curso de Direito Constitucional. 6ª edição. 2011. Saraiva. São Paulo.

MOURÃO, Juliana. Princípios aplicados às sociedades empresárias. 2016. Available at https://julianamdepaula.jusbrasil.com.br/artigos/253765290/principiosaplicados- as-sociedades-empresarias, last checked on 03 may 2018.

OLIVER, Peter. Companies and Their Fundamental Rights: A Comparative Perspective. 2015. Available at https://ssrn.com/abstract=2655690, last check on 16 april 2018.
PEDRONI, Guilherme Augusto. A Importância da Propriedade Intelectual para o Desenvolvimento Econômico de um País. 2016. Available at https://jus.com.br/artigos/54488/a-importancia-da-propriedade-intelectual-parao- desenvolvimento-economico-de-um-pais, last checked on 24 april 2018.

PINHEIRO, Gustavo Nehls. Possibilidade de a Pessoa Jurídica figurar como Sujeito Passivo do Crime de Difamação. 2014. Available at http://www.emerj.tjrj.jus.br/paginas/trabalhos_conclusao/1semestre2014/trabalh os_12014/GustavoNehlsPinheiro.pdf, last checked on 21 April 2018.

POLARINI, Giovana Meire. A eficácia vertical e horizontal das normas de direitos fundamentais. Pags. 38/56, in Informação de direitos fundamentais. A eficácia horizontal das normas constitucionais. GOZZO, Debora (coordenadora). 2012. Saraiva. São Paulo, Brasil.

Regulation (EC) No 2004/2003 of the European Parliament and of the Council. 4 November 2003. Available at http://eurlex. europa.eu/LexUriServ/LexUriServ.do? uri=CONSLEG: 2003R2004:20071227:EN:PDF, last checked on 01 May 2018.

RIBEIRO, Júlio César de Lima. A Pessoa Jurídica e os Danos Não Patrimoniais – Análise à Luz do Direito Brasileiro e Português. 2013. Available at http://momentum.emnuvens.com.br/momentum/article/download/52/46. Last checked on 16 april 2018.

SARLET, Ingo Wolfgang. A eficácia dos direitos fundamentais. Uma teoria geral dos direitos fundamentais na perspectiva constitucional. 13ª edição. Livraria do Advogado editora. Porto Alegre, RS – Brazil, 2018.

SARLET, Ingo Wolfgang. Direitos fundamentais e direito privado: Algumas considerações em torno da vinculação dos particulares aos direitos fundamentais. 2007. Available at http://www.tex.pro.br/artigos/71-artigos-nov- 2007/6114-direitos-fundamentais-e-direito-privado-algumas-consideracoes-emtorno- da-vinculacao-dos-particulares-aos-direitos-fundamentais, last checked on 10 march 2018.

SCHMITT, Cristiano Heineck. A invocação dos direitos fundamentais no âmbito das pessoas coletivas de direito privado. 2000. Available at https://www2.senado.leg.br/bdsf/bitstream/handle/id/555/r145-07.pdf? sequence=4, last check on 07 march 2018.

STEINMETZ, Wilson & PINDUR, Flavia Letícia de Mello A titularidade de direitos fundamentais por pessoas jurídicas. 2006. Available at http://www.periodicos.ulbra.br/index.php/direito/article/viewFile/2488/1720, last checked on 07 march 2018.

Superior Tribunal de Justiça (STJ). REsp 1327773/MG. Quarta Turma. Judgment 28 november 2017. Available at, http://www.stj.jus.br/SCON/jurisprudencia/toc.jsp?livre=201101223371.REG., last checked on 16 april 2018.

Superior Tribunal de Justiça (STJ). Súmula 227. Segunda Seção. Judgment 08 August 1999. Available at, http://www.stj.jus.br/SCON/sumulas/doc.jsp? livre=227&b=SUMU&p=true&t=JURIDICO&l=10&i=1, last checked on 16 april 2018.
Supreme Court (USA). Santa Clara County v. Southern Pacific R. Co., 118 U.S. 394 (1886). Available at https://supreme.justia.com/cases/federal/us/118/394/case.html, last checked on 06 may 2018.

Supremo Tribunal Federal (STF). AC 3327 MC-Ref. Minister Celso de Mello. Tribunal Pleno. Judgment 11 December 2014. Available at http://stf.jus.br/portal/jurisprudencia/visualizarEmenta.asp? s1=000260156&base=baseAcordaos, last checked on 22 April 2018.

Supremo Tribunal Federal (STF). HC/88747 AgR. Minister Ayres Britto. Judgment 15 august 2011. Primeira Turma. Available online at http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=605046, last checked on 12 april 2018.

Supremo Tribunal Federal (STF). Recurso Extraordinário 201819. Minister Gilmar Mendes.

Segunda Turma. Judgment 11 October 2015. Available at, http://stf.jus.br/portal/jurisprudencia/visualizarEmenta.asps1=000007697&base= baseAcordaos, last checked on 11 march 2018.

Supremo Tribunal Federal (STF). RHC 83091. Minister Marco Aurélio. Primeira Turma. Judgment 05 August 2003. Available at,http://stf.jus.br/portal/jurisprudencia/visualizarEmenta.asp?s1=000096651&base=baseAcordaos, last checked on 21 April 2018.

VALE, André Rufino do. Eficácia dos direitos fundamentais nas relações privadas. Sergio Antonio Fabris Editor. 2004. Porto Alegre, Brazil.

VALE, Horácio Eduardo Gomes. Princípio da criação personificante. 2016. Available at https://jus.com.br/artigos/52977/principio-da-criacao-personificante, last checked on 21 march 2018.

VANCE, Laurence M. Does the First Amendment Protect the Freedom of Association? May 2012. Available at https://www.fff.org/explorefreedom/ article/does-the-first-amendment-protect-the-freedom-of-association/, last checked on 03 may 2018.

Enforcement system design in the judicial control of public policies: does the compliance and deterrence strategies works in this field?

Juliana Castello; Samuel M. Brasil Jr.

jjbcastello@gmail.com; samuel.brasil.jr@gmail.com

ABSTRACT

This article researches the suitable strategies to shape an enforcement system design in the judicial control of public policies. It should be noted that several strategies and theories on governance and responsive regulation have been developed in recent decades on law enforcement. It happens that, when it comes to the control and implementation of public policies by the Courts of Justice, this is not about just obey or not obey the law and makes it enforceable, it is about identifying and designing an effective enforcement system**.** To do so, this work confronts two kinds of approaches of enforcement: deterrence-based approach, which punish and discourage the defendant who intends to disobey the law, and compliance-based approach, that guide and cooperate with the defendant to gain accountability and enforcement of law. These new kinds of approaches must be reconciled and aggregated with the classic corrective justice enforcement techniques, which are only intended to repair or rectify abuse of rights from a private and individual perspective. It can be said that a long debate has already been set on this subject: it is not enough to a judge allows or denies the right of access to health services and education policies, for example, what it is necessary is to solve issues of distributive justice, to dialogue with others state powers, to monitor the implementation of judicial orders, to reorient those policies in the face of new facts and obstacles encountered in the implementation carried out and, even, to punish resistance made in bad faith to judicial orders. But, if these aspects have already been defined, others still need to be advanced: when the Courts of Justice should repair a damage, when they should punish and when they should guide and cooperate with the defendant in the matter of judicial control of public policies? That's the real question.

Keywords: Deterrence, compliance, enforcement, public policies, judicial control.

1. Introduction

The use of regulatory and governance strategies as a management tool can become an important mechanism in the judicial control of public policies.

In the Democratic State, the judge, who is classically abstentionist, is in the present more interventionist (BUCCI, 2006, p. 2). Unlike the Liberal State, merely guarantor of individual rights and freedoms, the Courts of Justice are now concerned not only with restraint of power, but with the practical realization of fundamental rights and guarantees, tasks that were usually preponderant before the Legislative and Executive Branch (WATANABE, 2011, p. 216). A new feature is given to the separation of powers, a more coordinated one with concerted acts between the Branches of State

This feature is now characterized by the unity of the power, that is, state power is one, only rationalized by the functional criterion. It is only a specialization of activities, now more coordinated, aimed at the operationalization of constitutionally purposes (VILLE, 1998, p. 104).

It happens that this kind of specialization and coordination of state activities to the accomplish the constitutionally purposes can design diverse judicial strategies to shape the procedure of control of public policies. The present investigation intends, according to the deductive method and through bibliographical research, studies the suitable strategies to shape an enforcement system design in the judicial control of public policies.

To do so, this work confronts two kinds of new approaches: deterrence-based approach, which discourages the defendant who intends to disobey the law, and compliance-based approach, that guide and cooperate with the defendant to gain accountability and enforcement of law. These approaches must be reconciled and aggregated with the classic corrective justice enforcement techniques, which are only intended to repair abuse of rights from a private and individual perspective, not bothering to dissuade the wrongdoer or cooperate with the wrongdoer. It is not proposed or suggested that there is a kind of competition between these judicial strategies between corrective, deterrent and cooperative enforcement. What is proposed is that the Courts of Justice make, in advance, a judgment of adequacy of each of these strategies in the case in judgment. When

the Courts of Justice should correct, when they should punish and when they should guide and cooperate with the defendant in the matter of judicial control of public policies? That's the real question.

2. Judicial control of public policies

After World War II and the harmful practices of authoritarian regimes, it was realized that fundamental rights and guarantees needed a more consistent and unfailing foundation than the law.

.

According to the constitutional understanding coming from the French Revolution, the fundamental rights and guarantees, constitutionally foreseen, constituted guidelines for legislative production, but not binding directives. In this way, the concrete scope of the fundamental rights and guarantees was delimited or even abolished by the legislator according to the current political, social and economic guidelines (ZAGREBELSKY , 1999, p. 50).

If the Constitution did not present normative force, being only a suggestion to the legislator or a non-binding directive, the relations between individuals and between them and the State began to be regulated by law and to the extent of the law. This constitutional conception, although valid for the Liberal State of Law, forged under the influence of the French Revolution, was equally valid for the Authoritarian States (BARROSO, 2007, p. 217).

It is worth to say that the law could be instrumented for the establishment of a Authoritarian State, without more rigor and without any change in the constitutional order. A Authoritarian State therefore established itself using the same legal categories and institutes as existed before, in the Liberal State (ZAGREBELSKY , 1999, p. 50). This was paradoxical and inadmissible.

In a Democratic State of Right, the Constitution retakes its normative force and begins to radiate through all infraconstitutional law, with real exigibility, no longer as mere letter of political intentions or declaration of rights. Fundamental rights and guarantees become immediately enforceable. The question is how to demand and enforce them by the Courts of Justice? And what if the Courts of Justice could legitimately do it?

The recognition of imperativeness and the immediate exigibility of the fundamental rights and guarantees confer, at the same time, the possibility of direct access to the Courts of Justice as true subjective rights, independent of previous normative mediation by the Legislative Branch and by the Executive Branch. However, this activity carries with it obstacles of all kinds, especially the need for a judicial system of regulatory enforcement, a practice not commonly found in the Courts of Justice around the world.

3. Regulatory enforcement

The traditional view of the enforcement of a judicial decision justified for a long time, and still justifies, the most varied and deep state interventions on the particular and on the State itself to grant full compliance with the orders issued by the Courts of Justice.

In order to demonstrate this, it is enough to remember the hypotheses of execution by subrogation, coercive fines and the countless moments in which the Judiciary Branch determined, under contempt of court, the acquisition of medicines not foreseen administratively, the restructuring of schools, the reform of prisons and hospitals.

It is common that the judge uses a forced execution, endowed with a disciplinary and sanctioning character, to enforce a judicial decision, enthusiastic to comply with the law. That kind of enforcement – a repressive one – assumes that the opposing party is resistant or recalcitrant in complying with the judicial decision, which would justify, therefore, the imposition of forced or substitutive measures to carry out the expected behavior, but not spontaneously carried out. The aim is to redress the violation of rights, in favor of the creditor, subordinating the will of the debtor. In this kind of enforcement, Walt (2006, p. 1301) points out that "corrective justice describes the moral obligation of repair: the person morally responsible for wrongfully harming another has a duty to compensate the person harmed".

There is no problem in taking coercive measures to comply with judicial decisions. On several occasions there is in fact a resistance or recalcitrance of the defendant, requiring the Court to use its powers and prerogatives to obtain the full satisfaction of a plaintiff.

It should be noted, however, that more appropriate concepts of legal enforcement emerges, especially with regard to the implementation of judicial decisions involving public policies. Strategies aimed at deterring the wrongdoer, discouraging abusive behavior, and strategies aimed at cooperation, establishing a more negotiated relationship between the Courts of Justice, other Powers of the State and society, arisen strongly in this field (ODED, 2010, p. 1-2).

A deterrence-based approach, which discourages the defendant who intends to disobey of law, and compliance-based approach, that guide and cooperate with the defendant to gain accountability and enforcement of law, are sometimes more appropriate than the imposition of classical repressive, typical instrument of command. With this, it is necessary to know the strategies of a regulatory enforcement, instead of only holding the classic enforcement and sanctioning instruments of legal process.

The main purpose of the regulatory execution, to be carried out by the Courts of Justice, is the definition of norms, monitoring, supervision, control and evaluation of the implementation of public policies, in order to discourage abusive behavior or even to cooperate in the management of the public policy, object of the demand, guiding it to conform to the constitutional guidelines. The objective of the regulatory execution is mainly greater than that proposed by the classic theory of corrective justice, whose purpose is "rectifies the wrong that one person has done to another" (WEINRIB, 2002, p. 623) and “sees the remedy as corresponding to and undoing the wrong” (WEINRIB, 2002, p. 624), establishing an exact correspondence between the remedy and the violation of the law in a bipolar litigation (WEINRIB, 2002, p. 623).

In most cases, when it comes to the control of public policies, it is necessary to escape from the vision of corrective justice, very attached to the particularized relation between author and defendant. This is because, in this area, the controversy between author and defendant is often nothing more than a small part of a controversy related to the national, regional or sectorial public

policies that have developed in opposition to the constitutional guidelines. Traditional litigation gives way to a polycentric one.

Lianos (2013, p. 399) points out that "corrective justice creates duties to repair that apply ate particular moments" and "is based on the idea of correlativity". In the contrast, "public law litigation is by essence polycentric concept, because of the variety of interests to be considered".

If public policy control is thought exclusively from the point of view of corrective justice, establishing an exact correspondence between the protection of the claimed damage and the violation of the right, what will happen is only a change of provider. The Legislative Branch and the Executive Branch, which are the classic managers and providers of public policies, will no longer be predominant in the control of public policy, and this activity will be exercised by the Judiciary, identifying as the new and last provider. It is no use, however, only to change the provider, it takes a new and a more concerted and coordinated approach among the branchs of State.

Susan Sturm (1991, p. 1363) stresses that, in public law litigation, judges must:

> …develop affirmative requirements to govern the defendant's efforts to eliminate the ilegal conditions and practices. Because the judge is seeking to implement generally, articulated, aspirational norms in highly differentiated contexts. Liability norms do not dictate the content of remedy. Liability norms only provide goals and boundaries for the decision…does not, however dictate how those problems should be solved"

Among these new approaches, which should be reconciled and aggregated with classic corrective justice enforcement techniques (WEINRIB, 2002, p. 638), several strategies and theories on governance and responsive regulation have been developed in recent decades on law enforcement. In this field, attention should be drawn to deterrence-based approach and compliance-based approach as forms of enforcement of a decision.

4. Two strategies: deterrence and compliance

The idea of a regulatory enforcement aims to achieve not only accomplishment with laws, but also to control the quality and adequacy of results in light of constitutionally foreseen rights. In the field of public policy, the liability does not immediately correlate with the content of judicial

remedy, nor does it indicate the practical implementation of this right by the Judiciary Branch. That's why regulamentory strategy is essential.

The use of regulatory strategy as a management tool can become an important mechanism in the judicial control of public policies, because is able to: (i) involve parties and non-parties in the deliberative process of public litigation; (ii) considerer remedial alternatives support by facts and specific technical knowledge of the participants; (iii) develop of a remedy that is reasonably calculated to redress violations in each of the areas identified by Courts; (iv) brainstorm on possible solutions, selecting a remedy that best accommodate interests and norms in light of the factual records and coordinating with Executive and Legislative Branches; and, finally, (v) monitor the results, to maintain or to reorient those policies in the face of new facts and obstacles encountered in the implementation carried out by Courts (STURM, 1991, p. 1430).

Enforcement, in this scenario, is prospective (FISS, 1979, p. 48).
From this reasoning, it is necessary to focus on possible approaches to correcting the illegal and abusive practices. This possible approach is deterrence approach or, otherwise, the compliance approach, to gain accountability and enforcement of a judicial decision. It is not a question of exclusive approaches, but rather of making a judgment on the adequacy of each of them according to the circumstances of the case.

Deterrence approach, as explained by Oded (2010, p. 2), perceives people and institutions as opportunists, willing to comply with the law to the extent that they can maximize their goals. In this way, the enforcement system must be designed in such a way as to induce the subject to adopt behavior that complies with the law, discouraging abusive practice. "For that reason, the deterrence approach endorses penal, accusatory, and adversarial styles of enforcement, which go harsh on lawbreakers" (ODED, 2010, p. 2).

In this context, it is not enough to restore or repair an individual abuse, but rather to discourage abusive behavior. To do so, the offender must internalize and assume responsibility for the practice, even if his illegal act is not subject to individual persecution by the victim or even if the individual compensation of the offended person is very small. It is necessary to internalize the

negative externalities, that is, the social, environmental, economic costs of a breach of fundamental rights and guarantees. The institution is not allowed to privatize its advantages and objectives in the detriment of the law, socializing the losses. An enforcement system should prevent or avoid that.

As long as it is profitable to breach the law, the law will continue to be violated and judicial decisions will be disregarded. To avoid this, it is necessary to deprive the beneficiary of the advantages of abuse from a macro perspective. An example of this is the imposition of collective redress in cases of massive violations of human rights in prisons, even though individual reparations are prosecuted by prisoners held in conditions of unworthiness. In the same way, Inter-American Court of Human Rights, in the *case Awas Tingni v. Nicarágua*, find that the State of Nicarágua must repair immaterial damages, for the benefit of the Mayagna (Sumo) Awas Tingni Community.

On the contrary, compliance approach, according with Oded (2010, p. 2), perceives people and institutions as moral agents. In his words, they have:

> …a law-abiding nature which directs them to obey the law just because it is a law". Law-breaking should not be solely explained by profitmaximization considerations. Instead, various alternative reasons, such as honest mistakes, accidents, and misinterpretation of the law should be considered. Hence, the compliance approach promotes a conciliatory style of enforcement. It rests on the belief that compliance can be best achieved by persuasion rather than by a threat of sanctions. The compliance approach accentuates cooperation rather than confrontation, and conciliation rather than coercion (ODED, 2010, p. 2).

In this approach, the judge becomes a collaborator, assuming the responsibility to investigate the possible reasons why a certain public policy has not been adequately implemented by the competent institutions. In order to do so, the magistrate may (i) request hearings from members of certain groups affected by abusive practices, (ii) form panels of experts on technical matters, (iii) identify the interests involved and the possible impacts of a decision, (iv) to stimulate stakeholders to develop possible solutions and alternatives, reconciling possible antagonistic interests in the group.

Laycock (2012) explains that it is common practice in public law litigation to ask the parties to submit remedial plans, and for many reasons, Courts of Justice tend to agree with defendants proposal. In this case, remedies are commonly negotiated and, occasionally, important legislative committees are involved in this negotiations.

This is what happened in Missouri v. Jenkins, a case about school segregation: “negotiated and defendant proposed remedies are more likely to work than fully litigated remedies, because the court cannot implement a remedy without the cooperation of defendants and staff who run the school (or any other institution)” (LAYCOCK, 2012)

Both approaches – deterrence and compliance approach – are valid ones. It is not possible to say in perspective whether there is one better than the other. Both are management tools for judicial enforcement of public policies. What is to be done, in the face of these possible approaches, is a judgment of adequacy, in the circumstances of the concrete case. If the solution will be punitive/dissuasive or conciliatory/ cooperative, it is a question of analyzing the contours of the litigation and the behavior of defendant.

To define these contours, it can be said that the Courts of Justice must identify the character of the claim and the defendant's behavioral, based on two main questions : the target institution’s of illegal actions shows what kind of behavior? They need advisory and guidance to implement a public policy? Or they are tough litigators, who seek to maximize their own goals, socializing the damages, sometimes insusceptible to individual compensation? It is these questions, which reveal the behavior of the offender, that allow the Courts of Justice to define the appropriate approach to be adopted in public law litigation: deterrence approach or compliance approach.

5. Reference list

BARROSO, Luís Roberto.(2007). Neoconstitucionalismo e constitucionalização do Direito (o triunfo tardio do Direito Constitucional do Brasil). In: SOUZA NETO, Cláudio Pereira; SARMENTO, Daniel (Coords). A constitucionalização do direito: fundamentos teóricos e aplicações específicas. Rio de Janeiro: Lumen Juris.

BUCCI, Maria Paula Dallari.(2006) O conceito de políticas públicas em direito. In: _____ (org.) Políticas Públicas: reflexões sobre o conceito jurídico. São Paulo: Saraiva.

FISS, Owen M. (1979). The forms of justice. 93 Harvard Law Review, pp. 1-58.

ODED, Sharon. (2010). Enforcement strategies, compliance programs, and the intermediary gatekeepers. Available at: https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=ALEA2010&paper_id=197. Last accessed may 24, 2018.

LAYCOCK, Douglas. (2012). Modern American Remedies: cases and materials. 4th ed. Maryland: Wolters Kluwer.

LIANOS, Ioannis.(2013) Competition law remedies in Europe. In: LIANOS, Ioannis; GERADIN, Damien (editors). Handbook on European Competition Law: enforcement and procedure. Padston: T.J. International.

STURM, Susan P. (1991). *A Normative Theory of Public Law Remedies*, 79 Geo. L. J., pp. 1355-1399.

VILLE, M. J. C. Constitutionalism and the separation of powers. 2. ed. Indianapolis: Liberty Found, 1998.

WATANABE, Kazuo. (2011) Controle jurisdicional das políticas públicas: "mínimo existencial" e demais direitos fundamentais imediatamente judicializáveis. In: GRINOVER, Ada Pellegrini; WATANABE, Kazuo (Coords.). O Controle Jurisdicional de Políticas Públicas. Rio de Janeiro: Forense.

WEINRIB, Ernest J. Deterrence and corrective justice. 50 UCLA Law Review, pp. 620-640.

ZAGREBELSKY, Gustavo. (1999). El derecho dúctil. Ley, derechos, justicia. Tradução de Marina Gascón. 3. ed. Madrid: Trotta.

WALT, Steven.(2006). Eliminating corrective justice. 92 Virginia Law Review, pp.1311-1323.

Recent

Opinions

Opinions of the Court

"Slip" opinions are the first version of the Court's opinions posted on this website. A "slip" opinion consists of the majority or principal opinion, any concurring or dissenting opinions written by the Justices, and a prefatory syllabus prepared by the Reporter's Office that summarizes the decision. The slip opinions collected here are those issued during October Term 2016 (October 2, 2016, through October 1, 2017). These opinions are posted on the website within minutes after the opinions are issued and will remain posted until the opinions for the entire Term are published in the bound volumes of the United States Reports. For further information, see Column Header Definitions and Information About Opinions.

Caution: These electronic opinions may contain computer-generated errors or other deviations from the official printed slip opinion pamphlets. Moreover, a slip opinion is replaced by a paginated version of the case in the preliminary print, and, subsequently, by the final version of the case in a U. S. Reports bound volume. In case of discrepancies between the print and electronic versions of a slip opinion, the print version controls. However, where the electronic version has been designated "revised," the electronic version controls to the extent that it differs from the print version with regard to the noted revision. In case of discrepancies between the slip opinion and any later official version of the opinion–i.e., the preliminary print or bound volume version–the later version controls.

CASE I

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

SUPREME COURT OF THE UNITED STATES

Syllabus[139]

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

---

[139] 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.

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 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.

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 samesex 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.

---

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

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,cin 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 sevenmember 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-anddesist 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 September 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 crossmotions 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. Piggie 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 rhetorical—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 antidiscrimination law—a law that protects against 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' consciencebased 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' consciencebased 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.*[141]

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 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.

---

[141] *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.

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 selfconsciously 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. IrishAmerican 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 produce 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 exer cise his religion. As JUSTICE GORSUCH explains, the Commission treated Phillips' case differently from a simi lar 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 com ments 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 (includ ing 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 expres sive 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 dis claimer to that effect. This reasoning flouts bedrock prin ciples 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 regula tions 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 regu late conduct. Ante, at 9–10 (citing Hurley v. IrishAmerican 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 individ uals in the provision of publicly available goods, privileges, and services." Id., at 572 (emphasis added).

Although public-accommodations laws generally regu
late 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 exam ple, a Massachusetts public-accommodations law prohibited "'any distinction, discrimination or restriction on ac count of . . . sexual orientation . . . relative to the admis sion 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 IrishAmericans, 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 applica tion of the public-accommodations law "alter[ed] the ex pressive 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 primi tive 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, wear ing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag.[142]

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 suffi ciently 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 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 palette 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

---

142 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).

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 oc curred, 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 symbol ism 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 stand ardised 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 wed ding and afterwards." Ibid. Although the cake is eventu ally 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 "inedi ble"). The cake's purpose is to mark the beginning of a new marriage and to celebrate the couple.[143]

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).[144] By forcing Phillips to create custom wedding cakes for same 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 re quires him to, at the very least, acknowledge that samesex weddings are "weddings" and suggest that they should be celebrated—the precise message he believes his faith

---

[143] 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.

[144] 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 prece dents. 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.

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 "dis claimer" 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 reasonable 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 reason able observers would view the organizers as merely com plying 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 Master piece 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 government 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 maxim izing 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 Master piece 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 ques tion." 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., concurring 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 some times reviews regulations of expressive conduct under the more lenient test articulated in O'Brien,[145] 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 demonstra tion 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 Colo rado's law survives strict scrutiny, and I will not do so in the first instance. There is an obvious flaw, however, with one of the asserted justifications for Colorado's law. Ac cording to the individual respondents, Colorado can com pel 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);

---

145 "[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 expres sion; 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).

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 brown ies, 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 featur ing 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 con clude 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., dis senting) (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 individ uals 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 under standing 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 free dom 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.[146] I 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 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 decision making 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.

---

[146] 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 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).

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.[147]

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 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.[148]

---

[147] 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).

[148] 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).

The fact that Phillips might sell other cakes and cookies to gay and lesbian customers[149] 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 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.[150] 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 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 decision making, of which the Commission was but one. See App. to

---

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

[150] 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.

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 Colorado 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.

CASE II

WEAVER *v.* MASSACHUSETTS

OCTOBER TERM, 2016

SUPREME COURT OF THE UNITED STATES

Syllabus[151]

WEAVER *v.* MASSACHUSETTS

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 16–240. Argued April 19, 2017—Decided June 22, 2017

When petitioner was tried in a Massachusetts trial court, the courtroom could not accommodate all the potential jurors. As a result, for two days of jury selection, an officer of the court excluded from the courtroom any member of the public who was not a potential juror, including petitioner's mother and her minister. Defense counsel neither objected to the closure at trial nor raised the issue on direct review. Petitioner was convicted of murder and a related charge. Five years later, he filed a motion for a new trial in state court, arguing, as relevant here, that his attorney had provided ineffective assistance by failing to object to the courtroom closure. The trial court ruled that he was not entitled to relief. The Massachusetts Supreme Judicial Court affirmed in relevant part. Although it recognized that the violation of the right to public trial was a structural error, it rejected petitioner's ineffective-assistance claim because he had not shown prejudice.

Held:

1. In the context of a public-trial violation during jury selection, where the error is neither preserved nor raised on direct review but is raised later via an ineffective-assistance-of-counsel claim, the defendant must demonstrate prejudice to secure a new trial. Pp. 5–14.

(a) This case requires an examination of the proper application of the doctrines of structural error and ineffective assistance of counsel. They are intertwined, because the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error. Pp. 5–10.

(1) Generally, a constitutional error that "did not contribute to the verdict obtained" is deemed harmless, which means the defendant is not entitled to reversal. Chapman v. California, 386 U. S. 18, 24. However, a structural error, which "affect[s] the framework within which the trial

---

[151] 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.

proceeds," Arizona v. Fulminante, 499 U. S. 279, 310, defies harmless error analysis, id., at 309. Thus, when a structural error is objected to and then raised on direct review, the defendant is entitled to relief without any inquiry into harm.

There appear to be at least three broad rationales for finding an error to be structural. One is when the right at issue does not protect the defendant from erroneous conviction but instead protects some other interest—like the defendant's right to conduct his own defense—where harm is irrelevant to the basis underlying the right. See United States v. Gonzalez-Lopez, 548 U. S. 140, 149, n. 4. Another is when the error's effects are simply too hard to measure—e.g., when a defendant is denied the right to select his or her own attorney—making it almost impossible for the government to show that the error was "harmless beyond a reasonable doubt," Chapman, supra, at 24. Finally, some errors always result in fundamental unfairness, e.g., when an indigent defendant is denied an attorney, see Gideon v. Wainwright, 372 U. S. 335, 343–345. For purposes of this case, a critical point is that an error can count as structural even if it does not lead to fundamental unfairness in every case. See GonzalezLopez, supra, at 149, n. 4. Pp. 5–7.

(2) While a public-trial violation counts as structural error, it does not always lead to fundamental unfairness. This Court's opinions teach that courtroom closure is to be avoided, but that there are some circumstances when it is justified. See Waller v. Georgia, 467 U. S. 39; Presley v. Georgia, 558 U. S. 209, 215–216. The fact that the public-trial right is subject to exceptions suggests that not every public-trial violation results in fundamental unfairness. Indeed, the Court has said that a public-trial violation is structural because of the "difficulty of assessing the effect of the error." Gonzalez-Lopez, supra, at 149, n. 4. The public-trial right also furthers interests other than protecting the defendant against unjust conviction, including the rights of the press and of the public at large. See, e.g., PressEnterprise Co. v. Superior Court of Cal., Riverside Cty., 464 U. S. 501, 508–510. Thus, an unlawful closure could take place and yet the trial will still be fundamentally fair from the defendant's standpoint. Pp. 7–10.

(b) The proper remedy for addressing the violation of the right to a public trial depends on when the objection was raised. If an objection is made at trial and the issue is raised on direct appeal, the defendant generally is entitled to "automatic reversal" regardless of the error's actual "effect on the outcome." Neder v. United States, 527 U. S. 1, 7. If, however, the defendant does not preserve a structural error on direct review but raises it later in the context of an ineffective-assistance claim, the defendant generally bears the burden to show deficient performance and that the attorney's error "prejudiced the defense." Strickland v. Washington, 466 U. S. 668, 687. To demonstrate prejudice in most cases, the defendant must show "a reasonable probability that . . . the result of the proceeding would have been different" but for attorney error. Id., at 694. For the analytical purposes of this case, the Court will assume, as petitioner has requested, that even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the defendant shows that attorney errors rendered the trial fundamentally unfair.

Not every public-trial violation will lead to a fundamentally unfair trial. And the failure to object to that violation does not always deprive the defendant of a reasonable probability of a different outcome. Thus, a defendant raising a public-trial violation via an ineffectiveassistance claim must show either a reasonable probability of a different outcome in his or her case or, as assumed here, that the particular violation was so serious as to render the trial fundamentally unfair.

Neither this reasoning nor the holding here calls into question the Court's precedents deeming certain errors structural and requiring reversal because of fundamental unfairness, see Sullivan v. Louisiana, 508 U. S., at 278–279; Tumey v. Ohio, 273 U. S. 510, 535; Vasquez v. Hillery, 474 U. S., at 261–264, or those granting automatic relief to defendants who prevailed on

claims of race or gender discrimination in jury selection, e.g., Batson v. Kentucky, 476 U. S. 79, 100. The errors in each of these cases were preserved and then raised on direct appeal. The reason for placing the burden on the petitioner here, however, derives both from the nature of the error and the difference between a public-trial violation preserved and then raised on direct review and a public-trial violation raised as an ineffective-assistance claim.

When a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed, but when a defendant first raises the closure in an ineffective-assistance claim, the trial court has no chance to cure the violation. The costs and uncertainties of a new trial are also greater because more time will have elapsed in most cases. And the finality interest is more at risk. See Strickland, supra, at 693–694. These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or in an ineffective-assistance claim. Pp. 10–14.

2. Because petitioner has not shown a reasonable probability of a different outcome but for counsel's failure to object or that counsel's shortcomings led to a fundamentally unfair trial, he is not entitled to a new trial. Although potential jurors might have behaved differently had petitioner's family or the public been present, petitioner has offered no evidence suggesting a reasonable probability of a different outcome but for counsel's failure to object. He has also failed to demonstrate fundamental unfairness. His mother and her minister were indeed excluded during jury selection. But his trial was not conducted in secret or in a remote place; closure was limited to the jury voir dire; the courtroom remained open during the evidentiary phase of the trial; the closure decision apparently was made by court officers, not the judge; venire members who did not become jurors observed the proceedings; and the record of the proceedings indicates no basis for concern, other than the closure itself. There was no showing, furthermore, that the potential harms flowing from a courtroom closure came to pass in this case, e.g., misbehavior by the prosecutor, judge, or any other party. Thus, even though this case comes here on the assumption that the closure was a Sixth Amendment violation, the violation here did not pervade the whole trial or lead to basic unfairness. Pp. 14–16.

474 Mass. 787, 54 N. E. 3d 495, affirmed.

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

Cite as: 582 U. S. ____ (2017)

SUPREME COURT OF THE UNITED STATES

No. 16–240

KENTEL MYRONE WEAVER, PETITIONER *v.* MASSACHUSETTS

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

[June 22, 2017]

JUSTICE KENNEDY delivered the opinion of the Court.

During petitioner's trial on state criminal charges, the courtroom was occupied by potential jurors and closed to the public for two days of the jury selection process. Defense counsel neither objected to the closure at trial nor raised the issue on direct review. And the case comes to the Court on the assumption that, in failing to object, defense counsel provided ineffective assistance.

In the direct review context, the underlying constitutional violation — the courtroom closure — has been treated by this Court as a structural error, i.e., an error entitling the defendant to automatic reversal without any inquiry into prejudice. The question is whether invalidation of the conviction is required here as well, or if the prejudice inquiry is altered when the structural error is raised in the context of an ineffective-assistance-of-counsel claim.

I

In 2003, a 15-year-old boy was shot and killed in Boston. A witness saw a young man fleeing the scene of the crime and saw him pull out a pistol. A baseball hat fell off of his head. The police recovered the hat, which featured a distinctive airbrushed Detroit Tigers logo on either side.

---

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

The hat's distinctive markings linked it to 16-year-old Kentel Weaver. He is the petitioner here. DNA obtained from the hat matched petitioner's DNA.

Two weeks after the crime, the police went to petitioner's house to question him. He admitted losing his hat around the time of the shooting but denied being involved. Petitioner's mother was not so sure. Later, she questioned petitioner herself. She asked whether he had been at the scene of the shooting, and he said he had been there. But when she asked if he was the shooter, or if he knew who the shooter was, petitioner put his head down and said nothing. Believing his response to be an admission of guilt, she insisted that petitioner go to the police station to confess. He did. Petitioner was indicted in Massachusetts state court for first-degree murder and the unlicensed possession of a handgun. He pleaded not guilty and proceeded to trial.

The pool of potential jury members was large, some 60 to 100 people. The assigned courtroom could accommodate only 50 or 60 in the courtroom seating. As a result, the trial judge brought all potential jurors into the courtroom so that he could introduce the case and ask certain preliminary questions of the entire venire panel. Many of the potential jurors did not have seats and had to stand in the courtroom. After the preliminary questions, the potential jurors who had been standing were moved outside the courtroom to wait during the individual questioning of the other potential jurors. The judge acknowledged that the hallway was not "the most comfortable place to wait" and thanked the potential jurors for their patience. 2 Tr. II– 103 (Apr. 10, 2006). The judge noted that there was simply not space in the courtroom for everybody.

As all of the seats in the courtroom were occupied by the venire panel, an officer of the court excluded from the courtroom any member of the public who was not a potential juror. So when petitioner's mother and her minister came to the courtroom to observe the two days of jury selection, they were turned away.

All this occurred before the Court's decision in Presley v. Georgia, 558 U. S. 209 (2010) (per curiam). Presley made it clear that the public-trial right extends to jury selection as well as to other portions of the trial. Id., at 213–215. Before Presley, Massachusetts courts would often close courtrooms to the public during jury selection, in particular during murder trials.

In this case petitioner's mother told defense counsel about the closure at some point during jury selection. But counsel "believed that a courtroom closure for [jury selection] was constitutional." Crim. No. 2003–11293 (Super. Ct. Mass., Feb. 22, 2013), App. to Pet. for Cert. 49a. As a result, he "did not discuss the matter" with petitioner, or tell him "that his right to a public trial included the [jury voir dire]," or object to the closure. Ibid.

During the ensuing trial, the government presented strong evidence of petitioner's guilt. Its case consisted of the incriminating details outlined above, including petitioner's confession to the police. The jury convicted petitioner on both counts. The court sentenced him to life in prison on the murder charge and to about a year in prison on the gun-possession charge.

Five years later, petitioner filed a motion for a new trial in Massachusetts state court. As relevant here, he argued that his attorney had provided ineffective assistance by failing to object to the courtroom closure. After an evidentiary hearing, the trial court recognized a violation of the right to a public trial based on the following findings: The courtroom had been closed; the closure was neither de minimis nor trivial; the closure was unjustified; and the closure was full rather than partial (meaning that all members of the public, rather than only some of them, had been excluded from the courtroom). The trial court fur ther determined that defense counsel failed to object because of "serious incompetency, inefficiency, or inattention." Id., at 63a (quoting Massachusetts v. Chleikh, 82 Mass. App. 718, 722, 978 N. E. 2d 96, 100 (2012)). On the other hand, petitioner had

not "offered any evidence or legal argument establishing prejudice." App. to Pet. for Cert. 64a. For that reason, the court held that petitioner was not entitled to relief.

Petitioner appealed the denial of the motion for a new trial to the Massachusetts Supreme Judicial Court. The court consolidated that appeal with petitioner's direct appeal. As noted, there had been no objection to the closure at trial; and the issue was not raised in the direct appeal. The Supreme Judicial Court then affirmed in relevant part. Although it recognized that "[a] violation of the Sixth Amendment right to a public trial constitutes structural error," the court stated that petitioner had "failed to show that trial counsel's conduct caused prejudice warranting a new trial." 474 Mass. 787, 814, 54 N. E. 3d 495, 520 (2016). On this reasoning, the court rejected petitioner's claim of ineffective assistance of counsel.

There is disagreement among the Federal Courts of Appeals and some state courts of last resort about whether a defendant must demonstrate prejudice in a case like this one—in which a structural error is neither preserved nor raised on direct review but is raised later via a claim alleging ineffective assistance of counsel. Some courts have held that, when a defendant shows that his attorney unreasonably failed to object to a structural error, the defendant is entitled to a new trial without further inquiry. See, e.g., Johnson v. Sherry, 586 F. 3d 439, 447 (CA6 2009); Owens v. United States, 483 F. 3d 48, 64–65 (CA1 2007); Littlejohn v. United States, 73 A. 3d 1034, 1043–1044 (D. C. 2013); State v. Lamere, 327 Mont. 115, 125, 112 P. 3d 1005, 1013 (2005). Other courts have held that the defendant is entitled to relief only if he or she can show prejudice. See, e.g., Purvis v. Crosby, 451 F. 3d 734, 738 (CA11 2006); United States v. Gomez, 705 F. 3d 68, 79–80 (CA2 2013); Reid v. State, 286 Ga. 484, 487, 690 S. E. 2d 177, 180–181 (2010). This Court granted certiorari to resolve that disagreement. 580 U. S. ___ (2017). The Court does so specifically and only in the context of trial counsel's failure to object to the closure of the courtroom during jury selection.

II

This case requires a discussion, and the proper application, of two doctrines: structural error and ineffective assistance of counsel. The two doctrines are intertwined; for the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffectiveassistance claim premised on the failure to object to that error.

A

The concept of structural error can be discussed first. In Chapman v. California, 386 U. S. 18 (1967), this Court "adopted the general rule that a constitutional error does not automatically require reversal of a conviction." Arizona v. Fulminante, 499 U. S. 279, 306 (1991) (citing Chapman, supra). If the government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," the Court held, then the error is deemed harmless and the defendant is not entitled to reversal. Id., at 24.

The Court recognized, however, that some errors should not be deemed harmless beyond a reasonable doubt. Id., at 23, n. 8. These errors came to be known as structural errors. See Fulminante, 499 U. S., at 309–310. The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." Id., at

310. For the same reason, a structural error "def[ies] analysis by harmless error standards." Id., at 309 (internal quotation marks omitted).

The precise reason why a particular error is not amenable to that kind of analysis—and thus the precise reason why the Court has deemed it structural—varies in a significant way from error to error. There appear to be at least three broad rationales.

First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. This is true of the defendant's right to conduct his own defense, which, when exercised, "usually increases the likelihood of a trial outcome unfavorable to the defendant." McKaskle v. Wiggins, 465 U. S. 168, 177, n. 8 (1984). That right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. See Faretta v. California, 422 U. S. 806, 834 (1975). Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error. See United States v. Gonzalez-Lopez, 548 U. S. 140, 149, n. 4 (2006).

Second, an error has been deemed structural if the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his or her own attorney, the precise "effect of the violation cannot be ascertained." Ibid. (quoting Vasquez v. Hillery, 474 U. S. 254, 263 (1986)). Because the government will, as a result, find it almost impossible to show that the error was "harmless beyond a reasonable doubt," Chapman, supra, at 24, the efficiency costs of letting the government try to make the showing are unjustified.

Third, an error has been deemed structural if the error always results in fundamental unfairness. For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one. See Gideon v. Wainwright, 372 U. S. 335, 343–345 (1963) (right to an attorney); Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (right to a reasonable-doubt instruction). It therefore would be futile for the government to try to show harmlessness.

These categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural. See e.g., id., at 280–282. For these purposes, however, one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case. See Gonzalez-Lopez, supra, at 149, n. 4 (rejecting as "inconsistent with the reasoning of our precedents" the idea that structural errors "always or necessarily render a trial fundamentally unfair and unreliable" (emphasis deleted)).

B

As noted above, a violation of the right to a public trial is a structural error. See supra, at 1, 4. It is relevant to determine why that is so. In particular, the question is whether a public-trial violation counts as structural because it always leads to fundamental unfairness or for some other reason.

In Waller v. Georgia, 467 U. S. 39 (1984), the state court prohibited the public from viewing a weeklong suppression hearing out of concern for the privacy of persons other than those on trial. See id., at 41–43. Although it recognized that there would be instances where closure was justified, this Court noted that "such circumstances will be rare" and that the closure in question was unjustified. Id., at 45, 48. Still, the Court did not order a new trial. Id., at 49–50. Instead it ordered a new suppression hearing that was open to the public. Id., at 50. If the same evidence was found

admissible in that renewed pretrial proceeding, the Court held, no new trial as to guilt would be necessary. Ibid. This was despite the structural aspect of the violation.

Some 25 years after the Waller decision, the Court issued its per curiam ruling in Presley v. Georgia. 558 U. S. 209. In that case, as here, the courtroom was closed to the public during jury voir dire. Id., at 210. Unlike here, however, there was a trial objection to the closure, and the issue was raised on direct appeal. Id., at 210–211. On review of the State Supreme Court's decision allowing the closure, this Court expressed concern that the state court's reasoning would allow the courtroom to be closed during jury selection "whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators." Id., at 215 (internal quotation marks omitted). Although the Court expressly noted that courtroom closure may be ordered in some circumstances, the Court also stated that it was "still incumbent upon" the trial court "to consider all reasonable alternatives to closure." Id., at 215–216.

These opinions teach that courtroom closure is to be avoided, but that there are some circumstances when it is justified. The problems that may be encountered by trial courts in deciding whether some closures are necessary, or even in deciding which members of the public should be admitted when seats are scarce, are difficult ones. For example, there are often preliminary instructions that a judge may want to give to the venire as a whole, rather than repeating those instructions (perhaps with unintentional differences) to several groups of potential jurors. On the other hand, various constituencies of the public— the family of the accused, the family of the victim, members of the press, and other persons—all have their own interests in observing the selection of jurors. How best to manage these problems is not a topic discussed at length in any decision or commentary the Court has found.

So although the public-trial right is structural, it is subject to exceptions. See Simonson, The Criminal Court Audience in a Post-Trial World, 127 Harv. L. Rev. 2173, 2219–2222 (2014) (discussing situations in which a trial court may order a courtroom closure). Though these cases should be rare, a judge may deprive a defendant of his right to an open courtroom by making proper factual findings in support of the decision to do so. See Waller, supra, at 45. The fact that the public-trial right is subject to these exceptions suggests that not every public-trial violation results in fundamental unfairness.

A public-trial violation can occur, moreover, as it did in Presley, simply because the trial court omits to make the proper findings before closing the courtroom, even if those findings might have been fully supported by the evidence. See 558 U. S., at 215. It would be unconvincing to deem a trial fundamentally unfair just because a judge omitted to announce factual findings before making an otherwise valid decision to order the courtroom temporarily closed. As a result, it would be likewise unconvincing if the Court had said that a public-trial violation always leads to a fundamentally unfair trial.

Indeed, the Court has not said that a public-trial violation renders a trial fundamentally unfair in every case. In the two cases in which the Court has discussed the reasons for classifying a public-trial violation as structural error, the Court has said that a public-trial violation is structural for a different reason: because of the "difficulty of assessing the effect of the error." Gonzalez-Lopez, 548 U. S., at 149, n. 4; see also Waller, supra, at 49, n. 9.

The public-trial right also protects some interests that do not belong to the defendant. After all, the right to an open courtroom protects the rights of the public at large, and the press, as well as the rights of the accused. See, e.g., Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty., 464 U. S. 501, 508–510 (1984); Richmond Newspapers, Inc. v. Virginia, 448 U. S. 555, 572–573 (1980). So one other factor leading to the classification of structural error is that the public-trial

right furthers interests other than protecting the defendant against unjust conviction. These precepts confirm the conclusion the Court now reaches that, while the public-trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant's standpoint.

III

The Court now turns to the proper remedy for addressing the violation of a structural right, and in particular the right to a public trial. Despite its name, the term "structural error" carries with it no talismanic significance as a doctrinal matter. It means only that the government is not entitled to deprive the defendant of a new trial by showing that the error was "harmless beyond a reasonable doubt." Chapman, 386 U. S., at 24. Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to "automatic reversal" regardless of the error's actual "effect on the outcome." Neder v. United States, 527 U. S. 1, 7 (1999).

The question then becomes what showing is necessary when the defendant does not preserve a structural error on direct review but raises it later in the context of an ineffective-assistance-of-counsel claim. To obtain relief on the basis of ineffective assistance of counsel, the defendant as a general rule bears the burden to meet two standards. First, the defendant must show deficient performance— that the attorney's error was "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U. S. 668, 687 (1984). Second, the defendant must show that the attorney's error "prejudiced the defense." Ibid.

The prejudice showing is in most cases a necessary part of a Strickland claim. The reason is that a defendant has a right to effective representation, not a right to an attorney who performs his duties "mistake-free." GonzalezLopez, 548 U. S., at 147. As a rule, therefore, a "violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced." Ibid. (emphasis deleted); see also Premo v. Moore, 562 U. S. 115, 128 (2011); Lockhart v. Fretwell, 506 U. S. 364, 370 (1993).

That said, the concept of prejudice is defined in different ways depending on the context in which it appears. In the ordinary Strickland case, prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U. S., at 694. But the Strickland Court cautioned that the prejudice inquiry is not meant to be applied in a "mechanical" fashion. Id., at 696. For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on "the fundamental fairness of the proceeding." Ibid. Petitioner therefore argues that under a proper interpretation of Strickland, even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair. For the analytical purposes of this case, the Court will assume that petitioner's interpretation of Strickland is the correct one. In light of the Court's ultimate holding, however, the Court need not decide that question here.

As explained above, not every public-trial violation will in fact lead to a fundamentally unfair trial. See supra, at 10. Nor can it be said that the failure to object to a publictrial violation always deprives the defendant of a reasonable probability of a different outcome. Thus, when a defendant raises a public-trial violation via an ineffective assistance-of-counsel claim, Strickland prejudice is not shown automatically. Instead, the burden is on the defendant to show either a

reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes, see supra, at 11, to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.

Neither the reasoning nor the holding here calls into question the Court's precedents determining that certain errors are deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process. See Murray, A Contextual Approach to Harmless Error Review, 130 Harv. L. Rev. 1791, 1813, 1822 (2017) (noting that the "eclectic normative objectives of criminal procedure" go beyond protecting a defendant from erroneous conviction and include ensuring "'that the administration of justice should reasonably appear to be disinterested'" (quoting Liljeberg v. Health Services Acquisition Corp., 486 U. S. 847, 869–870 (1988))). Those precedents include Sullivan v. Louisiana, 508 U. S., at 278–279 (failure to give a reasonable-doubt instruction); Tumey v. Ohio, 273 U.S. 510, 535 (1927) (biased judge); and Vasquez v. Hillery, 474 U. S., at 261–264 (exclusion of grand jurors on the basis of race). See Neder, supra, at 8 (describing each of these errors as structural). This Court, in addition, has granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury, see Batson v. Kentucky, 476 U. S. 79, 100 (1986); J. E. B. v. Alabama ex rel. T. B., 511 U. S. 127, 145–146 (1994), though the Court has yet to label those errors structural in express terms, see, e.g., Neder, supra, at 8. The errors in those cases necessitated automatic reversal after they were preserved and then raised on direct appeal. And this opinion does not address whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review.

The reason for placing the burden on the petitioner in this case, however, derives both from the nature of the error, see supra, at 11–12, and the difference between a public-trial violation preserved and then raised on direct review and a public-trial violation raised as an ineffectiveassistance-of-counsel claim. As explained above, when a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed. See supra, at 8–9. When a defendant first raises the closure in an ineffectiveassistance claim, however, the trial court is deprived of the chance to cure the violation either by opening the courtroom or by explaining the reasons for closure.

Furthermore, when state or federal courts adjudicate errors objected to during trial and then raised on direct review, the systemic costs of remedying the error are diminished to some extent. That is because, if a new trial is ordered on direct review, there may be a reasonable chance that not too much time will have elapsed for witness memories still to be accurate and physical evidence not to be lost. There are also advantages of direct judicial supervision. Reviewing courts, in the regular course of the appellate process, can give instruction to the trial courts in a familiar context that allows for elaboration of the relevant principles based on review of an adequate record. For instance, in this case, the factors and circumstances that might justify a temporary closure are best considered in the regular appellate process and not in the context of a later proceeding, with its added time delays.

When an ineffective-assistance-of-counsel claim is raised in postconviction proceedings, the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases. The finality interest is more at risk, see Strickland, 466 U. S., at 693–694 (noting the "profound importance of finality in criminal proceedings"), and direct review often has given at least one opportunity for an appellate review of trial proceedings. These differences justify a different

standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel.

In sum, "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial," thus undermining the finality of jury verdicts. Harrington v. Richter, 562 U. S. 86, 105 (2011). For this reason, the rules governing ineffective-assistance claims "must be applied with scrupulous care." Premo, 562 U. S., at 122.

IV

The final inquiry concerns the ineffective-assistance claim in this case. Although the case comes on the assumption that petitioner has shown deficient performance by counsel, he has not shown prejudice in the ordinary sense, i.e., a reasonable probability that the jury would not have convicted him if his attorney had objected to the closure.

It is of course possible that potential jurors might have behaved differently if petitioner's family had been present. And it is true that the presence of the public might have had some bearing on juror reaction. But here petitioner offered no "evidence or legal argument establishing prejudice" in the sense of a reasonable probability of a different outcome but for counsel's failure to object. App. to Pet. for Cert. 64a; see Strickland, 466 U. S., at 694.

In other circumstances a different result might obtain. If, for instance, defense counsel errs in failing to object when the government's main witness testifies in secret, then the defendant might be able to show prejudice with little more detail. See ibid. Even in those circumstances, however, the burden would remain on the defendant to make the prejudice showing, id., at 694, 696, because a public-trial violation does not always lead to a fundamentally unfair trial, see supra, at 10.

In light of the above assumption that prejudice can be shown by a demonstration of fundamental unfairness, see supra, at 11, the remaining question is whether petitioner has shown that counsel's failure to object rendered the trial fundamentally unfair. See Strickland, supra, at 696. The Court concludes that petitioner has not made the showing. Although petitioner's mother and her minister were indeed excluded from the courtroom for two days during jury selection, petitioner's trial was not conducted in secret or in a remote place. Cf. In re Oliver, 333 U. S. 257, 269, n. 22 (1948). The closure was limited to the jury voir dire; the courtroom remained open during the evidentiary phase of the trial; the closure decision apparently was made by court officers rather than the judge; there were many members of the venire who did not become jurors but who did observe the proceedings; and there was a record made of the proceedings that does not indicate any basis for concern, other than the closure itself.

There has been no showing, furthermore, that the potential harms flowing from a courtroom closure came to pass in this case. For example, there is no suggestion that any juror lied during voir dire; no suggestion of misbehavior by the prosecutor, judge, or any other party; and no suggestion that any of the participants failed to approach their duties with the neutrality and serious purpose that our system demands.

It is true that this case comes here on the assumption that the closure was a Sixth Amendment violation. And it must be recognized that open trials ensure respect for the

justice system and allow the press and the public to judge the proceedings that occur in our Nation's courts. Even so, the violation here did not pervade the whole trial or lead to basic unfairness.

In sum, petitioner has not shown a reasonable probability of a different outcome but for counsel's failure to object, and he has not shown that counsel's shortcomings led to a fundamentally unfair trial. He is not entitled to a new trial.

* * *

In the criminal justice system, the constant, indeed unending, duty of the judiciary is to seek and to find the proper balance between the necessity for fair and just trials and the importance of finality of judgments. When a structural error is preserved and raised on direct review, the balance is in the defendant's favor, and a new trial generally will be granted as a matter of right. When a structural error is raised in the context of an ineffectiveassistance claim, however, finality concerns are far more pronounced. For this reason, and in light of the other circumstances present in this case, petitioner must show prejudice in order to obtain a new trial. As explained above, he has not made the required showing. The judgment of the Massachusetts Supreme Judicial Court is affirmed.

It is so ordered.

Cite as: 582 U. S. ____ (2017)

THOMAS, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 16–240

KENTEL MYRONE WEAVER, PETITIONER *v.*
MASSACHUSETTS

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

[June 22, 2017]

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

I write separately with two observations about the scope of the Court's holding. First, this case comes to us on the parties' "assumption[s]" that the closure of the courtroom during jury selection "was a Sixth Amendment violation" and that "defense counsel provided ineffective assistance" by "failing to object" to it. Ante, at 1, 15. The Court previously held in a per curiam opinion—issued without the benefit of merits briefing or argument—that the Sixth Amendment right to a public trial extends to jury selection. See Presley v. Georgia, 558 U. S. 209, 213 (2010); id., at 216 (THOMAS, J., dissenting). I have some doubts about whether that holding is consistent with the original understanding of the right to a public trial, and I would be open to reconsidering it in a case in which we are asked to do so.

Second, the Court "assume[s]," for the "analytical purposes of this case," that a defendant may establish prejudice under Strickland v. Washington, 466 U. S. 668 (1984), by demonstrating that his attorney's error led to a fundamentally unfair trial. Ante, at 11. According to Strickland, a defendant may establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"; by showing an "[a]ctual or constructive denial of the assistance of counsel altogether"; or by showing that counsel labored under "an actual conflict of interest." 466 U. S., at 692–694. Strickland did not hold, as the Court assumes, that a defendant may establish prejudice by showing that his counsel's errors "rendered the trial fundamentally unfair." Ante, at 11. Because the Court concludes that the closure during petitioner's jury selection did not lead to fundamental unfairness in any event, ante, at 15–16, no part of the discussion about fundamental unfairness, see ante, at 11–15, is necessary to its result.

In light of these observations, I do not read the opinion of the Court to preclude the approach set forth in JUSTICE ALITO's opinion, which correctly applies our precedents.

Cite as: 582 U. S. ____ (2017)

ALITO, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 16–240

KENTEL MYRONE WEAVER, PETITIONER *v.* MASSACHUSETTS

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

[June 22, 2017]

JUSTICE ALITO, with whom JUSTICE GORSUCH joins, concurring in the judgment.

This case calls for a straightforward application of the familiar standard for evaluating ineffective assistance of counsel claims. Strickland v. Washington, 466 U. S. 668, 687 (1984). Weaver cannot meet that standard, and therefore his claim must be rejected.

The Sixth Amendment protects a criminal defendant's right "to have the Assistance of Counsel for his defence." That right is violated when (1) "counsel's performance was deficient" in the relevant sense of the term and (2) "the deficient performance prejudiced the defense." Strickland, supra, at 687. The prejudice requirement—which is the one at issue in this case—"arises from the very nature" of the right to effective representation: Counsel simply "cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have)." United States v. Gonzalez-Lopez, 548 U. S. 140, 147 (2006). In other words, "a violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced." Ibid.

Strickland's definition of prejudice is based on the reliability of the underlying proceeding. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U. S., at 686 (emphasis added); see United States v. Cronic, 466 U. S. 648, 658 (1984). This is so because "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." Strickland, 466 U. S., at 691–692. Accordingly, an attorney's error "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id., at 691.

Weaver makes much of the Strickland Court's statement that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding." Id., at 696. But the very next sentence clarifies what the Court had in mind, namely, the reliability of the proceeding. In that sentence, the Court explains that the proper concern— "[i]n every case"—is "whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable." Ibid. In other words, the focus on reliability is consistent throughout the Strickland opinion.

To show that a counsel's error rendered a legal proceeding unreliable, a defendant ordinarily must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 694. In a challenge to a conviction, such as the one in this case, this means that the defendant must show "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id., at 695.

The Court has relieved defendants of the obligation to make this affirmative showing in only a very narrow set of cases in which the accused has effectively been denied counsel altogether:

These include the actual or constructive denial of counsel, state interference with counsel's assistance, or counsel that labors under actual conflicts of interest. Id., at 692; Cronic, 466 U. S., at 658–660. Prejudice can be presumed with respect to these errors because they are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Id., at 658; see Strickland, supra, at 692; Mickens v. Taylor, 535 U. S. 162, 175 (2002).

In short, there are two ways of meeting the Strickland prejudice requirement. A defendant must demonstrate either that the error at issue was prejudicial or that it belongs to the narrow class of attorney errors that are tantamount to a denial of counsel, for which an individualized showing of prejudice is unnecessary.

Weaver attempts to escape this framework by stressing that the deprivation of the right to a public trial has been described as a "structural" error, but this is irrelevant under Strickland. The concept of "structural error" comes into play when it is established that an error occurred at the trial level and it must be decided whether the error was harmless. See Neder v. United States, 527 U. S. 1, 7 (1999); Arizona v. Fulminante, 499 U. S. 279, 309–310 (1991). The prejudice prong of Strickland is entirely different. It does not ask whether an error was harmless but whether there was an error at all, for unless counsel's deficient performance prejudiced the defense, there was no Sixth Amendment violation in the first place. See GonzalezLopez, supra, at 150 (even where an attorney's deficient performance "pervades the entire trial," "we do not allow reversal of a conviction for that reason without a showing of prejudice" because "the requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue"). Weaver's theory conflicts with Strickland because it implies that an attorney's error can be prejudicial even if it "had no effect," or only "some conceivable effect," on the outcome of his trial. Strickland, supra, at 691, 693. That is precisely what Strickland rules out.

To sum up, in order to obtain relief under *Strickland*, Weaver must show that the result of his trial was unreliable. He could do so by demonstrating a reasonable likelihood that his counsel's error affected the verdict. Alternatively, he could establish that the error falls within the very short list of errors for which prejudice is presumed. Weaver has not attempted to make either argument, so his claim must be rejected. I would affirm the judgment of the Supreme Judicial Court of Massachusetts on that ground.

Cite as: 582 U. S. ____ (2017)

SUPREME COURT OF THE UNITED STATES

No. 16–240

KENTEL MYRONE WEAVER, PETITIONER *v.*
MASSACHUSETTS

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

[June 22, 2017]

JUSTICE BREYER, with whom JUSTICE KAGAN joins, dissenting.

The Court notes that Strickland's "prejudice inquiry is not meant to be applied in a 'mechanical' fashion," ante, at 11 (quoting Strickland v. Washington, 466 U. S. 668, 696 (1984)), and I agree. But, in my view, it follows from this principle that a defendant who shows that his attorney's constitutionally deficient performance produced a structural error should not face the additional—and often insurmountable—Strickland hurdle of demonstrating that the error changed the outcome of his proceeding.

In its harmless-error cases, this Court has "divided constitutional errors into two classes": trial errors and structural errors. United States v. Gonzalez-Lopez, 548 U. S. 140, 148 (2006). Trial errors are discrete mistakes that "occu[r] during the presentation of the case to the jury." Arizona v. Fulminante, 499 U. S. 279, 307 (1991). Structural errors, on the other hand, "affec[t] the framework within which the trial proceeds." Id., at 310.

The Court has recognized that structural errors' distinctive attributes make them "defy analysis by 'harmlesserror' standards." Id., at 309. It has therefore categorically exempted structural errors from the case-by-case harmlessness review to which trial errors are subjected. Our precedent does not try to parse which structural errors are the truly egregious ones. It simply views all structural errors as "intrinsically harmful" and holds that any structural error warrants "automatic reversal" on direct appeal "without regard to [its] effect on the outcome" of a trial. Neder v. United States, 527 U. S. 1, 7 (1999).

The majority here does not take this approach. It assumes that some structural errors—those that "lead to fundamental unfairness"—but not others, can warrant relief without a showing of actual prejudice under Strickland. Ante, at 7, 11–12. While I agree that a showing of fundamental unfairness is sufficient to satisfy Strickland, I would not try to draw this distinction.

Even if some structural errors do not create fundamental unfairness, all structural errors nonetheless have features that make them "defy analysis by 'harmless-error' standards." Fulminante, supra, at 309. This is why all structural errors—not just the "fundamental unfairness" ones—are exempt from harmlessness inquiry and warrant automatic reversal on direct review. Those same features mean that all structural errors defy an actual-prejudice analysis under Strickland.

For instance, the majority concludes that some errors— such as the public-trial error at issue in this case—have been labeled "structural" because they have effects that "are simply too hard to measure." Ante, at 6; see, e.g., Sullivan v. Louisiana, 508 U.S. 275, 281–282 (1993) (explaining that structural errors have "consequences that are necessarily unquantifiable and indeterminate"). But how could any error whose effects are inherently indeterminate prove susceptible to actual-prejudice analysis under Strickland? Just as the "difficulty of assessing the effect" of such an error would turn harmless-error analysis into "a speculative inquiry into what might have occurred in an alternate universe," Gonzalez-Lopez, supra, at 149, n. 4, 150, so too would it undermine a defendant's ability to make an actual-prejudice showing to establish an ineffective-assistance claim.

The problem is evident with regard to public-trial violations. This Court has recognized that "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance." Waller v. Georgia, 467 U. S. 39, 49, n. 9 (1984). As a result, "a requirement that prejudice be shown 'would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.' " Ibid. (quoting United States ex rel. Bennett v. Rundle, 419 F. 2d 599, 608 (CA3 1969) (en banc)) (alteration in original). In order to establish actual prejudice from an attorney's failure to object to a public-trial violation, a defendant would face the nearly impossible burden of establishing how his trial might have gone differently had it been open to the public. See ibid. ("'[D]emonstration of prejudice in this kind of case is a practical impossibility . . .' " (quoting State v. Sheppard, 182 Conn. 412, 418, 438 A. 2d 125, 128 (1980))).

I do not see how we can read Strickland as requiring defendants to prove what this Court has held cannot be proved. If courts do not presume prejudice when counsel's deficient performance leads to a structural error, then defendants may well be unable to obtain relief for incompetence that deprived them "of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." Neder, supra, at 8–9 (internal quotation marks omitted). This would be precisely the sort of "mechanical" application that Strickland tells us to avoid.

In my view, we should not require defendants to take on a task that is normally impossible to perform. Nor would I give lower courts the unenviably complex job of deciphering which structural errors really undermine fundamental fairness and which do not—that game is not worth the candle. I would simply say that just as structural errors are categorically insusceptible to harmless-error analysis on direct review, so too are they categorically insusceptible to actual-prejudice analysis in Strickland claims. A showing that an attorney's constitutionally deficient performance produced a structural error should consequently be enough to entitle a defendant to relief. I respectfully dissent.

CASE III

MCWILLIAMS *v*. DUNN, COMMISSIONER, ALABAMA

DEPARTMENT OF CORRECTIONS, ET AL.

OCTOBER TERM, 2016

SUPREME COURT OF THE UNITED STATES

Syllabus[153]

MCWILLIAMS *v*. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.

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

No. 16–5294. Argued April 24, 2017—Decided June 19, 2017

Ake v. Oklahoma, 470 U. S. 68, 83, clearly established that when an indigent "defendant demonstrates . . . that his sanity at the time of the offense is to be a significant fact at trial, the State must" provide the defendant with "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

One month after Ake was decided, Alabama charged petitioner McWilliams with rape and murder. Finding him indigent, the trial court appointed counsel, who requested a psychiatric evaluation of McWilliams. The court granted the motion and the State convened a commission, which concluded that McWilliams was competent to stand trial and had not been suffering from mental illness at the time of the alleged offense. A jury convicted McWilliams of capital murder and recommended a death sentence. Later, while the parties awaited McWilliams' judicial sentencing

---

153 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.

hearing, McWilliams' counsel asked for neurological and neuropsychological testing of McWilliams. The court agreed and McWilliams was examined by Dr. Goff. Dr. Goff filed a report two days before the judicial sentencing hearing. He concluded that McWilliams was likely exaggerating his symptoms, but nonetheless appeared to have some genuine neuropsychological problems. Just before the hearing, counsel also received updated records from the commission's evaluation and previously subpoenaed mental health records from the Alabama Department of Corrections. At the hearing, defense counsel requested a continuance in order to evaluate all the new material, and asked for the assistance of someone with expertise in psychological matters to review the findings. The trial court denied defense counsel's requests. At the conclusion of the hearing, the court sentenced McWilliams to death.

On appeal, McWilliams argued that the trial court denied him the right to meaningful expert assistance guarantee by Ake. The Alabama Court of Criminal Appeals affirmed McWilliams' conviction and sentence, holding that Dr. Goff's examination satisfied Ake's requirements. The State Supreme Court affirmed, and McWilliams failed to obtain state postconviction relief. On federal habeas review, a Magistrate Judge also found that the Goff examination satisfied Ake and, therefore, that the State Court of Criminal Appeals' decision was not contrary to, or an unreasonable application of, clearly established federal law. See 28 U. S. C. §2254(d)(1). Adopting the Magistrate Judge's report and recommendation, the District Court denied
relief. The Eleventh Circuit affirmed.

Held:

1. Ake clearly established that when certain threshold criteria are met, the state must provide a defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U. S., at 83. The Alabama courts' determination that McWilliams received all the assistance to which Ake entitled him was contrary to, or an unreasonable application of, clearly established federal law. Pp. 11–16.

(a) Three preliminary issues require resolution. First, the conditions that trigger Ake's application are present. McWilliams is and was an "indigent defendant," 470 U. S., at 70, and his "mental condition" was both "relevant to . . . the punishment he might suffer," id., at 80, and

"seriously in question," id., at 70. Second, this Court rejects Alabama's claim the State was relieved of its Ake obligations because McWilliams received brief assistance from a volunteer psychologist at the University of Alabama. Even if the episodic help of an outside volunteer could satisfy Ake, the State does not refer to any specific record facts that indicate that the volunteer psychologist was available to the defense at the judicial sentencing proceeding. Third, contrary to Alabama's suggestion, the record indicates that McWilliams did not get all the mental health assistance that he requested. Rather, he asked for additional help at the judicial sentencing hearing, but was rebuffed. Pp. 11–13.

(b) This Court does not have to decide whether Ake requires a State to provide an indigent defendant with a qualified mental health expert retained specifically for the defense team. That is because Alabama did not meet even Ake's most basic requirements in this case. Ake requires more than just an examination. It requires that the State provide the defense with "access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense." 470 U. S., at 83. Even assuming that Alabama met the examination requirement, it did not meet any of the other three. No expert helped the defense evaluate the Goff report or McWilliams' extensive medical records and translate these data into a legal strategy. No expert helped the defense prepare and present arguments that might, e.g., have explained that McWilliams' purported malingering was not necessarily inconsistent with mental illness. No expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing. Since Alabama's provision of mental health assistance fell so dramatically short of Ake's requirements, the Alabama courts' decision affirming McWilliams' sentence was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. §2254(d)(1). Pp. 13–16.

2. The Eleventh Circuit should determine on remand whether the Alabama courts' error had the "substantial and injurious effect or influence" required to warrant a grant of habeas relief, Davis v. Ayala, 576 U. S. ___, ___, specifically considering whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that Ake requires could have made a difference. P. 16.

634 Fed. Appx. 698, reversed and remanded.

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

Cite as: 582 U. S. ____ (2017)

SUPREME COURT OF THE UNITED STATES

No. 16–5294

JAMES E. MCWILLIAMS, PETITIONER v. JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.

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

[June 19, 2017]

JUSTICE BREYER delivered the opinion of the Court.

Thirty-one years ago, petitioner James Edmond McWilliams, Jr., was convicted of capital murder by an Alabama jury and sentenced to death. McWilliams challenged his sentence on appeal,

---

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

arguing that the State had failed to provide him with the expert mental health assistance the Constitution requires, but the Alabama courts refused to grant relief. We now consider, in this habeas corpus case, whether the Alabama courts' refusal was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. §2254(d)(1). We hold that it was. Our decision in Ake v. Oklahoma, 470 U. S. 68 (1985), clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." Id., at 83. Petitioner in this case did not receive that assistance.

I

McWilliams and the State of Alabama agree that Ake (which this Court decided in February 1985) sets forth the applicable constitutional standards. Before turning to the circumstances of McWilliams' case, we describe what the Court held in Ake. We put in italics language that we find particularly pertinent here.

The Court began by stating that the "issue in this case is whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question." Id., at 70 (emphasis added). The Court said it would consider that issue within the framework of earlier cases granting "an indigent defendant . . . a fair opportunity to present his defense" and "to participate meaningfully in a judicial proceeding in which his liberty is at stake." Id., at 76. "Meaningful access to justice," the Court added, "has been the consistent theme of these cases." Id., at 77.

The Court then wrote that "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." Id., at 80. A psychiatrist may, among other things, "gather facts," "analyze the information gathered and from it draw plausible conclusions," and "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers." Ibid. These and related considerations

> "lea[d] inexorably to the conclusion that, without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination." Id., at 82 (emphasis added).

The Court concluded: "We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. . . . Our concern is that the indigent defendant have access to a competent psychiatrist for the[se] purpose[s]." Id., at 83 (emphasis added).

Ake thus clearly establishes that when its threshold criteria are met, a State must provide a mental health professional capable of performing a certain role: "conduct[ing] an appropriate examination and assist[ing] in evaluation, preparation, and presentation of the defense." Ibid. Unless a defendant is "assure[d]" the assistance of someone who can effectively perform these functions, he has not received the "minimum" to which Ake entitles him. Ibid.

II

A

One month after this Court decided Ake, the State of Alabama charged McWilliams with rape and murder. The trial court found McWilliams indigent and provided him with counsel. It also granted counsel's pretrial motion for a psychiatric evaluation of McWilliams' sanity, including aspects of his mental condition relevant to "mitigating circumstances to be considered in a capital case in the sentencing stage." T. 1526. ("T." refers to the certified trial record; "P. C. T." refers to the certified court reporter's state postconviction proceedings transcript.) The court ordered the State to

convene a "Lunacy Commission," which would examine McWilliams and file a report with the court. See id., at 1528–1529.

Subsequently a three-member Lunacy Commission examined McWilliams at a state hospital, the Taylor Hardin Secure Medical Facility. The three members, all psychiatrists, concluded that McWilliams was competent to stand trial and that he had not been suffering from mental illness at the time of the alleged offense. Id., at 1544–1546. One of them, Dr. Kamal Nagi, wrote that "Mr. McWilliams is grossly exaggerating his psychological symptoms to mimic mental illness." Id., at 1546. Dr. Nagi noted that McWilliams' performance on one of the tests "suggested that [McWilliams] had exaggerated his endorsement of symptoms of illness and the profile was considered a 'fake bad.'" Ibid.

McWilliams' trial took place in late August 1986. On August 26 the jury convicted him of capital murder. The prosecution sought the death penalty, which under then-applicable Alabama law required both a jury recommendation (with at least 10 affirmative votes) and a later determination by the judge. See Ala. Code §13A–5–46(f) (1986). The jury-related portion of the sentencing proceeding took place the next day. The prosecution reintroduced evidence from the guilt phase and called a police officer to testify that McWilliams had a prior conviction. T. 1297, 1299–1303. The defense called McWilliams and his mother. Both testified that McWilliams, when a child, had suffered multiple serious head injuries. Id., at 1303–1318, 1320–1335. McWilliams also described his history of psychiatric and psychological evaluations, reading from the prearrest report of one psychologist, who concluded that McWilliams had a "blatantly psychotic thought disorder" and needed inpatient treatment. Id., at 1329–1332.

When the prosecutor, cross-examining McWilliams, asked about the neurological effects of his head injuries, McWilliams replied, "I am not a psychiatrist." Id., at 1328. Similarly, when the prosecutor asked McWilliams' mother whether her son was "crazy," she answered, "I am no expert: I don't know whether my son is crazy or not.

All I know, that my son do need help." Id., at 1317.

The prosecution then called two of the mental health professionals who had signed the Lunacy Commission's report, Dr. Kamal Nagi and Dr. Norman Poythress. Dr. Nagi testified that he had found no evidence of psychosis, but did not appear to be aware of McWilliams' history of head trauma. See id., at 1351–1352. Dr. Poythress testified that one of the tests that McWilliams took was

"clinically invalid" because the test's "validity scales" indicated that McWilliams had exaggerated or faked his symptoms. Id., at 1361–1363.

Although McWilliams' counsel had subpoenaed further mental health records from Holman State Prison, where McWilliams was being held, the jury did not have the opportunity to consider them, for, though subpoenaed on August 13, the records had not arrived by August 27, the day of the jury hearing.

After the hearing, the jury recommended the death penalty by a vote of 10 to 2, the minimum required by Alabama law. The court scheduled its judicial sentencing hearing for October 9, about six weeks later.

B

Five weeks before that hearing, the trial court ordered the Alabama Department of Corrections to respond to McWilliams's subpoena for mental health records. Id., at 1619. The court also granted McWilliams' motion for neurological and neuropsychological exams. Id., at 1615–1617. That motion (apparently filed at the suggestion of a University of Alabama psychologist who had "volunteer[ed]" to help counsel "in her spare time," P. C. T. 251– 252) asked the court to "issue an order requiring the State of Alabama to do complete neurological and neuropsychological testing on the Defendant in order to have the test results available for his sentencing hearing." T. 1615.

Consequently, Dr. John Goff, a neuropsychologist employed by the State's Department of Mental Health, examined McWilliams. On October 7, two days before the judicial sentencing hearing, Dr. Goff filed his report. The report concluded that McWilliams presented "some diagnostic dilemmas." Id., at 1635. On the one hand, he was "obviously attempting to appear emotionally disturbed" and "exaggerating his neuropsychological problems." Ibid. But on the other hand, it was "quite apparent that he ha[d] some genuine neuropsychological problems." Ibid. Tests revealed "cortical dysfunction attributable to right cerebral hemisphere dysfunction," shown by "left hand weakness, poor motor coordination of the left hand, sensory deficits including suppressions of the left hand and very poor visual search skills." Id., at 1636. These deficiencies were "suggestive of a right hemisphere lesion" and "compatible with the injuries [McWilliams] sa[id] he sustained as a child." Id., at 1635. The report added that McWilliams' "obvious neuropsychological deficit"

could be related to his "low frustration tolerance and impulsivity," and suggested a diagnosis of "organic personality syndrome." Ibid.

The day before the sentencing hearing defense counsel also received updated records from Taylor Hardin hospital, and on the morning of the hearing he received the records (subpoenaed in mid-August) from Holman Prison. The prison records indicated that McWilliams was taking an assortment of psychotropic medications including Desyrel, Librium, and an antipsychotic, Mellaril. See App. 190a–193a.

C

The judicial sentencing hearing began on the morning of October 9. Defense counsel told the trial court that the eleventh-hour arrival of the Goff report and the mental health records left him "unable to present any evidence today." Id., at 194a. He said he needed more time to go over the new information. Furthermore, since he was "not a psychologist or a psychiatrist," he needed "to have someone else review these findings" and offer "a second opinion as to the severity of the organic problems discovered." Id., at 192a–196a.

The trial judge responded, "All right. Well, let's proceed." Id., at 197a. The prosecution then presented its case. Once it had finished, defense counsel moved for a continuance in order "to allow us to go through the material that has been provided to us in the last 2 days." Id., at 204a. The judge offered to give defense counsel until 2 p.m. that afternoon. He also stated that "[a]t that time, The Court will entertain any motion that you may have with some other person to review" the new material. Id., at 205a. Defense counsel protested that "there is no way that I can go through this material," but the judge immediately added, "Well, I will give you the opportunity. . . . If you do not want to try, then you may not." Id., at 206a. The court then adjourned until 2 p.m.

During the recess, defense counsel moved to withdraw. He said that "the abritrary [sic] position taken by this Court regarding the Defendant's right to present mitigating circumstances is unconscionable resulting in this proceeding being a mockery." T. 1644. He added that "further participation would be tantamount to exceptance [sic] of the Court's ruling." Ibid. The trial court denied the motion to withdraw.

When the proceedings resumed, defense counsel renewed his motion for a continuance, explaining,

> "It is the position of the Defense that we have received these records at such a late date, such a late time that it has put us in a position as laymen, with regard to psychological matters, that we cannot adequately make a determination as what to present to The Court with regards to the particular deficiencies that the Defendant has. We believe that he has the type of diagnosed illness that we pointed out earlier for The Court and have mentioned for The Court. But we cannot determine ourselves from the records that we have received and the lack of receiving the test and the lack of our own expertise, whether or not such a condition exists; whether the reports and tests that have been run by Taylor Hardin, and the Lunacy Commission, and at Holman are tests that should be challenged in some type of way or the results should be challenged, we really need an opportunity to have the right type of experts in this field, take a look at all of those records and tell us what is happening with him. And that is why we renew the Motion for a Continuance." App. 207a.

The trial court denied the motion.

The prosecutor then offered his closing statement, in which he argued that there were "no mitigating circumstances." Id., at 209a. Defense counsel replied that he "would be pleased to respond to [the prosecutor's] remarks that there are no mitigating circumstances in this case if I were able to have time to produce . . . any mitigating circumstances." Id., at 210a. But, he said, since neither he nor his co-counsel were "doctors," neither was "really capable of going through those records on our own." Ibid. The court had thus "foreclosed by structuring this hearing as it has, the Defendant from presenting any evidence of mitigation in psychological—psychiatric terms." Id., at 211a.

The trial judge then said that he had reviewed the records himself and found evidence that McWilliams was faking and manipulative. Ibid. Defense counsel attempted to contest that point, which led to the following exchange:

> "MR. SOGOL: I told Your Honor that my looking at those records was not of any value to me; that I needed to have somebody look at those records who understood them, who could interpret them for me. Did I not tell Your Honor that?
>
> THE COURT: As I said, on the record earlier, Mr. Sogol, and I don't want to argue or belabor this, but I would have given you the opportunity to make a motion to present someone to evaluate that.
>
> MR. SOGOL: Your Honor gave me no time in which to do that. Your Honor told me to be here at 2 o'clock this afternoon. Would Your Honor have wanted me to file a Motion for Extraordinary Expenses to get someone?
>
> THE COURT: I want you to approach with your client, please." Id., at 211a–212a.

The court then sentenced McWilliams to death.

The court later issued a written sentencing order. It found three aggravating circumstances and no mitigating circumstances. It found that McWilliams "was not and is not psychotic," and that "the preponderance of the evidence from these tests and reports show [McWilliams] to be feigning, faking, and manipulative." Id., at 188a. The court wrote that even if McWilliams' mental health issues "did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance." Ibid.

D

McWilliams appealed, arguing that the trial court had denied him the right to meaningful expert assistance guaranteed by Ake. The Alabama Court of Criminal Appeals rejected his argument. It wrote that Ake's requirements "are met when the State provides the [defendant] with a competent psychiatrist." McWilliams v. State, 640 So. 2d 982, 991 (1991). And Alabama, by "allowing Dr. Goff to examine" McWilliams, had satisfied those requirements. Ibid. The court added that "[t]here is no indication in the record that [McWilliams] could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings," ibid.; that "the trial court indicated that it would have considered a motion to present an expert to evaluate this report" had one been made, ibid.; and that there was "no prejudice by the trial court's denial of [McWilliams'] motion for continuance," id., at 993. The appeals court therefore

affirmed McWilliams' conviction and sentence. The Alabama Supreme Court, in turn, affirmed the appeals court (without addressing the Ake issue). Ex parte McWilliams, 640 So. 2d 1015 (1993). After McWilliams failed to obtain postconviction relief from the state courts, he sought a federal writ of habeas corpus. See 28 U. S. C. §2254.

E

In federal habeas court McWilliams argued before a Magistrate Judge that he had not received the expert assistance that Ake required. The Magistrate Judge recommended against issuing the writ. He wrote that McWilliams had "received the assistance required by Ake" because Dr. Goff "completed the testing" that McWilliams requested. App. 88a. Hence, the decision of the Alabama Court of Criminal Appeals was not contrary to, or an unreasonable application of, clearly established federal law. See 28 U. S. C. §2254(d)(1). The District Court adopted the Magistrate Judge's report and recommendation and denied relief. A divided panel of the Eleventh Circuit Court of Appeals affirmed. See McWilliams v. Commissioner, Ala. Dept. of Corrections, 634 Fed. Appx. 698 (2015) (per curiam); id., at 711 (Jordan, J., concurring); id., at 712 (Wilson, J., dissenting). McWilliams filed a petition for certiorari. We granted the petition.

III

A

The question before us is whether the Alabama Court of Criminal Appeals' determination that McWilliams got all the assistance to which Ake entitled him was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. §2254(d)(1). Before turning to the heart of that question, we resolve three preliminary issues.

First, no one denies that the conditions that trigger application of Ake are present. McWilliams is and was an "indigent defendant," 470 U. S., at 70. See supra, at 3. His "mental condition" was "relevant to . . . the punishment he might suffer," 470 U. S., at 80. See supra, at 4–5. And, that "mental condition," i.e., his "sanity at the time of the offense," was "seriously in question," 470 U. S., at 70. See supra, at 4–5. Consequently, the Constitution, as interpreted in Ake, required the State to provide McWilliams with "access to a competent psychiatrist who will conduct

an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U. S., at 83.

Second, we reject Alabama's claim that the State was exempted from its obligations because McWilliams already had the assistance of Dr. Rosenszweig, the psychologist at the University of Alabama who "volunteer[ed]" to help defense counsel "in her spare time" and suggested the defense ask for further testing, P. C. T. 251–252. Even if the episodic assistance of an outside volunteer could relieve the State of its constitutional duty to ensure an indigent defendant access to meaningful expert assistance, no lower court has held or suggested that Dr. Rosenszweig was available to help, or might have helped, McWilliams at the judicial sentencing proceeding, the proceeding here at issue. Alabama does not refer to any specific record facts that indicate that she was available to the defense at this time.

Third, Alabama argues that Ake's requirements are irrelevant because McWilliams "never asked for more expert assistance" than he got, "even though the trial court gave him the opportunity to do so." Brief for Respondent 50–51. The record does not support this contention. When defense counsel requested a continuance at the sentencing hearing, he repeatedly told the court that he needed "to have someone else review" the Goff report and medical records. App. 193a. See, e.g., id., at 196a ("[I]t is just incumbent upon me to have a second opinion as to the severity of the organic problems discovered"); id., at 207a ("[W]e really need an opportunity to have the right type of experts in this field, take a look at all of these records and tell us what is happening with him"); id., at 211a ("I told Your Honor that my looking at these records was not of any value to me; that I needed to have somebody look at those records who understood them, who could interpret them for me"). Counsel also explicitly asked the trial court what else he was supposed to ask for to obtain an expert: "Would Your Honor have wanted me to file a Motion for Extraordinary Expenses to get someone?" Id., at 212a. We have reproduced a lengthier account of the exchanges, supra, at 7–9. They make clear that counsel wanted additional expert assistance to review the report and records—that was the point of asking for a continuance. In response, the court told counsel to approach the bench and sentenced McWilliams to death. Thus the record, in our view, indicates that McWilliams did request additional help from mental health experts.

B

We turn to the main question before us: whether the Alabama Court of Criminal Appeals' determination that McWilliams got all the assistance that Ake requires was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. §2254(d)(1).

McWilliams would have us answer "yes" on the ground that Ake clearly established that a State must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert available to both parties. He points to language in Ake that seems to foresee that consequence. See, e.g., 470 U. S., at 81 ("By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them" (emphasis added)).

We need not, and do not, decide, however, whether this particular McWilliams claim is correct. As discussed above, Ake clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." Id., at 83. As a practical matter, the simplest way for a State to meet this standard may be to provide a qualified expert retained specifically for the defense team. This appears to be the approach that the overwhelming majority of jurisdictions have adopted. See Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 8–35 (describing practice in capital-active jurisdictions); Tr. of Oral Arg. 40 (respondent conceding that "this issue really has been mooted over the last 30-some-odd years because of statutory changes"). It is not necessary, however, for us to decide whether the Constitution requires States to satisfy Ake's demands in this way. That is because Alabama here did not meet even Ake's most basic requirements.

The dissent calls our unwillingness to resolve the broader question whether Ake clearly established a right to an expert independent from the prosecution a "most unseemly maneuver." Post, at 1–2 (opinion of ALITO, J.). We do not agree. We recognize that we granted petitioner's first question presented—which addressed whether Ake clearly established a right to an independent expert—and not his second, which raised more case-specific concerns. See Pet. for Cert. i. Yet that does not bind us to issue a sweeping ruling when a narrow one will do. As we explain below, our determination that Ake clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to

effectively "assist in evaluation, preparation, and presentation of the defense," 470 U. S., at 83, is sufficient to resolve the case. We therefore need not decide whether Ake clearly established more. (Nor do we agree with the dissent that our approach is "acutely unfair to Alabama" by not "giv[ing] the State a fair chance to respond." Post, at 12. In fact, the State devoted an entire section of its merits brief to explaining why it thought that "[n]o matter how the Court resolves the [independent expert] question, the court of appeals correctly denied the habeas petition." Brief for Respondent 50. See also id., at 14, 52 (referring to the lower courts' case-specific determinations that McWilliams got all the assistance Ake requires).)

The Alabama appeals court held that "the requirements of Ake v. Oklahoma . . . are met when the State provides the [defendant] with a competent psychiatrist. The State met this requirement in allowing Dr. Goff to examine [McWilliams]." McWilliams, 640 So. 2d, at 991. This was plainly incorrect. Ake does not require just an examination. Rather, it requires the State to provide the defense with "access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense." Ake, supra, at 83 (emphasis added).

We are willing to assume that Alabama met the examination portion of this requirement by providing for Dr. Goff 's examination of McWilliams. See supra, at 6. But what about the other three parts? Neither Dr. Goff nor any other expert helped the defense evaluate Goff 's report or McWilliams' extensive medical records and translate these data into a legal strategy. Neither Dr. Goff nor any other expert helped the defense prepare and present arguments that might, for example, have explained that McWilliams' purported malingering was not necessarily inconsistent with mental illness (as an expert later testified in postconviction proceedings, see P. C. T. 936–943). Neither Dr. Goff nor any other expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing himself.

The dissent emphasizes that Dr. Goff was never ordered to do any of these things by the trial court. See post, at 13, n. 5. But that is precisely the point. The relevant court order did not ask Dr. Goff or anyone else to provide the defense with help in evaluating, preparing, and presenting its case. It only required "the Department of Corrections" to "complete neurological and neuropsychological testing on the Defendant . . . and send all test materials, results and evaluations to the Clerk of the Court." T. 1612. Nor did the short time frame allow for more expert assistance. (Indeed, given that timeframe, we do not see how Dr. Goff or any other expert could have satisfied

the latter three portions of Ake's requirements even had he been instructed to do so.) Then, when McWilliams asked for the additional assistance to which he was constitutionally entitled at the sentencing hearing, the judge rebuffed his requests. See supra, at 7–9.

Since Alabama's provision of mental health assistance fell so dramatically short of what Ake requires, we must conclude that the Alabama court decision affirming McWilliams's conviction and sentence was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. §2254(d)(1).

IV

The Eleventh Circuit held in the alternative that, even if the Alabama courts clearly erred in their application of federal law, their "error" nonetheless did not have the "substantial and injurious effect or influence" required to warrant a grant of habeas relief, Davis v. Ayala, 576 U. S. ___, ___ (2015) (slip op., at 10) (internal quotation marks omitted). See 634 Fed. Appx., at 707. In reaching this conclusion, however, the Eleventh Circuit only considered whether "[a] few additional days to review Dr. Goff's findings" would have made a difference. Ibid. It did not specifically consider whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that Ake requires would have mattered. There is reason to think that it could have. For example, the trial judge relied heavily on his belief that McWilliams was malingering. See App. 188a, 211a. If McWilliams had the assistance of an expert to explain that "[m]alingering is not inconsistent with serious mental illness," Brief for American Psychiatric Association et al. as Amici Curiae 20, he might have been able to alter the judge's perception of the case.

Since "we are a court of review, not of first view," Cutter v. Wilkinson, 544 U. S. 709, 718, n. 7 (2005), we do not now resolve this question. Rather we leave it to the lower courts to decide in the first instance.

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.

SUPREME COURT OF THE UNITED STATES

No. 16–5294

JAMES E. MCWILLIAMS, PETITIONER v. JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.

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

[June 19, 2017]

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

We granted review in this case to decide a straightforward legal question on which the lower courts are divided: whether our decision in Ake v. Oklahoma, 470 U. S. 68 (1985), clearly established that an indigent defendant whose mental health will be a significant factor at trial is entitled to the assistance of a psychiatric expert who is a member of the defense team instead of a neutral expert who is available to assist both the prosecution and the defense.[155]

---

[155] The question was worded as follows: "When this Court held in Ake that an indigent defendant is entitled to meaningful expert assistance for the 'evaluation, preparation, and presentation of the defense,' did it clearly establish that the expert should be independent of the prosecution?"

The answer to that question is plain: Ake did not clearly establish that a defendant is entitled to an expert who is a member of the defense team. Indeed, "Ake appears to have been written so as to be deliberately ambiguous on this point, thus leaving the issue open for future consideration." W. LaFave, Criminal Law §8.2(d), p. 449 (5th ed. 2010) (LaFave). Accordingly, the proper disposition of this case is to affirm the judgment below.

The Court avoids that outcome by means of a most unseemly maneuver. The Court declines to decide the question on which we granted review and thus leaves in place conflicting lower court decisions regarding the meaning of a 32-year-old precedent.[156] That is bad enough. But to make matters worse, the Court achieves this unfortunate result by deciding a separate question on which we expressly declined review. And the Court decides that fact-bound question without giving Alabama a fair opportunity to brief the issue.

I

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), federal habeas relief cannot be awarded on a claim that a state court decided on the merits unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. §2254(d)(1). That standard, by design, is "difficult to meet." White v. Woodall, 572 U. S. ___, ___ (2014) (slip op., at 3) (internal quotation marks omitted). It requires habeas petitioners to "show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U. S. 86, 103 (2011). Put another way, "[w]hen reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." Woods v. Donald, 575 U. S. ___, ___ (2015) (per curiam) (slip op., at 4–5).

---

156 Defending its approach, the Court says that it had no need to decide the "sweeping" question on which review was granted "when a narrow one will do." Ante, at 14. Narrow holdings have their place, but here: (1) We denied review of the narrow question; (2) the question decided is not just narrow, it is the sort of factbound question as to which review is disfavored, see this Court's Rule 10; (3) the narrow question is not fairly included in the question presented, see this Court's Rule 14(a); (4) deciding the case on this narrow ground leaves in place the conflict in the lower courts that supported the grant of certiorari; and (5) the parties were not given notice of this possible disposition, and the Court was thus deprived of the benefit of full briefing and argument on the issue.

In *Ake*, we held that a defendant must be provided "access to a competent psychiatrist" in two circumstances: first, "when [the] defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial," and, second, at the sentencing phase of a capital trial, "when the State presents psychiatric evidence of the defendant's future dangerousness." 470 U. S., at 83.

The question that we agreed to review concerns the type of expert that must be provided. Did Ake clearly establish that a defendant in the two situations just noted must be provided with the services of an expert who functions solely as a dedicated member of the defense team as opposed to a neutral expert who examines the defendant, reports his or her conclusions to the court and the parties, and is available to assist and testify for both sides? Did Ake speak with such clarity that it ruled out "any possibility for fairminded disagreement"? Harrington, supra, at 103. The answer is "no." Ake provides no clear guidance one way or the other.

A

It is certainly true that there is language in Ake that points toward the position that a defense-team psychiatrist should be provided. Explaining the need for the appointment of a psychiatric expert, Ake noted that a psychiatrist can "assist in preparing the cross-examination of a State's psychiatric witnesses" and would "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers." 470 U. S., at 82, 80. And when Ake discussed expert assistance during capital sentencing, the Court said that it is important for a defendant to "offer a well-informed expert's opposing view" in the form of "responsive psychiatric testimony." Id., at 84. Ake also explained that factfinding is improved when evidence is offered by "psychiatrists for each party." Id., at 81. While it is possible for a neutral expert to provide these services, in our adversary system they are customarily performed by an expert working exclusively for one of the parties.

Other language in Ake, however, points at least as strongly in the opposite direction. Ake was clear that an indigent defendant does not have a constitutional right to "choose a psychiatrist of his personal liking or . . . receive funds to hire his own." Id., at 83. Instead, the Court held only that a defendant is entitled to have "access" to "one competent psychiatrist" chosen by the trial judge. Id., at 83, 79.

These limitations are at odds with the defense-expert model, which McWilliams characterizes as "the norm in our adversarial system." Reply Brief 3. As McWilliams explains, "other litigants of means" screen experts to find one whose tentative views are favorable, and they often hire both consulting and testifying experts. Id., at 2–3. But the Ake Court was clear that it was not holding "that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy." 470 U. S., at 77. On the contrary, Ake expressly stated that a State need only provide for a single psychiatric expert to be selected by the trial judge. Thus, Ake does not give the defense the right to interview potential experts, to seek out an expert who offers a favorable preliminary diagnosis, or to hire more than one expert. And if the court appointed expert reaches a conclusion unfavorable to the defendant on the issue of sanity or future dangerousness, Ake requires the defense team to live with the expert's unfavorable conclusions. As McWilliams concedes, when the only expert available to indigent defendants is one selected by the trial court, these defendants "face a risk that their expert will ultimately be unwilling or unable to offer testimony that will advance their cause." Reply Brief 3.

Ake also acknowledged that one of our prior cases, United States ex rel. Smith v. Baldi, 344 U. S. 561 (1953), "support[ed] the proposition" that due process is satisfied if a defendant merely has access to a psychiatrist "not beholden to the prosecution." 470 U. S., at 85. While Ake also declared that Baldi did not limit the Court "in considering whether fundamental fairness today requires a different result," 470 U. S., at 85, Ake did not explicitly overrule Baldi, and ultimately its treatment of that case was "most ambiguous," LaFave §8.2, at 450, n. 124.

It is also significant that the Ake Court had no need to decide whether due process requires the appointment of a defense-team expert as opposed to a neutral expert because Ake was denied the assistance of any psychiatrist— neutral or otherwise—for purposes of assessing his sanity at the time of the offense or his mental state as it related to capital sentencing. 470 U. S., at 71–73 (state experts who examined Ake and testified he was dangerous evaluated him only in connection with his competency to stand trial). As Ake's counsel explained at argument, the Court could rule in his client's favor without accepting his client's "primary submission" that due process requires the appointment of a defense-team expert. Tr. of Oral Arg. in No. 83–5424 p. 21 (arguing that Ake's rights were violated even under Baldi).

In short, Ake is ambiguous, perhaps "deliberately" so. LaFave §8.2(d), at 449; see ibid. ("[C]omments supporting a move in either direction appear throughout the majority opinion in the

case"). If the Justices who joined Justice Marshall's opinion for the Court had agreed that a defense-team expert must be appointed, it would have been a simple matter for the Court to say so expressly. Justice Marshall demonstrated this a few years later when he dissented from the denial of certiorari in a case that presented the very issue that the Court now dodges. Granviel v. Texas, 495 U. S. 963 (1990). There, Justice Marshall stated unambiguously that "Ake mandates the provision of a psychiatrist who will be part of the defense team and serve the defendant's interests in the context of our adversarial system." Ibid. If all the Justices who joined the opinion of the Court in Ake had shared this view, there is no obvious reason for the absence of the sort of clear statement that Justice Marshall would later provide when he wrote only for himself. The opinion in Ake has all the hallmarks of a compromise.

The Court's actions in the aftermath of Ake lend support to this conclusion. The Court repeatedly denied certiorari in cases that would have permitted it to resolve this question or others left open by Ake. See, e.g., Norris v. Starr, 513 U. S. 995 (1994); Vickers v. Arizona, 497 U. S. 1033 (1990); Brown v. Dodd, 484 U. S. 874 (1987); Johnson v. Oklahoma, 484 U. S. 878 (1987); Granviel, supra, at 963. And in many of these cases (Vickers, Dodd, Johnson, and Granviel), Justice Marshall dissented. The most reasonable conclusion to draw from the Court's silence is that the exact type of expert required by Ake has remained "an open question in our jurisprudence." Carey v. Musladin, 549 U. S. 70, 76 (2006).

B

When the lower courts have "diverged widely" in assessing whether our precedents dictate a legal rule, that is a sign that the rule is not clearly established, ibid., and that is the situation here. At the time the Alabama court addressed McWilliams's Ake claim on the merits, some courts had held that Ake requires the appointment of a defense-team expert. See, e.g., Smith v. McCormick, 914 F. 2d 1153, 1156–1160 (CA9 1990); United States v. Sloan, 776 F. 2d 926, 929 (CA10 1985). But others disagreed. The Fifth Circuit had held that a defense-team expert is not required. Granviel v. Lynaugh, 881 F. 2d 185, 191– 192 (1989), cert. denied, 495 U. S. 963 (1990). And the Oklahoma courts in Ake itself also interpreted our holding this way. Ake v. State, 778 P. 2d 460, 465 (Okla. Crim. App. 1989) ("[D]ue process does not entitle [Ake] to a statefunded psychiatric expert to support his claim; rather, due process requires that he have access to a competent and impartial

psychiatrist"). So had at least seven other state high courts. Willie v. State, 585 So. 2d 660, 671 (Miss. 1991); State v. Hix, 38 Ohio St. 3d 129, 131– 132, 527 N. E. 2d 784, 787 (1988); Dunn v. State, 291 Ark. 131, 132–134, 722 S. W. 2d 595, 595–596 (1987); State v. Indvik, 382 N. W. 2d 623, 625–626 (N. D. 1986); Palmer v. State, 486 N. E. 2d 477, 481–482 (Ind. 1985); State v. Smith, 217 Mont. 453, 457–460, 705 P. 2d 1110, 1113– 1114 (1985); State v. Hoopii, 68 Haw. 246, 248–251, 710 P. 2d 1193, 1195–1196 (1985).

Other courts struggled to reach agreement on the question. Two Eleventh Circuit panels held that a neutral expert suffices, see Magwood v. Smith, 791 F. 2d 1438, 1443 (1986) (Ake satisfied where neutral, court-appointed experts examined the defendant and testified); Clisby v. Jones, 907 F. 2d 1047, 1050 (1990) (per curiam) ("The state provided a duly qualified psychiatrist not beholden to the prosecution and, therefore, met its obligation under Ake"), reh'g en banc, 960 F. 2d 925, 928–934 (1992) (rejecting Ake claim on other grounds). But another Eleventh Circuit panel disagreed. Cowley v. Stricklin, 929 F. 2d 640, 644 (1991) (holding that due process requires more than a neutral expert). A Sixth Circuit panel held that Ake does not require appointment of a defense-team expert. Kordenbrock v. Scroggy, 889 F. 2d 69, 75 (1989). And when the Sixth Circuit reviewed that decision en banc, its holding was fractured, but 7 of the 13 judges expressed the view that Ake requires only a neutral, courtappointed expert.[157] 919 F.2d 1091, 1110, 1117–1120, 1131–1132 (1990).

Ake's ambiguity has been noted time and again by commentators. See, e.g., LaFave §8.2(d), at 449 (Ake appears to be "deliberately ambiguous"); Mosteller, The Sixth Amendment Right to Fairness: The Touchstone of Effectiveness and Pragmatism, 45 Tex. Tech. L. Rev. 1, 16 (2012) (Ake held that "the defense had the right of access to an expert, but the Court did not conclude that access had to be a defense expert"); Greeley, The Plight of Indigent Defendants in a Computer-Based Age: Maintaining the Adversarial System by Granting Defendants Access to Computer Experts, 16 Va. J. L. & Tech. 400, 426 (2011) ("[T]he Supreme Court should affirmatively state whether a defendant is entitled to a neutral expert working for the defense and the government, or an expert advocating for the defense"); Groendyke, Ake v. Oklahoma: Proposals for Making the Right a Reality, 10 N. Y.

---

[157] The Sixth Circuit's experience, standing alone, is a telling reflection of Ake's ambiguity. Years after Kordenbrock, a Sixth Circuit panel held that Ake requires a defense expert. Powell v. Collins, 332 F. 3d 376, 392 (2003). A later panel disagreed. Smith v. Mitchell, 348 F. 3d 177, 207–208, and n. 10 (2003). A different panel concluded three years later that the Circuit had "extend[ed] Ake" to require a defense expert. Carter v. Mitchell, 443 F. 3d 517, 526 (2003). A later panel insisted that "Ake does not entitle [defendants] to . . . an [independent psychiatric] expert," but to "a 'friend of the court' appointment." Wogenstahl v. Mitchell, 668 F. 3d 307, 340 (2012). The Sixth Circuit ultimately concluded that Ake did not itself clearly compel an answer to this question for AEDPA purposes. Miller v. Colson, 694 F. 3d 691, 698 (2012) ("[O]ur own internal conflict about the scope of Ake evidences the reasonableness of the state court decision").

U. J. Legis. & Pub. Pol'y 367, 383 (2007) ("The intentions of the Ake Court regarding the role of the expert are not obvious from the opinion"); Giannelli, Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World, 89 Cornell L. Rev. 1305, 1399 (2004) ("It is uncertain from Ake whether the appointment of a neutral expert (who reports to the court) is sufficient or whether a 'partisan' defense expert is required"); Bailey, Ake v. Oklahoma and an Indigent Defendant's 'Right' to an Expert Witness: A Promise Denied or Imagined? 10 Wm. & Mary Bill Rts. J. 401, 403 (2002) ("[C]ourts have struggled with whether an indigent is entitled to his own independent advocate or a neutral expert provided by the state," and the Supreme Court "has . . . failed to confront this ambiguity"); Sullivan, Psychiatric Defenses in Arkansas Criminal Trials, 48 Ark. L. Rev. 439, 492 (1995) ("The issue left unresolved in Ake" is whether the defendant has "merely the right to an evaluation by a neutral mental health expert"); Giannelli et al., The Constitutional Right to Defense Experts, 16 Pub. Def. Rptr. 3 (Summer 1993) ("Ake fails to specify clearly the role of the expert—whether the appointment of a neutral expert, who reports to the court, satisfies due process, or whether a partisan defense expert is required"); Note, The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of Ake, 30 Am. Crim. L. Rev. 1329, 1356 (1993) (calling this the "preeminent ambiguity" in the opinion); Harris, Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent, 68 N. C. L. Rev. 763, 768, n. 44 (1990) ("The Court gave mixed signals concerning the psychiatrist's role with regard to a criminal defendant, resulting in lower court disagreement on the proper interpretation of Ake on this point"); Comment, A Question of Competence: The Indigent Criminal Defendant's Right to Adequate and Competent Psychiatric Assistance After Ake v. Oklahoma, 14 Vt. L. Rev. 121, 127 (1989) (Ake "left unanswered many questions," including "whether the defendant is entitled to 'neutral' or 'partisan' assistance"); Dubia, The Defense Right to Psychiatric Assistance in Light of Ake v. Oklahoma, 1987 Army Lawyer 15, 19–20 (Ake "did not define clearly the role of the state-supplied psychiatrist," and "[a] strong case can be made that Ake requires only access to an independent psychiatric examination"); Note, Due Process and Psychiatric Assistance: Ake v. Oklahoma, 21 Tulsa L. J. 121, 143 (1985) ("The Court is unclear as to the exact nature and scope of the substantive right it has created"); Sallet, Book Review, After Hinckley: The Insanity Defense Reexamined, 94 Yale L. J. 1545, 1551, n. 18 (1985) (predicting that "whether the Constitution requires one psychiatrist or rather one defense-oriented psychiatrist" would "likely be the next constitutional issue adjudicated").

In this case, the Alabama courts held that Ake is satisfied by the appointment of a neutral expert, and it is impossible to say that "there could be no reasonable dispute that they were wrong." Donald, 575 U. S., at ___ (slip op., 5).

II

McWilliams's petition for certiorari asked us to decide two questions. Pet. for Cert. i. The first was the legal question discussed above; the second raised an issue that is tied to the specific facts of McWilliams's case: whether the neutral expert appointed in this case failed to provide the assistance that Ake requires because he "distributed his report to all parties just two days before sentencing and was unable to review voluminous medical and psychological records." Pet. for Cert. i. Our Rules and practice disfavor questions of this nature, see this Court's Rule 10, and we denied review. Heeding our decision, the parties briefed the first question but scarcely mentioned anything related to the second.

The Court, however, feels no similar obligation to abide by the Rules. The Court refuses to decide the legal question on which we granted review and instead decides the question on which review was denied. The Court holds that "Alabama here did not meet even Ake's most basic requirements." Ante, at 14. In support of this conclusion, the Court states that neither Dr. Goff (the expert appointed by the trial judge) nor any other expert provided assistance in understanding and evaluating medical reports and records, preparing a legal strategy, presenting evidence, or preparing to cross-examine witnesses. Ibid. The Court does not question Dr. Goff's qualifications or his objectivity. Instead, the crux of the Court's complaint is that Dr. Goff merely submitted his report and did not provide further assistance to the defense. Ibid. But as far as the record shows, Dr. Goff was never asked and never refused to provide assistance to McWilliams. He did not provide the assistance that the Court finds essential because his report was not given to the parties until two days before sentencing, and arrangements were not made for him to provide the assistance during that brief interlude. Thus, the question that the Court decides is precisely the question on which we denied review: namely, whether Dr. Goff 's assistance was deficient because he "distributed his report to all parties just two days before sentencing and was unable to review voluminous medical and psychological records." Pet. for Cert. i

Our Rules instruct litigants that we will consider only the questions on which review was granted and "subsidiary question fairly included therein." This Court's Rule 14.1(a); Yee v. Escondido, 503 U. S. 519, 535 (1992) (The Court will consider an "unpresented question" only in "the most exceptional cases" (internal quotation marks omitted)); see also this Court's Rule 24.1(a) (parties may not change the substance of the question presented once granted). And we have not hesitated to enforce these Rules when petitioners who "persuaded us to grant certiorari" on one question instead "chose to rely on a different argument in their merits briefing." Visa, Inc. v. Osborn, 580 U. S. ___ (2016) (internal quotation marks omitted) (dismissing cases as improvidently granted on this ground).

These Rules exist for good reasons. Among other things, they give the parties notice of the question to be decided and ensure that we receive adversarial briefing, see Yee, supra, at 536, which in turns helps the Court reach sound decisions. But in this case, the Court feels free to disregard our Rules and long-established practice. If McWilliams, after inducing us to grant certiorari on the first question presented, had decided to ignore that question and instead brief a fact-specific alternative theory, we would have dismissed the case as improvidently granted. We do not tolerate this sort of bait-and-switch tactic from litigants, and we should not engage in it ourselves.

The Court's approach is acutely unfair to Alabama. The State surely believed that it did not need to brief the second question presented in McWilliams's petition. The State vigorously opposed review of that question, calling it "an invitation to conduct factbound error correction," Brief in Opposition 13, and we denied review. It will come as a nasty surprise to Alabama that the Court has ruled against it on the very question we declined to review—and without giving the State a fair chance to respond.[158]

It is worth remembering that today's ruling requires the Court to conclude that the state court's treatment of McWilliams's Ake claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S., at 103. This "standard is difficult to meet," id., at 102, and Alabama would surely have appreciated the opportunity to contest whether McWilliams has met it.

---

[158] The Court is incorrect in suggesting that Alabama "devoted an entire section of its merits brief" to the question that the Court decides. Ante, at 14. In the section to which the Court refers, Alabama argued that even if McWilliams was entitled to relief under Ake to a partisan expert, no relief was warranted because he "had a consulting expert that did not report to the State," i.e. "a psychologist employed at the University of Alabama," and because the trial court ordered every form of testing that the defense requested. Brief for Respondents 50–52. Exactly six sentences of the State's briefing in this section, id., at 52, touch on the services provided by Dr. Goff and the trial court's denial of a continuance. The State's inclusion of this fleeting discussion cannot justify a decision based on a question on which relief was denied.

Denying Alabama that chance does not show "[a] proper respect for AEDPA's high bar for habeas relief," which counsels restraint in "disturbing the State's significant interest in repose for concluded litigation, denying society the right to punish some admitted offenders, and intruding on state sovereignty to a degree matched by few exercises of federal authority." Virginia v. LeBlanc, ante, at 5 (per curiam) (alterations and internal quotation marks omitted).

It is debatable whether the Court has even answered question two correctly (and, of course, meaningful briefing by the parties would have allowed the Court to answer the question with more confidence).[159] But the fundamental point is that the Court should not have addressed this question at all.

III

Having completed an arduous detour around the question that we agreed to decide, the majority encounters an inconvenient roadblock: The Court of Appeals has already determined that any error of the sort the majority identifies today was harmless. So the majority relies on the thinnest of reasons to require the Eleventh Circuit to redo its analysis. That conclusion is unwarranted, and nothing in the majority opinion prevents the Court of Appeals from reaching the same result on remand.

The majority claims that the Court of Appeals did not "specifically consider whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that Ake requires would have mattered." Ante, at 15. But the Court of Appeals concluded that, even if Dr. Goff 's performance did not satisfy Ake, the error did not have a substantial and injurious effect on the outcome of the sentencing proceeding. McWilliams v. Commissioner, Ala. Dept. of Corrections, 634 Fed. Appx. 698, 706–707 (CA11 2015) (per curiam). Thus, the Court of Appeals specifically addressed the very question that the majority instructs it to consider on remand.

---

159 The Court never even recites the applicable standard: whether the Alabama courts erred beyond fairminded disagreement in rejecting McWilliams's claim under Ake v. Oklahoma, 470 U. S. 68 (1985). Harrington v. Richter, 562 U. S. 86, 103 (2011). This bar is difficult for a habeas petitioner to hurdle, and it is far from clear that McWilliams has done so. The Court says that Dr. Goff did not play the role Ake requires of an expert because he only examined McWilliams and reported his findings to the trial court. Ante, at 15. But that is exactly what the trial court (at McWilliams's request) ordered him to do. Cert. Trial Record 1615, 1616. The Court briskly concludes that Dr. Goff did not assist the defense in understanding his report prior to the hearing or testify for McWilliams at the judicial sentencing hearing. Ante, at 14–15. But the Alabama Court of Criminal Appeals found "no indication in the record that [McWilliams] could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings." McWilliams v. State, 640 So. 2d 982, 991 (1991). And the Eleventh Circuit saw no reason why McWilliams's defense team could not have been in contact with Dr. Goff while he was preparing the report. McWilliams v. Commissioner, Ala. Dept. of Corrections, 634 Fed. Appx. 698, 706–707 (2015) (per curiam).

If the majority disagrees with the Court of Appeals' decision on that question, it should explain its reasons, but the majority is unwilling to tackle that matter and instead recites that "we are a court of review, not first view." Ante, at 16 (internal quotation marks omitted). The Court's invocation of this oft-used formulation is utterly inapt because the Eleventh Circuit has already reviewed the question of harmless error. Moreover, unlike the question that the majority does decide, the harmless-error issue was at least briefed in a meaningful way by the parties. Brief for Petitioner 41–46; Brief for Respondents 52–56; Reply Brief 14–16.

Had the Court confronted the harmless-error issue, it would have found it difficult to reject the Court of Appeals' conclusion that any Ake error here was harmless. In 1984, McWilliams "raped, robbed, and murdered Patricia Vallery Reynolds." McWilliams v. State, 640 So. 2d 982, 986 (Ala. Crim. App. 1991) (internal quotation marks omitted). Reynolds was a clerk at a convenience store in Tuscaloosa, Alabama. Ibid. McWilliams robbed the store, brutally raped Reynolds in a back room, then left her on the floor to die after shooting her six times execution style with a .38 caliber pistol. Ibid. After McWilliams was apprehended, he bragged to other jail inmates about what he had done. Id., at 987. The jury needed less than an hour of deliberation to find him guilty, and it recommended the death penalty by a 10-to-2 vote the following day. Id., at 986.

Agreeing with the jury's nonbinding recommendation, the trial court imposed the death penalty based on three aggravating circumstances. McWilliams had prior violent felony convictions for first-degree robbery and first-degree rape. App. 182a–183a. He murdered Reynolds in the course of committing a robbery and rape. Id., at 183a. And his crime "was especially heinous, atrocious, or cruel": He executed the only potential eyewitness to his robbery, and his conduct during and after the crime showed an "obvious lack of regard or compassion for the life and human dignity of the victim." Id., at 184a. Balanced against these three aggravators was McWilliams's claim that he was psychotic and suffered from organic brain dysfunction—the mitigating evidence that Dr. Goff 's report supposedly would have supported. But the sentencing court concluded that this evidence "did not rise to the level of a mitigating circumstance," in part because of the extensive evidence that McWilliams was feigning symptoms. Id., at 188a. And in any event, the sentencing court found that "the aggravating circumstances would far outweigh this as a mitigating circumstance." Ibid. (emphasis added).

The majority hints that the sentencing court's weighing might have been different if McWilliams had been afforded more time to work with Dr. Goff to prepare a mitigation

presentation and to introduce Dr. Goff 's testimony at the sentencing hearing. But there is little basis for this belief. The defense would have faced potential rebuttal testimony from three doctors who evaluated McWilliams and firmly concluded that McWilliams's mental state did not reduce his responsibility for his actions. Certified Trial Record 1545 (Dr. Yumul) (McWilliams "was responsible and free of mental illness at the time of the alleged offense"); id., at 1546 (Dr. Nagi) (McWilliams "was not suffering from a mental illness" at the time of the crime and "[t]here see[m] to be no mitigating circumstances involved in [his] case"); ibid. (Dr. Bryant) (finding no "evidence of psychiatric symptoms of other illness that would provide a basis for mitigating factors at the time of the alleged crime"). One of these psychiatrists also concluded that McWilliams was "grossly exaggerating his psychological symptoms to mimic mental illness" and that he "obviously" did so "to evade criminal prosecution." Ibid. (Dr. Nagi). Even Dr. Goff found it "quite obvious" that McWilliams's "symptoms of psychiatric disturbance [were] quite exaggerated and, perhaps, feigned." Id., at 1635. In light of all this, the defense would have faced an uphill battle in convincing the sentencing judge that, despite McWilliams's consistent malingering, his mental health was so impaired that it constituted a mitigating circumstance and that it outweighed the three aggravators the State proved. If the sentencing judge had thought that there was a possibility that hearing from Dr. Goff would change his evaluation of aggravating and mitigating factors, he could have granted a continuance and called for Dr. Goff to appear. But he did not do so.

The majority also ignores the fact that McWilliams has already had the chance to show that the outcome of the sentencing proceeding would have been different if he had been given more expert assistance. In state postconviction proceedings, McWilliams argued that he was denied effective assistance of counsel because his lawyers did not obtain an expert who would have fully probed his mental state for purposes of mitigation. McWilliams called an expert, Dr. Woods, who offered the opinion that McWilliams suffered from bipolar disorder at the time of the crime and testified that McWilliams's exaggeration of symptoms was not inconsistent with psychiatric problems. But Dr. Woods also acknowledged that McWilliams "tr[ied] to malinger for purposes of making himself look worse than he is," agreed that this malingering could have been done for the purpose of avoiding the death penalty, and declined to say that McWilliams's disorder explains why he raped and murdered Reynolds. Postconviction Tr. 1002–1005, 1022–1023. Dr. Woods even endorsed Dr. Goff's conclusion that McWilliams "exaggerated certain aspects of his impairment." Id., at 955 ("I think Dr. Goff did an excellent job of attempting to separate out what were in fact exaggerations and

what was real impairment"). The State introduced a psychologist of its own (Dr. Kirkland) who strenuously disagreed with Dr. Woods's diagnosis and concluded that nothing "indicate[s] that Mr. McWilliams was mentally impaired on the night of the offense." Id., at 1088. At the end of a lengthy hearing in which both experts addressed the malingering issue (see, e.g., id., at 935–943, 955, 964–966, 1076–1077), the state postconviction court found that "McWilliams's claims

based upon the testimony of Dr. Woods are without merit." Id., at 1810. It credited the "consensus opinion" reached by the three neutral state psychiatrists, who observed and evaluated McWilliams for over a month before his trial and concluded that he "did not suffer from a mental illness." Id., at 1812. It expressly found that "both the credibility of Dr. Woods and the reliability of his findings are questionable." Id., at 1814. And even if Dr. Woods's diagnosis was accurate, the court stated, it "[would] not find that a failure to present" evidence of this sort "made a difference in the outcome." Id., 1815.[160] The Alabama Court of Criminal Appeals affirmed, McWilliams v. State, 897 So. 2d 437 (2004), and the Alabama Supreme Court denied review. I see no ground for disturbing the Eleventh Circuit's decision on harmless error.[161]

* * *

The Court's decision represents an inexcusable departure from sound practice. I would affirm the judgment below, and I therefore respectfully dissent.

---

[160] Dr. Goff was notably absent from the postconviction proceeding. McWilliams's failure to call him as a witness there creates a "void in the record" that prevents McWilliams from carrying his burden of showing "how additional time with Dr. Goff (and his report) would have benefited the defense." 634 Fed. Appx., at 712 (Jordan, J., concurring). It also suggests that, to McWilliams's postconviction counsel, Dr. Goff's diagnosis and the opportunity to present it to the sentencer was not as important as McWilliams suggests.

[161] McWilliams's entitlement to relief under Ake is questionable for an additional reason. Ake held that the right to a psychiatric expert at capital sentencing comes into play "when the State presents psychiatric evidence of the defendant's future dangerousness." 470 U. S., at 83–84, 86. Here, the State did not introduce such evidence because future dangerousness was not an aggravator under Alabama law. See App. 182a–184a. As lower courts have noted, we have never held that a capital defendant is entitled to the assistance of a psychiatric expert at sentencing where future dangerousness is not in issue and the State does not introduce psychiatric evidence to prove it. See, e.g., Revilla v. Gibson, 283 F. 3d 1203, 1220–1221 (CA10 2002) ("Ake held only that an indigent capital defendant must, upon request, be provided an expert for the penalty phase when the State presents psychiatric evidence of the defendant's future dangerousness" (internal quotation marks omitted)); Ramdass v. Angelone, 187 F. 3d 396, 409 (CA4 1999) ("Ake provides a right to assistance of a mental health expert only if . . . , in arguing future dangerousness in the sentencing phase, the prosecution used expert psychiatric testimony"); Goodwin v. Johnson, 132 F. 3d 162, 189 (CA5 1997), as amended Jan. 15, 1998 ("Ake only creates an entitlement to the assistance of a psychiatrist during sentencing when the state offers psychiatric evidence of the defendant's future dangerousness" (emphasis deleted)).

CASE IV

SESSIONS, ATTORNEY GENERAL *v*. MORALES SANTANA

OCTOBER TERM, 2016

SUPREME COURT OF THE UNITED STATES

Syllabus[162]

SESSIONS, ATTORNEY GENERAL v. MORALES SANTANA

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

No. 15–1191. Argued November 9, 2016—Decided June 12, 2017

The Immigration and Nationality Act provides the framework for ac quisition of U. S. citizenship from birth by a child born abroad, when one parent is a U. S. citizen and the other a citizen of another nation. Applicable to married couples, the main rule in effect at the time here relevant, 8 U. S. C. §1401(a)(7) (1958 ed.), required the U. S.-citizen parent to have ten years' physical presence in the United States prior to the child's birth, "at least five of which were after attaining" age 14. The rule is made applicable to unwed U. S.-citizen fathers by §1409(a), but §1409(c) creates an exception for an unwed U. S.-citizen mother, whose citizenship can be transmitted to a child born abroad if she has lived continuously in the United States for just one year prior to the child's birth.

Respondent Luis Ramón Morales-Santana, who has lived in the United States since he was 13, asserts U. S. citizenship at birth based on the U. S. citizenship of his biological father, José Morales. José moved to the Dominican Republic 20 days short of his 19th birthday, therefore failing to satisfy §1401(a)(7)'s requirement of five years' physical presence after age 14. There, he lived

---

[162] 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.

with the Dominican woman who gave birth to Morales-Santana. José accepted parental responsibility and included Morales-Santana in his house hold; he married Morales-Santana's mother and his name was then added to hers on Morales-Santana's birth certificate. In 2000, the Government sought to remove Morales-Santana based on several criminal convictions, ranking him as alien because, at his time of birth, his father did not satisfy the requirement of five years' physical presence after age 14. An immigration judge rejected Morales Santana's citizenship claim and ordered his removal. Morales Santana later moved to reopen the proceedings, asserting that the Government's refusal to recognize that he derived citizenship from his U. S.-citizen father violated the Constitution's equal protection guarantee. The Board of Immigration Appeals denied the motion, but the Second Circuit reversed. Relying on this Court's post-1970 construction of the equal protection principle as it bears on genderbased classifications, the court held unconstitutional the differential treatment of unwed mothers and fathers. To cure this infirmity, the Court of Appeals held that Morales-Santana derived citizenship through his father, just as he would were his mother the U. S. citizen.

Held:

1. The gender line Congress drew is incompatible with the Fifth Amendment's requirement that the Government accord to all persons "the equal protection of the laws." Pp. 6–23.

(a) Morales-Santana satisfies the requirements for third-party standing in seeking to vindicate his father's right to equal protection. José Morales' ability to pass citizenship to his son easily satisfies the requirement that the third party have a " 'close' relationship with the person who possesses the right." Kowalski v. Tesmer, 543 U. S. 125, 130. And José's death many years before the current controversy arose is "a 'hindrance' to [José's] ability to protect his own interests." Ibid. Pp. 6–7.

(b) Sections 1401 and 1409 date from an era when the Nation's lawbooks were rife with overbroad generalizations about the way men and women are. Today, such laws receive the heightened scrutiny that now attends "all gender-based classifications," J. E. B. v. Alabama ex rel. T. B., 511 U. S. 127, 136, including laws granting or denying benefits "on the basis of the sex of the qualifying parent," Califano v. Westcott, 443 U. S. 76, 84. Prescribing one rule for moth ers, another for fathers, §1409 is of the same genre as the classifica tions declared unconstitutional in Westcott;

Reed v. Reed, 404 U. S. 71, 74, 76–77; Frontiero v. Richardson, 411 U. S. 677, 688–691; Weinberger v. Wiesenfeld, 420 U. S. 636, 648–653; and Califano v. Goldfarb, 430 U. S. 199, 206–207. A successful defense therefore requires an"'exceedingly persuasive justification.'" United States v. Virginia, 518 U. S. 515, 531. Pp. 7–9.

(c) The Government must show, at least, that its gender-based "'classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to [achieving] those objectives."'" Virginia,518U.S.,at533. The classification must serve an important governmental interest today, for "new insights and societal understandings can reveal unjustified ine quality . . . that once passed unnoticed and unchallenged." Obergefell v. Hodges, 576 U. S. ___, ___. Pp. 9–14.

(1) At the time §1409 was enacted as part of the Nationality Act of 1940 (1940 Act), two once habitual, but now untenable, assumptions pervaded the Nation's citizenship laws and underpinned judicial and administrative rulings: In marriage, husband is dominant, wife subordinate; unwed mother is the sole guardian of a nonmarital child. In the 1940 Act, Congress codified the mother-as-sole guardian perception for unmarried parents. According to the stereo type, a residency requirement was justified for unwed citizen fathers, who would care little about, and have scant contact with, their non marital children. Unwed citizen mothers needed no such prophylactic, because the alien father, along with his foreign ways, was presumptively out of the picture. Pp. 9–13.

(2) For close to a half century, this Court has viewed with suspicion laws that rely on "overbroad generalizations about the differ ent talents, capacities, or preferences of males and females." Virginia, 518 U. S., at 533. No "important [governmental] interest" is served by laws grounded, as §1409(a) and (c) are, in the obsolescing view that "unwed fathers [are] invariably less qualified and entitled than mothers" to take responsibility for nonmarital children. Caban v. Mohammed, 441 U. S. 380, 382, 394. In light of this equal protection jurisprudence, §1409(a) and (c)'s discrete duration-of-residence requirements for mothers and fathers are anachronistic. Pp. 13–14.

(d) The Government points to Fiallo v. Bell, 430 U. S. 787; Miller v. Albright, 523 U. S. 420; and Nguyen v. INS, 533 U. S. 53, for sup port. But Fiallo involved entry preferences for alien children; the case did not present a claim of U. S. citizenship. And Miller and Nguyen addressed a

paternal-acknowledgment requirement well met here, not the length of a parent's prebirth residency in the United States. Pp. 14–16.

(e) The Government's suggested rationales for §1409(a) and (c)'s gender-based differential do not survive heightened scrutiny. Pp. 16–
23.

(1) The Government asserts that Congress sought to ensure that a child born abroad has a strong connection to the United States. The statute, the Government suggests, bracketed an unwed U. S. citizen mother with a married couple in which both parents are U. S. citizens because she is the only legally recognized parent at birth; and aligned an unwed U. S.-citizen father with a married couple, one spouse a citizen, the other, an alien, because of the competing national influence of the alien mother. This rationale conforms to the long-held view that unwed fathers care little about their children. And the gender-based means scarcely serve the suggested congressional interest. Citizenship may be transmitted to children who have no tie to the United States so long as their U. S.-citizen mother was continuously present in the United States for one year at any point in her life prior to the child's birth; but it may not be transmitted by a U. S.-citizen father who falls a few days short of meeting §1401(a)(7)'s longer physical-presence requirements, even if he acknowledges paternity on the day the child is born and raises the child in the United States. Pp. 17–19.

(2) The Government also maintains that Congress wished to reduce the risk of statelessness for the foreign-born child of a U. S. citizen. But congressional hearings and reports offer no support for the assertion that a statelessness concern prompted the diverse physical-presence requirements. Nor has the Government shown that the risk of statelessness disproportionately endangered the children of unwed U. S.-citizen mothers. Pp. 19–23.

2. Because this Court is not equipped to convert §1409(c)'s exception for unwed U. S.-citizen mothers into the main rule displacing §§1401(a)(7) and 1409(a), it falls to Congress to select a uniform prescription that neither favors nor disadvantages any person on the basis of gender. In the interim, §1401(a)(7)'s current requirement should apply, prospectively, to children born to unwed U. S.-citizen mothers. The legislature's intent, as revealed by the statute at hand, governs the choice between the two remedial alternatives: extending favorable treatment to the excluded class or withdrawing favorable treatment from the favored class. Ordinarily, the preferred rule is to extend favorable treatment. Westcott, 443 U. S., at 89–90. Here, however, extension to fathers of §1409(c)'s favorable treatment for mothers would displace Congress' general rule, the longer

physical presence requirements of §§1401(a)(7) and 1409 applicable to unwed U. S.-citizen fathers and U. S.-citizen parents, male as well as female, married to the child's alien parent. Congress' " 'commitment to th[is] residual policy' " and " 'the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation,' " Heckler v. Mathews, 465 U. S. 728, 739, n. 5, indicate that Congress would likely have abrogated §1409(c)'s special exception, preferring to preserve "the importance of residence in this country as the talisman of dedicated attachment," Rogers v. Bellei, 401 U. S. 815, 834. Pp. 23–28.

804 F. 3d 520, affirmed in part, reversed in part, and remanded.

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

Opinion of the Court[163]

SUPREME COURT OF THE UNITED STATES

No. 15–1191

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL, PETITIONER v. LUIS RAMON MORALES-SANTANA

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

[June 12, 2017]

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns a gender-based differential in the law governing acquisition of U. S. citizenship by a child born abroad, when one parent is a U. S. citizen, the other, a citizen of another nation. The main rule appears in 8 U. S. C. §1401(a)(7) (1958 ed.), now §1401(g) (2012 ed.). Applicable to married couples, §1401(a)(7) requires a period of physical presence in the United States for the U. S.-citizen parent. The requirement, as initially pre scribed, was ten years' physical presence prior to the child's birth, §601(g) (1940 ed.); currently, the requirement is five years prebirth, §1401(g) (2012 ed.). That main rule is rendered applicable to unwed U. S.-citizen fathers

---

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

by §1409(a). Congress ordered an exception, however, for unwed U. S.-citizen mothers. Contained in §1409(c), the exception allows an unwed mother to transmit her citizen ship to a child born abroad if she has lived in the United States for just one year prior to the child's birth.

The respondent in this case, Luis Ramón MoralesSantana, was born in the Dominican Republic when his father was just 20 days short of meeting §1401(a)(7)'s physical-presence requirement. Opposing removal to the Dominican Republic, Morales-Santana asserts that the equal protection principle implicit in the Fifth Amendment[164] entitles him to citizenship stature. We hold that the gender line Congress drew is incompatible with the requirement that the Government accord to all persons "the equal protection of the laws." Nevertheless, we can not convert §1409(c)'s exception for unwed mothers into the main rule displacing §1401(a)(7) (covering married couples) and §1409(a) (covering unwed fathers). We must therefore leave it to Congress to select, going forward, a physical-presence requirement (ten years, one year, or some other period) uniformly applicable to all children born abroad with one U. S.-citizen and one alien parent, wed or unwed. In the interim, the Government must ensure that the laws in question are administered in a manner free from gender-based discrimination.

I

A

We first describe in greater detail the regime Congress constructed. The general rules for acquiring U. S. citizen ship are found in 8 U. S. C. §1401, the first section in Chapter 1 of Title III of the Immigration and Nationality Act (1952 Act or INA), §301, 66 Stat. 235–236. Section 1401 sets forth the INA's rules for determining who "shall be nationals and citizens of the United States at birth" by establishing a range of residency and physical-presence requirements calibrated primarily to the parents' nation ality and the child's place of birth. §1401(a) (1958 ed.); §1401 (2012 ed.). The primacy of §1401 in the statutory scheme is evident. Comprehensive in coverage, §1401

---

164 As this case involves federal, not state, legislation, the applicable equality guarantee is not the Fourteenth Amendment's explicit Equal Protection Clause, it is the guarantee implicit in the Fifth Amend ment's Due Process Clause. See Weinberger v. Wiesenfeld, 420 U. S. 636, 638, n. 2 (1975) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." (citations and internal quotation marks omitted; alteration in original)).

provides the general framework for the acquisition of citizenship at birth. In particular, at the time relevant here,[165] §1401(a)(7) provided for the U. S. citizenship of

> "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its out lying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be in cluded in computing the physical presence require ments of this paragraph."

Congress has since reduced the duration requirement to five years, two after age 14. §1401(g) (2012 ed.).[166]

Section 1409 pertains specifically to children with un married parents. Its first subsection, §1409(a), incorpo rates by reference the physical-presence requirements of §1401, thereby allowing an acknowledged unwed citizen parent to transmit U. S. citizenship to a foreign-born child under the same terms as a married citizen parent. Section 1409(c)—a provision applicable only to unwed U. S.-citizen mothers—states an exception to the physical-presence requirements of §§1401 and 1409(a). Under §1409(c)'s exception, only one year of continuous physical presence is required before unwed mothers may pass citizenship to their children born abroad.

B

Respondent Luis Ramón Morales-Santana moved to the United States at age 13, and has resided in this country most of his life. Now facing deportation, he asserts U. S. citizenship at birth

---

[165] Unless otherwise noted, references to 8 U. S. C. §§1401 and 1409 are to the 1958 edition of the U. S. Code, the version in effect when re spondent Morales-Santana was born. Section 1409(a) and (c) have retained their numbering; §1401(a)(7) has become §1401(g).

[166] The reduction affects only children born on or after November 14, 1986. §8(r), 102 Stat. 2619; see §§12–13, 100 Stat. 3657. Because Morales-Santana was born in 1962, his challenge is to the ten-years, five-after-age-14 requirement applicable at the time of his birth.

based on the citizenship of his biologi cal father, José Morales, who accepted parental responsi bility and included Morales-Santana in his household.

José Morales was born in Guánica, Puerto Rico, on March 19, 1900. Record 55–56. Puerto Rico was then, as it is now, part of the United States, see Puerto Rico v. Sanchez Valle, 579 U. S. ___, ___–___ (2016) (slip op., at 2– 4); 8 U. S. C. §1101(a)(38) (1958 ed.) ("The term United States . . . means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the [U. S.] Virgin Is lands." (internal quotation marks omitted)); §1101(a)(38) (2012 ed.) (similar), and José became a U. S. citizen under the Organic Act of Puerto Rico, ch. 145, §5, 39 Stat. 953 (a predecessor to 8 U. S. C. §1402). After living in Puerto Rico for nearly two decades, José left his childhood home on February 27, 1919, 20 days short of his 19th birthday, therefore failing to satisfy §1401(a)(7)'s requirement of five years' physical presence after age 14. Record 57, 66. He did so to take up employment as a builder-mechanic for a U. S. company in the then-U. S.-occupied Dominican Republic. Ibid.[167]

By 1959, José attested in a June 21, 1971 affidavit presented to the U. S. Embassy in the Dominican Repub lic, he was living with Yrma Santana Montilla, a Domini can woman he would eventually marry. Id., at 57. In 1962, Yrma gave birth to their child, respondent Luis Morales-Santana. Id., at 166–167. While the record before us reveals little about Morales-Santana's childhood, the Dominican archives disclose that Yrma and José mar ried in 1970, and that José was then added to Morales Santana's birth certificate as his father. Id., at 163–164, 167. José also related in the same affidavit that he was then saving money "for the susten[ance] of [his] family" in anticipation of undergoing surgery in Puerto Rico, where members of his family still resided. Id., at 57. In 1975, when Morales-Santana was 13, he moved to Puerto Rico, id., at 368, and by 1976, the year his

167 See generally B. Calder, The Impact of Intervention: The Dominican Republic During the U. S. Occupation of 1916–1924, pp. 17, 204–205 (1984) (describing establishment of a U. S. military government in the Dominican Republic in 1916, and plans, beginning in late 1920, for withdrawal).

father died, he was attending public school in the Bronx, a New York City borough, id., at 140, 369.[168]

C

In 2000, the Government placed Morales-Santana in removal proceedings based on several convictions for offenses under New York State Penal Law, all of them rendered on May 17, 1995. Id., at 426. Morales-Santana ranked as an alien despite the many years he lived in the United States, because, at the time of his birth, his father did not satisfy the requirement of five years' physical presence after age 14. See supra, at 3–4, and n. 3. An immigration judge rejected Morales-Santana's claim to citizenship derived from the U. S. citizenship of his father, and ordered Morales-Santana's removal to the Dominican Republic. Record 253, 366; App. to Pet. for Cert. 45a–49a. In 2010, Morales-Santana moved to reopen the proceed ings, asserting that the Government's refusal to recognize that he derived citizenship from his U. S.-citizen father violated the Constitution's equal protection guarantee. See Record 27, 45. The Board of Immigration Appeals (BIA) denied the motion. App. to Pet. for Cert. 8a, 42a– 44a.

The United States Court of Appeals for the Second Circuit reversed the BIA's decision. 804 F. 3d 520, 524 (2015). Relying on this Court's post-1970 construction of the equal protection principle as it bears on gender-based classifications, the court held unconstitutional the differ ential treatment of unwed mothers and fathers. Id., at 527–535. To cure the constitutional flaw, the court further held that Morales-Santana derived citizenship through his father, just as he would were his mother the U. S. citizen. Id., at 535–538. In so ruling, the Second Circuit declined to follow the conflicting decision of the Ninth Circuit in United States v. Flores-Villar, 536 F. 3d 990 (2008), see 804 F. 3d, at 530, 535, n. 17. We granted certiorari in Flores-Villar, but ultimately affirmed by an equally divided Court. Flores-Villar v. United States, 564 U. S. 210 (2011) (per curiam). Taking up Morales-Santana's request for review, 579 U. S. ___ (2016), we consider the matter anew.

II

[168] There is no question that Morales-Santana himself satisfied the five-year residence requirement that once conditioned a child's acquisi tion of citizenship under §1401(a)(7). See §1401(b).

Because §1409 treats sons and daughters alike, MoralesSantana does not suffer discrimination on the basis of his gender. He complains, instead, of gender-based discrimi nation against his father, who was unwed at the time of Morales-Santana's birth and was not accorded the right an unwed U. S.-citizen mother would have to transmit citi zenship to her child. Although the Government does not contend otherwise, we briefly explain why Morales-Santana may seek to vindicate his father's right to the equal protection of the laws.[169]

Ordinarily, a party "must assert his own legal rights" and "cannot rest his claim to relief on the legal rights . . . of third parties." Warth v. Seldin, 422 U. S. 490, 499 (1975). But we recognize an exception where, as here, "the party asserting the right has a close relationship with the person who possesses the right [and] there is a hindrance to the possessor's ability to protect his own interests." Kowalski v. Tesmer, 543 U. S. 125, 130 (2004) (quoting Powers v. Ohio, 499 U. S. 400, 411 (1991)). José Morales' ability to pass citizenship to his son, respondent MoralesSantana, easily satisfies the "close relationship" require ment. So, too, is the "hindrance" requirement well met. José Morales' failure to assert a claim in his own right "stems from disability," not "disinterest," Miller v. Albright, 523 U. S. 420, 450 (1998) (O'Connor, J., concurring in judgment), for José died in 1976, Record 140, many years before the current controversy arose. See Hodel v. Irving, 481 U. S. 704, 711–712, 723, n. 7 (1987) (children and their guardians may assert Fifth Amendment rights of deceased relatives). Morales-Santana is thus the "obvious claimant," see Craig v. Boren, 429 U. S. 190, 197 (1976), the "best available proponent," Singleton v. Wulff, 428 U. S. 106, 116 (1976), of his father's right to equal protection.

III

Sections 1401 and 1409, we note, date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are. See, e.g., Hoyt v. Florida, 368 U. S. 57, 62 (1961) (women are the "center of home and family life," therefore they can be "relieved from the civic duty of jury service"); Goesaert v. Cleary, 335 U. S. 464, 466 (1948) (States may draw "a sharp line between the sexes"). Today, laws of this kind are subject to review under the heightened scrutiny that now attends "all gender-based classifications." J. E. B. v. Alabama ex rel.

---

[169] We explain why Morales-Santana has third-party standing in view of the Government's opposition to such standing in Flores-Villar v. United States, 564 U. S. 210 (2011) (per curiam). See Brief for United States, O. T. 2010, No. 09–5801, pp. 10–14.

T. B., 511 U. S. 127, 136 (1994); see, e.g., United States v. Virginia, 518 U. S. 515, 555–556 (1996) (state-maintained military academy may not deny admis sion to qualified women).

Laws granting or denying benefits "on the basis of the sex of the qualifying parent," our post-1970 decisions affirm, differentiate on the basis of gender, and therefore attract heightened review under the Constitution's equal protection guarantee. Califano v. Westcott, 443 U. S. 76, 84 (1979); see id., at 88–89 (holding unconstitutional provision of unemployed-parent benefits exclusively to fathers). Accord Califano v. Goldfarb, 430 U. S. 199, 206– 207 (1977) (plurality opinion) (holding unconstitutional a Social Security classification that denied widowers survi vors' benefits available to widows); Weinberger v. Wiesenfeld, 420 U. S. 636, 648–653 (1975) (holding unconstitu tional a Social Security classification that excluded fathers from receipt of child-in-care benefits available to mothers); Frontiero v. Richardson, 411 U. S. 677, 688–691 (1973) (plurality opinion) (holding unconstitutional exclusion of married female officers in the military from benefits au tomatically accorded married male officers); cf. Reed v. Reed, 404 U. S. 71, 74, 76–77 (1971) (holding unconstitu tional a probate-code preference for a father over a mother as administrator of a deceased child's estate).[170]

Prescribing one rule for mothers, another for fathers, §1409 is of the same genre as the classifications we de clared unconstitutional in Reed, Frontiero, Wiesenfeld, Goldfarb, and Westcott. As in those cases, heightened scrutiny is in order. Successful defense of legislation that differentiates on the basis of gender, we have reiterated, requires an "exceedingly persuasive justification." Virginia, 518 U.S., at 531 (internal quotation marks omitted); Kirchberg v. Feenstra, 450 U. S. 455, 461 (1981) (internal quotation marks omitted).

A

The defender of legislation that differentiates on the basis of gender must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substan tially related to the achievement of those objectives." Virginia, 518 U. S., at 533 (quoting Mississippi Univ. for Women v. Hogan, 458 U. S. 718, 724 (1982); alteration in original); see Tuan Anh Nguyen v. INS, 533 U. S. 53, 60, 70 (2001). Moreover, the classification

---

170 See Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 34 (1972) ("It is difficult to understand [Reed] without an assumption that some special sensitivity to sex as a classifying factor entered into the analy sis. . . . Only by importing some special suspicion of sex-related means . . . can the [Reed] result be made entirely persuasive.").

must substantially serve an important governmental interest today, for "in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality ... that once passed unnoticed and unchallenged." Obergefell v. Hodges, 576 U. S. ___, ___ (2015) (slip op., at 20). Here, the Govern ment has supplied no "exceedingly persuasive justifica tion," Virginia, 518 U. S., at 531 (internal quotation marks omitted), for §1409(a) and (c)'s "gender-based" and "gender biased" disparity, Westcott, 443 U.S., at 84 (internal quotation marks omitted).

1

History reveals what lurks behind §1409. Enacted in the Nationality Act of 1940 (1940 Act), see 54 Stat. 1139– 1140, §1409 ended a century and a half of congressional silence on the citizenship of children born abroad to unwed parents.[171] During this era, two once habitual, but now untenable, assumptions pervaded our Nation's citizenship laws and underpinned judicial and administrative rulings: In marriage, husband is dominant, wife subordinate; unwed mother is the natural and sole guardian of a nonmarital child.

Under the once entrenched principle of male dominance in marriage, the husband controlled both wife and child. "[D]ominance [of] the husband," this Court observed in 1915, "is an ancient principle of our jurisprudence." Mackenzie v. Hare, 239 U. S. 299, 311 (1915).[172] See generally Brief for Professors of History et al. as Amici Curiae 4–15. Through the early 20th century, a male citizen automati cally conferred U. S. citizenship on his alien wife. Act of Feb. 10, 1855, ch. 71, §2, 10 Stat. 604; see Kelly v. Owen, 7 Wall. 496, 498 (1869) (the 1855 Act "confers the privileges of citizenship upon women married to citizens of the United States"); C. Bredbenner, A Nationality of Her Own: Women, Marriage, and the Law of Citizenship 15–16, 20–21 (1998). A female citizen, however, was incapable of con ferring citizenship on her husband; indeed, she was sub ject to

---

[171] The provision was first codified in 1940 at 8 U. S. C. §605, see §205, 54 Stat. 1139–1140, and recodified in 1952 at §1409, see §309, 66 Stat. 238–239. For simplicity, we here use the latter designation.

[172] This "ancient principle" no longer guides the Court's jurisprudence. See Kirchberg v. Feenstra, 450 U. S. 455, 456 (1981) (invalidating, on equal protection inspection, Louisiana's former "head and master" rule).

expatriation if she married an alien.[173] The family of a citizen or a lawfully admitted permanent resident en joyed statutory exemptions from entry requirements, but only if the citizen or resident was male. See, e.g., Act of Mar. 3, 1903, ch. 1012, §37, 32 Stat. 1221 (wives and children entering the country to join permanent-resident aliens and found to have contracted contagious diseases during transit shall not be deported if the diseases were easily curable or did not present a danger to others); S. Rep. No. 1515, 81st Cong., 2d Sess., 415–417 (1950) (wives exempt from literacy and quota requirements). And from 1790 until 1934, the foreign-born child of a married couple gained U. S. citizenship only through the father.[174]

For unwed parents, the father-controls tradition never held sway. Instead, the mother was regarded as the child's natural and sole guardian. At common law, the mother, and only the mother, was "bound to maintain [a nonmarital child] as its natural guardian." 2 J. Kent, Commentaries on American Law *215–*216 (8th ed. 1854); see Nguyen, 533 U. S., at 91–92 (O'Connor, J., dissenting). In line with that understanding, in the early 20th century, the State Department sometimes permitted unwed mothers to pass citizenship to their children, de spite the absence of any statutory authority for the prac tice. See Hearings on H. R. 6127 before the House Com mittee on Immigration and Naturalization, 76th Cong., 1st Sess., 43, 431 (1940) (hereinafter 1940 Hearings); 39 Op. Atty. Gen. 397, 397–398 (1939); 39 Op. Atty. Gen. 290, 291 (1939). See also Collins, Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation, 123 Yale L. J. 2134, 2199–2205 (2014) (hereinafter Collins).

In the 1940 Act, Congress discarded the father-controls assumption concerning married parents, but codified the mother-as-sole-guardian perception regarding unmarried parents. The Roosevelt administration, which proposed §1409, explained: "[T]he mother [of a nonmarital child] stands in the place of the father . . . [,] has a right to the custody and control of such a child as

---

[173] See generally C. Bredbenner, A Nationality of Her Own: Women, Marriage, and the Law of Citizenship 58–61 (1998); Sapiro, Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States, 13 Politics & Society 1, 4–10 (1984). In 1907, Congress codified several judicial decisions and prevailing State De-partment views by providing that a female U. S. citizen automatically lost her citizenship upon marriage to an alien. Act of Mar. 2, 1907, ch. 2534, §3, 34 Stat. 1228; see L. Gettys, The Law of Citizenship in the United States 119 (1934). This Court upheld the statute. Mackenzie v. Hare, 239 U. S. 299, 311 (1915).

[174] Act of Mar. 26, 1790, ch. 3, 1 Stat. 104; Act of Jan. 29, 1795, §3, 1 Stat. 415; Act of Apr. 14, 1802, §4, 2 Stat. 155; Act of Feb. 10, 1855, ch. 71, §2, 10 Stat. 604; see 2 J. Kent, Commentaries on American Law *52–*53 (8th ed. 1854) (explaining that the 1802 Act, by adding "fa thers," "seem[ed] to remove the doubt" about "whether the act intended by the words, 'children of persons,' both the father and mother, . . . or the father only"); Kerber, No Constitutional Right To Be Ladies: Women and the Obligations of Citizenship 36 (1998); Brief for Professors of History et al. as Amici Curiae 5–6. In 1934, Congress moved in a new direction by allowing a married mother to transmit her citizenship to her child. Act of May 24, 1934, ch. 344, §1, 48 Stat. 797.

against the putative father, and is bound to maintain it as its natural guardian." 1940 Hearings 431 (internal quotation marks omitted).

This unwed-mother-as-natural-guardian notion renders §1409's gender-based residency rules understandable. Fearing that a foreign-born child could turn out "more alien than American in character," the administration believed that a citizen parent with lengthy ties to the United States would counteract the influence of the alien parent. Id., at 426–427. Concern about the attachment of foreign-born children to the United States explains the treatment of unwed citizen fathers, who, according to the familiar stereotype, would care little about, and have scant contact with, their nonmarital children. For unwed citizen mothers, however, there was no need for a pro longed residency prophylactic: The alien father, who might transmit foreign ways, was presumptively out of the pic ture. See id., at 431; Collins 2203 (in "nearly uniform view" of U. S. officials, "almost invariably," the mother alone "concern[ed] herself with [a nonmarital] child" (in ternal quotation marks omitted)).

2

For close to a half century, as earlier observed, see supra, at 7–8, this Court has viewed with suspicion laws that rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." Virginia, 518 U. S., at 533; see Wiesenfeld, 420 U. S., at 643, 648. In particular, we have recognized that if a "statutory objective is to exclude or 'protect' members of one gender" in reliance on "fixed notions concerning [that gender's] roles and abilities," the "objective itself is illegitimate." Mississippi Univ. for Women, 458 U. S., at 725.

In accord with this eventual understanding, the Court has held that no "important [governmental] interest" is served by laws grounded, as §1409(a) and (c) are, in the obsolescing view that "unwed fathers [are] invariably less qualified and entitled than mothers" to take responsibility for nonmarital children. Caban v. Mohammed, 441 U. S. 380, 382, 394 (1979).[175]

[175] Lehr v. Robertson, 463 U. S. 248 (1983), on which the Court relied in Tuan Anh Nguyen v. INS, 533 U. S. 53, 62–64 (2001), recognized that laws treating fathers and mothers differently "may not constitutionally be applied . . . where the mother and father are in fact similarly situated with regard to their relationship with the child," Lehr, 463 U. S., at 267. The "similarly situated" condition was not satisfied in Lehr, however, for the father in that case had "never established any custodial, personal, or financial relationship" with the child. Ibid.

Here, there is no dispute that José Morales formally accepted paren tal responsibility for his son during Morales-Santana's childhood. See supra, at 5. If subject to the same physical-presence requirements that applied to unwed U. S.-citizen mothers, José would have been recognized as Morales-Santana's father "as of the date of birth." §1409(a); see §1409(c) ("at birth").

Overbroad generalizations of that order, the Court has come to comprehend, have a con straining impact, descriptive though they may be of the way many people still order their lives.[176] Laws according or denying benefits in reliance on "[s]tereotypes about women's domestic roles," the Court has observed, may "creat[e] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver." Nevada Dept. of Human Resources v. Hibbs, 538 U. S. 721, 736 (2003). Correspondingly, such laws may disserve men who exercise responsibility for raising their children. See ibid. In light of the equal protection jurisprudence this Court has developed since 1971, see Virginia, 518 U. S., at 531–534, §1409(a) and (c)'s discrete duration-of-residence requirements for unwed mothers and fathers who have accepted parental responsibility is stunningly anachronistic.

B

In urging this Court nevertheless to reject Morales Santana's equal protection plea, the Government cites three decisions of this Court: Fiallo v. Bell, 430 U. S. 787 (1977); Miller v. Albright, 523 U. S. 420; and Nguyen v. INS, 533 U. S. 53. None controls this case.

The 1952 Act provision at issue in Fiallo gave special immigration preferences to alien children of citizen (or lawful-permanent-resident) mothers, and to alien unwed mothers of citizen (or lawful-permanent-resident) children. 430 U. S., at 788–789, and n. 1. Unwed fathers and their children, asserting their right to equal protection, sought the same preferences. Id., at 791. Applying minimal scrutiny (rational-basis review), the Court upheld the provision, relying on Congress' "exceptionally broad power" to admit or exclude aliens. Id., at 792, 794.[177] This case, however, involves no entry preference for aliens. MoralesSantana claims he is, and since birth has been, a U.

---

[176] Even if stereotypes frozen into legislation have "statistical support," our decisions reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn. J. E. B. v. Alabama ex rel. T. B., 511 U. S. 127, 139, n. 11 (1994); see, e.g., Craig v. Boren, 429 U.S. 190, 198–199 (1976); Weinberger v. Wiesenfeld, 420 U. S. 636, 645 (1975). In fact, unwed fathers assume responsibility for their children in numbers already large and notably increasing. See Brief for Population and Family Scholars as Amici Curiae 3, 5–13 (documenting that nonmarital fathers "are [often] in a parental role at the time of their child's birth," and "most . . . formally acknowledge their paternity either at the hospital or in the birthing center just after the child is born"); Brief for American Civil Liberties Union et al. as Amici Curiae 22 (observing, inter alia, that "[i]n 2015, fathers made up 16 percent of single parents with minor children in the United States").

[177] In 1986, nine years after the decision in Fiallo, Congress amended the governing law. The definition of "child" that included offspring of natural mothers but not fathers was altered to include children born out of wedlock who established a bona fide parent-child relationship with their natural fathers. See Immigration Reform and Control Act of 1986, §315(a), 100 Stat. 3439, as amended, 8 U. S. C. §1101(b)(1)(D) (1982 ed., Supp. IV); Miller v. Albright, 523 U. S. 420, 429, n. 4 (1998) (opinion of Stevens, J.).

S. citizen. Examining a claim of that order, the Court has not disclaimed, as it did in Fiallo, the application of an exacting standard of review. See Nguyen, 533 U. S., at 60–61, 70; Miller, 523 U. S., at 434–435, n. 11 (opinion of Stevens, J.).

The provision challenged in Miller and Nguyen as viola tive of equal protection requires unwed U. S.-citizen fathers, but not mothers, to formally acknowledge parenthood of their foreign-born children in order to transmit their U. S. citizenship to those children. See §1409(a)(4) (2012 ed.).[178] After Miller produced no opinion for the Court, see 523 U. S., at 423, we took up the issue anew in Nguyen. There, the Court held that imposing a paternal-acknowledgment requirement on fathers was a justifiable, easily met means of ensuring the existence of a biological parent-child relationship, which the mother establishes by giving birth. See 533 U. S., at 62–63. Morales-Santana's challenge does not renew the contest over §1409's paternal-acknowledgment requirement (whether the current version or that in effect in 1970), and the Government does not dispute that Morales-Santana's father, by marrying Morales-Santana's mother, satisfied that requirement.

Unlike the paternal-acknowledgment requirement at issue in Nguyen and Miller, the physical-presence requirements now before us relate solely to the duration of the parent's prebirth residency in the United States, not to the parent's filial tie to the child. As the Court of Ap peals observed in this case, a man needs no more time in the United States than a woman "in order to have assimilated citizenship-related values to transmit to [his] child." 804 F. 3d, at 531. And unlike Nguyen's parental acknowledgment requirement, §1409(a)'s age-calibrated physical-presence requirements cannot fairly be described as "minimal." 533 U. S., at 70.

C

Notwithstanding §1409(a) and (c)'s provenance in traditional notions of the way women and men are, the Government maintains that the statute serves two important objectives: (1) ensuring a

---

178 Section 1409(a), following amendments in 1986 and 1988, see §13, 100 Stat. 3657; §8(k), 102 Stat. 2618, now states:
"The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, . . . shall apply as of the date of birth to a person born out of wedlock if—
"(1) a blood relationship between the person and the father is estab lished by clear and convincing evidence,
"(2) the father had the nationality of the United States at the time of the person's birth,
"(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
"(4) while the person is under the age of 18 years—
"(A) the person is legitimated under the law of the person's residence or domicile,
"(B) the father acknowledges paternity of the person in writing under oath, or
"(C) the paternity of the person is established by adjudication of a competent court."

connection between the child to become a citizen and the United States and (2) preventing "statelessness," i.e., a child's possession of no citizenship at all. Even indulging the assumption that Congress intended §1409 to serve these interests, but see supra, at 9–13, neither rationale survives heightened scrutiny.

1

We take up first the Government's assertion that §1409(a) and (c)'s gender-based differential ensures that a child born abroad has a connection to the United States of sufficient strength to warrant conferral of citizenship at birth. The Government does not contend, nor could it, that unmarried men take more time to absorb U. S. values than unmarried women do. See supra, at 16. Instead, it presents a novel argument, one it did not advance in Flores-Villar.[179]

An unwed mother, the Government urges, is the child's only "legally recognized" parent at the time of childbirth. Brief for Petitioner 9–10, 28–32.[180] An unwed citizen fa ther enters the scene later, as a second parent. A longer physical connection to the United States is warranted for the unwed father, the Government maintains, because of the "competing national influence" of the alien mother. Id., at 9–10. Congress, the Government suggests, de signed the statute to bracket an unwed U. S.-citizen mother with a married couple in which both parents are U. S. citizens,[181] and to align an unwed U. S.-citizen father with a married couple, one spouse a citizen, the other, an alien.

Underlying this apparent design is the assumption that the alien father of a nonmarital child born abroad to a U. S.-citizen mother will not accept parental responsibility. For an actual affiliation between alien father and nonmarital child would create the "competing national influence" that, according to the Government, justifies imposing on unwed U. S.-citizen fathers, but not unwed U. S.-citizen mothers, lengthy physical-presence requirements. Hardly gender neutral, see id., at 9, that assump tion conforms to the long-held view that unwed fathers care little about, indeed are

---

[179] In Flores-Villar, the Government asserted only the risk-of statelessness rationale, which it repeats here. See Brief for United States, O. T. 2010, No. 09–5801, at 22–39; infra, at 19–23.

[180] But see §1409(a) (unmarried U. S.-citizen father who satisfies the physical-presence requirements and, after his child is born, accepts parental responsibility transmits his citizenship to the child "as of the date of birth").

[181] When a child is born abroad to married parents, both U. S. citizens, the child ranks as a U. S. citizen at birth if either parent "has had a residence in the United States or one of its outlying possessions, prior to the birth of [the child]." §1401(a)(3) (1958 ed.); §1401(c) (2012 ed.) (same).

strangers to, their children. See supra, at 9–13. Lump characterization of that kind, however, no longer passes equal protection inspection. See supra, at 13–14, and n. 13.

Accepting, arguendo, that Congress intended the diverse physical-presence prescriptions to serve an interest in ensuring a connection between the foreign-born nonmarital child and the United States, the gender-based means scarcely serve the posited end. The scheme permits the transmission of citizenship to children who have no tie to the United States so long as their mother was a U. S. citizen continuously present in the United States for one year at any point in her life prior to the child's birth. The transmission holds even if the mother marries the child's alien father immediately after the child's birth and never returns with the child to the United States. At the same time, the legislation precludes citizenship transmission by a U. S.-citizen father who falls a few days short of meeting §1401(a)(7)'s longer physical-presence requirements, even if the father acknowledges paternity on the day of the child's birth and raises the child in the United States.[182] One cannot see in this driven-by-gender scheme the close means-end fit required to survive heightened scrutiny. See, e.g., Wengler v. Druggists Mut. Ins. Co., 446 U. S. 142, 151–152 (1980) (holding unconstitutional state workers' compensation death-benefits statute presuming widows' but not widowers' dependence on their spouse's earnings); Westcott, 443 U. S., at 88–89.

2

The Government maintains that Congress established the gender-based residency differential in §1409(a) and (c) to reduce the risk that a foreign-born child of a U. S. citizen would be born stateless. Brief for Petitioner 33. This risk, according to the Government, was substantially greater for the foreign-born child of an unwed U. S.-citizen mother than it was for the foreign-born child of an unwed U. S.-citizen father. Ibid. But there is little reason to believe that a statelessness concern prompted the diverse physical-presence requirements. Nor has the Government shown that the risk of statelessness disproportionately endangered the children of unwed mothers.

---

[182] Brief for Respondent 26, n. 9, presents this example: "Child A is born in Germany and raised there by his U. S.-citizen mother who spent only a year of her life in the United States during infancy; Child B is born in Germany and is legitimated and raised in Germany by a U. S.-citizen father who spent his entire life in the United States before leaving for Germany one week before his nineteenth birthday. Not withstanding the fact that Child A's 'legal relationship' with his U. S. citizen mother may have been established 'at the moment of birth,' and Child B's 'legal relationship' with his U. S.-citizen father may have been established a few hours later, Child B is more likely than Child A to learn English and assimilate U. S. values. Nevertheless, under the discriminatory scheme, only Child A obtains U. S. citizenship at birth." For another telling example, see Brief for Equality Now et al. as Amici Curiae 19–20.

As the Court of Appeals pointed out, with one exception,[183] nothing in the congressional hearings and reports on the 1940 and 1952 Acts "refer[s] to the problem of statelessness for children born abroad." 804 F. 3d, at 532– 533. See Collins 2205, n. 283 (author examined "many hundreds of pre-1940 administrative memos . . . de fend[ing] or explain[ing] recognition of the nonmarital foreign-born children of American mothers as citizens"; of the hundreds, "exactly one memo by a U. S. official . . . mentions the risk of statelessness for the foreign-born nonmarital children of American mothers as a concern"). Reducing the incidence of statelessness was the express goal of other sections of the 1940 Act. See 1940 Hearings 430 ("stateless[ness]" is "object" of section on foundlings). The justification for §1409's gender-based dichotomy, however, was not the child's plight, it was the mother's role as the "natural guardian" of a nonmarital child. See supra, at 9–13; Collins 2205 ("[T]he pronounced gender asymmetry of the Nationality Act's treatment of nonmari tal foreign-born children of American mothers and fathers was shaped by contemporary maternalist norms regarding the mother's relationship with her nonmarital child—and the father's lack of such a relationship."). It will not do to "hypothesiz[e] or inven[t]" governmental purposes for gender classifications "post hoc in response to litigation." Virginia, 518 U. S., at 533, 535–536.

Infecting the Government's risk-of-statelessness argu ment is an assumption without foundation. "[F]oreign laws that would put the child of the U. S.-citizen mother at risk of statelessness (by not providing for the child to acquire the father's citizenship at birth)," the Government asserts, "would protect the child of the U. S.-citizen father against statelessness by providing that the child would take his mother's citizenship." Brief for Petitioner 35. The Government, however, neglected to expose this sup posed "protection" to a reality check. Had it done so, it would have recognized the formidable impediments placed by foreign laws on an unwed mother's transmission of citizenship to her child. See Brief for Scholars on State lessness as Amici Curiae 13–22, A1–A15.

Experts who have studied the issue report that, at the time relevant here, in "at least thirty countries," citizen mothers generally could not transmit their citizenship to nonmarital children born

---

[183] A Senate Report dated January 29, 1952, is the sole exception. That Report relates that a particular problem of statelessness accounts for the 1952 Act's elimination of a 1940 Act provision the State De partment had read to condition a citizen mother's ability to transmit nationality to her child on the father's failure to legitimate the child prior to the child's 18th birthday. See 1940 Act, §205, 54 Stat. 1140 ("In the absence of . . . legitimation or adjudication [during the child's minority], . . . the child" born abroad to an unmarried citizen mother "shall be held to have acquired at birth [the mother's] nationality status." (emphasis added)). The 1952 Act eliminated this provision, allowing the mother to transmit citizenship independent of the father's actions. S. Rep. No. 1137, 82d Cong., 2d Sess., 39 (1952) ("This provi sion establish[es] the child's nationality as that of the [citizen] mother regardless of legitimation or establishment of paternity . . . ." (emphasis added)). This sole reference to a statelessness problem does not touch or concern the different physical-presence requirements carried over from the 1940 Act into the 1952 Act.

within the mother's country. Id., at 14; see id., at 14–17. "[A]s many as forty-five coun tries," they further report, "did not permit their female citizens to assign nationality to a nonmarital child born outside the subject country with a foreign father." Id., at 18; see id., at 18–21. In still other countries, they also observed, there was no legislation in point, leaving the nationality of nonmarital children uncertain. Id., at 21–22; see Sandifer, A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality, 29 Am. J. Int'l L. 248, 256, 258 (1935) (of 79 nations studied, about half made no specific provision for the nationality of nonmarital children). Taking account of the foreign laws actually in force, these experts concluded, "the risk of parenting stateless children abroad was, as of [1940 and 1952], and remains today, substantial for unmarried U. S. fathers, a risk perhaps greater than that for unmarried U. S. mothers." Brief for Scholars on Statelessness as Amici Curiae 9–10; see id., at 38–39. One can hardly characterize as gender neutral a scheme allegedly attend ing to the risk of statelessness for children of unwed U. S. citizen mothers while ignoring the same risk for children of unwed U. S.-citizen fathers.

In 2014, the United Nations High Commissioner for Refugees (UNHCR) undertook a ten-year project to elimi nate statelessness by 2024. See generally UNHCR, End ing Statelessness Within 10 Years, online at http:// www.unhcr.org/en-us/protection/statelessness/546217229/ special-report-ending-statelessness-10-years.html (all Internet materials as last visited June 9, 2017). Cogni zant that discrimination against either mothers or fathers in citizenship and nationality laws is a major cause of statelessness, the Commissioner has made a key compo nent of its project the elimination of gender discrimination in such laws. UNHCR, The Campaign To End Stateless ness: April 2016 Update 1 (referring to speech of UNHCR "highlight[ing] the issue of gender discrimination in the nationality laws of 27 countries—a major cause of state lessness globally"), online at http://www.unhcr.org/ibelong/ wp-content / uploads / Campaign-Update-April-2016.pdf; UNHCR, Background Note on Gender Equality, Nationali ty Laws and Statelessness 2016, p. 1 ("Ensuring gender equality in nationality laws can mitigate the risks of statelessness."), online at http://www.refworld.org/docid/ 56de83ca4.html. In this light, we cannot countenance risk of statelessness as a reason to uphold, rather than strike out, differential treatment of unmarried women and men with regard to transmission of citizenship to their children.

In sum, the Government has advanced no "exceedingly persuasive" justification for §1409(a) and (c)'s gender specific residency and age criteria. Those disparate crite ria, we hold,

cannot withstand inspection under a Consti tution that requires the Government to respect the equal dignity and stature of its male and female citizens.[184]

IV

While the equal protection infirmity in retaining a longer physical-presence requirement for unwed fathers than for unwed mothers is clear, this Court is not equipped to grant the relief Morales-Santana seeks, i.e., extending to his father (and, derivatively, to him) the benefit of the one-year physical-presence term §1409(c) reserves for unwed mothers.

There are "two remedial alternatives," our decisions instruct, Westcott, 443 U. S., at 89 (quoting Welsh v. United States, 398 U. S. 333, 361 (1970) (Harlan, J., concurring in result)), when a statute benefits one class (in this case, unwed mothers and their children), as §1409(c) does, and excludes another from the benefit (here, unwed fathers and their children). "[A] court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." Westcott, 443 U. S., at 89 (quot ing Welsh, 398 U. S., at 361 (opinion of Harlan, J.)).[185]

"[W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." Heckler v. Mathews, 465 U. S. 728, 740 (1984) (quoting Iowa-Des Moines Nat. Bank v. Bennett, 284 U. S. 239, 247 (1931); emphasis

---

[184] JUSTICE THOMAS, joined by JUSTICE ALITO, sees our equal protection ruling as "unnecessary," post, at 1, given our remedial holding. But, "as we have repeatedly emphasized, discrimination itself . . . perpetuat[es] 'archaic and stereotypic notions'" incompatible with the equal treat ment guaranteed by the Constitution. Heckler v. Mathews, 465 U. S. 728, 739 (1984) (quoting Mississippi Univ. for Women v. Hogan, 458 U. S. 718, 725 (1982)).

[185] After silently following the path Justice Harlan charted in Welsh v. United States, 398 U. S. 333 (1970), in several cases involving genderbased discrimination, see, e.g., Wiesenfeld, 420 U.S., at 642, 653 (extending benefits); Frontiero v. Richardson, 411 U. S. 677, 690–691, and n.25 (1973) (plurality opinion) (same), the Court unanimously adopted his formulation in Califano v. Westcott, 443 U. S. 76 (1979). See id., at 89–90 (opinion for the Court); id., at 94–95 (Powell, J., concurring in part and dissenting in part). The appropriate remedy, the Westcott majority held, was extension to unemployed mothers of federal family-aid unemployment benefits provided by statute only for families of unemployed fathers. Id., at 90–93. In the dissent's view, nullification was the proper course. Id., at 94–96.

deleted). "How equality is accomplished . . . is a matter on which the Constitution is silent." Levin v. Commerce Energy, Inc., 560 U. S. 413, 426–427 (2010).[186]

The choice between these outcomes is governed by the legislature's intent, as revealed by the statute at hand. See id., at 427 ("On finding unlawful discrimination, . . . courts may attempt, within the bounds of their institu tional competence, to implement what the legislature would have willed had it been apprised of the constitu tional infirmity."). See also Ayotte v. Planned Parenthood of Northern New Eng., 546 U. S. 320, 330 (2006) ("the touchstone for any decision about remedy is legislative intent").[187]

Ordinarily, we have reiterated, "extension, rather than nullification, is the proper course." Westcott, 443 U. S., at 89. Illustratively, in a series of cases involving federal financial assistance benefits, the Court struck discrimina tory exceptions denying benefits to discrete groups, which meant benefits previously denied were extended. See, e.g., Goldfarb, 430 U. S., at 202–204, 213–217 (plurality opin ion) (survivors' benefits), aff'g 396 F. Supp. 308, 309 (EDNY 1975) (per curiam); Jimenez v. Weinberger, 417 U. S. 628, 630–631, and n. 2, 637–638 (1974) (disability benefits); Department of Agriculture v. Moreno, 413 U. S. 528, 529–530, 538 (1973) (food stamps); Frontiero, 411 U. S., at 678–679, and n. 2, 691, and n. 25 (plurality opin ion) (military spousal benefits). Here, however, the dis criminatory exception consists of favorable treatment for a discrete group (a shorter physical-presence requirement for unwed U.S.-citizen mothers giving birth abroad). Following the same approach as in those benefits cases striking the discriminatory exception—leads here to ex tending the general rule of longer physical-presence re quirements to cover the previously favored group.

---

[186] Because the manner in which a State eliminates discrimination "is an issue of state law," Stanton v. Stanton, 421 U. S. 7, 18 (1975), upon finding state statutes constitutionally infirm, we have generally remanded to permit state courts to choose between extension and invalidation. See Levin v. Commerce Energy, Inc., 560 U. S. 413, 427 (2010). In doing so, we have been explicit in leaving open on remand the option of removal of a benefit, as opposed to extension. See, e.g., Orr v. Orr, 440 U. S. 268, 283–284 (1979) (leaving to state courts remedy for unconstitutional imposition of alimony obligations on husbands but not wives); Stanton, 421 U. S., at 17–18 (how to eliminate unconstitutional age differential, for child-support purposes, between male and female children, is "an issue of state law to be resolved by the Utah courts").

[187] We note, however, that a defendant convicted under a law classify ing on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity. In Grayned v. City of Rockford, 408 U. S. 104 (1972), for example, the defendant participated in a civil rights demonstration in front of a school. Convicted of violating a local "antipicketing" ordinance that exempted "peaceful picketing of any school involved in a labor dispute," he successfully challenged his conviction on equal protection grounds. Id., at 107 (internal quotation marks omitted). It was irrelevant to the Court's decision whether the legislature likely would have cured the constitutional infirmity by excising the labor dispute exemption. In fact, the legislature had done just that subsequent to the defendant's conviction. Ibid., and n. 2. "Necessarily," the Court observed, "we must consider the facial constitutionality of the ordinance in effect when [the defendant] was arrested and convicted." Id., at 107, n. 2. See also Welsh, 398 U. S., at 361–364 (Harlan, J., concurring in result) (reversal required even if, going forward, Congress would cure the unequal treatment by extending rather than invalidating the criminal proscription).

The Court has looked to Justice Harlan's concurring opinion in Welsh v. United States, 398 U. S., at 361–367, in considering whether the legislature would have struck an exception and applied the general rule equally to all, or instead, would have broadened the exception to cure the equal protection violation. In making this assessment, a court should " 'measure the intensity of commitment to the residual policy'"—the main rule, not the exception—"'and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abro gation.' " Heckler, 465 U. S., at 739, n. 5 (quoting Welsh, 398 U. S., at 365 (opinion of Harlan, J.)).

The residual policy here, the longer physical-presence requirement stated in §§1401(a)(7) and 1409, evidences Congress' recognition of "the importance of residence in this country as the talisman of dedicated attachment." Rogers v. Bellei, 401 U. S. 815, 834 (1971); see Weedin v. Chin Bow, 274 U. S. 657, 665–666 (1927) (Congress "at tached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent. . . . [T]he heritable blood of citizenship was thus associated unmistakeably with residence within the coun try which was thus recognized as essential to full citizen ship." (internal quotation marks omitted)). And the poten tial for "disruption of the statutory scheme" is large. For if §1409(c)'s one-year dispensation were extended to unwed citizen fathers, would it not be irrational to retain the longer term when the U. S.-citizen parent is married? Disadvantageous treatment of marital children in compar ison to nonmarital children is scarcely a purpose one can sensibly attribute to Congress.[188]

Although extension of benefits is customary in federal benefit cases, see supra, at 23–24, n. 22, 25, all indicators in this case point in the opposite direction.[189] Put to the choice, Congress, we believe, would have abrogated §1409(c)'s exception, preferring preservation of the general rule.[190]

---

[188] Distinctions based on parents' marital status, we have said, are subject to the same heightened scrutiny as distinctions based on gender. Clark v. Jeter, 486 U. S. 456, 461 (1988).

[189] In crafting the INA in 1952, Congress considered, but did not adopt, an amendment that would have applied the shorter one-year continu ous physical-presence requirement now contained in §1409(c) to all foreign-born children of parents with different nationalities. See S. 2842, 82d Cong., 2d Sess., §301(a)(5) (1952).

[190] Compare with the remedial issue presented here suits under Title VII of the Civil Rights Act of 1964 challenging laws prescribing terms and conditions of employment applicable to women only, e.g., minimum wage, premium pay, rest breaks, or lunch breaks. Most courts, perhaps mindful of the mixed motives implicated in passage of such legislation (some conceiving the laws as protecting women, others, as discouraging employers from hiring women), and, taking into account the economic burdens extension would impose on employers, have invalidated the provisions. See, e.g., Homemakers, Inc., of Los Angeles v. Division of Industrial Welfare, 509 F. 2d 20, 22–23 (CA9 1974), aff 'g 356 F. Supp. 1111 (1973) (ND Cal. 1973); Burns v. Rohr Corp., 346 F. Supp. 994, 997–998 (SD Cal. 1972); RCA del Caribe, Inc. v. Silva Recio, 429 F. Supp. 651, 655–658 (PR 1976); Doctors Hospital, Inc. v. Recio, 383 F. Supp. 409, 417–418 (PR 1974); State v. Fairfield Communities Land Co., 260 Ark. 277, 279–281, 538 S. W. 2d 698, 699–700 (1976); Jones Metal Products Co. v. Walker, 29 Ohio St. 2d 173, 178–183, and n. 6, 281 N. E. 2d 1, 6–9, and n. 6 (1972); Vick v. Pioneer Oil Co., 569 S. W. 2d 631, 633–635 (Tex. Civ. App. 1978).

V

The gender-based distinction infecting §§1401(a)(7) and 1409(a) and (c), we hold, violates the equal protection principle, as the Court of Appeals correctly ruled. For the reasons stated, however, we must adopt the remedial course Congress likely would have chosen "had it been apprised of the constitutional infirmity." Levin, 560 U. S., at 427. Although the preferred rule in the typical case is to extend favorable treatment, see Westcott, 443 U. S., at 89–90, this is hardly the typical case.[191] Extension here would render the special treatment Congress prescribed in §1409(c), the one-year physical-presence requirement for U. S.-citizen mothers, the general rule, no longer an exception. Section 1401(a)(7)'s longer physical-presence requirement, applicable to a substantial majority of children born abroad to one U. S.-citizen parent and one foreign citizen parent, therefore, must hold sway.[192] Going for ward, Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender. In the interim, as the Government suggests, §1401(a)(7)'s now-fiveyear requirement should apply, prospectively, to children born to unwed U. S.-citizen mothers. See Brief for Petitioner 12, 51; Reply Brief 19, n. 3.

* * *

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

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

---

[191] The Court of Appeals found the remedial issue "the most vexing problem in this case." 804 F. 3d 520, 535 (2015).

[192] That Morales-Santana did not seek this outcome does not restrain the Court's judgment. The issue turns on what the legislature would have willed. "The relief the complaining party requests does not circumscribe this inquiry." Levin, 560 U. S., at 427.

SUPREME COURT OF THE UNITED STATES

No. 15–1191

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL, PETITIONER *v*. LUIS RAMON MORALES-SANTANA

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

[June 12, 2017]

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

The Court today holds that we are "not equipped to" remedy the equal protection injury that respondent claims his father suffered under the Immigration and Nationality Act (INA) of 1952. Ante, at 23. I agree with that holding. As the majority concludes, extending 8 U. S. C. §1409(c)'s 1-year physical presence requirement to unwed citizen fathers (as respondent requests) is not, under this Court's precedent, an appropriate remedy for any equal protection violation. See ante, at 23. Indeed, I am skeptical that we even have the "power to provide relief of the sort requested in this suit—namely, conferral of citizenship on a basis other than that prescribed by Congress." Tuan Anh Nguyen v. INS, 533 U. S. 53, 73 (2001) (Scalia, J., joined by THOMAS, J., concurring) (citing Miller v. Albright, 523 U. S. 420, 452 (1998) (Scalia, J., joined by THOMAS, J., concurring in judgment)).

The Court's remedial holding resolves this case. Because respondent cannot obtain relief in any event, it is unnecessary for us to decide whether the 1952 version of the INA was constitutional, whether respondent has third party standing to raise an equal protection claim on behalf of his father, or whether other immigration laws (such as the current versions of §§1401(g) and 1409) are constitutional. I therefore concur only in the judgment reversing the Second Circuit.

FHE Press

ISSN 2640-1185